

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002234-MR

JASON SCOTT

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
INDICTMENT NO. 02-CR-00127

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2003-CA-002239-MR

MITCHELL POTTER

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
INDICTMENT NO. 02-CR-00127

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

DYCHE, JUDGE. On July 22, 2002, Jason Scott and Mitchell Van Potter visited the home of Raymond Hamilton. Scott and Hamilton had known each other for many years through Scott's friendship

with Hamilton's son; it was the first time that Potter and Hamilton had met. It was ten o'clock in the evening, and Hamilton had been drinking beer all day. Scott accepted Hamilton's offer to join him in drinking, but Potter did not.

The three sat together for some time. At some point the subject of baseball arose, and Scott mentioned that he would like to tape up an old baseball bat that he had in the vehicle outside. He brought it into Hamilton's house, and Hamilton gave Scott some black electrical tape for the bat's handle. Later on, as Hamilton averted his attention to see about a disturbance outside his home, he was struck numerous times in the head with the baseball bat. Hamilton claimed that his wallet was taken from his back pocket. Potter and Scott fled the premises. A neighbor summoned an ambulance, and Hamilton was taken to the hospital in Pikeville, then transported to Huntington, West Virginia, where he underwent surgery and remained for five days.

Potter and Scott were indicted for first degree robbery and burglary. Although Scott was initially determined incompetent to stand trial, that finding was vacated. The two were tried together on September 2 and 3, 2003, and found guilty of first degree burglary. Each was sentenced to thirteen years' imprisonment. Because their appeals have no single issue in common, they will be considered separately.

Jason Scott first argues that the trial court erred in vacating the finding of incompetence. He concedes that lay witness testimony is not only admissible but also can be convincing when a trial court is considering the issue of competency. See Mozee v. Commonwealth, 769 S.W.2d 757 (Ky. 1989). However, Scott insists that the medical opinion testimony was unanimous, and that the trial court was erroneous in determining that Scott was competent to stand trial.

We disagree. The medical testimony, while it was unanimous concerning Scott's low intelligence quotient, also contained evidence that appellant was feigning symptoms.

A trial court is not absolutely bound by the testimony of medical experts in making a determination as to competency to stand trial. A judge is also entitled to consider the testimony of laypersons and his own observations and impressions based upon the conduct and testimony of the accused at the hearing.

. . . .

While the medical testimony in this case would certainly support a finding of incompetency to stand trial, the totality of the evidence did not require such a finding.

Mozee, supra at 758. While appellant would prefer the trial court to base its finding on the medical rather than lay evidence, he cites no inaccuracy in that lay testimony nor makes any argument regarding its lack of reliability or credibility. The trial court properly exercised its prerogative in taking

into account the totality of the evidence before it. We shall not disturb that finding. See also Jacobs v. Commonwealth, 58 S.W.3d 435, 441 (Ky. 2001); and Gabbard v. Commonwealth, 887 S.W.2d 547 (Ky. 1994).

Scott's second argument, viz., that the Commonwealth's motion to vacate was untimely, is without merit, and we decline to discuss it further. See CR 54.01 and 59.05; RCr 8.03; and Jacobs, supra.

Scott lastly urges that he was unduly prejudiced by certain remarks made by the prosecution during closing argument. "In order to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair. The conduct of the prosecutor in this case was not so prejudicial as to deprive [appellant] of a fundamentally fair trial." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996) (citations omitted). We thus affirm Scott's conviction.

Appellant Potter first argues that the trial court erred in denying his motion for a directed verdict of acquittal. Potter maintains that he was provoked into assaulting Hamilton by the latter's comments that Potter's ex-wife was a "crack whore." Potter continues that the sole evidence of the extent of Hamilton's physical injuries consisted of the victim's own testimony. Potter further contends that the Commonwealth failed

to prove intent to commit a crime, a statutory element of burglary.

We have examined the evidence and cannot hold that it was clearly unreasonable for the jury to find guilt.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The photographic evidence of the victim's injuries was certainly compelling. Appellant's characterization of the victim as "obnoxious," "belligerent," "an old mouthy drunk," "an impaired sot," "a fifth grade dropout . . . who was pickled to the gills with a vast amount of alcohol," and "a pugnacious sort" cannot detract from the Commonwealth's proof that Scott and Potter committed burglary in the first degree. KRS 511.020. The motions for directed verdict of acquittal were properly denied.

Lastly, Potter asserts that certain prosecutorial remarks during closing argument resulted in reversible error. Potter admits that this issue is not preserved but requests appellate review under the palpable error standard. RCr 10.26. Mentioning the failure to present witnesses does not equate with the verboten comment on a defendant's right to remain silent. See Maxie v. Commonwealth, 82 S.W.3d 860, 866 (Ky. 2002). We find no palpable error in this regard.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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