RENDERED: OCTOBER 24, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001843-MR

KERMANUEL RICE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 07-CR-00360

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Kermanuel Rice appeals from a judgment and order imposing sentence entered on September 6, 2007, by the Kenton Circuit Court

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

after a jury found him guilty of possession of a handgun by a convicted felon. We affirm.

On April 14, 2007, Covington Police Officers Corey Warner and Matthew Winship were patrolling the Jacob Price Housing Project on foot. At approximately 4:00 a.m., they noticed a man (later identified as Kermanuel Rice) looking into various mail boxes. When the officers reached Rice, he was crouched on a concrete pad with his arm extended behind a garbage can. Concerned for their safety, the officers drew their weapons and directed Rice to show his hands. In response, Rice brandished a fully-loaded .45 caliber pistol. Officers Warner and Winship ordered Rice to drop the weapon. Instead of obeying the command, Rice ran from the officers. While he was running, Rice threw the gun down. He was eventually captured and arrested. After Rice was handcuffed, Officer Winship retraced his footsteps and found the pistol in the grass. He also found a black bandana a few feet away.

Following a jury trial in the Kenton Circuit Court, Kermanuel Rice was convicted of possession of a handgun by a convicted felon. He was sentenced to seven-years' imprisonment. He now appeals as a matter of right.

Rice raises several grounds for reversal of the judgment of conviction and sentence. He first argues that the trial court erred by permitting Officer Corey Warner to sit at counsel table throughout the presentation of the Commonwealth's case despite Rice's objection. We disagree.

Kentucky Rule(s) of Evidence (KRE) 615 provides that the trial court shall order that witnesses be excluded from the proceedings so that they cannot hear the testimony of other witnesses. However, the rule does not authorize the exclusion of:

> (1) A party who is a natural person;
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

Whether a witness qualifies for an exemption enumerated in the rule is an issue to be resolved by the sound discretion of the trial court. *Hatfield v. Commonwealth,* 250 S.W.3d 590 (Ky. 2008). In *Dillingham v. Commonwealth,* 995 S.W.2d 377 (Ky. 1999), the Supreme Court of Kentucky noted that the Commonwealth's lead investigator or detective on a criminal case is permitted to sit at counsel table pursuant to section (2) of KRE 615, and no special showing need be made that his presence is essential. Rice prefers to characterize Officer Warner as a fact witness rather than as an investigator. However, the distinction is illusory since Warner was acting as an advisor to the Commonwealth during the course of the proceedings. He fell within the rule's description of a properly designated representative because he was an employee of the state and was treated by the Commonwealth's Attorney as its representative. Therefore, he was not subject to the separation-of-witnesses portion of the rule. Moreover, Rice has failed to show any specific prejudice resulting from Warner's presence in the

courtroom. The record does not indicate that the court abused its discretion, and there are no grounds for reversal on this point.

Rice next argues that the trial court erred by permitting the Commonwealth to introduce into evidence the black bandana recovered from the scene. We disagree.

Rice contends that the Commonwealth's introduction of the black bandana violated the provisions of KRE 401 and 403 because bandanas are commonly worn by gang members to identify themselves as such and are sometimes used to mask the identity of bandits. Rice challenges the relevancy of the evidence and indicates that he was prejudiced by its introduction since it "painted him as a bad, guilty fellow" and "reinforced the police identification of Rice as the person who dropped or threw the gun."

Rice mistakes the nature of the prohibition against character evidence introduced merely to prove a criminal pre-disposition. It is true that evidence of a defendant's character is very often relevant to a determination of the facts. That evidence is ordinarily quite prejudicial to the defendant. But it is excluded under the provisions of KRE 403 only where the probative value of the challenged evidence is substantially outweighed by its prejudicial effect. If the challenged evidence is found to be "unduly prejudicial" to the defendant, it is rendered inadmissible.

In this case, the trial court did not err by concluding that the probative value of the challenged evidence was not substantially outweighed by its

prejudicial effect. The officers testified that Rice had dropped the bandana when he dropped the gun. Their testimony explaining that they had collected it as part of a thorough investigation was wholly relevant to the case. The jury had already seen the Commonwealth's photo of the bandana close to the gun. Rice did not object. Therefore, the subsequent admission of the bandana into evidence was neither prejudicial nor erroneous.

Rice also argues that the Commonwealth failed to offer adequate proof of Rice's prior convictions of a felony and various misdemeanors. He contends that that failure amounted to an error of constitutional magnitude. He admits that these arguments are not properly preserved for our review. Having reviewed the relevant case law, we are satisfied that the alleged error – if any – did not result in a manifest injustice to Rice.

We affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Jackson Balliet
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky