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NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2007-CA-001998-MR

COREY JACKSON

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CR-01700

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: ACREE, KELLER AND WINE, JUDGES.

WINE, JUDGE: On October 24, 2006, at approximately 7:15 a.m., Rebekah Kirkland was robbed at gunpoint in downtown Lexington. As Kirkland exited her automobile, a man put a gun to her stomach and demanded that she get back into the car. Kirkland refused and grabbed the gun. The two struggled and Kirkland's purse fell to the ground. The man grabbed the purse and ran toward St. James

Apartments. Kirkland's purse contained a five dollar bill, credit cards, a wallet, a checkbook, bank statements, keys, and a cellular phone.

Kirkland ran to Auto Tech, her place of employment, and informed her co-workers that she had been robbed. A co-worker called 911, and the police arrived at the business at approximately 7:26 a.m. Kirkland described the robber to the police as a black male, six feet tall, two hundred pounds, wearing a wallet chain on his pants, and wearing a hunter colored coat with a hood and fur. She also told police that he ran toward St. James Apartments.

Rebekah Kirkland's husband, Jeff Kirkland, was also an employee of Auto Tech. Mr. Kirkland told police that, several weeks earlier, he had seen someone matching the description of the robber across the street watching the people at Auto Tech. Mr. Kirkland gave a similar description to the one given by Mrs. Kirkland but added that the person he saw had "big hair."

Police began searching the area for an individual matching the description provided by Mrs. Kirkland. Less than an hour after the robbery, police located and detained a suspect, Corey Jackson. At the time of his arrest, Jackson wore a wallet chain and a coat similar to the one described by Mrs. Kirkland. A search of Jackson revealed that he only had a twenty dollar bill on his person. The five dollar bill taken from Mrs. Kirkland was never recovered. Police took Rebekah Kirkland to the scene where Jackson was arrested and asked whether she could identify Jackson as the man who robbed her. Jackson, a black male, was surrounded by police. Jackson's hands were handcuffed behind his back. Mrs.

Kirkland identified him as the man who robbed her. Mr. Kirkland also identified Jackson as the man he saw standing outside Auto Tech. The Kirklands were kept separate at the time they were asked to make an identification.

On December 6, 2006, the Fayette County grand jury indicted Jackson on the charge of first-degree robbery. On July 17, 2007, a jury found Jackson guilty of first-degree robbery. On August 31, 2007, Jackson was sentenced to thirteen years' imprisonment. No suppression hearing was conducted in this case.

I. Directed Verdict

First, Jackson argues that the trial court erred in denying his motion for directed verdict. Jackson claims that a directed verdict should have been granted because the Kirklands' out-of-court identifications were unreliable and unduly suggestive because he was handcuffed and surrounded by police when the identifications occurred.

We must examine a trial court's decision on a motion for directed verdict by asking whether, under the entire body of evidence, "it would be clearly unreasonable for a jury to find guilt . . ." *Benham v. Commonwealth*, 816 S.W.2d 186, 187 (Ky. 1991). The defendant is only entitled to a directed verdict if the examination indicates a verdict of guilt would be unreasonable. *Id.*

Further, the evidence must be examined in a light most favorable to the Commonwealth. *Sawhill v. Commonwealth*, 660 S.W.2d 3, 4 (Ky. 1983). The Kentucky Supreme Court, in *Sawhill*, provided:

The trial court must draw all fair and reasonable

inferences from the evidence in favor of the party opposing the motion, and a directed verdict should not be given unless the evidence is insufficient to sustain a conviction. The evidence presented must be accepted as true. **The credibility and the weight to be given the testimony are questions for the jury exclusively.**

(Emphasis added). In our review of the record, evaluating the evidence in the light most favorable to the Commonwealth, we cannot conclude that a guilty verdict was clearly unreasonable. The Commonwealth presented Mrs. Kirkland's testimony which included her identification of Jackson as the man who robbed her. The Commonwealth also presented testimony from Mr. Kirkland who identified Jackson as the man who he had previously observed watching people at Auto Tech. The identifications, coupled with Jackson's clothing presented as exhibits and the location of his arrest, show that a verdict of guilty is not clearly unreasonable.

Jackson's defense counsel, however, did not argue that the evidence presented rendered a guilty verdict unreasonable. Instead, defense counsel argued that the Kirklands' identifications of Jackson were unreliable and suggestive. These types of identifications, called "show-up identifications," are suggestive in nature. *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995). However, show-up identifications are not necessarily unreliable and/or unduly suggestive. "[S]how-ups are nonetheless necessary in some instances because they occur immediately after the commission of the crime and aid the police in either establishing probable cause or clearing a possible suspect . . ." *Id.* at 513.

The question of whether a show-up identification was unduly suggestive is not at issue during a motion for directed verdict. As previously stated, the Kentucky Supreme Court in *Sawhill* stated that the credibility and weight of the evidence was to be decided by a jury rather than a judge. The trial court properly allowed the jury to weigh the evidence and consider whether the Kirklands' out-of-court identifications were reliable.

Aside from his argument that a directed verdict was improperly denied, Jackson also argues his case must be remanded for a new trial because the identifications were improperly admitted. A review of the record indicates that no motion to suppress the out-of-court identifications was filed. Also, during the trial, defense counsel failed to object to testimony concerning the identifications. Because counsel failed to preserve the identification issue for appeal, we must determine whether this claim rises to the level of a palpable error. Under the Kentucky Rules of Criminal Procedure ([RCr](#)) 10.26:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

“Manifest injustice” means that “a substantial possibility exists that the result of the trial would have been different.” [*Brock v. Commonwealth, 947 S.W.2d 24, 28 \(Ky. 1997\)*](#). “[I]f upon a consideration of the whole case [the] court does not believe there is a substantial possibility that the result would have been

any different, the irregularity will be held nonprejudicial.” *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (internal quotation marks and citation omitted). “An error must seriously affect the fairness, integrity, or public reputation of a judicial proceeding in order to be considered palpable under RCr 10.26.” *Page v. Commonwealth*, 149 S.W.3d 416, 422 (Ky. 2004) (internal quotation marks and citation omitted).

The jury was fully informed that Mrs. Kirkland based her identification on Jackson’s coat and wallet chain. A review of the trial indicates that both identification witnesses were subjected to thorough cross-examinations concerning weaknesses in their statements and recognition. The jury had ample information from which to weigh the evidence and determine credibility. Therefore, we do not consider the admission of testimony concerning the identifications to constitute manifest injustice.

II. Juror Bias

During the trial, Juror 489 submitted a written question to the judge. The juror asked whether Ms. Carr, Jackson’s mother and a defense witness, was present in the courtroom when other witnesses testified. Defense counsel argued that the juror should be dismissed because the juror had already formed an opinion that Ms. Carr listened to the testimonies of other witnesses giving her testimony an unfair advantage. The prosecutor argued, and the trial court agreed, that the

question was not indicative of bias. The trial court answered the question by explaining that the court did not see Ms. Carr in the courtroom.

Jackson argues that the trial court erred in refusing to dismiss Juror 489 and that the court's answer to the question did not cure the juror's bias. Both Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution guarantee the right to a speedy and public trial "by an impartial jury." In *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994), the Kentucky Supreme Court stated, "The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict."

Nothing about the juror's question indicated that the juror could not render a fair and impartial verdict once the question was answered. Any bias against Ms. Carr and the possibility of an unfair advantage should have been cured by the trial court's answer to the question.

III. Mug Shot

In his third argument, Jackson argues that the trial court erred in allowing the Commonwealth to introduce Jackson's mug shot in rebuttal to show the jury what hairstyle Jackson had at the time of his arrest. Jackson argued that the introduction of his mug shot was unduly prejudicial and negated his indicia of innocent.

Kentucky Courts have adopted the three-prong test from *United States v. Harrington*, 490 F.2d 487 (2nd Cir. 1973), for the use of booking

photographs. The test requires that:

(1) the prosecution must have a demonstrable need to introduce the photographs; (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

Williams v. Commonwealth, 810 S.W.2d 511, 513 (Ky. 1991), quoting *Redd v. Commonwealth*, 591 S.W.2d 704, 708 (Ky. App. 1979).

We believe that the introduction of the mug shot was not prejudicial, and that the above test has been satisfied. The mug shot was not introduced to show that Jackson was arrested but to demonstrate Jackson's hairstyle on the day of arrest, chin-length dreadlocks piled on top of his head, and to rebut the testimony of a defense witness, Jerry Seabolt, the GED counselor, who testified he had seen Jackson the day before, wearing dreadlocks. The mug shot, taken at the booking for the current charge, in no way indicated that he had a previous criminal record. Further, neither party dwelled on the fact that the mug shot was an arrest photograph. Finally, the jury was clearly aware Jackson had been arrested on the morning of the robbery. The purpose of introduction was clearly to prove that Jackson had his hair stacked up on top of his head when arrested.

IV. Irrelevant Cross-Examination

Finally, Jackson argues that the Commonwealth improperly questioned a defense witness, Victor Edwards, about the amount of money he paid

in rent to Ms. Carr, Jackson's mother. Jackson claims that Edwards' rent is a collateral fact that is irrelevant to the Commonwealth's case-in-chief and is an impermissible subject for cross-examination. We disagree.

It is well established that the right to cross-examine a witness concerning credibility issues, such as bias, is fundamental to a fair trial. *Williams v. Commonwealth*, 569 S.W.2d 139, 145 (Ky. 1978), *citing Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). "Witness credibility is always at issue and relevant evidence which affects credibility should not be excluded." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997), *citing Parsley v. Commonwealth*, 306 S.W.2d 284 (Ky. 1957). "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Id.*

Edwards' answer indicated that he did not pay rent to Ms. Carr and freely lived in her home. Edwards' testimony was intended to provide an alibi for Jackson. The Commonwealth used the Edwards' rent amount as the basis to impeach him for bias. We find that the trial court was within its discretion to allow this line of cross-examination.

Accordingly, for the reasons stated herein, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky