IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-11-03 ELA Graviff, D.C.

2002-SC-0052-MR

LONNIE COBB — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
CRIMINAL NO. 00-CR-01333

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Lonnie Cobb, was convicted in the Fayette Circuit Court of first and second-degree robbery, fourth-degree assault, and of being a first-degree persistent felony offender. He was sentenced to seventy years imprisonment and appeals to this Court as a matter of right.

Appellant's convictions stem from crimes he committed between October 3, 2000, and October 21, 2000, in and around Lexington, Kentucky, with the help of his then-girlfriend, Melissa Frost. In December 2000, Appellant was indicted on nine counts of first-degree robbery, one count of second-degree robbery, first-degree assault, and for being a first-degree persistent felony offender. Following a trial, the jury convicted him of four counts of first-degree robbery, two counts of second-degree robbery, fourth-degree assault, and of being a first-degree persistent felony offender. The jury

recommended a total of 240 years imprisonment, which was reduced to seventy years pursuant to the aggregate limitation in KRS 532.110.

I.

Appellant first claims that the trial court erred in denying his motion to sever, and that he was prejudiced by the improper joinder of all charges for trial.

RCr 6.18 states:

> Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

Appellant relies on RCr 9.26 which provides:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires . . . .

The trial court has broad discretion in granting or denying a motion for separate trials, and Appellant must show prejudice and a clear abuse of discretion to reverse the trial court's decision on appeal. Commonwealth v. Collins, Ky., 933 S.W.2d 811 (1996); Sherley v. Commonwealth, Ky., 889 S.W.2d 794 (1994); Rearick v. Commonwealth, Ky., 858 S.W.2d 185 (1993). Offenses of the "same or similar character" may be properly joined for trial. RCr 6.18; Cargill v. Commonwealth, Ky., 528 S.W.2d 735 (1975). "Offenses closely related in character, circumstances and time need not be severed." Sherley, supra, at 800; see also Cardine v. Commonwealth, Ky., 623 S.W.2d

895 (1981). Joinder of charges is prejudicial when it is "unnecessarily or unreasonably hurtful." Romans v. Commonwealth, Ky., 547 S.W.2d 128, 131 (1977).

A significant factor in determining whether joinder would be prejudicial is whether evidence of one offense would be admissible in the trial of the other offenses. Rearick, supra, at 187. However, in Marcum v. Commonwealth, Ky., 390 S.W.2d 884, 886 (1965), our predecessor Court noted:

> [T]here is no prejudicial effect from joinder of crimes for trial when evidence of each crime is simple and distinct even though such evidence might not have been admissible in separate trials. This rule rests upon the assumption that a properly instructed jury can easily keep such evidence separate in their deliberations and therefore the danger of cumulative of evidence is substantially avoided.

In this case, the ten robberies for which Appellant was indicted and tried all occurred in a period of less than three weeks, involved drug-related characteristics, and were committed under like circumstances. The crimes were similar enough to be tried in a single proceeding, yet sufficiently distinct for a jury to keep the evidence of each offense separate, as demonstrated by its acquittal on four of the first-degree robbery charges. Therefore, the trial court did not abuse its discretion by denying Appellant's severance motion.

II.

Appellant alleges that at the time of their arrest on the morning of October 22, 2000, both he and Frost were suffering from the effects of cocaine intoxication. As such, Appellant claims that his subsequent confession should have been suppressed as having been involuntarily obtained.

At the suppression hearing, the lead investigator, Sergeant Douglas Lamb, testified that he first attempted to interview Appellant at approximately 1:17 p.m. Sergeant Lamb advised Appellant of his Miranda rights, and asked if he wished to waive such rights. Appellant responded that he first wanted to speak with Frost. Sergeant Lamb agreed and allowed Appellant and Frost to speak with each other. Thereafter, Sergeant Lamb interviewed Frost, and recorded her statements.

Around 3:00 p.m., Sergeant Lamb again advised Appellant of his Miranda rights and asked if Appellant would like to make a statement. Appellant responded, "I guess so," and thereafter admitted to the robberies of Jo-Ann Fabrics, Speedway, Bill Hardy Stereo, and The Gold Mine. Sergeant Lamb did not record Appellant's interview, nor did he obtain a signed confession. Sergeant Lamb testified that he ended the interview when Appellant refused to answer any more questions.

A defendant must knowingly, intelligently, and voluntarily waive his right not to incriminate himself for his confession to be admissible in court. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 93 L.Ed.2d 694 (1966). "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286, 292 (1979); see also Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987). Similarly, a confession need not be recorded to be admissible. Brashars v. Commonwealth, Ky., 25 S.W.3d 58 (2000), cert. denied, 531 U.S. 1100 (2001).

The Commonwealth bears the burden of proving by a preponderance of the evidence that the defendant confessed voluntarily. Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999), cert. denied, 528 U.S. 1164 (2000); Crawford v. Commonwealth, Ky., 824 S.W.2d 847 (1992); Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). The trial court considers the "totality of the circumstances" to determine the voluntariness of a confession. Allee v. Commonwealth, Ky., 454 S.W.2d 336, 341 (1970); Fikes v. Alabama, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957).

While intoxication may be a factor to be considered, Jones v. Commonwealth, Ky., 560 S.W.2d 810 (1977), a confession is involuntary by self-induced intoxication only if the defendant "was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements." Peters v. Commonwealth, Ky., 403 S.W.2d 686, 688 (1966), see also Britt v. Commonwealth, Ky., 512 S.W.2d 496 (1974). Sergeant Lamb testified that Appellant was alert, calm, and coherent, and appeared to fully understand his Miranda rights. Further, Appellant showed no sign of mania and seemed to understand the meaning of his statements, even bargaining with Sergeant Lamb about speaking with Frost before he would give a statement.

"A trial court's ruling that a confession is voluntary will not be disturbed on appeal unless the ruling is clearly erroneous." Allee, supra; see also Henson v. Commonwealth, Ky., 20 S.W.3d 466 (1999). Furthermore, "[i]f supported by substantial evidence the factual findings of the trial court shall be conclusive." RCr 9.78. We conclude the trial court correctly found that Appellant's confession was voluntary.

III.

Appellant takes issue with the trial court's denial of his motion to suppress an out-of-court identification which he believes was tainted. We conclude that no error occurred.

During the course of the robbery investigation, the Fugitive Task Force disseminated to various Lexington businesses photographs of Appellant and Frost with information that they were suspects in the string of recent robberies. Norma Summers, the general manager of the Lexington Motor Inn, was shown the photographs on October 20, 2000. The following day, a man walked into the Inn's office with a shotgun and threatened to shoot Summers if she moved. While pointing the gun at Summers, he proceeded to fill a bank bag with money from the cash drawer. Summers subsequently identified Appellant as the perpetrator from a photo line-up, as well as identified the coat he wore and the shotgun he carried during the robbery. Summers also again identified Appellant at trial.

Appellant argues that because Summers was shown his photograph prior to the robbery of the Lexington Motor Inn, any future identification of him by Summers was tainted. We disagree. Summers was shown Appellant's photograph as a routine part of the task force's investigation of the robberies. Summers was not singled out, rather she happened to an area business employee. It is rather ironic, of course, that Appellant chose to rob the motor inn the next day. Nonetheless, if we were to adopt Appellant's argument, warning the public about criminal suspects would effectively become illegal, or at least an impediment to the legal process if any subsequent identification were deemed tainted.

It was within the province of the jury to determine whether Summers was credible and whether her out-of-court and in-court identifications of Appellant were accurate. The court need only exclude the testimony if the identification procedure was unduly suggestive and the witness was incapable of accurately identifying the witness. Wilson v. Commonwealth, Ky., 695 S.W.2d 854 (1985); Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Here, Appellant takes no issue with the procedure of identification after the crime, but with the circumstances surrounding the identification because Summers viewed his photograph prior to the robbery.

IV.

Appellant claims that he was denied due process by the trial court's refusal to excuse prospective jurors 938 and 609 for cause. Juror 938 worked for a competitor of Bill Hardy Stereos and knew the owner/victim, Bill Hardy. Although he had not spoken to Hardy about the robbery, Juror 938 had heard that Hardy had been "ripped off by a black guy." Also, Juror 938 had purchased a car from one of the Commonwealth's witnesses, a detective who identified Appellant as a suspect in a security recording of one of the robberies, but took no part in the actual investigation. Juror 609 informed the trial court that fifteen years earlier, she testified against a defendant who had robbed her at gunpoint. Both Jurors 938 and 609 stated that they could render a fair and impartial decision based on the evidence presented. The trial court denied Appellant's motion to excuse both jurors for cause.

Citing Thomas v. Commonwealth, Ky., 864 S.W.2d 252 (1993), Appellant contends that simply because he exhausted all of his peremptory challenges, he was prejudiced by the trial court's refusal to excuse Jurors 938 and 609 for cause. However,

Appellant did not use a peremptory challenge to remove Juror 938 or Juror 609; nor did either juror participate in the decision. Following the motions to remove for cause, Juror 938 was not included on the list of the thirty-two qualified jurors drawn from the box who were then subject to peremptory challenges. RCr 9.36. While Juror 609 was seated as an alternate, she did not participate in the decision.

In Thomas, we held that "Kentucky law has always been . . . that prejudice is presumed, and the defendant is entitled to a reversal in those cases where a defendant is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause." Id. at 259; see also Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 372 (2002). In other words, when a defendant has been denied the full use of his peremptory challenges by having been required to use them to remove unqualified prospective jurors, his substantive procedural due process rights have been violated regardless of whether he was tried by a fair and impartial jury. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). In this case, Appellant neither used peremptory challenges on unqualified jurors nor did Jurors 938 and 609 participate in the decision. Finding no possibility that the trial court's refusal to excuse Juror 938 and Juror 609 for cause interfered with Appellant's rights to an impartial jury and to his allotted number of peremptory strikes, we conclude that error, if any, does not warrant reversal.

V.

Appellant argues the trial court erroneously denied his request for an instruction on the lesser-included offense of theft with regard to the second-degree robbery of Jo-Ann Fabrics. We disagree.

KRS 515.030 provides, "A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft." Here, the question is whether a juror could reasonably doubt that Appellant threatened physical force, but could not reasonably doubt that he committed a theft.

Store employee, Cindy Rankin, testified that she first noticed Appellant crouched down in one the aisles, ostensibly looking for children's items. A short time later, Appellant approached the counter where Rankin was standing. He had pulled up the hood of his sweatshirt, placed pantyhose over his face, and was wearing a blue mouth-guard. Appellant threw a note on the counter to Rankin which read, "Bitch, you have 3 seconds. Don't make a sound. Do it now bitch. Don't make me do anything I don't want to." Rankin testified that she panicked and went to the back office, locked the door, and called 911. When another store employee, Rayna Moore, approached the cash register, Appellant yelled at Moore to immediately open the register. When Moore finally did so, Appellant grabbed the money drawer and fled the store.

The trial court gives instructions based on the totality of the evidence and "applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." Lee v. Commonwealth, Ky., 329 S.W.2d 57, 60 (1959); see also Reed v. Commonwealth, Ky., 738 S.W.2d 818 (1987); Rice v. Commonwealth, Ky., 472 S.W.2d 512 (1971). "An instruction on a lesser-included offense should not be given unless the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser-included offense." Luttrell v. Commonwealth, Ky., 554 S.W.2d 75, 78 (1977).

Both Moore and Rankin testified that they were threatened by Appellant. Further, his note certainly could have been interpreted as a threat of physical force if the women did not comply with his demands. The trial court did not err in refusing to instruct the jury as to mere theft.

VI.

Appellant also contends that the trial court erred in denying his request for an instruction on voluntary intoxication. Again, we disagree.

Bill Hardy, the owner of the Bill Hardy Stereo store testified that on October 11, 2000, Appellant entered the store and proceeded to wander from room to room. Hardy stated that he felt as if he were playing a "cat and mouse game" with a possible shoplifter. At some point, Appellant asked a question and when Hardy turned around to answer, he found Appellant pointing a gun at him. Appellant demanded money and threatened to shoot Hardy if he did not cooperate. Hardy noted that Appellant became agitated when Hardy only had $100 to give him. Appellant thereafter forced Hardy into the restroom, made sure he did not have a cell phone, and ordered him to remain there for five minutes or he would be killed. When Hardy eventually exited the restroom, he discovered that the phone lines to the store had been cut.

During his trial testimony, Hardy commented that during the course of the robbery, Appellant had admitted to being a "crackhead." Hardy testified that he was familiar with the effects of crack cocaine and that he believed Appellant's claim. As such, Appellant concludes that Hardy's testimony supported an instruction on the defense of voluntary intoxication.

"A voluntary intoxication instruction is justified only when there is evidence that the defendant 'was so drunk that he did not know what he was doing' or when the intoxication 'negatives the existence of an element of the offense.'" Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 44 (2002) (quoting Meadows v. Commonwealth, Ky., 550 S.W.2d 511 (1977) and Mishler v. Commonwealth, Ky., 556 S.W.2d 676 (1977)). Mere drunkenness does not satisfy the penal code's requirements for an intoxication defense. Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977), overruled, in part, on other grounds, Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981), cert. denied, 456 U.S. 907 (1982).

Regardless of whether Appellant was under the effects of crack cocaine at the time of the robbery, there is no evidence that he did not know what he was doing. To the contrary, Appellant had the clarity of mind to cut the phone lines to the store, as well as make sure that Hardy did not have a cell phone to call police. In the absence of any evidence that Appellant did not know what he was doing or could not form the requisite intent, the trial court was not required to instruct the jury on the defense of intoxication.

VII.

Appellant next challenges the trial court's refusal to allow Frost to be questioned about her parole eligibility and attempts for shock-probation. We find no error.

KRE 611(b) permits cross-examination of a witness "on any matter relevant to any issue in the case, including credibility." Here, Frost testified that she was charged with first-degree robbery but pled guilty to first-degree facilitation to robbery. Further, the jury was informed that Frost agreed to testify against Appellant in exchange for a ten year prison sentence, when she would have otherwise faced a possible twenty-year

sentence as a first-degree persistent felony offender. However, Frost's parole eligibility and the fact that she moved for shock probation had no bearing on her credibility unless there was evidence that the Commonwealth had agreed to such. The trial court properly limited evidence to that relevant to Frost's motive for testifying and her credibility as a witness. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), cert. denied, 516 U.S. 854 (1995); Williams v. Commonwealth, Ky., 569 S.W.2d 139, 145 (1978).

VIII.

Appellant argues that he was entitled to a mistrial after the arresting officer, Sergeant Rife, testified that Appellant told him at the time of arrest ,"You old son of a bitch you. You're good. I would have killed a younger officer." During a bench conference, defense counsel asserted that she had received no notice of Appellant's statement, and moved for a mistrial based on the discovery violation. The Commonwealth responded that it had only learned of the statement the prior week and had, in fact, sent defense counsel a memo. On appeal, Appellant now concedes that the Commonwealth did provide the statement to defense counsel before trial, but argues that it was inadmissible under KRE 404(b) as a prior bad act.

In denying the motion for a mistrial, the trial court noted that the only two people present at the time of Appellant's arrest were Appellant and Sergeant Rife. As such, any investigation into the statement would involve questioning Appellant and Sergeant Rife, both of whom were present at trial. Accordingly, the trial court concluded that a mistrial was not warranted. We agree.

Nor are we convinced that the statement constitutes a "bad act" under KRE 404(b), since its probative value pertains to Appellant's willingness to prevent his arrest, rather than showing a criminal predisposition through acts unrelated to the Lexington robberies. Absent any evidence of prejudice to Appellant, no error occurred.

IX.

Appellant argues that the Commonwealth's use of a peremptory challenge to remove Juror 952 violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986). In fact, the Commonwealth used three of its seven peremptory challenges to remove Jurors 691, 898, and 952, all of whom were African-American. However, defense counsel only objected to the removal of Juror 952. The prosecutor responded that she had not noted the jurors' race on her note pad, and that she actually struck Jurors 605, 647, 691, and 952 because of their young age. The prosecutor commented that she had struck Juror 952 for the additional reason that he had not filled out all of the questions on the jury questionnaire, specifically omitting his age. Although no objection was raised, the prosecutor defended that Juror 898 was removed because she had indicated on the jury form that she had been sued for an accident involving a gun. The trial court ruled that the Commonwealth had presented race-neutral reasons for all of the peremptory challenges.

Pursuant to Batson, supra, a defendant must first make a prima facie case of racial discrimination. Next, the prosecution must provide a race-neutral reason for the exercise of a peremptory challenge on a member of a protected class. Finally, the trial court conducts an inquiry into the question of whether the prosecutor intended to

discriminate. Id. at 96-98. We will not disturb a trial court's ruling on a Batson challenge unless clearly erroneous. Washington v. Commonwealth, Ky., 34 S.W.3d 376 (2000).

The Commonwealth removed Juror 952 because of his youth and because he failed to completely answer the jury questionnaire. In fact, only two of the four jurors struck because of age were African-American. Even an explanation which is neither plausible nor persuasive is a legitimate reason so long as there is no discriminatory intent. Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); Standford v. Commonwealth, Ky., 793 S.W.2d 112 (1990).

Failing to complete a jury questionnaire can raise doubts in the mind of the prosecutor whether the juror recognizes the importance of his duties as a juror. The trial court found nothing to suggest racial bias or discriminatory intent on the part of the Commonwealth, and neither do we. Juror 952's youth and his failure to complete the jury questionnaire were legitimate, non-discriminatory reasons for the Commonwealth to remove him from the jury, and in the absence of any evidence of discrimination, we find no error in the trial court's decision.

X.

Finally, Appellant argues that he was entitled to a directed verdict on all counts. A trial court is authorized to direct a verdict of acquittal only if the prosecution produces no more than a scintilla of evidence of guilt. Edmonds v. Commonwealth, Ky., 906 S.W.2d 343, 346 (1995); see also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). We defer to the trial court on motions for directed verdict except under extreme circumstances. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996); Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). A trial court's decision is reversed only if it is

clearly unreasonable for the jury to find the defendant guilty. Sawhill, supra; Trowel v. Commonwealth, Ky., 550 S.W. 2d 530 (1977). The evidence presented during the four day trial was more than sufficient to support the jury's finding of guilt.

The judgment and sentence of Fayette Circuit Court are affirmed.

All concur.

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