IMPORTANT NOTICE

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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2002-SC-0717-MR

HOSEA ARON CHATMAN — APPELLANT

V.

APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
2001-CR-0150

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Chatman of theft by unlawful taking over $300 and being a first-degree persistent felony offender. He was sentenced to a total of twenty years in prison.

The questions presented are whether the trial judge properly resolved Chatman's request for outside counsel or request to proceed pro se; whether an inventory list of items stolen was competent evidence; whether the prosecutor conducted an improper experiment during closing argument; whether the Commonwealth improperly narrated the surveillance tape, and whether prosecutorial misconduct occurred during the closing argument of the guilt phase.

A Wal-Mart employee observed Chatman taking DVD and VHS tapes into the garden area of the store and placing them outside the fence. Chatman then left the store. When confronted in the parking lot by the store manger, Chatman was unable to

produce a receipt for the items he was carrying. Chatman then handed some of the DVDs to the manager and dropped the remainder of the items. He started to run but three store employees apprehended and held him until police arrived. The store security camera recorded portions of the theft. Within an hour of the crime, a store employee inventoried the thirty-one items taken including their price. The items were then re-stocked for sale.

Chatman was charged with one count of theft by unlawful taking over $300 and being a persistent felony offender in the first-degree. The prior felony charges included twelve counts of second-degree criminal possession of a forged instrument; second-degree arson; second-degree escape; resisting arrest; second-degree burglary and first-degree sexual abuse. He was convicted of both charges in this case and was sentenced to five years on the theft charge enhanced to twenty years pursuant to the PFO charge. This appeal followed.

I. Outside Counsel

Chatman argues that the trial judge did not properly resolve his request for outside counsel or allow him to proceed pro se because he merely told him to file an RCr 11.42 petition and did not hold a hearing to determine a) whether he could represent himself or b) the extent of the conflict. We disagree.

After his indictment and before his arraignment, Chatman filed a pro se motion for appointment of outside counsel. He stated that he had a conflict with the office of public defenders based on a bar complaint pending against an attorney appointed by that office. Following another pro se motion by Chatman in which he alluded to a conflict with his attorney, the trial judge responded that he would not consider any pro se motions because Chatman had counsel. Two weeks before trial, defense counsel

filed a motion to withdraw and to allow Chatman to proceed pro se. After a hearing on the motion, the trial judge denied the same. Five days after trial, Chatman filed a motion to be appointed pro se counsel or co-counsel for final sentencing and to be allowed to file a pro se motion for a new trial. The trial judge denied this motion as well.

In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) the Supreme Court held that the protection of the Sixth Amendment includes the right of an accused to waive counsel to represent himself. In Wake v. Barker, Ky., 514 S.W.2d 692 (1974), we concluded that the best procedure, upon an unequivocal request to proceed pro se, or an unequivocal request to limit the role of counsel, is for the trial judge to conduct a hearing to determine whether the waiver is being made knowingly and intelligently. However, the principles of Faretta, supra, and Barker, supra, only become applicable when the request to proceed pro se or with counsel in a limited fashion is timely made and is unequivocal.

Here, neither the pro se motions nor the motion filed by defense counsel were an unequivocal request to proceed pro se. See Faretta; Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982); Barker. This was made abundantly clear at the hearing on the motion by defense counsel. There, the chief complaint by Chatman was that his defense counsel was not adequately representing him. Chatman stated that his attorney had not talked to him and would not present his defense or subpoena his witnesses. He also complained that defense counsel had not yet obtained clothes for him to wear at trial. Chatman never made an unequivocal request to proceed pro se. He simply expressed displeasure with the way his attorney was handling his case. The trial judge was not required to inquire whether Chatman could represent himself. The extent of the conflict was fully explored.

The expression "counsel of one's own choice" drawn from the holding of the case in Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1931), does not mean that an indigent defendant is entitled to the appointment of any particular attorney. Hargrove v. Commonwealth, Ky., 362 S.W.2d 37 (1962). A defendant is not entitled to the dismissal of his counsel and the appointment of a substitute "except for adequate reasons or a clear abuse by counsel." Fulz v. Commonwealth, Ky., 398 S.W.2d 881, 882 (1966). Here, there were none. As noted by defense counsel at the hearing, the bar complaint filed against her had been dismissed. Chatman did not dispute this fact. We agree with the rationale of State v. Davis, 577 N.W.2d 763 (Neb.Ct.App. 1998) that the filing of a bar complaint against a public defender does not automatically entitle the defendant to new counsel. The trial judge did not err in denying any of the motions. Chatman's right to counsel under the federal and state constitutions was not violated.

II. Evidence of Value

Next, Chatman contends that his conviction must be vacated because the Commonwealth did not introduce competent evidence to prove the value and nature of the items stolen in this case. We disagree.

Before arraignment, Chatman filed a motion to "hold evidence and amend charge" based on KRS 422.350. As noted earlier in this opinion, the trial judge responded that it would not consider the pro se motions because Chatman had counsel. Defense counsel then filed a motion to suppress the inventory list of items stolen because it was not the best evidence. At a subsequent hearing, she argued that Wal-Mart should have taken photographs of the items and that there was no proof of the actual value of the items. The trial judge denied the motion.

One of the elements of a charge of theft by unlawful taking is that the items in question are valued at more than $300. KRS 514.030(2). The Commonwealth must prove the market value of the items at the time and place of the theft. Commonwealth v. Reed, Ky., 57 S.W.2d 269 (2001) *citing* Perkins v. Commonwealth, Ky., 409 S.W.2d 294 (1966). Testimony of the owner of the property is competent evidence as to the value of the property. Reed, supra, *citing* Poteet v. Commonwealth, Ky., 556 S.W.2d 893 (1977).

Here, a Wal-Mart employee testified that the items taken from the store were valued at over $300.00. The Best Evidence Rule has no application in this case. The itemized list was competent evidence. We recognize that KRS 422.350 permits photographic evidence in prosecutions of offenses defined in KRS Chapter 514 or 515. That statute, however, does not preclude testimony of the owner as to the value of the items in question. Cf. Reed. No error occurred. There was no violation of either the state or federal constitution.

III. & IV. Closing Experiment/Narration

We will consider the next two arguments by Chatman together. First, Chatman claims that the prosecutor improperly conducted an experiment without foundation during the closing argument when he filled a plastic bag with thirty-one unnamed items and told the jury that the defendant could have had thirty-one items in a shopping bag. Second, Chatman argues that the Commonwealth was improperly allowed to narrate the videotape of him in the Wal-Mart rather than merely allowing it to be played to the jury. He concedes that both of these issues are not properly preserved but seeks review pursuant to RCr 10.26.

The palpable error rule in RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. RCr 9.22. The general rule is that a party must make a proper objection to the trial judge and request a ruling on that objection, or the issue is waived. See Commonwealth v. Pace, Ky., 82 S.W.3d 894 (2002). See also Bell v. Commonwealth, 473 S.W.2d 820 (1971). An appellate court may consider an issue that was not preserved if it deems the error to be a "palpable" one which affected the defendant's "substantial rights" and resulted in "manifest injustice." RCr 10.26. In determining whether an error is palpable, "an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Pace, supra, *quoting* Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

Here, Wal-Mart employees caught Chatman in the act of stealing thirty-one DVD and VHS tapes. The store surveillance system recorded at least portions of the theft. Considering the overwhelming evidence of guilt, review of either of these issues pursuant to RCr 10.26 is unwarranted.

V. Race Card

Finally, Chatman contends that the prosecution injected race into the case by implying that Wal-Mart would not try to prosecute an innocent person and that the defense was asking the jury to believe that the only reason that he was arrested was because he was black. This issue is not properly preserved for appellate review. RCr 9.22. When defense counsel objected to the racial reference, the prosecutor stated that he would withdraw it. No further relief was requested. Consequently, any objection to these comments was waived. Cf. Wilcher v. Commonwealth, Ky., 566 S.W.2d 812 (1978).

Neither the state nor the federal constitutional rights of Chatman were violated.

The judgment of conviction is affirmed.

All concur except Keller, J., who dissents in part and would vacate the final judgment and remand the case for a new final sentencing hearing because Appellant's Motion to be Appointed Pro Se Counsel or Co-Counsel for Final Sentencing was an unequivocal request that, if knowing and intelligent, entitled Appellant to represent himself at final sentencing.

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