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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-13-03 Ella Gaunt, D.C.

2002-SC-0856-MR

PIERRE LONDON — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
KENTON CRIMINAL NO. 02-CR-463

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury of the Kenton Circuit Court convicted Appellant, Pierre London, for Robbery in the First Degree (KRS 515.020) and for the status offense of Persistent Felony Offender in the Second Degree (KRS 532.080). For these crimes, the jury fixed Appellant's sentence at twenty years. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant's convictions stem from a robbery and shooting near 12th Street in Covington. In order to commit the robbery, Appellant allegedly hid in the backseat of a car while his unsuspecting victim shopped inside a local market. After the victim returned to the car and drove down the street, Appellant emerged, placed a rusty pistol to the back of his victim's head, and ordered him to "give the money up." A brief

struggle ensued, whereupon Appellant shot his victim in the left arm, demanded money once again, then absconded with $300 in cash.

I. Sufficiency of the Evidence

In any criminal prosecution, the Due Process Clause of the United States Constitution prohibits conviction without proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 309, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970). Appellant claims that his robbery conviction, based primarily on what he calls the uncorroborated, biased and contradictory testimony of the victim, violates this constitutional guarantee, necessitating a directed verdict of acquittal on all charges. We disagree.

At trial, the victim described the robbery in detail, including how he recognized Appellant during their struggle in the car, despite Appellant's attempt to conceal his identity underneath a hooded sweatshirt. Indeed, Appellant corroborated several details of the victim's testimony, for instance by testifying that he saw the victim drive up to the market just before the robbery occurred. In fact, Appellant placed himself just across the street from where he allegedly entered the victim's car, averring that he spent most of the evening there with others from the area.

Despite Appellant's efforts to call our attention to the contradictory evidence presented at trial, such as the alibi witness who vouched for Appellant's whereabouts during the robbery, or the evidence suggesting the victim's motivation for bias, Appellant has confused our role as a reviewing court with that of the jury. On appeal, our standard for testing the sufficiency of the evidence is to determine whether, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). In contrast, questions

regarding the credibility of witnesses and the weight to give to their testimony are matters for the jury to decide. Young v. Commonwealth, Ky., 50 S.W.3d 148, 165 (2001); Estep v. Commonwealth, Ky., 957 S.W.2d 191, 194 (1997); Benham, supra, at 187.

Certainly, as Appellant argues, an occasion may arise where a witness' testimony is so "incredible on its face as to require its rejection as a matter of law." Taylor v. Commonwealth, 301 Ky. 109, 113, 190 S.W.2d 1003, 1005 (1945), citing Ferguson v. Commonwealth, 291 Ky. 222, 224, 163 S.W.2d 449, 450 (1942). However, Appellant points to no testimony by the victim that strikes him as out of the ordinary. Furthermore, our review of the record does not reveal anything "so at variance with natural laws or common human experience as to be patently untrue." Bussey v. Commonwealth, Ky., 797 S.W.2d 483, 484 (1990); Holland v. Commonwealth, Ky., 272 S.W.2d 458, 459 (1954).

Considering the evidence as a whole, nothing leads us to believe the jury's verdict was "clearly unreasonable." Benham, supra, at 187. Accordingly, we find no error in the trial court's decision to deny Appellant's motion for a directed verdict of acquittal.

II. Prior Consistent Statements

During the direct examination of Covington Police Detective Ray Haley, the prosecution posed the following question:

Prosecution: Has [the victim's] version of what happened ever wavered?

Detective Haley: No ma'am.

Appellant complains that this testimony improperly bolstered the victim's account of the robbery. However, because Appellant failed to object to this colloquy at trial, he asks that we review this matter for palpable error. RCr 10.26.

In general, "a witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony." Eubank v. Commonwealth, 210 Ky. 150, 275 S.W. 630, 633 (1925). Several exceptions to this rule allow the introduction of prior consistent statements, such as when they are "offered to rebut an express or implied charge... of recent fabrication or improper influence or motive," KRE 801A(a)(2), or when the statements have "some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." Noel v. Commonwealth, Ky., 76 S.W.3d 923, 929 (2002), quoting United States v. Ellis, 121 F.3d 908, 920 (4th Cir.1997).

Here, no exception applies, nor does the Commonwealth attempt to draw our attention to any legitimate reason for this testimony. Detective Haley's assertion preceded the victim's testimony, and at that time during the trial no evidence had been introduced which suggested a motivation for Appellant to fabricate evidence. As such, the Detective's statement only served to bolster the credibility of the victim, a matter of some importance, since the outcome of the trial largely boiled down to whom the jury found more credible, Appellant or the victim.

Nonetheless, by failing to object to Detective Haley's testimony at trial, Appellant has waived this matter on appeal. Griffin v. Commonwealth, Ky., 576 S.W.2d 514 (1978); Bell v. Commonwealth, Ky., 473 S.W.2d 820, 821 (1971). As we explained in Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002), "[t]he palpable error rule set forth in RCr 10.26 is not a substitute for the requirement that a litigant must

contemporaneously object to preserve an error for review." To determine whether an error is palpable, this Court "must consider whether on the whole case there is a substantial possibility that the result would have been any different." Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983).

In the present matter, Appellant cross-examined the victim at length, probing for inconsistencies in the victim's account of the robbery. Later, a defense witness testified regarding prior inconsistent statements allegedly made by the victim, directly contradicting the victim's earlier trial testimony. When viewed in the context of the entire trial, we cannot say that this single bolstering statement, although improper, resulted in "manifest injustice," RCr 10.26, nor do we characterize this error as one that would "seriously affect the fairness, integrity or public reputation of judicial proceedings." Brock v. Commonwealth, Ky., 947 S.W.2d 24, 28 (1997), citing United States v. Filani, 74 F.3d 378 (2nd Cir.1996). Thus, we deny Appellant's request to reverse and remand this case for a new trial.

The conviction and the judgment of the Kenton Circuit Court are affirmed.

All concur.

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