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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: DECEMBER 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-8-04 Ella Grouth, D.C.

2000-SC-0103-MR

ALEX R. ROGERS, JR. — APPELLANT

V.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. HAGERMAN, JUDGE
98-CR-00098-001 AND 98-CR-00136-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, VACATING IN PART, AND REMANDING

Appellant, Alex Rogers was convicted of first-degree robbery, first-degree assault, and attempted murder in the Boyd Circuit Court. He was sentenced to sixteen and one half years, thirteen years, and twenty years, respectively. The sentence for assault was to run consecutively with the robbery sentence and the combined terms were to run concurrently with the attempted murder sentence for a total of twenty-nine and one-half years imprisonment. This appeal is as a matter of right.[1]

The facts are that Appellant and his accomplice, while off-roading, decided to rob a tow truck operator. They left their vehicle parked in the mud and walked to a house to call a tow truck. When the tow truck arrived, Appellant and his accomplice hitched a ride with the tow truck operators back to their truck. After the

[1] Ky. Const. § 110(2)(b).

truck was pulled out of the ditch, Appellant approached one of the operators, demanded money, and then shot him in the head, causing serious physical injuries. As the co-operator attempted to intervene, he too was shot at by both Appellant and his accomplice before driving away and calling the police. Appellant's arguments on appeal will be examined in turn.

I. HEARSAY AND PRESERVATION OF ERROR

Appellant contends that the trial court erred by refusing to allow Detective Moore's testimony regarding a statement by Appellant's accomplice, Jeffrey Newsome. The trial court excluded the testimony as hearsay pursuant to KRE 802. The testimony dealt with Newsome's comments to Detective Moore concerning who was driving the truck, Newsome or Appellant Rogers, as it was being pulled out of the ditch. Appellant points out that both victims indicated in their statements to the police that the driver of the truck as it was being pulled from the ditch was the person who shot and robbed the victims. In Newsome's statement to Detective Moore at the time of his capture, he stated that he was driving the truck. Thus, Appellant reasons that the excluded testimony would have shown that Newsome and not Appellant was responsible for the crimes.

Appellant argues that the testimony should have been allowed under KRE 804 as an exception to the hearsay rule because Newsome was an unavailable witness whose statement was against penal interest. Under KRE 804, a statement is not excluded under the hearsay rule when the declarant is unavailable as a witness and his

> statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another,

> that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.[2]

Newsome was allegedly unavailable as a witness because his own case was on appeal at the time of Appellant's trial. Appellant requested that the testimony be preserved by avowal, and the trial court granted the motion. Appellant failed, however, to actually present the testimony of Detective Moore by avowal and thus it is unclear what Detective Moore would have actually said.

Appellant contends that his failure to put on Detective Moore's testimony by avowal does not defeat our consideration of this issue because Newsome's statement is in the record by means of Detective Moore's official report made after Newsome's arrest. Appellant contends that the desired information could have been solicited by a question merely asking Detective Moore to read a highlighted portion of his official report, an instrument which is before us.

It might be possible to assume that Detective Moore's testimony would have been consistent with his report, but our rules relating to avowals are strict. In Commonwealth v. Ferrell,[3] this Court disagreed with the idea that "trial counsel need not offer avowal testimony in order to preserve an evidentiary exclusion issue for appeal when the excluded testimony's relevancy is apparent from the questioning." As Detective Moore's testimony was not even apparent from the questioning, Appellant failed to adequately preserve this issue and it is not before this Court. At best, we regard this as flawed preservation that would require speculation on our part.

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[2] KRE 804(b)(3).
[3] Ky., 17 S.W.3d 520, 524 (2000).

Even if proper preservation were to be assumed, there is also the absence of an unavailability determination by the trial court. Newsome was not called as a witness. There is no evidence that a ruling was ever made, nor was the issue ever considered as to whether Newsome met the requirements for being deemed unavailable. Under KRE 804 it is first necessary to determine if the witness is unavailable. KRE 804(a)(1) states that a witness is unavailable if the declarant "[i]s exempted *by ruling of the court* on the ground of privilege from testifying concerning the subject matter of the declarant's statement."[4] Unavailability cannot be presumed. This Court has stated, "Before a declarant may be excused as unavailable based on a claim of privilege, the declarant must appear at trial, assert the privilege, and have that assertion approved by the trial judge."[5] Here, Appellant did not request and the trial judge did not make the determination that the declarant would rely on the Fifth Amendment privilege, and that the privilege was valid because his conviction was pending on appeal.[6] For these reasons, Appellant's claim with respect to the exclusion of Newsome's hearsay statement is unpreserved for appellate review.

II. AMENDED INDICTMENT

On October 8, 1998, a Boyd County Grand Jury returned an indictment charging Appellant with first-degree robbery by using physical force and causing physical injury to the victim. Appellant was also indicted for first-degree assault on December 22, 1998, and the indictment charged that "Alex Rogers assaulted Randy

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[4] KRE 804(a)(1) (emphasis added).
[5] Marshall v. Commonwealth, Ky., 60 S.W.3d 513, 519 (2001) (*citing* United States v. Udey, 748 F.2d 1231 (8th Cir. 1984); Crawley v. Commonwealth, Ky., 568 S.W.2d 927 (1978)).
[6] *See* Taylor v. Commonwealth, Ky., 821 S.W.2d 72 (1990) (trial judge ruling on unavailability).

Davidson by shooting him with a gun." On November 4, 1999, the Commonwealth moved to amend the first-degree robbery indictment by striking the language "and causing physical injury to." The trial court granted the motion to amend and on November 10, 1999, defense counsel objected to the amended indictment.

Appellant argues that removing the "injury" language from the original (October 8) indictment affected his substantial rights by subjecting him to double jeopardy because he was then charged with two crimes, robbery and assault, arising out of the same occurrence. It is his contention that under the original indictment returned by the grand jury this would be impermissible as the "injury" language used in the robbery indictment is also necessary for the separate assault indictment. Appellant contends that he was prejudiced because the original indictment with the "injury" language caused him to focus his defense on the indictment for robbery without fear of an indictment for assault, and he was thereby prejudiced.

Under the test set forth by this Court in Commonwealth v. Burge,[7] and reflected in KRS 505.020, a person charged with two crimes arising from the same course of conduct is not subject to double jeopardy as long as each crime requires proof of an additional fact which the other does not. Charges of assault and robbery arising from the same occurrence do not necessarily violate double jeopardy. Moreover, as Appellant concedes, the "injury" language used in the robbery indictment is not necessary as robbery in the first degree may be committed in a manner that does not involve injury to the victim. Accordingly, the indictment was properly amended as permitted under RCr 6.16, which allows the court to amend an indictment "any time

[7] Ky., 947 S.W.2d 805, 809 (1996).

before verdict or finding if no additional offense is charged and if the substantial rights of the defendant are not prejudiced."[8]

This case is distinguishable from O'Hara v. Commonwealth,[9] upon which Appellant relies, because here Appellant was charged and convicted of robbery in the first degree under KRS 515.020(1)(b) and assault in the first degree under KRS 508.010(1)(a). In O'Hara,[10] the appellant was convicted of assault and of first-degree robbery, but the robbery indictment contained the same "injury" language as the assault charge. The indictment was not amended, and the jury was not given the opportunity to convict of robbery without relying on injury as an element.[11] In the case at bar, the jury was instructed in accordance with the language of KRS 515.020(1)(b) because Appellant was armed with a deadly weapon. Therefore, there was no double jeopardy violation.

III. STRIKING JUROR FOR CAUSE

During voir dire, Appellant made a motion to strike a juror for cause after extensive questioning revealed he had read about the crime in the newspaper and had discussed it with his wife. Appellant maintains that it was apparent that the juror in question "had discussed the crime in detail with his wife and was still very disturbed by the event." The trial court refused to strike the juror for cause and Appellant exercised one of his peremptory challenges to remove the juror.

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[8] RCr 6.16.
[9] Ky., 781 S.W.2d 514 (1989).
[10] Id.
[11] Id. at 515.

The refusal of the trial court to strike a juror for cause was not in error. In Sanders v. Commonwealth,[12] this Court recognized that upon appellate review of a trial court's refusal to strike a juror for cause, the principal focus is on the trial court's satisfaction that the prospective juror could be impartial and fair. The juror in question admitted reading about the crime in the newspaper, but testified that he had not yet formed an opinion as to the events nor did he remember names of those involved. The trial court asked the juror if he could base his opinion solely on the evidence from the witness stand and the juror answered affirmatively. Accordingly there was no error.

IV. VIOLENT OFFENDER DESIGNATION

Appellant contends that he was denied due process of law because the trial court treated the attempted murder conviction as a violent offense. He makes a similar claim with respect to his first-degree robbery conviction. By virtue of the violent offense designations, Appellant will not be eligible for parole until he has served eighty-five percent of his attempted murder and first-degree robbery sentences.

Appellant asserts that the crime of attempted murder is an inchoate offense and thus, is not included as a felony for which violent offender status is permissible. KRS 439.3401(1) provides:

> "[V]iolent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim, . . . or robbery in the first degree."[13]

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[12] Ky., 801 S.W.2d 665, 670 (1990).
[13] KRS 439.3401(1) (as amended in 2002).

The statute offers no exemption for attempted murder or for any other inchoate offense, although section five of the statute prohibits application of violent offender status in cases where the offenders were victims of domestic abuse.[14] Here, "[a]s with any case involving statutory interpretation, our duty is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used."[15] Had the legislature intended to include inchoate offenses in the list of exemptions in KRS 439.3401(5) it could have done so,[16] and we will not discover a legislative intent unsupported by statutory language.

With respect to the violent offense designation of Appellant's first-degree robbery conviction, we note that when Appellant's offenses were committed, KRS 439.3401 provided:

> "[V]iolent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim, or rape in the first degree or sodomy in the first degree of the victim.

At that time there was no provision in the statute making first-degree robbery a violent offense unless it was accompanied by death or serious physical injury. Not until July 15, 2002, did the amended version of the statute become effective permitting violent

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[14] KRS 439.3401(5).
[15] Beckham v. Bd. of Educ. Of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994) (*citing* Gateway Construction Co. v. Wallbaum, Ky., 356 S.W.2d 247 (1962)).
[16] *See* Commonwealth v. Harris, Ky., 59 S.W.3d 896, 900 (2001) (enumeration of particular items excludes other items that are not specifically mentioned); *see also* Smith v. Wedding, Ky., 303 S.W.2d 322 (1957); Louisville Water Co. v. Wells, Ky.App., 664 S.W.2d 525 (1984).

offender status to apply to the stand-alone crime of robbery in the first degree.[17] As earlier explained, Appellant was originally charged with inflicting serious physical injury in the course of committing first-degree robbery and attempted murder. That indictment was amended to eliminate the serious physical injury element, and Appellant was indicted again and charged with infliction of serious physical injury in the course of committing first-degree assault. In this posture the case went to trial and the instructions on criminal attempt to commit murder and first-degree robbery were without any serious physical injury element. The only instruction that permitted a finding of serious physical injury was the first-degree assault instruction. Appellant was determined to be guilty of all three crimes with the court entering judgment on attempt to commit murder and first-degree robbery, and a separate judgment on first-degree assault.

Despite the amended indictment that omitted serious physical injury from the first-degree robbery charge and the failure to include serious physical injury as an element in either the first-degree robbery or the attempted murder instructions, the trial court designated all three offenses as violent offenses, yet in only one of those offenses was there a finding of serious physical injury. Under the prevailing statute, there must be a death or a serious physical injury related to the commission of a Class B felony (first-degree robbery and attempted murder) if it is to be treated as a violent offense. Here the jury found that Appellant caused serious physical injury to the victim only while committing assault in the first degree. As to the other convictions, a violent offense

[17] *See* KRS 439.3401(8).

designation was not available. Accordingly, it was error to designate the attempted murder conviction and the first-degree robbery conviction as violent offenses.

Moreover, the statute states that the trial judge "shall designate in its judgment if the victim suffered death or serious physical injury." While the trial court did not make such finding in the final judgment of conviction for assault in the first degree, there was an implicit finding that serious physical injury occurred based on the jury verdict and the trial court's conclusion that it was a violent offense. In the final judgment, the trial court stated, "the defendant is guilty of the crime(s) First Degree Assault, which the Court finds to be a violent offense." Despite this finding, the statute plainly requires the court to designate in its judgment if the victim suffered death or serious physical injury, and the court did not so state. As such, this cause will be remanded to the trial court for modification of the judgment of conviction for first-degree assault in accordance with KRS 439.3401.

V. CONCLUSION

For the foregoing reasons, Appellant's convictions for the crimes of first-degree robbery and attempted murder are affirmed, provided, however, that the designation of such crimes as violent offenses is vacated. Appellant's conviction of first-degree assault is affirmed and remanded to the trial court with directions to modify its judgment by complying with KRS 439.3401(1).

Lambert, C.J., and Cooper, Graves, Johnstone, and Stumbo, JJ., concur. Wintersheimer, J., concurs in result only. Keller, J., files a separate opinion concurring in part and dissenting in part.

COUNSEL FOR APPELLANT:

Richard Hoffman
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane'
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

A. B. Chandler III
Attorney General of Kentucky

Anitria M. Alo
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204

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COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION BY JUSTICE KELLER

CONCURRING IN PART AND DISSENTING IN PART

I write separately because I disagree with the majority opinion's Part IV analysis of the KRS 439.3401 "violent offender" issues presented in this appeal. I concur in the majority opinion to the extent that it: (1) affirms Appellant's convictions and sentences for Attempted Murder, First-Degree Robbery, and First-Degree Assault; and (2) vacates the language in the trial court's final judgment in Boyd Circuit Court Indictment No. 98-CR-00098 that purports to designate Appellant's Attempted Murder and First-Degree Robbery crimes as "violent offenses." I dissent from the majority opinion, however, to the extent that it remands Appellant's First-Degree Assault conviction under Boyd Circuit Court Indictment No. 98-CR-000136-001 for the trial court to modify its final judgment to include express (but redundant) language to the effect that "serious physical injury" resulted from Appellant's crime.

Initially, I would note that the "relief" granted by the majority has absolutely no effect upon Appellant's parole eligibility date. Simply put, the judgments entered four

(4) years ago by the trial court have the exact same legal effect as the judgments that will exist after remand in this case, i.e., after the trial court's "violent offender" findings as to Appellant's Attempted Murder and First-Degree Robbery convictions are vacated and the trial court makes express findings upon remand with respect to Appellant's First-Degree Assault conviction. Under the applicable law, the final judgments that are currently on appeal to this Court require Appellant to serve 85% of his sixteen and one-half (16 ½) year First-Degree Assault sentence before he will reach his "ultimate date," i.e., the date "before which the inmate may not be released by either parole or sentence reduction credits[.]"[1] The "vacating in part, remanding in part" of today's majority opinion will also result in "new" final judgments that will also require Appellant to serve 85% of his sixteen and one-half (16 1/2) year First-Degree Assault sentence before he reaches his ultimate date. In other words, the majority opinion does not change Appellant's parole eligibility status by even a single day.

In fact, I would wager that these issues would not have been raised on appeal at all if anyone had examined Appellant's Kentucky Department of Corrections Resident Record Card. The plain truth is that the KRS 439.3401 issues constitute "much ado about nothing" because the "violent offender" language in the trial court's judgments ("which the [trial] Court finds to be [violent offenses/a violent offense]") has no legal effect whatsoever and no bearing at all on Appellant's parole eligibility date. It is true that, in "determin[ing] exactly what sentence the Court imposed and apply[ing] it according to existing Kentucky law . . . the Department of Corrections . . . rel[ies]

[1] Brenn O. Combs, *Understanding Sentence Calculation and Application*, 25 (No. 5) THE ADVOCATE 30, 33 (Sept. 2003).

primarily upon the final judgment entered by the court."[2] But, in order for a Class B felony conviction to trigger KRS 439.3401's parole eligibility restrictions, the trial court's final judgment must designate that "the victim suffered death or serious physical injury."[3] Accordingly, the Justice Cabinet's parole eligibility regulations calculate parole eligibility for a Class B felony conviction in accordance with KRS 439.3401 only "where the elements of the offense or the judgment of the court demonstrate that the offense involved death or serious physical injury to the victim."[4] A final judgment that labels an offense a "violent offense" is meaningless unless the final judgment otherwise designates that the victim suffered death or serious physical injury – i.e., where the elements of the offense in question conclusively establish that a victim suffered death or serious physical injury or where the trial court makes the additional finding authorized by KRS 439.3401(1). Thus, although I concur in the majority's decision to vacate the "violent offense" label attached to Appellant's Attempted Murder and First-Degree Robbery convictions, I do so only because I recognize that language is without legal effect and that this Court can easily eliminate the surplusage.

I break ranks with the majority and dissent from its decision to remand the First-Degree Assault conviction so that the trial court can make the proper KRS 439.3401(1) "serious physical injury" finding in its judgment because: (1) neither party requests such relief; and (2) remanding this case for the trial court to amend its final judgment when the amendment will not change the legal effect of the prior judgment seems to be a waste of judicial resources. The Department of Corrections will already have treated

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[2] Id. At 30.

[3] KRS 439.3401(1) ("The court shall designate in its judgment if the victim suffered death or serious physical injury.").

[4] 501 KAR 1:030 §3(1)(b).

Appellant's First-Degree Assault conviction as a violent offense under the applicable regulation because, given the elements of the offense in question (First-Degree Assault),[5] the trial court's judgment, which states that Appellant was convicted of First-Degree Assault, necessarily designates that the victim suffered serious physical injury.

I also take issue with the majority opinion's suggestion that Appellant was not subject to KRS 439.3401's parole eligibility restrictions as to his First-Degree Robbery conviction because the jury's verdict on that charge did not include a finding of serious physical injury. KRS 439.3401(1), of course, requires only that the Class B felony offense *involve* serious physical injury to a victim, and no Kentucky appellate court has ever held that violent offender status is dependent upon the jury's findings. In fact, the ink is barely dry on Brooks v. Commonwealth,[6] in which this Court held that a trial court properly "determined for the purposes of the violent offender parole ineligibility provisions of KRS 439.3401 that the injuries inflicted by Brooks on the victim were serious physical injuries"[7] and that Brooks "was properly a subject for the violent offender parole limitation provided in KRS 439.3401"[8] although the offense for which

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[5] KRS 508.010(1) provides:

> A person is guilty of assault in the first degree when:
> (a) He intentionally *causes serious physical injury to another person* by means of a deadly weapon or a dangerous instrument; or
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby *causes serious physical injury to another person*. (Emphasis added).

[6] Ky., 114 S.W.3d 818 (2003).

[7] Id. at 823.

[8] Id. at 824.

Brooks was convicted, Attempted Murder, did not require a jury finding of serious physical injury.[9] In light of the uncontested evidence demonstrating that the physical force that Appellant and his accomplice used to accomplish their robbery of the tow-truck operator consisted of *shooting the man in the head*, I feel confident that the trial court could have made the appropriate KRS 439.3401(1) finding in this case. Appellant cites no authority for the proposition that constitutional or statutory double jeopardy protections prohibit the Commonwealth from restricting his parole eligibility on more than one offense as a result of the serious physical injuries he caused to a single victim during the commission of those offenses. However, because the trial court did not make the required KRS 439.3401(1), "serious physical injury" finding as to Appellant's First-Degree Robbery conviction in its final judgment, and the Commonwealth has brought no cross-appeal from the judgment,[10] which contained only an ineffective "violent offender" label, I agree with the majority's conclusion that Appellant is subject to KRS 439.3401's parole eligibility restrictions only for his First-Degree Assault conviction.

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[9] Id. ("[T]he jury correctly found from the evidence that Brooks attempted to kill the victim but that does not mean that the jury thereby rejected a finding of serious physical injury.")

[10] I express no opinion, however, as to whether the Commonwealth could ask the trial court to amend the final judgment under CR 60.02.