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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-8-04 ELIA Grant, D.C.

2002-SC-0358-MR

BOBBY LEE BLACKFORD, SR. — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
INDICTMENT NO. 01-CR-00934

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Bobby Lee Blackford, Sr., was convicted by a jury in the Fayette Circuit Court of second-degree burglary and of the status offense of first-degree persistent felony offender. The final judgment sentenced him to a twenty-year term of imprisonment. He appeals to this Court as a matter of right.[1]

During July 2001, the McKnight residence in Lexington, Kentucky was burglarized. Taken from the residence were a purse, a wallet, a flashlight, and $75.00 cash. During the course of the burglary, the burglar pried open and damaged the window screen, then removed the window from its frame. The subsequent police investigation revealed only a partial fingerprint on the window screen. The fingerprint was lifted from the screen and examined by a fingerprint expert. Fingerprint analysis performed by local police identified Appellant as the suspect. This was the only

[1] Ky. Const. § 110(2)(b).

evidence obtained during the entire investigation and none of the stolen items were recovered.

At trial, Mr. McKnight testified that he went to bed at approximately 11:30 p.m. on the night of the burglary and that he was the last person in the house to retire for the evening. He also testified that his wife was the first person to awaken and enter their family room the following morning, and that she discovered that their home had been burglarized. He also stated that he did not know Appellant and that Appellant had never been invited into his home. At trial, Appellant did not testify but presented two alibi witnesses. The first witness, Appellant's friend, testified that she was with him at a party downtown from about 11:00 p.m. until approximately 3:30 a.m. on the night of the burglary. Appellant's other witness, his girlfriend, testified that he arrived at their home at about 3:00 a.m. and remained there until 10:30 a.m. when he drove her daughter to work. Appellant presents various issues on appeal and additional facts will be presented as necessary.

Appellant's first claim of error deals with the trial court's treatment of testimony presented by Sergeant Bottoms and fingerprint evidence that was not provided to him during discovery. He contends that he was denied due process when the trial court improperly denied his pretrial motion *in limine* to limit the testimony of Sergeant Bottoms, and when the trial court improperly admitted certain fingerprint evidence that was not provided during discovery. In the pretrial motion, Appellant asked that Sergeant Bottoms not be allowed to say that the fingerprints were a perfect or exact "match" because such testimony would lead to a conclusion that this type of

evidence is infallible. Appellant does not make any other argument as to the admissibility of Sergeant Bottoms' testimony.

At trial, Sergeant Bottoms testified as to the process he used in the course of fingerprint analysis. He admitted on cross-examination that this type of analysis is subjective and susceptible to error. He also explained that no universal minimum number of points exists to determine a fingerprint match. He stated that he used 10 points because he had found that 5 points led to more than one matching individual.

Appellant argues that a reference to a fingerprint "match" as perfect or exact is misleading to the jury because as Sergeant Bottoms admitted fingerprint analysis is subjective and prone to human error. KRE 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." The balancing of the probative value of the evidence against the danger of misleading the jury is reserved to the sound discretion of the trial court.[2] A ruling on such an evidentiary issue will be reversed only if the trial court abused its discretion.[3] Allowing Sergeant Bottoms to say "perfect" or "exact" when describing his conclusion regarding the fingerprint was not unfairly prejudicial or misleading because he also testified that the entire process was subjective and prone to human error. As such, we conclude that the trial court did not abuse its discretion in allowing the testimony of Sergeant Bottoms.

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[2] Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).
[3] Justice v. Commonwealth, Ky., 987 S.W.2d 306, 315 (1998); Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 103 (1998); Brock v. Commonwealth, Ky., 947 S.W.2d 24, 29 (1997); Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996).

During the Commonwealth's case-in-chief, the trial court allowed the admission of a fingerprint index card created during the investigation and a fingerprint chart created by Sergeant Bottoms during his fingerprint analysis. The index card contained the actual lift of the fingerprint from the crime scene and the chart showed the matching points between the fingerprint found during the investigation and Appellant's known fingerprint. Appellant contends that the index card violated KRE 404(a) because "AFIS" was stamped on the card, yet there was no identification number following the letters. Appellant contends that it was prejudicial to introduce the index card because it is well know that "AFIS" is an acronym used by the FBI for criminal identification purposes. He also argues that the index card and the chart should have been turned over to the defense pursuant to RCr 7.26. The Commonwealth argues that Appellant was not entitled to either item prior to trial, and even so, that these items were in the sole possession of the police not the Commonwealth Attorney.

RCr 7.26(1) provides that:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

This rule provides a defendant with reasonable opportunity to inspect and copy certain witness statements. In this case, the index card about which Appellant complains was not such a statement. It was created for investigatory purposes and for use in the

process of fingerprint analysis. Inasmuch as the index card held the fingerprint dusting, it was real evidence. As such, it was not discoverable under RCr 7.26.

The fingerprint chart was created and used by Sergeant Bottoms during his fingerprint analysis. This chart was a computer-generated piece of paper that portrayed a comparison of Appellant's fingerprint and the fingerprint from the crime scene. This piece of evidence was used by Sergeant Bottoms to explain the matching points of the two fingerprints. Appellant concedes that this chart was not a verbatim statement by a witness. RCr 7.26 applies to statements by witnesses, not to demonstrative aids or to analytical documents. As to Appellant's claim of prejudice from the "AFIS" stamp, we do not believe such a stamp is a universal or even well known FBI designation. Moreover, there was no number associated with the stamp nor did Appellant's name or other identifying information appear on it. However, the Commonwealth's contention that a distinction exists between the police and the Commonwealth Attorney with respect to possession of evidence is refuted by Ballard v. Commonwealth.[4] Accordingly, the trial court did not err by admitting the above fingerprint evidence.

Appellant's next claim of error is that the trial court improperly denied his request for a criminal trespass instruction. He argues that he should have received the lesser-included offense instruction based upon the evidence. Appellant claims that it was possible that he was on the premises at another time, but did not commit the burglary since no other evidence linked him to the crime.

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[4] Ky., 743 S.W.2d 21, 22-23 (1988).

Jury instructions are based on evidence presented at trial. There was no evidence that Appellant had ever been at the McKnight residence on any other occasion. Also, Appellant did not admit to having been on the premises before. The present case is factually distinguishable from Martin v. Commonwealth,[5] wherein the appellants testified that they had been inside the residence in question but did not enter with the intent to commit a crime nor commit a crime while inside. Under such evidence, this Court held that it was proper to include a lesser-included offense instruction for criminal trespass. The present case is controlled by Commonwealth v. Sanders,[6] wherein this Court held that a criminal trespass instruction was not warranted solely on the basis of an alibi defense where there was no "testimony or circumstances that the jury could infer that there was presence in the house with no intent to commit a crime."[7]

In the present case, the evidence at trial clearly revealed that someone unlawfully entered the McKnight residence and stole property. There was no evidence supporting a view that Appellant merely entered or remained unlawfully inside the home. Consequently, there was no basis for an instruction on the lesser-included offense of criminal trespass in the second degree.

Finally, Appellant claims the trial court erred when it denied his directed verdict motion. He argues that the only fact linking him to the McKnight residence was the fingerprint evidence. He further argues that the subjective fingerprint comparison is

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[5] Ky., 571 S.W.2d 613 (1978).
[6] Ky., 685 S.W.2d 557 (1985).
[7] Id. at 559.

insufficient to support this conviction of second-degree burglary, particularly since none of the property taken from the residence was ever found or linked to Appellant.

Relying on Commonwealth v. Sawhill,[8] Appellant suggests that the prosecution produced no more than a "scintilla of evidence" against him with no evidence of substance, and for this reason he was entitled to a directed verdict. We disagree. Fingerprint evidence is evidence of substance. We have reviewed the record and it would not have been unreasonable for a jury to find guilt based on the evidence presented at trial.[9]

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

Lambert, C.J., and Graves, Johnstone, and Wintersheimer, JJ., concur. Keller, J., files a separate concurring opinion in which Cooper and Stumbo, JJ., join.

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[8] Ky., 660 S.W.2d 3 (1983).
[9] Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

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CONCURRING OPINION BY JUSTICE KELLER

I concur in the majority's ultimate holding, but write separately with respect to Appellant's allegation that the trial court erred when it permitted the Commonwealth to introduce into evidence a computer-generated fingerprint chart, which it failed to provide to the defense during pretrial discovery, that portrayed a "side-by-side" comparison of Appellant's fingerprint and the latent fingerprint found at the crime. Although the majority opinion observes correctly that the Commonwealth was not required to provide discovery of the chart pursuant to RCr 7.26 – which, in all fairness to the majority, is the discovery provision cited in Appellant's brief – the Commonwealth's failure to permit Appellant to inspect and copy the chart constituted a clear breach of its discovery obligations under RCr 7.24. In my view, however, the trial court did not abuse its discretion when it elected to remedy the Commonwealth's discovery violation by permitting defense counsel to examine the chart prior to its cross-examination of the Commonwealth's fingerprint expert.

The agreed order entered following the pretrial conference states "[t]he Defendant requests and the Commonwealth agrees to provide discovery pursuant to RCr 7.24 and 7.26." RCr 7.24(1) provides in relevant part that:

> Upon written request by the defense, the attorney for the Commonwealth shall . . . permit the defendant to inspect and copy or photograph any relevant . . . (b) results or reports of . . . scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth.[1]

The chart at issue was created by Sergeant Bottoms of the Lexington Police Department, who used it first during his fingerprint analysis itself and then again at trial to explain the matching points of the two fingerprints. There is no suggestion in this record that the Commonwealth was unaware that Sergeant Bottoms had created this chart. In fact, given that the fingerprint was the only evidence against Appellant, I would wager that the Commonwealth knew of the chart before it even presented the case to the grand jury. While it may be debatable whether a fingerprint examination is "science," the chart represented a "result[ ] or report[ ]" of Sergeant Bottoms's findings, and the Commonwealth was required by RCr 7.24(1) to permit discovery of it.[2] In addition, because the pretrial order does not limit the Commonwealth's discovery obligation to the items addressed under RCr 7.24(1), the Commonwealth was required "to permit the defendant to inspect and copy . . . papers, documents, or tangible

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[1] RCr 7.24(1).

[2] Cf. James v. Commonwealth, Ky., 482 S.W.2d 92, 94 ("A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced.").

objects, or copies thereof, that are in the possession, custody or control of the Commonwealth[,]"[3] which would include Sergeant Bottoms's chart.

I concur in the majority's holding, however, because I am unable to say that the trial court abused its discretion in its selection from among the "array of available remedies"[4] under RCr 7.24(9), which provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.[5]

Although Appellant understandably argues that the trial court should have "prohibit[ed] the party from introducing in evidence the material not disclosed," I find no abuse of discretion in the trial court's decision to remedy the Commonwealth's discovery violation by allowing defense counsel to inspect the chart prior to his cross-examination of Sergeant Bottoms, i.e., by "permit[ing] the discovery or inspection of materials not previously disclosed."[6]

Cooper and Stumbo, JJ., join this concurring opinion.

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[3] RCr 7.24(2).

[4] See Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 849-50 (1999).

[5] RCr 7.24(9).

[6] Cf. Copley v. Commonwealth, Ky., 854 S.W.2d 748, 750 (1993) (where the Court found no prejudicial error in the Commonwealth's failure to disclose a coroner's and an investigating officer's notes and reports in part because "Copley's counsel was afforded an opportunity to review the photographs and the reports prior to the testimony.").