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RENDERED: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 3-11-04 ELIZABETHTOWN, K.D.C

2001-SC-0080-TG

FRANKLIN RALPH ROARK — APPELLANT

V.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
98-CR-00336

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Franklin Roark, was convicted by a jury of one (1) count of First-Degree Rape, two (2) counts of First-Degree Burglary, and one (1) count of First-Degree Robbery. After the jury found Appellant to be a First-Degree Persistent Felony Offender (PFO), he received life sentences for his First-Degree Rape and First-Degree Robbery convictions and forty (40) year sentences for each of his First-Degree Burglary convictions. He appeals to this Court as a matter of right,[1] raising six issues for our consideration: (1) whether a witness's posthypnotic identification of Appellant was admissible; (2) whether a witness is subject to cross-examination on a statement made by her during hypnotic session; (3) whether a witness may testify as to statements

[1] KY. CONST. §110(2)(b).

made by her during hypnotic session; (4) whether other crimes allegedly committed by Appellant were admissible; (5) whether a mistrial should have been granted because of improper statements by Commonwealth's witnesses; (6) whether a prior conviction of Appellant was admissible when the conviction remained on appeal; and (7) whether the evidence was sufficient to support Appellant's convictions. Finding no reversible error, we affirm.

II. BACKGROUND

In the late evening of October 24, 1998, Melissa and Brandon Barry's residence on Curley Court in Burlington, Kentucky, was burglarized. Among the items taken from the residence were a .22 caliber revolver and several pieces of jewelry. That same night, S.M. was spending the evening out with her boyfriend, her son, and her son's girlfriend. At that time, S.M. was awaiting the completion of work on her home, thus she had obtained a short-term lease and moved into an apartment on Curley Court only a few weeks prior. S.M.'s apartment was located just a few doors from the Barry's residence. S.M. returned home with her boyfriend and son at approximately 11:30 p.m. that evening. Shortly thereafter, both her son and her boyfriend left, leaving S.M. alone in the apartment.

Preparing for bed, S.M. was in the bathroom when she turned and saw a masked man holding a gun standing in the doorway. He put a pillowcase over her head, tied her hands behind her back, and proceeded to sexually assault and rape her by penetrating her with his fingers and penis. He asked her where she kept her money and jewels, and as she listened, he went from room to room searching for her valuables. Her assailant then fled. S.M. drove to her boyfriend's home in Florence, Kentucky, and contacted the police.

Less than one week later, the Boone County Police Department recovered two (2) necklaces that had been stolen in the Barry burglary from Quick Cash Pawn Shop in Latonia, Kentucky. The necklaces had been pawned by a man who claimed he had done so at the behest of Appellant. Appellant was then arrested and charged with First-Degree Burglary of the Barry home, First-Degree Rape of S.M., First-Degree Burglary of S.M.'s apartment, and First-Degree Robbery of S.M. In December 1998, Appellant was indicted by the grand jury on all of the charges, along with a charge of being a First-Degree Persistent Felony Offender, and his jury trial took place in July 2000.

At trial, the Commonwealth presented evidence of other crimes in order to demonstrate a similar pattern of crimes committed by Appellant. Testimony was offered by police officers from the Kentucky State Police and the Boone County, Kenton County, Pendleton County, and Fort Wright police departments, as well as from three (3) victims of similar sexual assault/burglary crimes, who testified as follows:

N.T. testified that on November 29, 1997, she was at home alone when she heard a noise that sounded like breaking glass. She later discovered that a basement window had been broken and that her bedroom had been ransacked. Money and numerous items of jewelry were missing from the bedroom, including a cross and chain. A few weeks later, on December 19, 1997, N.T. was standing in her kitchen when suddenly the kitchen door swung open and a figure rushed at her and attacked her. As N.T. struggled with the intruder, he produced a knife, placed it against her throat and ordered her to quiet down. He forced her onto the floor, removed his coat, covered her head with it, ordered her to lie still, and began to take things from the residence. By lifting up the coat, N.T. was able to observe the intruder for a few seconds before he

attacked her again, pulled her robe up over her head, and began to sexually assault her. He tied her hands in front of her body with rope, cut off her underwear with the knife, and digitally penetrated her vagina and anus. Shortly thereafter, he fled the residence and N.T. called the police. N.T. later discovered that the intruder had stolen money and a cameo broach from her bedroom, much as the November 29th burglar had done. The cameo brooch and the cross and chain were recovered from Appellant's residence in Butler, Kentucky during a search performed on October 29, 1998.

A.R. testified that on September 17, 1998, as she entered her home in Fort Wright, Kentucky, she was attacked by a masked assailant and thrown to the floor. Brandishing a knife, the assailant then bound her hands with pantyhose and covered her head with a pillowcase. He forced A.R. onto the couch, raped her, forced her to perform oral sex upon him, and repeatedly asked her if she "liked" it. He then demanded money and jewelry, and then fled the residence. Two (2) of the rings stolen during the attack were recovered from the Quick Cash Pawn Shop in Florence; the items were pawned by Appellant's live-in girlfriend, at his behest.

A.H. testified that on October 15, 1998, she was raped in her residence in Butler, Kentucky, by a masked assailant. The man entered through a window near the front of her residence. Armed with a gun, he bound her hands with pantyhose, covered her head with a pillow, and forced her onto the bed. When she resisted, he punched her in the head until she relented. He then raped her, penetrated her rectum with his fingers, and performed oral sex upon her, all the while inquiring as to whether she was "enjoying" it. After raping her, he demanded and took cash and jewelry from the residence, including a herringbone necklace, before fleeing. The necklace was

recovered from Quick Cash Pawn Shop in Florence; it had been pawned by a man who did so at the behest of Appellant.

Appellant was convicted as charged on all counts. In the sentencing phase, the jury first recommended a sentence of twenty (20) years for each conviction, and then, after finding Appellant to be a First-Degree PFO, recommended enhanced sentences of life imprisonment for the First-Degree Rape and First-Degree Robbery convictions and enhanced sentences of forty (40) years for both First-Degree Burglary convictions. The jury recommended that the sentences run consecutively. The trial court sentenced Appellant to imprisonment in accordance with the jury's recommendations, [2] and this appeal followed.

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[2] The trial court's judgment, itself, does not set forth the sentences finally imposed by the trial court but refers to "See attached sheet." A single sheet of paper styled "SENTENCING" is contained in the record next to the judgment and presumably is the "attached sheet" referred to in the judgment. The enhanced sentences recommended by the jury are set forth in the attachment, which also contains the jury's recommendation of consecutive sentences. Appellant's brief only mentions the enhanced sentences fixed by the jury and makes no mention of the jury's recommendation of consecutive sentences. The Commonwealth's brief states only that Appellant was sentenced to life imprisonment, and it too makes no mention of the recommendation of consecutive sentences. Generally, a sentence of life imprisonment may not run consecutively to another sentence, Holloman v. Commonwealth, Ky., 37 S.W.3d 764 (2001); Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1994); Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993); Lear v. Commonwealth, Ky., 884 S.W.2d 657 (1994), but under KRS 533.060(2) any felony sentence, including a life sentence, received for a felony committed while on probation or parole for a prior felony must run consecutively to any other felony sentence, White v. Commonwealth, Ky. App., 32 S.W.3d 83 (2000); Devore v. Commonwealth, Ky., 662 S.W.2d 829 (1984); Riley v. Parke, Ky., 740 S.W.2d 934 (1987), subject, however, to KRS 532.110(1)(c)'s 70-year limitation on the aggregate of consecutive term-of-years sentences. We are unable to determine from the record whether Appellant was on parole at the time of the commission of the subject offenses, but this is of no consequence because "[t]he application of KRS 533.060(2) is essentially administrative in nature, and is certainly properly included in the duties of the Corrections Cabinet[,]" Riley v. Parke, Ky., 740 S.W.2d 934, 936 (1987); Cardwell v. Commonwealth, Ky., 12 S.W.3d 672 (2000), and therefore, the Department of Corrections (formerly the Corrections Cabinet) will determine whether Appellant's sentences run concurrently or consecutively. Riley, supra; Cardwell, supra. We would note, however, that under KRS 532.110(1)(c) the

III. ANALYSIS

A. N.T.'S POSTHYPNOTIC IDENTIFICATION OF APPELLANT

Appellant objected to N.T.'s testimony because she identified him only after a hypnotic session. This issue was thoroughly analyzed in Appellant's appeal of his conviction for crimes against N.T. In Roark v. Commonwealth[3] (hereinafter Roark I), we adopted the "totality of circumstances" approach as "the soundest approach thus far developed for evaluating the admissibility of evidence that is the product of an hypnotically induced, refreshed or enhanced recollection."[4] We then applied the "totality of circumstances" test to N.T.'s identification of Appellant and concluded that "the trial judge's admission of N.T.'s posthypnotic identification and testimony in [Roark I] was neither clearly erroneous nor an abuse of discretion."[5] For the same reasons, we again find that the trial court's admission of N.T.'s posthypnotic identification in the present case was neither clearly erroneous nor an abuse of its discretion.

In his reply brief,[6] Appellant argues that the Roark I analysis does not apply because N.T.'s identification of Appellant "is being introduced in a collateral case." We disagree. N.T.'s identification and testimony is still the evidence being evaluated, not S.M.'s testimony. The factors remain the same.

B. IMPEACHMENT OF N.T.

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aggregate of Appellant's two Burglary sentences (forty-years each) may not exceed seventy (70) years.

[3] Ky., 90 S.W.3d 24 (2002).

[4] Id. at 36.

[5] Id. at 37 (citation omitted).

[6] In fairness to Appellant, we observe that Roark I was decided after Appellant filed his original brief in this appeal.

In response to the Commonwealth's Attorney's (CA) questions during her direct testimony regarding her hypnotism, N.T. testified as follows:

CA: Following the time you were hypnotized, was there any new information that came out of that about your attacker? (pause) Anything that you hadn't previously remembered? (long pause) I mean, were you able to name a person in that --

N.T.: Oh. In the hypnosis you mean?

CA: Yes.

N.T.: Yeah, I did, you know.

C.A.: OK, Now, who is the person that you are referring to?

N.T.: His name is [D.M.]

C.A.: And, did you tell the hypnotist that he was the person that attacked you?

N.T.: No, I didn't.

C.A.: What did you tell her about that person -

N.T.: I just said...it just popped in my brain, um, um...I just said that he was a friend of my son's and, um, I don' know –

C.A.: Did you say that he was the person that attacked you?

N.T.: No I didn't.

C.A.: What did you say?

N.T.: I just, I don't know, I just, uh, I just said he was a friend of my son's and he just lived, um, behind us at one time. But I just didn't, um, I didn't say it was him, the person that attacked me.

C.A.: Was [D.M.] the person that attacked you?

N.T.: No it wasn't.

C.A.: Did [D.M.] look like the person that attacked you?

N.T.: No he didn't.

C.A.: OK. Following the hypnosis do you have any independent recollection about what you said during that session?

N.T.: Not really. No I don't.

Although an audio recording[7] was made of N.T.'s hypnotism session and was made available to Appellant's lawyer, his lawyer sought to impeach N.T.'s testimony by utilizing a purported transcript of the audiotape in cross-examining her on statements that she made during the session.[8] The trial court ruled, however, that the transcript could not be used to impeach N.T. because N.T. could not remember what she said during the hypnotism session. Appellant claims that the trial court erred in not permitting Appellant's counsel to use the transcript to impeach N.T. We disagree.

In Wise v. Commonwealth,[9] the Court of Appeals pointed out that Kentucky case law had "thoroughly settled" the issue and that "the credibility of any witness, including one's own witness, may be impeached by showing that the witness has made prior inconsistent statements[,]"[10] and stated that "[n]o person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'"[11] The Wise Court noted, however, that "[t]he trial judge has a broad discretion in deciding whether or not to permit the introduction of such contradictory evidence[.]"[12] This Court recently cited Wise approvingly in Manning v. Commonwealth,[13] and pointed out that "[t]he [Wise] Court concluded that it is within the

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[7] In Roark I, the audio tape was admitted into evidence during the testimony of Jill Brunner, the hypnotist. Roark, 90 S.W.3d at 37.

[8] Although the Commonwealth's Attorney entered both the audiotape and transcript into the record by avowal, they were not made part of the record on appeal and are not available for our review.

[9] Ky. App., 600 S.W.2d 470 (1978).

[10] Id. at 472.

[11] Id. Accord Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001).

[12] Wise, 600 S.W.2d at 472.

[13] Ky., 23 S.W.3d 610 (2000).

trial court's discretion to admit the contradictory evidence."[14] Accordingly, as with most rulings regarding the admission and exclusion of evidence, whether to allow impeachment of N.T. with statements that she allegedly made during her hypnotism was within the discretion of the trial court, and the standard of review is whether there has been an abuse of that discretion.[15]

In Mills v. State,[16] defense counsel sought to refresh the recollection of a witness by using statements that the witness did not recall making while under hypnosis. The trial court sustained objections to defense counsel's attempts to show the witness a transcript of the hypnotherapy session and to play a tape of the hypnotherapy session. In upholding the trial court's ruling, the Arkansas Supreme Court first noted that the "situation is different from when a defendant or witness is called to give hypnotically refreshed testimony[,]"[17] and that the defendant "presents us with no authority for why statements of a witness made under hypnosis should be relevant, reliable, or otherwise admissible."[18] Then, after mentioning that the statements were allegedly made by the witness "while she was in a hypnotic trance,"[19] the Mills Court held that the trial court

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[14] Id. at 613.

[15] Commonwealth v. King, Ky., 950 S.W.2d 807, 809 (1997) ("It is a well-settled principle of Kentucky law that a trial court ruling with respect to the admission of evidence will not be reversed absent an abuse of discretion."); Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 438 (2003) ("We review a trial court's KRE 403 decision for abuse of discretion.").

[16] 910 S.W.2d 682 (Ark. 1995).

[17] Id. at 690 (citations omitted).

[18] Id.

[19] Id.

did not abuse its discretion in "disallowing the use of [the witness's] statements made under hypnosis to expand her testimony."[20]

Although Arkansas has adopted a modified form of the per se inadmissible rule for testimony induced, refreshed or enhanced by hypnosis,[21] and although Mills does not involve an attempt to impeach a witness's testimony with a prior inconsistent statement, but rather to refresh a witness's testimony, we find it persuasive. We too agree that it is one thing to admit hypnotically-refreshed testimony and quite a different matter to admit statements made by a witness while under hypnosis. Like in Mills, Appellant did not present any evidence that a statement made by a witness while under hypnosis is "relevant, reliable, or otherwise admissible." Roark I did not address this issue; so, the "totality of circumstances" test does not apply to this situation. To allow cross-examination of a witness based on statements made by the witness while under hypnosis would be akin to allowing cross-examination of a witness based on statements made while the witness was asleep or otherwise unconscious.[22] Neither situation promotes trustworthiness in the statements made by the witness. Additionally, we point out that the situation presented here, i.e., the witness was never aware of making the statement, is different from the situation presented when a witness claims a loss of memory. In the former, the witness never had any memory of making the statement to

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[20] Id.

[21] Partin v. State, 885 S.W.2d 21, 22 (Ark. 1994) ("This court's decision in Rock[v. State, 708 S.W.2d 78 (Ark. 1986), *vacated,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)], held that hypnotically enhanced testimony of a criminal defendant is inadmissible *per se,* and that testimony of pre-hypnotic memories is admissible if shown by the proponent by clear and convincing evidence to be reliable and if limited to memories prior to the hypnosis.").

[22] Indeed, one of the definitions of hypnosis is "[a] sleeplike condition." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

begin with; whereas, in the latter, the witness has merely forgotten – either voluntarily or involuntarily – that she made the statement. Thus the hypnotized witness is called upon to testify to a statement that she never had any memory of making. Accordingly, her failure to recall the statement cannot fairly be classified as inconsistent with her present testimony. For the above reasons, we find no abuse of discretion in the trial court's refusal to allow Appellant's attorney to use the transcript in his cross-examination of N.T.

Additionally, we would note that Appellant's lawyer did not attempt to use the audiotape itself, but rather he opted to use a purported transcript that was not properly authenticated[23] and was strongly contested by the Commonwealth, and rightfully so, whether the transcript was an accurate translation of the audiotape. We would also mention that the proper foundation was not laid for impeaching N.T.'s testimony.[24] And, finally, we point out that this claimed error was not properly preserved with avowal testimony by N.T.[25]

C. N.T.'S HYPNOTIC STATEMENTS

Appellant argues that "[N.T.] should not have been permitted to testify about anything related to her hypnosis session because she could not remember any of what happened during the session[,]" and therefore, "she had no personal knowledge of the

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[23] KRE 901(a) ("General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

[24] KRE 613(a); Noel v. Commonwealth, Ky., 76 S.W.3d 923 (2002).

[25] Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 525 (2000); KRE 103(a)(2); RCr 9.52.

session and was not competent to testify about the session." KRE 601(b)(2)[26] and 602[27] are cited in support of this argument. Although we tend to agree with Appellant that N.T.'s testimony relating statements that she made while hypnotized was improper, this claimed error was admittedly not preserved, and because Appellant does not allude to any prejudice resulting from this particular testimony of N.T., we do not find that Appellant suffered manifest injustice as a result of such testimony. Appellant has failed to demonstrate "that a substantial possibility exists that the result would have been different" absent the claimed error.[28] Accordingly, we decline to review this claimed error under a palpable error standard.[29]

D. PRIOR BAD ACTS

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.][30]

Thus, evidence of other crimes is admissible if relevant for some purpose other than to show criminal disposition.[31] Here, the evidence of Appellant's other crimes had a two-

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[26] KRE 601(b) ("Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he: . . . (2) Lacks the capacity to recollect facts[.]").

[27] KRE 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

[28] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

[29] RCr 10.26 ("A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."); Partin, supra note 28; Butcher v. Commonwealth, Ky., 96 S.W.3d 3, 11 (2002).

[30] KRE 404(b).

fold purpose: one, his identity and two, his modus operandi. Like the issues of corpus delicti and identity,[32] the issues of identity and modus operandi are integrated. Accordingly, "[i]t is entirely appropriate, we believe, for purposes of assessing the admissibility of evidence of collateral crimes in the present context, to treat the evidence as if offered to prove identity by similarity, and to require that the details of the charged and uncharged acts be sufficiently similar as to demonstrate a modus operandi."[33] The standard was stated in Adcock v. Commonwealth:[34]

> In every case in which evidence of other crimes is sought to be introduced to establish a pattern or scheme, the real question is whether the method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person. If it does so, evidence that the defendant committed the other crime is admissible. If it only tends to show a disposition to commit a crime, the evidence is not admissible.[35]

In the present case, the evidence supports a finding that Appellant's signature was on all of the crimes.[36]

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[31] United States v. Vance, 871 F.2d 572, 575 (6th Cir. 1989) ("This court has noted that Rule 404(b) 'is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified.'" (citation omitted)).

[32] Billings v. Commonwealth, Ky., 843 S.W.2d 890, 893 (1992) ("While the issue of the corpus delicti is primary in these cases, identity of the perpetrator (if any) is not wholly irrelevant. It seems more accurate to say that the latter issue is assimilated into the former. If the act occurred, then the defendant almost certainly was the perpetrator. The two issues are essentially integrated.").

[33] Id.

[34] Ky., 702 S.W.2d 440 (1986).

[35] Id. at 443.

[36] Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993) ("That is, evidence of other acts of sexual deviance offered to prove the existence of a common

In each sexual assault/burglary/theft case, the perpetrator was armed and committed a sexual offense, burglary, and theft with the object of the theft being money and jewelry. Additionally, several common characteristics established a common method, pattern, or modus operandi, by which the perpetrator committed the sexual assault/burglary/theft crimes. For example, in the cluster of crimes occurring between September 17, 1998 and October 24, 1998 (involving A.R., A.H., and S.M.), the perpetrator of the sexual assaults/burglaries/thefts was armed with either a knife or gun, demanded money, took jewelry and cash (among other things), wore a mask, and entered through a window. Each victim noted the same characteristics regarding the perpetrator's genitalia, notably, that the assailant demonstrated difficulty maintaining an erection and that the size of his penis was quite small. In each instance, the victim was bound with pantyhose and her head was covered with a pillowcase while she was being sexually assaulted. As to N.T., the perpetrator again committed a sex offense, burglary, and theft. He was armed with a knife, and stolen property was recovered that linked Appellant to the crimes against her. The perpetrator came upon N.T. from behind – eliminating the need for a mask – and placed his coat and then her robe over her head – eliminating the need for a pillow case. We would also note that N.T. picked Appellant out of both a photo lineup and an audio lineup.

S.M. was unable to identify her assailant, and no physical evidence was introduced that connected Appellant to the sexual assault of her and the theft of her property. Consequently, the admission of evidence of Appellant's prior crimes, although highly prejudicial, was also highly probative because it established Appellant's

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scheme or plan must be so similar to the crime on trial as to constitute a so-called signature crime.").

identity as the perpetrator of the crimes against S.M.. Its probative value was not substantially outweighed by the danger of undue prejudice.[37]

As to the burglary of the Barry home, the perpetrator gained entry through a window, apparently wore gloves, and was linked to property stolen from the home. The Barry home was only a few homes away from S.M.'s residence, and the burglary occurred earlier the same night as the assault of S.M. and the burglary of her home. Appellant asserts that the evidence does not support a finding that he committed the burglary. We disagree. Proof of Appellant's possession of property taken in the burglaries was sufficient evidence that he committed the crime:

> Wahl's second assigned error is that there was insufficient evidence to warrant submission of the case to the jury. He says that the only evidence connecting him with the crime was his having had possession of the goods. It is well established that where there is evidence of a breaking and entering of a dwelling and property taken therefrom, and the property is found in the possession of the accused, such showing makes a submissible jury case.[38]

For the above reasons, we hold that the trial court did not abuse its discretion in admitting into evidence the proof of Appellant's prior crimes.[39]

E. MOTION FOR MISTRIALS

Appellant contends that the trial court should have granted Appellant's requests for mistrials as a result of statements made by Commonwealth's witnesses. Terry Brown, Appellant's nephew, when asked by the Commonwealth's Attorney how long he

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[37] KRE 403.

[38] Wahl v. Commonwealth, Ky., 490 S.W.2d 769, 770-71 (1972).

[39] Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999) ("The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.").

had known Appellant, answered that he had known him since he got out of prison. The trial court denied Appellant's motion for a mistrial but appropriately admonished the jury. Jennifer Patrick, the wife of a co-worker of Appellant, mouthed the words "I could kill you" to Appellant as she exited the stand.[40] Appellant again moved for a mistrial that was denied by the trial court; however, the trial court admonished the jury not to consider the witness's statement. Robert Thomas, the detective who investigated the assault on N.T., opined that the perpetrator had committed these kinds of acts before and would do so again. Again Appellant moved for a mistrial that was denied, and the trial court admonished the jury. Detective Thomas then began testifying about Appellant's Campbell County conviction, and as he read the conviction, he read that Appellant had been convicted of being a First-Degree Persistent Felony Offender. Once again, Appellant moved for a mistrial that was denied; however, Detective Thomas then read only the underlying convictions but not the PFO conviction. We disagree with Appellant's contention that the trial court was required to declare a mistrial.

"A mistrial is justified only when a 'manifest necessity for such an action or an urgent or real necessity' appears in the record[,]" and "[i]t is within the trial judge's discretion whether a mistrial should be granted, and his decision should not be disturbed, absent an abuse of discretion."[41] Here, the testimony was not elicited by the Commonwealth's Attorney. Jennifer Patrick's statement was not even responsive to a question by the Commonwealth's Attorney but was simply uttered as she was leaving

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[40] The assertion that witness Jennifer Patrick mouthed these words to Appellant was not evidenced in the record. Only defense counsel's objection to the behavior was recorded.

[41] Neal v. Commonwealth, Ky., 95 S.W.3d 843, 851-53 (2003) (citations omitted).

the witness stand. The trial court admonished the jury not to consider the complained of testimony and the statement by the exiting witness. We find that no manifest necessity for a mistrial or an urgent or real necessity appears in the record; therefore, we hold that the trial court did not abuse its discretion in denying Appellant's motions for a mistrial.

F. ADMISSION OF APPEALED CONVICTION

Appellant claims as error the introduction into evidence of the fact of his conviction in Roark I, which was on appeal at the time of his trial in this case. His conviction was brought out during N.T.'s testimony in the guilt phase of the trial. While this Court agrees that it was likely error to admit into evidence the fact that Appellant had been convicted under the prior indictment,[42] this issue was not preserved for appeal, and we do not find that the introduction of the conviction rises to the level of "palpable error".[43] Regardless, Appellant's conviction has now been affirmed and any error resulting from introducing the conviction while it was on appeal has now been remedied. We would also note that even evidence of an uncharged prior crime is admissible if sufficiently proven. In fact, evidence of prior bad acts by a defendant does not have to be established by direct evidence.[44]

G. SUFFICIENCY OF THE EVIDENCE

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[42] But cf. R. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 2.25(II)(C), at 90 (3d ed. Michie 1993) ("Evidence offered under the "other crimes" rules occasionally consists of a conviction, making it easy to assume that the defendant, in fact, committed the uncharged offense."). It is doubtful if a conviction, itself, would satisfy the standard for admission of a prior crime under KRE 404(b). See supra, Part IIID.

[43] RCr 10.26.

[44] Parker v. Commonwealth, Ky., 952 S.W.2d 209, 213 (1997).

Finally, Appellant claims that the trial court erred in denying defense counsel's motion for directed verdict because the Commonwealth did not produce sufficient evidence to sustain the conviction. We review Appellant's argument under the standard articulated in Commonwealth v. Benham:[45]

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserv[e] to the jury questions as to the credibility and weight to be given to such testimony.
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> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict.[46]

Appellant's claim is largely based on the Commonwealth's reliance upon circumstantial evidence to prosecute the case. However, "[c]ircumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt."[47] Thus, we consider whether, in view of the entire body of evidence presented by the Commonwealth, it would be clearly unreasonable for a jury to find the defendant guilty. Although the evidence in this case was circumstantial, the Commonwealth presented

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[45] Ky., 816 S.W.2d 186 (1991).

[46] Id. at 187. See also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 4-5 (1983) ("The clearly unreasonable test seems to be a higher standard for granting a directed verdict ... constitut[ing] an appellate standard of review.").

[47] Trowel v. Commonwealth, Ky., 550 S.W.2d 530 (1977).

sufficient evidence connecting Appellant to the burglary of the Barry residence and the crimes against S.M. Accordingly, we hold that the trial court properly overruled Appellant's motion for a directed verdict.

IV. CONCLUSION

For the foregoing reasons we affirm the judgment of the Boone Circuit Court.

All concur.

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