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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 12-9-04 E.M.A. Grow, D.C.

2002-SC-1081-MR

CHRISTOPHER HUGHES — APPELLANT

V.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
02-CR-7-1

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Christopher Hughes, was convicted by a Laurel Circuit Court jury of burglary in the first degree, KRS 511.020(1), five counts of unlawful imprisonment in the first degree, KRS 509.020(1), and two counts of theft by unlawful taking under $300, KRS 514.030(1). He was sentenced to a total of twenty years imprisonment and appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting the following claims of error: (1) the trial court's failure to declare a mistrial because of the Commonwealth's failure to disclose a supplemental investigative report pursuant to a discovery order; (2) failure to instruct the jury on the defense of voluntary intoxication; (3) insufficiency of the evidence to support his convictions of burglary and theft by unlawful taking; (4) denial of his motion for continuance for the purpose of obtaining a psychiatric examination; and (5) exclusion of a photograph of the corpse of his half-

brother, Eric Hopkins, and photographs portraying Appellant's relationship with Hopkins's child, Drake Vanourney. We affirm.

Eric Hopkins and Jennifer Vanourney began dating in high school. After graduating, they moved to Richmond, Kentucky, where they lived together. In March 1998, Jennifer had a son, Drake. In June 2001, the couple separated and Jennifer moved to Utah, taking Drake with her. On October 10, 2001, Hopkins committed suicide by a self-inflicted gunshot wound to the head.

On the evening of December 19, 2001, Appellant and Homer Lawson, who had been a close friend of Hopkins, were drinking alcohol at Appellant's home. The two decided to go to the residence of Kenneth and Patricia Vanourney, Jennifer's parents, "to get the truth and to find Drake." They left their car at a store and walked several miles from the store to the Vanourney residence. At approximately 10:30 p.m., Homer Lawson knocked on the Vanourneys' door and asked Patricia Vanourney if they could use her telephone, claiming they had car trouble. When Mrs. Vanourney left to retrieve the telephone, Lawson followed her in, and Appellant followed. Appellant was wearing a toboggan cap, a surgical mask, and gloves. Both he and Lawson brandished handguns. For the next seven hours, they terrorized the Vanourneys, their twenty-year-old daughter, Rebecca, and their twelve-year-old twin daughters, Janice and Kenna. First, they handcuffed Mr. Vanourney and bound his legs with duct tape, then used duct tape to bind the legs of Mrs. Vanourney, Rebecca, and the twins. They threatened that "[i]f we find anybody else here we will kill every one of you." Mr. Vanourney testified that after binding the family members, Appellant removed his mask and said several times, "This is for old Eric," pointing to a tattoo of Hopkins's tombstone on his shaved head. Appellant told Mr. Vanourney that they wanted Drake brought back to Kentucky.

During the night, Lawson took ten to twenty dollars from Mr. Vanourney's billfold and additional money from the purses of Mrs. Vanourney and Rebecca. Appellant and Lawson also found and consumed alcohol belonging to the Vanourneys. Mr. Vanourney testified that Appellant put his gun to Mr. Vanourney's head and threatened to shoot him and, later, pushed the barrel of the gun into Mr. Vanourney's rectum, again threatening to shoot him. Appellant and Lawson also threatened to shoot the other family members. Mr. Vanourney testified that the two kept pointing their guns at them and saying, "Well, let's just kill them now." On cross-examination defense counsel attacked Mr. Vanourney's credibility by pointing out that Vanourney had not mentioned the "pistol in the rectum" incident in the tape-recorded statement he had given to the police and that there was no mention of the incident in any of the police reports obtained by way of discovery.

Mr. Vanourney testified that his family's ordeal ended between 5:30 and 6:00 a.m. the next morning when Mrs. Vanourney agreed to fly to Utah and bring Drake back to Kentucky. Before leaving the Vanourney residence, Appellant and Lawson put everything they had touched in a duffel bag that they took with them.

I. DISCOVERY VIOLATION.

The last witness to testify for the Commonwealth was Detective Johnny Phelps of the Laurel County Sheriff's Department, the lead investigator on the case. He read into the record the written confession he obtained from Appellant. He also produced an investigative report that summarized his interview of Kenneth Vanourney and the confessions of Appellant and Lawson and read an excerpt from the report that contained Vanourney's description of the "pistol in the rectum" incident. Phelps explained that Vanourney described this incident before Phelps activated the tape

recorder and that Phelps forgot to have him repeat it during the recorded interview. A bench conference then ensued during which defense counsel insisted that he had not received the report as part of the required discovery and the prosecutor stated that he was certain it had been furnished. Following a lunch recess, the prosecutor conceded that he had inadvertently failed to include Phelps's six-page report in the approximately 140 pages of discovery material furnished. Defense counsel moved for a mistrial, asserting that the discovery omission had caused him to make a misstatement during his cross-examination of Vanourney. The trial court found that any prejudice was insufficient to warrant a mistrial. Defense counsel did not ask the trial court to inform the jury about the discovery omission or otherwise attempt to rehabilitate the misstatement made during counsel's cross-examination of Vanourney. Although he had reviewed the six-page report during the one-hour lunch recess, defense counsel did not question Phelps about any other entries in the investigative report that might contradict the trial testimony of the Commonwealth's other witnesses.

On appeal, Appellant alleges that Phelps's report contained twelve undisclosed or contradictory statements, viz:

1. The report states that "Mr. Vanourney, his wife, and three daughters were all ordered to lie on the floor and their feet and hands were bound," whereas the testimony at trial was that only the feet, not the hands of the Vanourney daughters were bound.

2. The report states that the Vanourneys were kept "hostage until after 5:00 a.m. Thursday morning, 12-20-01,"[1] whereas the testimony at trial was that the Vanourneys were not released until 5:30 a.m.

3. The report states that "Kenneth (Vanourney) stated . . . on one occasion, Chris Hughes pushed the barrel of his pistol so hard into his rectum area as he lied [sic] face down that he knew he was going to die," whereas the Vanourney's tape-recorded statement contains no reference to this allegation.

[1] The report notes at another point that they were released around 5:30 a.m.

4. The report states that "Jennifer and Eric later had a son named Drake," whereas the Vanourneys stated at trial that Hopkins may not have been the father of the child.

5. The report states that "[d]uring the night the perpetrators began drinking a bottle of Labrot and Graham whiskey, and some Montezuma Tequila which belonged to the victims," whereas the evidence at trial was that the defendants did not drink the tequila at the Vanourney home but took the bottle with them.

6. The report states that "Kenneth said he began worrying more when the perpetrators began being obviously intoxicated," whereas the testimony of the Vanourneys at trial was that Appellant was not intoxicated.

7. The report states that "[t]he perpetrators removed the money from Kenneth's wallet and Patricia's purse," whereas the testimony of the victims at trial was that Lawson, not Appellant, took the money.

8. The report states that "[l]ater, two of the victims were forced to drive the accused to their vehicle," and "Kenneth stated the perpetrators took him and his daughter, Rebecca at gunpoint and had them drive them to a location on Ky. 30 and drop them off," whereas the testimony at trial was that Rebecca and Mr. Vanourney offered to drive the defendants to their vehicle and there was no testimony that a gun was held on them at any time during the drive.[2]

9. The report states that "Deputy Buddy Blair interviewed Rebecca, Kenna and Janice. (Taped interviews)," but Appellant was never provided with any statement taken from Kenna and Janice Vanourney, either in transcript or tape form.

10. The report states that "Christopher admitted to holding a gun on several of the family members and using duct tape to bound [sic] their hands and feet," whereas in Appellant's taped statement, he admitted holding a gun on Mr. Vanourney but did not admit holding a gun on the other family members. This statement appears nowhere else in discovery, nor was it ever disclosed to defense counsel. Further, there was no testimony at trial that Appellant taped anyone's legs other than Mr. Vanourney's.

11. The reports states that "I later asked Christopher Hughes about Felice [Lawson told police that Jerrod Felice had driven them to the Vanourney residence], and he admitted he had dropped them off but stated he didn't know what he and Lawson were going to do," but this statement

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[2] Mr. Vanourney testified that he only volunteered to drive because Appellant and Lawson said that they were going to take Rebecca with them. Mr. Vanourney feared that the two were going to rape Rebecca, so he convinced them to allow him to drive.

by Appellant appears nowhere else in discovery nor was it ever disclosed to counsel.

12. The report states that "I took two photographs of [the] bruise on back of Kenneth Vanourney. Bruise caused when Mr. Vanourney was forced to the floor of residence," whereas no mention of a bruise on Mr. Vanourney's back appears elsewhere in discovery and no photographs of the alleged bruise were furnished to Appellant by way of discovery.

Except for the "pistol in the rectum" entry, the jury heard none of the entries in Phelps's report. The photographs of the bruises were not introduced and defense counsel specifically waived the failure to furnish those in discovery. Even after receiving Phelps's report, Appellant did not request copies of Deputy Blair's allegedly recorded interviews with Janice and Kenna, and the notation in Phelps's report is the only indication in this record that such recorded interviews ever existed. The only entry in Phelps's report that could possibly have benefited Appellant at trial was Vanourney's alleged statement that he began worrying more "when the perpetrators began being obviously intoxicated." Despite being aware of that entry, however, Appellant neither asked Phelps about the statement, which would have been admissible as a prior inconsistent statement under KRE 801A(a)(1), nor asked to recall Vanourney for further cross-examination about it. As discussed infra, that additional evidence would not have entitled Appellant to an instruction on voluntary intoxication. Considering that Appellant confessed to the offenses of which he was convicted (except the misdemeanor theft convictions, which were lesser included offenses of the indicted offenses of robbery in the first degree), we conclude that the discovery violation did not affect Appellant's substantial rights, thus was harmless. RCr 9.24; Copley v. Commonwealth, Ky., 854 S.W.2d 748, 750-51 (1993). Therefore, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial. Bray v. Commonwealth, Ky., 68 S.W.3d 375, 383 (2002).

II. DENIAL OF VOLUNTARY INTOXICATION INSTRUCTION.

Appellant next contends that the trial court erred in refusing to instruct the jury on the defense of voluntary intoxication. The evidence presented demonstrated that he had been consuming alcohol prior to going to the Vanourney residence; however, there is no indication of how long he had been drinking or how much he had consumed.

"While intoxication may be a defense in a criminal case, it is such only if there is evidence sufficient to support a doubt that the defendant knew what he was doing." Stanford v. Commonwealth, Ky., 793 S.W.2d 112, 117 (1990). See also Rogers v. Commonwealth, Ky., 86 S.W.3d 29, 44 (2002) (citing Meadows v. Commonwealth, Ky., 550 S.W.2d 511, 513 (1977)) (instruction on voluntary intoxication is warranted only if there is evidence showing the defendant was "so drunk he did not know what he was doing.") "Mere drunkenness" is not enough to meet this standard. Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812-13 (1977) ("[T]he exculpatory effect of intoxication clearly relates to the capacity to form an intent as well as the capacity to deliberate or premeditate . . . ."), overruled on other grounds by Payne v. Commonwealth, Ky., 623 S.W.2d 867, 870 (1981).

The evidence presented was wholly insufficient to establish that Appellant was so intoxicated that he did not know what he was doing. Although he contends that he only went to the Vanourney's residence to find out where his nephew was, he brought with him handguns, handcuffs, and duct tape, and he wore surgical gloves. He also had the foresight to park at a store several miles from the Vanourney house because he did not want to park on the street and run the risk of his car being towed. Furthermore, Appellant acknowledged that he wore a surgical mask to disguise himself from Mr. Vanourney, whom he feared would shoot him if he recognized him, hardly indicative of

someone unaware of his actions. Although Appellant stated that he drank more alcohol at the Vanourney residence, he did not do so until after he and Lawson had entered the house without permission, with handguns, threatened to use them, and restrained the Vanourneys with handcuffs and duct tape. Appellant argues that his actions were "of such illogic that he must have not known what he was doing. . . ." However, illogical actions do not ipso facto prove that the actor did not know what he was doing. The evidence was insufficient to require a jury instruction on the defense of voluntary intoxication.

III. SUFFICIENCY OF THE EVIDENCE.

A. Burglary.

At the close of the Commonwealth's case, Appellant moved for a directed verdict of acquittal on the charge of burglary in the first degree, claiming that there was no evidence that he intended to commit a crime within the Vanourney residence, relying on his own theory that his intent was only to "scare the Vanourneys into . . . providing information." Suffice it to say that Appellant admitted unlawfully imprisoning the Vanourney family after entering the residence and the offense of burglary in the first degree can be committed by either entering or remaining unlawfully in a building with the intent to commit a crime. KRS 511.020(1); Colwell v. Commonwealth, Ky., 37 S.W.3d 721, 727 (2001). Further, "[i]ntent can be inferred from the act itself and the surrounding circumstances." Commonwealth v. Suttles, Ky., 80 S.W.3d 424, 426 (2002). "[B]ecause a person is presumed to intend the logical and probable consequences of his conduct, a person's state of mind may be inferred from his actions preceding and following the charged offense." Id. (citing Hudson v. Commonwealth,

Ky., 979 S.W.2d 106, 110 (1998)). The evidence was sufficient to support Appellant's burglary conviction. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

B. Unlawful Taking Under $300.

Appellant also maintains that the evidence was insufficient to convict him of theft by unlawful taking because only Lawson took the money from the Vanourneys. The theft instructions permitted the jury to convict Appellant under either a principal or accomplice instruction. There was evidence that Appellant held the family at gunpoint while Lawson stole their money. Although there was evidence that Appellant told the Vanourneys that "I am not a thief," "the jury [was] not required to believe such an exculpatory explanation in view of other inculpatory evidence presented by the prosecution." Edmonds v. Commonwealth, Ky., 906 S.W.2d 343, 347 (1995) (citing Armstrong v. Commonwealth, Ky., 517 S.W.2d 233, 235 (1975)). There was sufficient evidence to support Appellant's three convictions of misdemeanor theft. Benham, 816 S.W.2d at 187.

IV. DENIAL OF CONTINUANCE.

Four days prior to trial and eleven months after his arrest on these charges, Appellant moved for a continuance so that he could obtain a psychiatric examination in support of a possible mental health defense. In his affidavit in support of his motion, he stated that he had previously decided not to pursue an insanity defense because he lacked funds for a psychiatric evaluation and, instead, had decided to pursue a defense of extreme emotional disturbance (EED). However, upon realizing that EED was no defense to the offenses for which he was indicted, he needed a continuance to "explore" again the possibility of an insanity defense.

RCr 9.04 provides:

> The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it.

In Jackson v. Commonwealth, Ky., 703 S.W.2d 883 (1986), the defendant, as Appellant does here, claimed "that denial of his motion for continuance prevented him from 'exploring' the possibility" of an insanity defense. Id. at 885. Appellant, unlike the defendant in Jackson, did comply with the requirement that the motion be accompanied by an affidavit. However, as in Jackson, Appellant's affidavit failed to establish anything more than a planned "fishing expedition" for possible evidence of insanity. Id. As in Jackson, "[t]he appellant had no history of mental disorders or psychiatric treatment." Id. Defense counsel's affidavit stated only that the affiant was "concerned that [Appellant] suffered such emotional and psychological problems as a result of his brother's suicide that a psychiatric evaluation was needed." There was no reported instance of any prior psychiatric treatment or consultation. Furthermore, the affidavit did not demonstrate that "due diligence" had been used to obtain possible psychiatric evidence, only that trial strategy had changed (again) upon realization that EED was an unavailable defense.

The decision to grant a continuance lies within the sound discretion of the trial court. Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991), overruled on other grounds by Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 544 (2001). Factors to be considered by the trial court include the length of delay, previous continuances, inconvenience to the litigants, witnesses, counsel and the court, whether the delay is purposeful or is caused by the accused, availability of other competent counsel,

complexity of the case, and whether denying the continuance will lead to identifiable prejudice. Id.

Applying these factors to the case, we find no abuse of discretion in the refusal to grant a continuance. Appellant admits the length of delay would be a few months. Appellant was granted two previous continuances, and this delay would no doubt further inconvenience the court and witnesses. Furthermore, Appellant purposely caused the delay by initially deciding not to pursue an insanity defense, then changing strategies again at the last minute.

V. PHOTOGRAPHS.

The Commonwealth filed a motion in limine to exclude a gruesome photograph of Eric Hopkins's corpse taken shortly after his suicide, and to exclude family photographs portraying Appellant and Drake. The trial court sustained both motions. The photographs were introduced by way of avowal. KRE 103(a)(2). Appellant asserts that the evidence was admissible because it was probative of his mental state at the time of the crimes. No doubt, Appellant has a constitutional right to a fair opportunity to present a defense. Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 2146-47, 90 L.Ed.2d 636 (1986); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973); Beaty v. Commonwealth, Ky., 125 S.W.3d 196, 206-07 (2003). The exclusion of evidence violates that constitutional right when it "significantly undermine[s] fundamental elements of the defendant's defense." United States v. Scheffer, 523 U.S. 303, 315, 118 S.Ct. 1261, 1267-68, 140 L.Ed.2d 413 (1998). The exclusion of the photographs in this case fails that test.

A. Suicide Photograph.

KRE 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or needless presentation of cumulative evidence." (Emphasis added.) This determination lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 103 (1998). It was uncontested that Hopkins committed suicide by shooting himself in the head. Thus, the photograph was not only gruesome but also cumulative, and could only have supported Appellant's theory that he was emotionally disturbed when he committed the offenses against the Vanourneys. The problem is that emotional disturbance is not a defense to those offenses. Even if that were not so, EED presupposes the existence of intent. Todd v. Commonwealth, Ky., 716 S.W.2d 242, 246 (1986). Appellant does not claim that he did not intend to commit the offenses when he committed them, only that he did not leave home with the intent to commit them. Thus, the evidence was not only gruesome and cumulative, but also of marginal relevance. The trial court did not abuse its discretion in excluding it.

B. Family Photographs.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Relevant evidence in a criminal case is any evidence that tends to prove or disprove an element of the offense. Commonwealth v. Mattingly, Ky. App., 98 S.W.3d 865, 869 (2003). Appellant's theory was that his intent in going to the Vanourney residence was to determine the whereabouts of Drake rather than to injure or terrorize the Vanourneys. The

photographs did not prove or disprove that theory, but only proved that Appellant was fond of Drake – a fact that was not contested. Again, the element of intent in this case pertained not to what Appellant intended when he left his residence but what he intended when he committed the offenses. The photographs were cumulative to Appellant's testimony that he was fond of Drake and went to the Vanourney residence only with the intent to learn where Drake was living.

Accordingly, the judgment of convictions and the sentences imposed by the Laurel Circuit Court are AFFIRMED.

All concur.

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