IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0585-MR

DERRICK LANE — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
2002-CR-0014

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Derrick Lane, was convicted of first-degree burglary and fourth-degree assault by the Fayette Circuit Court. He received concurrent sentences of twenty years' imprisonment for burglary and twelve months for assault. His appeal comes before this Court as a matter of right. Ky. Const. §110(2)(b). Appellant asserts the following trial errors: 1) the improper admission of prior bad acts and "investigative hearsay," 2) the improper admission of hearsay testimony from other witnesses, 3) the improper admission of unduly prejudicial statements made by the interviewing detective, 4) the failure to instruct the jury on the right to enter a dwelling, 5) the failure to order a competency hearing, and 6) the failure to enter a directed verdict. We affirm.

Facts

In the early morning hours of October 28, 2001, Appellant, a maintenance man at the Surfside Apartment complex, entered the victim's apartment purportedly to investigate a fire. No other witness reported any indication of smoke or fire at the time

in question. The victim testified that a loud noise awoke her from bed, so she threw on her clothes and grabbed her cell phone. At first, she could only perceive a shadowy figure, but Appellant then lunged at her and she recognized him as the apartment complex's maintenance man. A struggle ensued. The victim attempted to dial 911, but Appellant knocked the phone away. According to the victim, Appellant grabbed at her clothing and she feared that he was going to take advantage of her. She received cuts and bruises on her chest, neck, and hands while defending herself. When Appellant covered her mouth to prevent her from screaming, she bit down on his finger until blood dripped from her mouth onto the wall and the carpet. Eventually, Appellant agreed to leave if she would release his finger. As Appellant lay on the floor, she offered him a bandage in the hope that he might leave. When Appellant did not leave, she brought him a glass of water to appease him and to create an opportunity to escape. But because she had on no shoes, she decided against this plan and undertook instead to calm Appellant until he would voluntarily leave. Finally, he left, warning her not to call the police or anyone else. She then began to lock the doors and windows and, in doing so, noticed Appellant pacing beneath her kitchen window. She called Gary Slone, the apartment manager. There was no answer so she left a message and waited in her apartment until morning when Slone arrived with the police. The victim identified Appellant as the assailant. Slone directed police to Appellant's sleeping quarters where he was immediately arrested.

Appellant was tried before a Fayette Circuit Court jury and found guilty of burglary in the first degree and assault in the fourth degree. He was sentenced to twenty years' imprisonment on the burglary charge, and twelve months' imprisonment on the assault charge. Additional facts will be developed as necessary.

Detective Roper's Testimony

Appellant contends the trial court erred to his substantial prejudice by admitting certain portions of the testimony of Detective Roper, the investigating officer. Appellant first complains of Detective Roper's statement that other charges against Appellant had been contemplated, though not brought. According to Appellant, these statements constituted improper character evidence. Next, Appellant directs our attention to Detective Roper's testimony regarding a possible criminal investigation of Ike Lawrence, owner of the apartment complex and the sole defense witness. Appellant asserts that such testimony is inadmissible hearsay.

Appellant's first claim of error, regarding Detective Roper's testimony that other charges against Appellant had been contemplated, is not preserved for review. At trial, the Commonwealth asked Detective Roper, "Did you contemplate any other charges in this case?" Defense counsel objected before the detective responded, and a conference at the bench followed. The Commonwealth explained that it sought to lay a foundation on this issue prior to the admission of Appellant's taped interview with Detective Roper. During the interview, Detective Sweeney informs Appellant that he is facing attempted rape charges. At the point of Detective Sweeney's in-court testimony, however, the trial court had not yet ruled on the admissibility of the taped interview. Following a brief discussion, the trial court explained that a general question regarding other charges against Appellant – without reference to the specific attempted rape charge – would be permitted. The Commonwealth verbally agreed to this limitation, and defense counsel replied, "okay, okay." Defense counsel did not make any further objections as the Commonwealth proceeded with the limited direct examination on this issue, and therefore the issue is not preserved for appellate review. RCr 9.22.

Furthermore, it is axiomatic that defense counsel may not agree to a proposed remedy at trial, then appeal the trial court's decision to follow that very recommendation.

Appellant also argues that Detective Roper improperly testified concerning a criminal investigation of Ike Lawrence, arising from the same set of events. Apparently, as the criminal investigation of Appellant progressed, the officers encountered allegations that Mr. Lawrence had approached witnesses about altering their testimony and were conducting an investigation into that matter. The Commonwealth sought to question Detective Roper concerning this investigation in order to lay a foundation as to why he was compelled to re-interview certain witnesses. Prior to commencing this portion of the testimony, the prosecutor approached the bench and explained her intent to the court and opposing counsel. Defense counsel objected, arguing that the testimony was hearsay, that it amounted to improper bolstering of the prosecution witnesses, and that it was an impeachment in advance of Mr. Lawrence. The trial judge overruled the objection, though he did limit the Commonwealth to certain questions that would not elicit any hearsay from Detective Roper. The testimony proceeded as follows:

COMM: Are you aware of whether or not Mr. Lawrence is currently under any criminal investigation?

ROPER: Yes, I am.

COMM: Does this have to do with the witnesses in this case and their testimony?

ROPER: Yes, it does.

On appeal, Appellant again argues that these statements constituted impermissible "investigative hearsay" that bolstered the Commonwealth's witnesses while improperly impeaching the defense witness, Mr. Lawrence.

We find Appellant's assertions to be without merit. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE 801(c). Officer Roper's testimony does not constitute hearsay because it did not involve any out-of-court statements, and was entirely based on information within his personal knowledge as the lead investigator of the case. Cf. Slaven v. Commonwealth, 962 S.W.2d 845 (Ky. 1997).

Considering the perfunctory nature of the testimony, we likewise cannot agree with Appellant that Detective Roper's statements improperly bolstered the prosecution witnesses or impeached Mr. Lawrence in advance. Detective Roper did not elaborate whatsoever on the allegations underlying the investigation of Mr. Lawrence, nor did he specifically name any witnesses inculpated by the investigation. Moreover, Detective Roper only stated that the investigation concerned the witnesses' testimony; he did not reveal the underlying allegation that certain witnesses had changed their statements during the course of the investigation into Appellant. Common sense dictates that it is not possible to bolster the testimony of a witness without identifying the witness in any way. Furthermore, without any details or additional information revealed as to the underlying allegations, it is difficult to discern how Detective Roper's testimony served to impeach Ike Lawrence in advance of his testimony. We find no error.

Additional Allegations of Hearsay

Appellant next argues that the trial court erred in admitting the hearsay testimony of Sue Quiggins. Sue Quiggins was staying with Gary Slone on the night of the incident, and was present when Slone received the distressed message from the victim. In response to questioning about why the two called 911 and then went to the victim's

apartment, Quiggins relayed that Slone stated, "I think a woman has been raped." Defense counsel objected. On appeal, Appellant maintains that this testimony constituted inadmissible hearsay resulting in extreme prejudice.

Upon review of the testimony, we agree with the trial court's determination that Quiggins' statements do not amount to hearsay. Again, hearsay is an out-of-court statement offered for the truth of the matter asserted. KRE 801. Quiggins did not relay Slone's statements in order to prove that the victim was in fact raped; rather the testimony was offered to explain why Slone and Quiggins hurriedly rushed to her apartment. Furthermore, even assuming arguendo that Appellant was prejudiced by Quiggins' testimony, it is rendered harmless as Slone later testified himself that he went to the victim's apartment on the belief that she had been raped. There was no error.

Unduly Prejudicial Statements

Appellant argues that the trial court erred in admitting an unedited recording of an interrogation session conducted by Detective Sweeney. Detective Sweeney questioned Appellant at the police station the same day that he was arrested. Specifically, Appellant objects to two portions of the taped interrogation: (1) Detective Sweeney's comment that Appellant's statements were a "lot of crap" and a "line of bull"; and (2) Detective Sweeney's comment that Appellant "looks familiar" after which he asked Appellant if he had ever seen him before. Defense counsel objected to these statements, arguing that they were unduly prejudicial. The objection was overruled, and the taped interrogation was played before the jury. We find no error.

We examine first Detective Sweeney's comments that Appellant's statements were a "lot of crap" and a "line of bull." Recently, in Commonwealth v. Lanham, we addressed the issue of permissible interrogation techniques. ___ S.W.3d ____ (Ky.

2005). In that case, the jury heard an unedited recording of Lanham's confession, during which the interrogating officer repeatedly accused him of lying. We rejected the argument that the KRE 608(a) limitations on character-based attacks of a witness's credibility apply to non-testimonial statements made by a police officer. We concluded that such comments are not aimed at impeaching a witness nor are they an attempt to convince the jury that the defendant is, in fact, lying; rather, they are "part of an interrogation technique aimed at showing the defendant that the officer recognizes the holes and contradictions in the defendant's story." We also warned, however, that such comments create the possibility that the jury will misunderstand the purpose of the recorded statement and give the officer's comments undue weight. For this reason, we determined that the court should give a limiting admonition before playing the recording when there is the potential for adverse inferences to be drawn. We finally noted that reversible error may result when such an admonition is requested and denied.

Here, as in Lanham, Appellant objected to the admission of the recorded interrogation, but did not request an admonition once that objection had been overruled. Where an admonishment is sufficient to cure an error and the defendant fails to ask for the admonishment, we will not review the error. Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). Therefore, reversal is not warranted.

Appellant also objects to the admission of Detective Sweeney's comment that Appellant "looks familiar" and subsequent inquiry, "Haven't I seen you before?" Appellant argues that these comments created a prejudicial inference about his character. We first note that the remarks made by Detective Sweeney were brief and very ambiguous. He did not elaborate on his comment, or explain why he thought Appellant looked familiar or where he might have seen Appellant in the past. For this

reason, it is very difficult to discern in what way Appellant might have been prejudiced by the detective's comments. Nonetheless, even assuming for argument's sake that the jury might have drawn an improper inference about Appellant's character as a result of Detective Sweeney's remarks, any resulting error is harmless. The weight of the evidence against Appellant was overwhelming. He presented no evidence to contradict the victim's incriminating testimony other than his own self-serving testimony. And Appellant's testimony was highly suspect: his statements to the police and other witnesses were inconsistent in numerous respects; no evidence or testimony corroborated his version of events; and nearly every material portion of his testimony was directly challenged by the victim's testimony. When there is no substantial possibility that the result would have been different absent an alleged error, the supposed irregularity is non-prejudicial. Scott v. Commonwealth, 495 S.W.2d 800, 802 (Ky. 1972). Therefore, reversal is not required. See also Henson v. Commonwealth, 20 S.W.3d 466 (Ky. 1999).

Admission of Audiotape of Slone's Call to 911

Appellant also argues that it was error to play the audiotape of Gary Slone's call to 911 for the jury, as it failed to meet the present sense impression hearsay exception requirements of KRE 803(1). However, this alleged error was not properly preserved for appellate review. Prior to the tape being played, a bench conference was held during which the Commonwealth asked defense counsel if he had any objections to admission of the taped 911 call. Defense counsel replied that he had no objection at that time, even commenting that he believed the taped call complied with the present sense impression rule, though counsel did reserve the right to "jump up and object." However, counsel made no objection during the entirety of the tape. "One claiming

error may not rely on a broad ruling and thereafter fail to object specifically to the matter complained of." Tucker v. Commonwealth, 916 S.W.2d 181, 183 (Ky. 1996). Thus, the claimed error is unpreserved for further review. RCr 9.22.

Jury Instructions

Appellant argues that the trial court's failure to specifically instruct the jury on his right to enter the dwelling as the landlord's agent substantially prejudiced his ability to present a complete defense. Because he claimed that he entered the victim's apartment because he believed there was a fire, Appellant complains that the trial court's instruction was not specific enough to allow the jury to fully comprehend his defense theory that he was authorized to enter in the event of an emergency. At trial, defense counsel requested that provisions of the Uniform Residential Landlord and Tenant Act, as well as principles of agency, be inserted in the instructions. The trial court denied the request, and delivered the following instruction on First-Degree Burglary:

> You will find the Defendant guilty of First-Degree Burglary under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this county on or about the 28th day of October 2001, and before the finding of the Indictment herein, he entered or remained in a building occupied by [the victim].
>
> B. That in so doing, he knew that he did not have permission from [the victim], or any other authority;
>
> C. That he did so with the intention of committing a crime therein; AND
>
> D. That while in the building he caused physical injury to [the victim] who was not a participant in the crime.

The general rule is that the trial court is required to instruct on every theory of the case that is reasonably deducible from the evidence. Ragland v. Commonwealth, 421 S.W.2d 79, 81 (Ky. 1967). And, a defendant is entitled to have his theory of the case submitted to the jury for consideration. Davis v. Commonwealth, 252 S.W.2d, 9, 10 (Ky. 1952). However, a special instruction on a defendant's theory of the case is not required "if the instruction which submits the Commonwealth's theory is couched in such language that the ordinary layman who sits upon the jury can easily understand and its negative completely covers the defense of the accused." Blevins v. Commonwealth, 258 S.W.2d 501, 502-03 (Ky. 1953). By contrast, a defendant is entitled to a specific instruction on his theory of the case when the defendant has admitted to conduct that constitutes the essential elements of an offense, but relies on circumstances amounting to an avoidance of the actual crime or circumstances that might have the ultimate effect of excusing criminal intent. Hayes v. Commonwealth, 870 S.W.2d 786, 788 (Ky. 1993).

Here, we find that language included in subsection B of the trial court's instruction adequately encompassed Appellant's theory of the case: "he knew that he did not have permission from [the victim], or any other authority" (emphasis added). As set forth in Blevins, the negative included in this instruction ("did not have permission from . . . any other authority") completely covers Appellant's defense that he was authorized to enter the apartment for emergency purposes. As determined by the trial court, a specific instruction including Appellant's proposed language would have unreasonably complicated the case and confused the jury. Furthermore, a specific instruction was not warranted because Appellant did not admit to any of the essential elements of first-degree burglary. Instead, he merely asserted that he was lawfully

present in the apartment. Because all of the essential elements were still at issue, (i.e. whether Appellant knowingly entered or remained unlawfully in a building with the intent to commit a crime), Appellant is not relying on mere circumstances to exculpate himself and thus is not entitled to a specific instruction. Therefore, the trial court did not err in denying Appellant's request for a specific instruction on his alleged right to enter the victim's apartment.

Competency Hearing

Appellant asserts that the trial court's failure to conduct a competency hearing pursuant to KRS 504.100 was error. According to Appellant, the trial court had reasonable grounds to believe that he was incompetent to stand trial and the failure to conduct an evidentiary hearing on the matter results in reversible error. We disagree.

In support of his assertion that the trial court had reasonable grounds upon which to question his competency, Appellant points first to his decision to testify on his own behalf despite the repeated advice of his counsel to remain silent. Appellant relies more heavily, however, on the trial court's statements during a conference that occurred on the first day of trial. Following the victim's testimony, and outside the presence of the jury, the trial court initiated a discussion between counsel, the court, and Appellant regarding plea offers that had previously been made by the Commonwealth. At the outset, the trial court announced that he was going to continue the trial until the following day in order to give defense counsel an opportunity to further discuss the plea offer with his client. In light of the strength and persuasiveness of the victim's testimony, it is clear that the court was concerned that Appellant would choose to proceed towards a likely guilty verdict that would carry a minimum of a ten-year sentence, when a plea agreement of four years was available. In fact, the trial court

plainly stated to both defense counsel and Appellant, "I don't know how else to put this, except . . . you're in trouble." The trial court then proceeded to question Appellant as to whether he fully understood the plea agreement offered by the Commonwealth, the strength of the Commonwealth's case, and that the minimum sentence he could receive from the jury would be ten years' imprisonment. Appellant responded that he did understand the purpose and consequences of the trial, and correctly identified the three charges against him. As the conversation came to an end, the trial court again expressed disbelief that Appellant would reject a plea agreement in the face of an almost certain guilty verdict. In response, Appellant noted that no one had yet heard "his side" of the case, and that he thought he could "beat" the charges. Finally, after defense counsel raised the issue of competency, the trial court stated in no uncertain terms that he did not believe there was any issue as to Appellant's competency to stand trial.

KRS 504.100 states that if "the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition." On appeal, the standard of review in this situation is "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." Thompson v. Commonwealth, 56 S.W.3d 406, 408 (Ky. 2001). It is within the trial court's discretion to determine whether or not reasonable grounds exist as to a defendant's competency to stand trial. Bishop v. Caudill, 118 S.W.3d 159, 161 (Ky. 2003). Appellant demonstrated that he possessed a substantial capacity to understand the nature and consequences of the proceedings, and to

participate rationally in his defense. That he rejected an attractive plea agreement in the hope of an acquittal is not an indication of mental incapacity. Nor can we say that Appellant's disregard for his attorney's advice not to testify constituted an inability to participate rationally in his defense. We find no abuse of discretion in the trial court's determination that reasonable grounds did not exist as to Appellant's competency to stand trial.

Directed Verdict

Finally, Appellant asserts that he was entitled to a directed verdict on the first-degree burglary charge. He argues that the Commonwealth failed to produce any evidence that Appellant knowingly entered or remained unlawfully in the victim's apartment with the requisite intent to commit a crime. This contention is without merit.

When presented with a motion for a 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." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). "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 the defendant is entitled to a directed verdict of acquittal." Id. Here, the Commonwealth presented sufficient evidence that Appellant entered the victim's apartment unlawfully with the intent to commit a crime. The victim testified that she never heard Appellant knock on her door or otherwise announce himself. Appellant claimed that he entered the apartment through the front door with a manager's key, but the victim testified that he admitted to her that he had entered via a kitchen window. She also testified that the front door was locked when

Appellant finally left, and that her kitchen window was in fact open. Appellant's claim that he suspected a fire was highly suspect: no other person detected any smoke, nor did Appellant alert the police or any other party to the supposed fire. The victim further testified that, as she peered out her bedroom door to investigate a loud thud, Appellant immediately lunged at her and slapped a phone out of her hand as she tried to dial 911. The victim's testimony alone was a sufficient basis upon which a rational juror could conclude that Appellant did not attempt to enter her apartment to investigate a fire, but entered with the intent to attack her, which is precisely what transpired. We find no error.

Conclusion

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

All concur.

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