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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JANUARY 19, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2004-SC-0488-TG DATE 2-9-06 Elia Grant p.c.

WILLIS E. GARDNER — APPELLANT

V.

TRANSFER FROM COURT OF APPEALS
2004-CA-0254
WOODFORD CIRCUIT COURT NO. 02-CR-00067

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Willis E. Gardner, was convicted by a Woodford Circuit Court jury of third degree burglary, theft by unlawful taking over $300, and first-degree persistent felony offender (PFO). Appellant was sentenced to twenty years in prison, and appeals to this Court as a matter of right. Ky. Const. § 110 (2)(b).

FACTUAL BACKGROUND

On October 26, 2002, Rivard's Fine Jewelry in Versailles, Kentucky, was burglarized. A large rock was thrown through the front door, and five wristwatches were stolen from a smashed display case. Police stopped a gray Cadillac seen leaving the scene. Appellant fled the passenger seat of the car and was apprehended by officers. Police found the watches in the passenger seat and floorboard of the car. During the police investigation a unique shoe print was found on a glass jewelry case at the store.

The shoe print was very similar to the unusual sole of the shoes Appellant wore at the time of his arrest.

Appellant was tried in Woodford Circuit Court on November 17, 2003. Employees of the gas station across the street from the jewelry store presented eyewitness testimony. Appellant testified in his own defense, claiming he had been using drugs for several days and was "passed out" when the burglary took place.

Appellant raises four issues on appeal: (1) the trial court erred by denying Appellant's right to a speedy trial; (2) the trial court erred by denying Appellant's motion to compel the Commonwealth to comply with a plea agreement; (3) prosecutorial misconduct; and (4) the trial court erred in admitting offender registration information from the Department of Corrections.

I.

Appellant first claims he was denied his constitutional right to a speedy trial. To determine if Appellant's rights were violated, we look to the four-factor Barker test. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The reviewing court must balance 1) prejudice due to length of delay; 2) reason for delay; 3) defendant's assertion of his right to a speedy trial; and 4) prejudice to the defendant as a result of the delay. Id. at 530.

Appellant experienced a thirteen-month delay between his arrest and trial. This Court has previously found a thirteen and one-half month delay presumptively prejudicial. Dunaway v. Commonwealth, 60 S.W.3d 563, 569 (Ky. 2001) (where defendant was charged with robbery and PFO). Accordingly, Appellant's thirteen-month delay satisfies the first inquiry under the Barker test, and triggers application of the remaining three factors. See Barker, supra, at 530.

The second inquiry is the reason for delay. The Barker Court delineated three categories: deliberate delay, neutral delay, and valid delay. Id. at 531. In this case, Appellant claims the Commonwealth is responsible for a deliberate six-month delay because the government "illegally withdrew" a plea agreement between the parties. Appellant's initial trial date was canceled when the plea agreement was entered; however, the Commonwealth rescinded the agreement because Appellant was untruthful. A second trial date was set two months later, but was postponed because Appellant moved the trial court to enforce the plea agreement. The case finally went to trial six months after the first trial date.

Contrary to the Appellant's assertions, we find there was no deliberate delay on the part of the Commonwealth. Rather, Appellant is partially responsible for the delay because he did not comply with the Commonwealth's plea agreement, and the second trial date was canceled due to Appellant's motion to compel the Commonwealth to comply with the plea agreement. Furthermore, Appellant did not object to any of the rescheduled dates, and we have held that acquiescence in delay forecloses subsequent complaints. Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000).

The third prong, assertion of right, is readily satisfied in this case. Appellant moved the trial court for a speedy trial at his first arraignment in January 2003.

The final element is the prejudice suffered by Appellant as a result of the delay. Appellant argues he suffered prejudice after the failed plea agreement because he revealed his testimony to the Commonwealth, thereby impairing Appellant's defense at trial. We find that any prejudice Appellant suffered due to statements given at the plea agreement is not attributable to the delay in trial. Appellant also claims he suffered prejudice because he was incarcerated for thirteen months. We recognize the inherent

prejudice of pre-trial incarceration, Barker, supra, at 532-33; however, Appellant "has not identified any prejudice with respect to his ability to present his defense at trial." Gabow, supra, at 70.

After balancing the four Barker factors, it is apparent that Appellant's right to a speedy trial was not infringed. "Though [Appellant] asserted his rights and the length of delay was presumptively prejudicial, the reasons for the delay were acceptable and the prejudice caused the Appellant was minimal." Dunaway, supra, at 572.

II.

Appellant claims the trial court erred by denying Appellant's motion to compel the Commonwealth to enforce the plea agreement. Appellant entered into a plea agreement with the Commonwealth to cooperate with the prosecution and give a statement regarding his co-defendant. In his statement, Appellant denied all knowledge of the burglary and claimed he was "passed out" in the car and did not awake until the police were chasing him. Appellant also denied any knowledge of the criminal activities of his co-defendant, who was a long-time friend of Appellant. A few minutes into the proceeding, the Commonwealth terminated the agreement because Appellant was not complying with the plea agreement. Appellant subsequently filed a motion to compel the Commonwealth to comply with the plea agreement. The trial court conducted a hearing and denied the motion, finding Appellant did not detrimentally rely on the agreement and there was physical evidence contradicting Appellant's statements to the Commonwealth.

When a plea agreement is in dispute, this Court has held, "if the offer is made by the prosecution and accepted by the accused, either by entering a plea or by taking action to his detriment in reliance on the offer, then the agreement becomes binding and

enforceable." Commonwealth v. Reyes, 764 S.W.2d 62, 65 (Ky. 1989). In this case, Appellant argues that his statement revealed his defense to the Commonwealth, thereby constituting detrimental reliance. We disagree.

The trial court aptly distinguished this case from Reyes. In the latter, the defendant cooperated with the prosecution and gave a full confession to the crime. Id. at 66. In the case at bar, however, Appellant merely recited his purported defense to the crime. As the trial court pointed out, Appellant did not make any statements detrimental to his own interest, nor did he implicate himself or his co-defendant.

Accordingly, we find the trial court did not abuse its discretion by denying Appellant's motion to compel. The evidence was sufficient to support the trial court's conclusion that the plea agreement was not enforceable between the parties.

III.

The third issue raised by Appellant is prosecutorial misconduct. Appellant argues the prosecutor improperly commented on Appellant's post-arrest silence.

During the prosecutor's opening statements, she explained the evidence the jury would see, and made the following statement:

Commonwealth:	"Then, there was an interview. Officer Clark gave this defendant a chance to explain, but he had nothing to say."

Defense counsel objected and the trial court sustained the objection.

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During the prosecution's direct examination of the investigating officer, Detective Clark, the following occurred:

Commonwealth:	"And then, did you interview the defendant – or attempt to interview him?"
Witness:	"Yes, I did."
Commonwealth:	"Okay – and did he make any statements to you?"

Defense Counsel: "Judge, may we approach?"

The detective did not answer the question, and at the bench, defense counsel objected to the line of questioning and the court sustained the objection.

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During the prosecution's cross-examination of Appellant, the following was said:

Commonwealth:	"And this right after the burglary happened?"
Defendant:	"I guess so."
Commonwealth:	"Okay – and you say that Mr. Edwards gives you the jewelry?"
Defendant:	"He just threw it over there and said, 'Throw this out.' I didn't really know what it was. I am saying – I ask him – I say 'What – throw what out?'"
Commonwealth:	"Uh-huh."
Defendant:	"And he pulled over and jumped out and ran."
Commonwealth:	"Okay – and then, you ran too?"
Defendant:	"I never ran. I got out and walked away from the car."
Commonwealth:	"You haven't done anything. Couldn't you have told the police, 'Hey! This guy just committed a burglary?'"
Defendant:	"I didn't know that he had committed a burglary, ma'am."
Commonwealth:	"You had watches and stuff in your seat?"
Defendant:	"I didn't know he committed a burglary."
Commonwealth:	"Did those watches just appear out of the air?"
Defendant:	"I didn't know where they came from, ma'am."
Commonwealth:	"They were underneath your legs, where you would have been sitting?"
Defendant:	"I ain't paying no attention. He just threw it over to me."
Commonwealth:	"All right."
Defendant:	"And I got out of the car."
Commonwealth:	"And you got out of the car and you left?"
Defendant:	"I walked away from the car."
Commonwealth:	"You weren't too high or too passed out at that point to try to get away, were you?"
Defendant:	"I wasn't trying to get away. I was just walking away from the car."
Commonwealth:	"Why didn't you stick around?"
Defendant:	"I don't know."
Commonwealth:	"Didn't you tell the police that you didn't do anything?"
Defendant:	"Ma'am?"
Commonwealth:	"Well, couldn't you have told the police, 'Well, I didn't do anything?'"
Defendant:	"I could have, but I wasn't thinking at that moment, ma'am."

Commonwealth:	"Uh-huh – and so you want the jury to believe that Mr. Edwards is the one who committed this burglary, and you didn't know anything about it?"
Defendant:	"I am not saying I want the jury to feel that he committed it. I don't know who committed the burglary."
Commonwealth:	"You don't know who committed it?"
Defendant:	"Right."

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We first examine the comments to which defense counsel entered an objection. In West v. Commonwealth, 780 S.W.2d 600, 603 (Ky. 1989), this Court stated that defense counsel's failure to move for a mistrial signaled that the requested admonition was a sufficient remedy for the prosecutor's improper comments. In the case at bar, Appellant's defense counsel merely objected to the improper statements, and sought no further remedy in the form of an admonition or mistrial. "[I]t is clear that a party must inform the court of the error and request the relief to which he considers himself entitled. Otherwise the issue may not be raised on appeal." Id. at 602. Accordingly, we presume the relief granted by the trial court was satisfactory.

Appellant next urges palpable error review for the comments made during the cross-examination of Appellant. Relief may be granted for palpable error under RCr 10.26 only if "manifest injustice" results from an error affecting the "substantial rights" of a party. The Court of Appeals has stated that improper comments on post-arrest silence do not always rise to the level of palpable error. Salisbury v. Commonwealth, 556 S.W.2d 922, 926-27 (Ky. App. 1977). Defense attorneys necessarily make many strategic decisions during trial, and unpreserved constitutional errors are generally waived. Id. at 927. After review of the record, we do not find that Appellant's claim reaches the level of palpable error in this case.

Appellant also alleges other instances of prosecutorial misconduct during closing argument. To warrant reversal, prosecutorial misconduct must be so egregious "as to render the entire trial fundamentally unfair." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky. 1996). The reviewing court "must focus on the overall fairness of the trial, and not the culpability of the prosecutor." Slaughter v. Commonwealth, 744 S.W.2d 407, 411-12 (Ky. 1988). A prosecutor has wide latitude to comment on trial strategy, evidence, as well as the tactics of the defense. Id. at 412.

In this case, the prosecutor commented on Appellant's demeanor while testifying, the eyewitness testimony, and the evidence presented. After reviewing the record, we do not find the trial was rendered fundamentally unfair as a result of the prosecutor's comments.

IV.

Lastly, Appellant contends the trial court erred in admitting offender registration information from the Department of Corrections during the penalty phase of the trial.

We first note that Appellant fails to recognize the Commonwealth properly introduced certified copies of Appellant's three prior felony convictions, which the trial court admitted without objection. These three prior convictions gave the jury enough evidence to infer the PFO elements required by KRS 532.080(3).

The Commonwealth also introduced Department of Corrections records to show when Appellant's sentences were "served out or if he was paroled." In Garner v. Commonwealth, 645 S.W.2d 705, 707 (Ky. 1983), we held offender records from the Department of Corrections were only reliable to prove "age and parole status alone."

Appellant urges there was not enough direct evidence to satisfy the PFO requirements, but wholly overlooks our decision in Martin v. Commonwealth, 13 S.W.3d

232 (Ky. 1999). Martin held the statutory PFO elements may be satisfied by a reasonable inference drawn from the evidence presented. Id. at 235. This proposition was recently affirmed in Shabazz v. Commonwealth, 153 S.W.3d 806 (Ky. 2005).

In Shabazz, the Commonwealth introduced certified copies of prior indictments and judgments, allowing the jury to draw a logical inference as to the defendant's probationary status. Id. at 814. In the case at bar, the Commonwealth introduced sufficient direct evidence and the Department of Corrections records merely supported the logical inference as to Appellant's probationary status.

Accordingly, we find the trial court did not err in admitting the offender registration information from the Department of Corrections.

V.

For the foregoing reasons, the judgment and sentence imposed by the Woodford Circuit Court are affirmed.

Lambert, C.J., Cooper, Graves, Roach, Scott, and Wintersheimer, J.J. concur. Johnstone, J., concurs in result only.

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