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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JANUARY 19, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-1110-TG DATE 2-9-06 Ex-A Grant, D.C.

RONALD DOUGLAS CRAWLEY APPELLANT

V.

TRANSFER FROM COURT OF APPEALS
2004-CA-001148
FAYETTE CIRCUIT COURT NO. 00-CR-00396-002

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

In March 2004, a Fayette Circuit Court jury convicted Appellant, Ronald Douglas Crawley, of First-Degree Robbery and for being a First-Degree Persistent Felony Offender. For these crimes, Appellant was sentenced to a total of twenty-five years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

The crimes for which Appellant was convicted stemmed from a robbery which occurred in February 2000. Appellant was initially tried and convicted for this crime in October 2000. This Court reversed that conviction, however, on June 12, 2003. Crawley v. Commonwealth, 107 S.W.3d 197 (Ky. 2003). The evidence presented at Appellant's re-trial disclosed that on the afternoon of February 28, 2000, Angie Mullins

was preparing a bank deposit at the adult night club she managed. Managers at the club were known to prepare the club's bank deposits at the same time each day. Angela Banta, a dancer at the club, knew the managers' habit of preparing the bank deposits at the same time each day and also knew that the front door to the club was frequently unlocked during that time. Banta called the club around 1 p.m. to see if a male or female manager was working that day. When Mullins answered the telephone, Banta inquired as to whether Mullins was alone and Mullins indicated that she was alone.

Approximately fifteen to twenty minutes after Banta's call, Edward Fletcher and William Searight entered the establishment. Mullins attempted to tell the men that the club was closed; however, the men immediately ambushed and pointed a gun at her. Mullins was then choked and pushed against the wall. She was forced to kneel and one of the men beat her about the head several times. The men then left with the bank deposit, which amounted to approximately three thousand ($3,000) dollars.

Mullins immediately reported the robbery. The next day, she told the police about the unusual telephone call from Banta. Mullins later recognized Searight as an acquaintance of Banta. Banta and Searight told the police that Appellant needed money to leave town because there was an outstanding warrant for his arrest. Banta, Searight, Fletcher, and Appellant allegedly discussed various robbery plots for the purpose of obtaining that money. Banta told the men that the night club where she worked would be an easy target. She admitted providing the gun for the robbery and helping to carry out the crime.

Searight testified that Appellant drove him and Fletcher to the club after Banta made the telephone call. The quartet decided that Appellant should wait outside while the robbery transpired because Appellant was known by Mullins to be dating Banta. Once the robbery was completed, Appellant drove Searight and Fletcher to a mall where they met up with Banta and Fletcher's girlfriend. Appellant, Searight, Fletcher, and Banta later split the robbery proceeds. At re-trial, Fletcher testified (along with two other witnesses) that Appellant had no knowledge that he and Searight would commit a robbery when Appellant drove them to the night club. Rather, Fletcher claimed that Appellant drove them to the club for the purpose of purchasing cocaine. He stated that they did not decide to rob the club until they entered it and saw Mullins with money.

The jury convicted Appellant of all charges. Appellant now claims that he is entitled to a new trial due to several errors which occurred at his re-trial. Upon consideration of each of Appellant's arguments, we disagree and thus, affirm Appellant's convictions.

I. EVIDENCE OF PRIOR BAD ACTS

Appellant first claims he was denied a fair trial when the prosecutor introduced evidence of prior bad acts. Appellant further contends that even if the evidence of prior bad acts was relevant, it was excessive and thus, prejudiced him to the extent as to preclude him a fair trial. For the reasons set forth herein, we disagree.

Evidence of prior bad acts is generally considered irrelevant and thus, inadmissible unless the evidence is offered for some purpose other than to prove the character of a person. KRE 404(b). Furthermore, even when evidence of prior bad acts is admissible pursuant to KRE 404(b), it may be excluded if its probative value is

substantially outweighed by the danger of undue prejudice. KRE 403; see also Commonwealth v. English, 993 S.W.2d 941, 944-45 (Ky. 1999).

At trial, the prosecution introduced evidence showing that Appellant had discussed several possible robbery targets in the days leading up to the robbery at the adult night club. The prosecution further presented evidence establishing that just hours prior to the robbery at the adult night club, Appellant, Fletcher, and Searight attempted to rob a man driving a white Cadillac. Banta, Fletcher, and a nurse who treated the victim of the attempted robbery testified,[1] reporting that the three men bumped into the victim's Cadillac with their car in an attempt to force the victim off the road. When the victim did not stop, the car containing Appellant, Fletcher, and Searight pulled along side the Cadillac and Fletcher shot the victim. Banta and Searight testified that Appellant was driving the car during this attempted robbery.

The Commonwealth maintains that this evidence is relevant to prove motive, knowledge, and intent on the part of Appellant. See, e.g., Muncy v. Commonwealth, 132 S.W.3d 845, 847 (Ky. 2004) (evidence of prior drug transactions relevant to prove knowledge and intent). The Commonwealth argues further that the evidence reflects a common plan or scheme by Appellant to perpetrate a successful robbery so that he could obtain money to flee from an outstanding arrest warrant. See, e.g., English, supra, at 943 (a common scheme or plan is one "embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others"). These arguments are especially persuasive in light of Appellant's claim at trial that he was merely an unwitting dupe of Banta's, driving Fletcher and Searight to the night club

[1] The victim of the attempted robbery was not available to testify at Appellant's trial.

for the sole purpose of purchasing cocaine. Appellant submits nothing of substance to refute the Commonwealth's arguments. Accordingly, we find that evidence regarding Appellant's motives, his discussions regarding other possible robbery targets, and his participation in an attempted robbery just hours prior to the adult night club robbery were relevant to prove motive, knowledge, and intent. Furthermore, the evidence was relevant to show a common scheme or plan.

Appellant next argues that even if the evidence was relevant pursuant to KRE 404(b), it was too prejudicial to justify its admission. "A trial court's decision with respect to the KRE 403 balancing test is reviewed for abuse of discretion." Purcell v. Commonwealth, 149 S.W.3d 382, 400 (Ky. 2004). Appellant's primary argument is that the evidence was presented in excessive amounts, and thus, unnecessarily inflamed or prejudiced the jury against him. Chiefly, Appellant contends that testimony from the nurse who treated the victim of the attempted robbery for wounds sustained as a result of that incident was overkill, especially in light of testimony from both Banta and Searight regarding the attempted robbery. Furthermore, it appears from the record that Appellant admitted to police that he was present during the attempted robbery.[2] Despite all this, we disagree that testimony from the nurse was excessive. Appellant introduced evidence establishing that both Banta and Searight had reason to lie about their versions of the events leading up to the night club robbery. Moreover, Appellant's admission was vague, at best, and did not establish any intent on the part of Appellant

[2] Appellant admitted to police that he was with Fletcher the night Fletcher "went off and started shooting." Appellant explained that he accidentally bumped into a man's car, and that when the man took off he followed. Appellant then stated that Fletcher inexplicably shot at the car three times.

to rob or assault the victim. Independent testimony establishing that the attempted robbery actually occurred was reasonably necessary to prove the Commonwealth's case. Accordingly, we find no abuse of discretion on the part of the trial court.

II. ADMISSIBILITY OF HEARSAY EVIDENCE

Appellant next alleges he was prejudiced by inadmissible hearsay testimony offered by a nurse who treated the victim of the attempted robbery which occurred just hours prior to the adult night club robbery. The nurse testified that the victim came to the emergency room and explained that he might have been shot. As part of her triage assessment, the nurse stated that she asked the victim exactly what happened to him. He recounted that he was driving home from Lexington when another car bumped into him. He assumed the bump was an accident, but then realized that the car that had bumped him was trying to run him off the road. He stated that he sped up to get away from the car, but that the other car caught up with him. The victim then told the nurse that he heard a "pow" and felt a burning sensation. Upon examination, the nurse stated that she observed blood running down both of the victim's legs and an entry wound into the victim's left buttocks. An x-ray taken in the emergency room showed a bullet lodged in the victim's buttocks.

KRE 803 (4) provides that statements made for "purposes of medical treatment or diagnosis" are an exception to the general prohibition against hearsay. The rule provides that such statements must be "reasonably pertinent to treatment or diagnosis." Id. Appellant claims that the nurse's testimony exceeded the boundaries of this hearsay exception when she testified as to the events which led to the injury, including the victim's vehicle being bumped by another car, and the fact that the victim had to speed

up in order to get away from the car. We find Appellant's arguments to be without merit, since these statements were provided for the purpose of allowing the nurse to assess any and all injuries that may have been sustained by the victim and reasonably related to the "inception or general character of the cause or external source" of the injury. Id. The nurse did not identify any of the alleged perpetrators of this incident, nor did she provide any extraneous detail which was unnecessary for the purposes of treatment. See Rowe v. Commonwealth, 50 S.W.3d 216, 225 (Ky. App. 2001). Accordingly, the nurse's testimony was admissible pursuant to KRE 803 (4).

III. REFERENCES TO PRIOR TRIAL

Appellant next argues that the errors alleged (and rejected) thus far were exacerbated by the prosecutor's violation of a pre-trial agreement to avoid referencing the prior trial. The record reflects that the prosecutor made reference to the prior trial on two different occasions – once during the rehabilitation of a witness and three times over the span of approximately twenty seconds during the cross-examination of another witness. While Appellant objected to these references, he did not seek an admonition or mistrial. We do not believe these isolated references, when considered individually or in light of the entire record, (1) were made with malice or (2) in any way deprived Appellant of a fair trial. See Tamme v. Commonwealth, 973 S.W.2d 13, 34 (Ky. 1998); Hodge v. Commonwealth, 17 S.W.3d 824, 846 (Ky. 2000). Accordingly, Appellant's arguments to the contrary are overruled.

IV. IMPROPER ADMISSION OF DEPOSITION TESTIMONY

Appellant lastly contends that he is entitled to a new trial because the trial court violated his confrontation rights by admitting testimony through a video deposition. The

prosecutor filed a motion asking that the testimony of Officer Shane Ensminger be taken by video deposition prior to trial. The prosecutor's request was based on Officer Ensminger's inability to be present at the trial due to a previously scheduled appointment to attend an out-of-state training conference. Both the prosecutor and the trial court reasonably presumed that the deposition testimony would be admissible pursuant to RCr 7.10(1) which states:

> If it appears that a prospective witness may be unable to attend or is or may be prevented from attending a trial or hearing or is or may become a nonresident of the Commonwealth, that the witness's testimony is material and that it is necessary to take the witness's deposition in order to prevent a failure of justice, in any pending proceeding the court may upon motion and notice to the parties order that the witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

However, three months after Appellant's trial, this Court published its opinion in Parson v. Commonwealth, 144 S.W.3d 775 (Ky. 2004) which held that "mere absence of the witness from the jurisdiction does not constitute 'unavailability,' and RCr 7.10(1) cannot be so interpreted." Id. at 783. The Commonwealth concedes that admission of Officer Ensminger's videotape deposition at trial violated Appellant's confrontation rights pursuant to Parson, supra. The Commonwealth maintains, nevertheless, that the error was harmless beyond a reasonable doubt. For the reasons set forth herein, we agree.

The violation of a defendant's right to face-to-face confrontation is subject to harmless error analysis. Coy v. Iowa, 487 U.S. 1012, 1021, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988). "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure

speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." Id. at 1021-22.

Officer Ensminger was not a primary aspect of the Commonwealth's case. Appellant was familiar with Ensminger from a prior investigation and called him after he was arrested. Ensminger testified that Appellant asked him to call his girlfriend (Banta) to make sure she was okay. Appellant also volunteered that he had some information about the robbery at the adult night club. Ensminger stated that he passed this information along to Detective Hess, the lead investigator in the case. Ensminger testified that he was later contacted by Detective Hess during Appellant's interrogation. Ensminger testified that he participated, along with Detective Hess, in a portion of the interrogation. At one point, Appellant asked to speak with Ensminger alone and Detective Hess agreed to step out of the room. During that time, Appellant admitted using cocaine. He also talked about his loyalty to Banta and his knowledge that his car was used in the adult night club robbery. However, Appellant told Ensminger that (1) he was at a local mall at the time of the robbery; and (2) it was Fletcher and Searight who spearheaded any and all robberies/robbery attempts.

Appellant claims that this testimony was crucial to the Commonwealth's case because (1) it was necessary to authenticate the audiotape of Appellant's interrogation which contained Appellant's incriminating statements and (2) it helped establish Appellant's culpability for the charged crimes. We disagree that Officer Ensminger's testimony or the portions of the interrogation where Appellant is alone with Officer Ensminger were crucial to the Commonwealth's case. First, Officer Ensminger was not necessary to authenticate the whole of the audiotape because Detective Hess was

present for most of the interrogation, including the beginning and the end. Therefore, despite the erroneous admission of Officer's Ensminger's testimony, Detective Hess's authentication of the interrogation tape was, at the very least, sufficient for those portions of the tape where Detective Hess was present. Second, Ensminger's testimony is largely cumulative and insubstantial compared to the weight of evidence introduced at trial. The few portions which are not cumulative are largely beneficial to Appellant since those portions (1) tend to bolster Appellant's claim that he was Banta's dupe, simply blinded by love and (2) contain assertions of innocence as to any intent on the part of Appellant to commit robbery.

Ensminger's testimony functioned largely to provide background and cumulative support for the Commonwealth's case. When the remaining evidence is reviewed in its totality, we find it to be more than sufficient to support a finding that the erroneous admission of evidence introduced through Officer Ensminger was harmless beyond a reasonable doubt. See RCr 9.24.

In sum, when the errors alleged by Appellant are reviewed in light of the entire record, we find the trial court did not abuse its discretion or commit any errors, either individually or in accumulation, which rise to the level of reversible or palpable error. The judgment of the Fayette Circuit Court is affirmed.

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

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