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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: MARCH 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0733-MR

DATE 4-13-06 ElizAGrowth, D.C.

PHILLIP A. WHALEY — APPELLANT

V.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
2002-CR-0033

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment convicting Whaley of kidnapping, receiving stolen property valued over $300, second degree escape, second degree wanton endangerment, third degree criminal mischief and as a second degree persistent felony offender. He was sentenced to serve a total of 44 years in the penitentiary.

Whaley presents five questions for review: 1) whether there was error when the trial judge did not conduct an evidentiary hearing before finding Whaley competent to stand trial; 2) whether a bench trial was appropriate absent a signed waiver; 3) whether there was error when Whaley was not allowed to appear in clothing other than the prisoner uniform; 4) whether there was sufficient evidence of escape to maintain a conviction; and 5) whether improper victim impact testimony was allowed.

Whaley was a chronic cocaine user. He ingested cocaine for several days in a row by the time he arrived in Versailles on a July morning. He had been involved in an

accident in Ohio earlier and ultimately stole a car and fled that area. After consuming alcohol, more cocaine and arming himself with a BB gun and a kitchen knife, he eventually stopped the vehicle in front of a local retail store. He grabbed a female pedestrian who just happened to be walking by and forced her into the store at knifepoint. An off duty firefighter was in the store and contacted police on his emergency radio. He attempted to reason with Whaley and even offered to exchange himself for the female hostage. Police arrived and after almost an hour had elapsed from the initial hostage taking, they were able to trade some simulated cocaine for the hostage and subdued Whaley using a bean bag gun and chemical spray.

Whaley was arrested and taken to the police station for questioning. While there and while still in handcuffs, he threw himself through a closed window onto the concrete parking lot below suffering serious injury in the escape attempt.

He was tried before the circuit judge without a jury and sentenced to serve 44 years in the state penitentiary on his convictions for kidnapping, receiving stolen property valued over $300, second degree escape, second degree wanton endangerment, third degree criminal mischief and second degree persistent felony offender. His defense was voluntary intoxication. This appeal followed.

I. COMPETENCY HEARING

On a joint motion from the defense and the prosecution, the trial judge ordered a competency evaluation. The mental health professional returned a report declaring Whaley to be incompetent to stand trial because of his belligerence and refusal to take part in the evaluation. The trial judge rejected the finding because it did not take into consideration the legal requirements of competency and ordered a new evaluation. A new report was submitted to the trial judge on the morning of trial finding Whaley to be

competent. Defense counsel waived any hearing and asked the trial judge to accept the report as dispositive. Based on the report and the trial judge's own observations, Whaley was ruled competent to stand trial.

The issue is not preserved but may still be reviewed to prevent manifest injustice. RCr 10.26. When an examination of a defendant's competency is performed, the trial judge is required to conduct a hearing to determine if the defendant is competent to stand trial. KRS 504.100(3). We have previously determined that when a hearing is not held, the standard of review is whether a reasonable judge "should have experienced doubt with respect to competency to stand trial". Mills v. Commonwealth, 996 S.W.2d 473 (Ky. 1999).

The trial judge had significant interaction with Whaley. He conducted a hearing determining that Whaley was able to function as *pro se* co-counsel in the case. Whaley's attorney requested the waiver of the competency hearing in Whaley's presence. There was nothing in his actions or behavior to suggest to anyone that he was not capable of proceeding to trial. It is critical that the trial judge made his determination based not only on the report but on his own observations. The trial judge had nothing before him causing any doubt with respect to Whaley's competency. Cf. Thompson v. Commonwealth, 56 S.W.3d 406 (Ky. 2001), which was remanded for a retrospective competency hearing when the trial judge's order included some doubt of competency. There was no error.

II. BENCH TRIAL

The trial judge conducted a bench trial in this case. There is no formal written waiver of a jury trial signed by Whaley. See RCr 9.26(1). On appeal, he now claims error for the first time because the record does not contain a formal written waiver. This

issue is not properly preserved which is an important factual consideration in determining if Whaley consented to a bench trial. There are methods other than a formal written waiver that confirm a defendant has knowingly, voluntarily and intelligently waived a jury trial. See Jackson v. Commonwealth, 113 S.W.3d 128 (Ky. 2003).

Whaley had ample opportunity himself to assert his right to a trial by jury. The record is clear that he was fully aware of his rights and consented to the bench trial. Defense counsel on several occasions consented to the waiver. Whaley himself requested leave to act as *pro se* co-counsel. That request was granted and throughout the proceedings, Whaley himself never requested a jury trial nor raised an issue regarding the bench trial. Even when raising this issue for the first time on appeal, Whaley only argues that he never signed a waiver. He does not claim that the bench trial was contrary to his wishes. There was no error of a magnitude requiring further action from this Court.

III. PRISONER CLOTHING

At the beginning of the bench trial, counsel sought a delay so that Whaley could be allowed to appear in clothing other than a jail uniform. The trial judge denied this request and emphasized that he would decide the matter solely on the evidence without regard to Whaley's manner of dress. A defendant should not be forced to be tried before a jury in jail clothing. Scrivener v Commonwealth, 539 S.W.2d 291 (Ky. 1976). The purpose is to make sure that the presumption of innocence is not tainted by forcing a defendant to appear dressed as an already convicted felon. Estelle v. Williams, 425 U.S. 501 (1976).

The trial judge took great pains to explain that a jail uniform would not influence him in any way nor influence his decision. Whaley does not suggest that his clothing prejudiced him in any manner. Given an absence of even a hint of prejudice, there is no reason to extend the clothing requirements to a bench trial environment. There was no error.

IV. EVIDENCE OF ESCAPE

Whaley's generalized motion for directed verdict did not preserve this issue. It is incumbent on any party to make known to the trial judge the action desired. RCr 9.22. Absent a specific objection, an issue may not be first brought forward on appeal. CR 51.01. Even if not preserved and under the palpable error standard, there was sufficient evidence to allow the charge to survive a motion for directed verdict. RCr 10.26. Taken in the light most favorable to the opposing party there is no question that Whaley is unable to show that it would have been clearly unreasonable for a jury to find guilt. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

V. VICTIM IMPACT TESTIMONY

Before the trial began, the Commonwealth informed Whaley and the trial judge that it intended to call the victim's daughter to testify regarding her observations of her mother's actions before and after the offense. The trial judge correctly interpreted KRS 421.500 as not imposing limitations on evidence that is relevant to sentencing. KRS 532.055(2)(a)(7). The daughter's testimony was strictly limited to her observations and did not include improper hearsay or opinion testimony. There was no error.

The judgment of conviction is affirmed.

All concur, except Cooper, J., who would reverse and remand for the same reasons stated in his dissenting opinion in Jackson v. Commonwealth, 113 S.W.3d 128 (Ky. 2003) and Johnstone, J., who dissents without opinion.

COUNSEL FOR APPELLANT:

Donna L. Boyce
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael Harned
Assistant Attorney General

Kenneth Wayne Riggs
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204