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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0469-MR

JOHN T. BOSTON — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN SHAKE, JUDGE
02-CR-1135

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND VACATING IN PART

A Jefferson Circuit Court jury convicted Appellant, John T. Boston, of three counts of rape in the first degree, three counts of robbery in the first degree, two counts of burglary in the first degree, one count of burglary in the second degree, and found him to be a persistent felony offender ("PFO") in the second degree premised upon six 1982 felony convictions. The offenses that are the subject of this appeal occurred on three separate occasions and were perpetrated against three different victims at their respective residences. The following outline is helpful in understanding the nature of each offense, against whom it was perpetrated, and the sentence fixed by the jury:

1. Date: September 18, 1994.

   Victim: J.A.

Offenses:

(a) Count 1: Rape in the first degree, 20 years, PFO-enhanced to 50 years;
(b) Count 2: Robbery in the first degree, 20 years, PFO-enhanced to 50 years;
(c) Count 3: Burglary in the first degree, 20 years, PFO-enhanced to 50 years.

2. Date: July 10, 1995.

Victim: K.A.

Offenses:

(a) Count 4: Rape in the first degree 20 years, PFO-enhanced to 50 years;
(b) Count 5: Robbery in the first degree, 20 years, PFO-enhanced to 50 years;
(c) Count 6: Burglary in the second degree, 10 years, PFO-enhanced to 20 years.

3. Date: October 1, 1995.

Victim: L.M.B.

Offenses:

(a) Count 7: Rape in the first degree, 20 years, PFO-enhanced to 50 years;
(b) Count 8: Robbery in the first degree, 20 years, PFO-enhanced to 50 years;
(c) Count 9: Burglary in the first degree, 20 years, PFO-enhanced to 50 years.

The trial court accepted the jury's recommendation that the sentences be served consecutively for a total of 420 years.[1] The trial court also ordered the sentences to run

[1] The length of the sentence is not raised as an issue on appeal. The offenses of which Appellant was convicted were committed in 1994 and 1995. Although a 1998 amendment of KRS 532.110(1)(c) set a ceiling of 70 years as the maximum aggregate indeterminate sentence and KRS 446.110 permits a defendant to consent to a retroactive application of a new law that mitigates punishment, Appellant specifically elected prior to the commencement of the penalty phase of the trial to have his penalty determined under the law as it existed at the time the offenses were committed. See Lawson v. Commonwealth, 53 S.W.3d 534, 550 (2001) ("KRS 446.110 . . . require[s]

consecutively to a 40-year sentence previously imposed for a 1996 conviction of burglary in another division of the Jefferson Circuit Court. Finally, the trial court imposed a three-year sentence of conditional discharge pursuant to KRS 532.043(2) (person convicted of felony offense under KRS Chapter 510, e.g., rape in the first degree, KRS 510.040, shall also be sentenced to a three-year period of conditional discharge).

Appellant appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting that (1) all three of his convictions of offenses perpetrated against K.A. should be reversed because the trial court erred in allowing the Commonwealth to introduce at trial an audiotaped statement made during a ride-around with a police detective in which Appellant admitted burglarizing K.A.'s residence on two occasions; (2) there was insufficient evidence to support his convictions of robbery in the first degree of K.A. and of both burglary in the first degree and robbery in the first degree of L.M.B.; and (3) the trial court erred in imposing the three-year period of conditional discharge because his offenses were committed prior to the effective date of KRS 532.043. Appellant does not assert any error with respect to his three convictions of the offenses perpetrated against J.A. or his conviction of rape in the first degree perpetrated against L.M.B. However, he claims he should be resentenced for those convictions because the severity of the sentences for those offenses indicates that the jury was unduly prejudiced by being allowed to consider those penalties at the same time it was considering penalties for offenses for which he should not have been convicted.

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courts [sic] to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is 'certainly' or 'definitely' mitigating.").

The Commonwealth concedes error with respect to the retroactive application of KRS 532.043 to Appellant's rape convictions, Purvis v. Commonwealth, 14 S.W.3d 21, 24 (Ky. 2000); Lozier v. Commonwealth, 32 S.W.3d 511, 514 (Ky. App. 2000), and we vacate that aspect of the sentence. We also reverse Appellant's convictions of the offenses perpetrated against K.A. and remand those charges for a new trial. We affirm Appellant's convictions of the offenses perpetrated against J.A. and L.M.B. and the sentences imposed for those convictions.

I. STATEMENTS MADE DURING RIDE-AROUND.

After Appellant's 1996 arrest for a previous burglary for which he was subsequently convicted, he admitted committing other burglaries at unidentified locations in Louisville. To determine whether Appellant was the perpetrator of other unsolved burglaries within its jurisdiction, the Louisville Police Department requested his participation in a ride-around with Detective Mike Loran (unaccompanied by his attorney) to see if he could identify locations where he might have committed other burglaries. On October 3, 1996, more than five years before the return of the indictments in the case sub judice, the presiding judge of Division 8 of the Jefferson Circuit Court signed the following order:

ORDER

Motion having been made and the Court being sufficiently advised:

IT IS HEREBY ORDERED THAT, John Boston be placed in the custody of Detective Mike Loran of LPD-Burglary and/or Sgt. Jay Pierce of LPD-Homicide on the 3rd day of October, 1996, and again on the 4th day of October, 1996, for a period not to exceed 8 hours.

IT IS FURTHER ORDERED THAT, at or before the expiration of 8 hours on the 3rd day of October, 1996, and the 4th day of October, 1996, that John Boston be returned to the custody of Jefferson County Corrections.

Nothing Defendant says to be used [sic] against him.

/s/
JUDGE

/s/
ATTY FOR DEFENDANT

10/3/96
DATE

The order was duly entered on the same date, thus it complied with CR 58(1). Appellant's then-attorney, who signed off on the order agreeing to Appellant's uncounseled participation in the ride-around, testified at the suppression hearing that Appellant's participation in the ride-around was a part of the plea negotiations in the then-pending burglary case. However, the order does not recite and there was no evidence that Appellant was offered any leniency on that charge for his cooperation or that he was subject to any penalty for his lack of cooperation. From this we conclude that Appellant was "hoping" that his cooperation would result in some unpromised consideration with respect to his pending burglary charge. The former assistant Commonwealth's attorney who prosecuted that charge testified that the ultimate plea agreement reached in that case was not premised upon Appellant's cooperation during the ride-around. Thus, the only consideration given Appellant in return for his participation was the court order that any statements made by Appellant during the ride-around could not be used against him. Detective Loran audiotaped the statements Appellant made to him during the course of the ride-around.

Appellant told Loran during the ride-around that he and another man burglarized K.A.'s residence twice (with Appellant actually entering the residence on one occasion but only acting as a lookout on the other occasion) and that they pawned some property stolen from the residence at a nearby pawn shop. He did not admit to raping or robbing K.A. (and was not asked whether he committed those additional offenses). K.A.

testified at trial that her assailant entered her bedroom through an open window and that she got only a brief look at him before he grabbed her, turned her around, and put a bandana or some other type of covering over her head. The incident occurred at night and no lights were on in K.A.'s bedroom. K.A. was not requested to make a photopack identification until March 8, 2002, more than seven years after the burglary, rape and robbery. She said at the time of the identification that she was "75% sure" that Appellant was the man who raped her. At trial, she was even more sure. That would have been sufficient evidence to avoid a directed verdict of acquittal; however, the Commonwealth, apparently believing that her identification testimony was not strong enough to guarantee a conviction, gave pretrial notice of its intent to play the audiotape of Appellant's statement in which he admitted to Detective Loran that he had entered K.A.'s residence.

Although the trial court overruled Appellant's motion to suppress the audiotape, it found that the Commonwealth had agreed that the statements made by Appellant during the ride-around could not be used against him. Of course, that finding was unnecessary because the October 3, 1996, Order was not an agreement but an order that Appellant's statements could not be used against him. In overruling the motion, the trial court concluded:

> Although weak, sufficient evidence in the record indicates that an agreement existed between Boston and the Commonwealth that his statements made pursuant to the October 3, 1996 drive around could not be used against him. Other evidence in the record, however, also indicates that Boston lied to Loran and the Commonwealth about several of the burglaries and crimes in question. Boston did not keep his end of the bargain. As a result, the Commonwealth is not bound by the terms of the October 3, 1996 agreement and Boston's statements may be used against him in the case sub judice. Roberts v. Commonwealth, Ky., 896 S.W.2d 4, 6 (1995).

The problem with the trial court's conclusion is that Roberts held that statements made by the defendant in that case could not be used against him even though the defendant's statements had been neither truthful nor complete. Roberts, 896 S.W.2d at 6. In Roberts, the defendant agreed to give a complete and truthful statement with respect to other offenses he had committed in exchange for not being charged with being a persistent felony offender ("PFO"). The Court held that since the defendant had not lived up to his part of the bargain, the Commonwealth was not required to dismiss the subsequently charged PFO count. However, the Court held that KRE 410 precluded the Commonwealth from using the statements made by the defendant against him at trial because they were made during the course of plea negotiations. Id.

The trial court's finding that there was an agreement would seem to bring this case within the holding of Roberts that KRE 410 precludes use of Appellant's statements because they were made during the course of plea negotiations. Regardless, Appellant did not breach any agreement with the Commonwealth. He only agreed to participate in the ride-around. He did not agree, as did the defendant in Roberts, to give a complete and truthful statement with respect to other offenses committed by him. Why should he? Unlike the defendant in Roberts, the Commonwealth did not offer him a deal in return for a complete and truthful statement. However, the Commonwealth did promise Appellant that if he participated in the ride-around, any statements he made to Detective Loran during that participation would not be used against him. Appellant performed his part of the agreement; it was the Commonwealth that breached it.

> If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies

> anarchy. We deal here with a pledge of public faith[:] a promise made by state officials and one that should not be lightly disregarded.

Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979) (quotation omitted), overruled on other grounds by Morton v. Commonwealth, 817 S.W.2d 218, 222 (Ky. 1991). And that would be true even if the Commonwealth's promise exceeded its authority (which, in this case, it did not). Brock v. Sowders, 610 S.W.2d 591, 592 (Ky. 1980). "[I]f 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) (emphasis added) (quotation omitted).

> When . . . the defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees. This basic estoppel principle was recognized by the Court in Santobello [v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)]; when a defendant pleads guilty in reliance on an agreement with the prosecutor, that promise must be fulfilled. Santobello arguably could be extended to cover the situation where the defendant has not yet entered the plea, but has relied on the bargain in such a way that a fair trial would no longer be possible.

Virgin Islands v. Scotland, 614 F.2d 360, 365 (3d Cir. 1980) (footnote omitted). That is precisely what occurred here.

The Commonwealth suggests that the error was harmless because Appellant subsequently admitted during his testimony that he did burglarize K.A.'s apartment, though he denied raping or robbing her. We have twice rejected similar arguments. In Salinas v. Commonwealth, 84 S.W.3d 913 (Ky. 2002), we held that defense counsel's cross-examination of a witness who had been allowed to testify to inadmissible hearsay evidence did not waive the error.

> If that were true, any party against whom evidence was improperly admitted would be required to forego cross-examination and enhance the risk of losing at trial, or attempt to cross-examine in an effort to mitigate

the prejudicial effect of the evidence and thereby be deemed to have acquiesced in the error.

Id. at 919. Similarly, in Gerlaugh v. Commonwealth, 156 S.W.3d 747 (Ky. 2005), we held that the defendant's attempt on surrebuttal to attribute an innocent meaning to a letter that was improperly admitted against him in violation of the hearsay rule, KRE 802, did not waive or cure the trial court's error in allowing the Commonwealth to introduce the letter in the first place. Id. at 754. Likewise, the trial court's error in admitting Appellant's statement to Detective Loran that he had burglarized K.A.'s residence was not waived or cured by Appellant's attempt to mitigate the effect of that evidence by testifying that he did not also rape and rob K.A. during the burglary.

Thus, we reverse Appellant's convictions under counts 4, 5, and 6 of the indictment (rape, robbery and burglary of K.A.) for a new trial at which Appellant's statements made during the ride-around with Detective Loran on October 3-4, 1996, will not be admitted into evidence.

II. SUFFICIENCY OF THE EVIDENCE.

The statutory schemes for the first and second degrees of burglary and robbery are very similar. The first degree of each offense requires proof of the same elements as the second degree plus proof of an additional aggravating factor. Thus, the penal code defines the first and second degrees of burglary as follows:

KRS 511.030 Burglary in the second degree.

(1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.
(2) Burglary in the second degree is a Class C felony.

* * *

KRS 511.020 Burglary in the first degree.

(1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
   (a) Is armed with explosives or a deadly weapon; or
   (b) Causes physical injury to any person who is not a participant in the crime; or
   (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.
(2) Burglary in the first degree is a Class B felony.

Similarly, the penal code defines the first and second degrees of robbery as follows:

KRS 515.030 Robbery in the second degree.

(1) A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.
(2) Robbery in the second degree is a Class C felony.

* * *

KRS 515.020 Robbery in the first degree.

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
   (a) Causes physical injury to any person who is not a participant in the crime; or
   (b) Is armed with a deadly weapon; or
   (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.
(2) Robbery in the first degree is a Class B felony.

J.A., the victim of Counts 1, 2, and 3 of the indictment, testified that her assailant placed a knife against her neck and threatened to kill her if she did not comply with his wishes. She also testified that he threatened to cut off her finger if she did not give him the ring she was wearing. The Commonwealth also proved by DNA evidence that semen found in J.A.'s vagina during the rape-kit examination was Appellant's semen.

Thus, Appellant's only defense to Counts 1 (rape) and 3 (burglary) were his claims that J.A. willingly admitted him to her residence and engaged in consensual sexual intercourse with him. J.A. testified that Appellant stole a piece of jewelry and her car keys. Appellant's defense to Count 2 (robbery) was a denial that he either threatened J.A. with a knife or stole her jewelry and car keys. The jury believed J.A.'s version of these events and disbelieved Appellant's version. Appellant admits that J.A.'s testimony was sufficient to convict him under Counts 1, 2, and 3 and has not contested those convictions on appeal.

K.A., the victim of Counts 4, 5, and 6, testified that Appellant entered her bedroom through an open window, grabbed her, turned her around, and put a bandana or other type of covering over her head. He then removed her clothing, made her get down on her hands and knees, and raped her. K.A. testified that the intruder stole $500.00 from her purse and departed through the same window through which he had entered. There was no evidence that Appellant was armed with explosives or a deadly weapon while in K.A.'s residence, or that he used or threatened K.A. with a dangerous instrument. K.A. testified that Appellant did not hurt her. Thus, Appellant asserts that he could not be convicted of either robbery in the first degree or burglary in the first degree with respect to K.A.

The issue was first raised at trial by Appellant's motion to dismiss the charge of burglary in the first degree because of the Commonwealth's failure to prove one of the three aggravating factors as required by KRS 511.020(1). The trial court gave the prosecutor until the following day to research the issue. The next day, the prosecutor conceded that he could find no case law holding that proof of sexual intercourse by forcible compulsion alone satisfied the definition of "physical injury" contained in KRS

500.080(13) ("substantial physical pain or any impairment of physical condition").[2] Thus, he moved to amend Count 6 of the indictment from burglary in the first degree to burglary in the second degree, and the trial court sustained that motion. Appellant then moved to dismiss the charge of robbery in the first degree on the same grounds. The prosecutor responded by moving to amend Count 5 to delete the language "caused physical injury to [K.A.], who was not a participant in the crime," and the trial court also sustained that motion. Inexplicably, however, the trial court instructed the jury on robbery in the first degree with respect to Count 5 as follows:

Robbery in the First Degree

> You will find the defendant, John Boston, guilty of First-Degree Robbery 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 July 10, 1995, he unlawfully took items from [K.A.]; and
>
> B) That in the course of so doing and with intent to accomplish the theft, he used or threatened the use of physical force upon [K.A.].

Thus, although the trial court allowed the jury to convict Appellant of robbery in the first degree under this instruction, the instruction, in fact, defined the offense of robbery in the second degree. Equally inexplicable is the fact that, although Appellant moved to dismiss the charge of robbery in the first degree and the prosecutor agreed that the elements of that offense had not been proven, neither party objected to the trial court's instruction that the jury could convict Appellant of robbery in the first degree on evidence that proved only robbery in the second degree. The Commonwealth virtually

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[2] In Van Dyke v. Commonwealth, 581 S.W.2d 563 (Ky. 1979), we held that it was error for the trial court to permit the prosecutor to argue to the jury that every rape is in and of itself a "physical injury," but that the error was harmless because the victim did, in fact, suffer a facial bruise and scratches on her thighs. Id. at 565. The prosecutor in the case sub judice conceded that K.A. did not sustain a physical injury and the Commonwealth has not requested that we revisit Van Dyke.

concedes the error in its brief, but claims it was not preserved for appellate review.[3] To preserve a claim of insufficiency of the evidence to prove a particular theory of the case involving multiple counts and varying theories, the defendant must object to the giving of an instruction on that count or theory. Commonwealth v. Wolford, 4 S.W.3d 534, 535 (Ky. 1999); Seay v. Commonwealth, 609 S.W.2d 128, 130 (Ky. 1980). Since Appellant did not tender instructions or object to the instruction as given, the claim of insufficiency of the evidence to prove robbery in the first degree is not preserved.

However, because the conviction under Count 5 is being reversed and remanded for a new trial on other grounds, the failure to preserve this error does not amount to manifest injustice as required for reversal for palpable error. RCr 10.26. The only effect of the failure to preserve the error is that the Commonwealth will have another chance to prove its case. If the evidence is the same, we presume the error will not recur.

As with respect to the offenses perpetrated against K.A., there was no evidence that Appellant was armed with explosives or a firearm when he perpetrated the offenses against L.M.B., or that he threatened L.M.B. with a dangerous instrument. L.M.B. did not testify that she sustained a physical injury during the commission of the crimes; but, unlike K.A., neither did she testify that she did not sustain a physical injury. She did testify that, after raping her, Appellant bound her wrists and ankles together and left her lying on the bed. Nine photographs of L.M.B. taken at the police station on the day she was assaulted were introduced cumulatively at trial as Commonwealth's exhibit 14. The officer who took the photographs, Maurice Raque, testified that they revealed bruises

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[3] "The Commonwealth fully appreciates the wording of the instructions as given, and how they compare with specimen instructions, but asserts no error was preserved for review." Brief for Commonwealth, at 35.

and discoloration on L.M.B.'s arms and wrists. The jury could reasonably believe the bruises and discoloration resulted from Appellant tying her wrists together.

"Any impairment of physical condition," as used in KRS 500.080(13), simply means "any injury." Commonwealth v. Potts, 884 S.W.2d 654, 656 (Ky. 1994). Thus, in Meredith v. Commonwealth, 628 S.W.2d 887 (Ky. App. 1982), a superficial knife wound was held to be a physical injury. Id. at 888. In Key v. Commonwealth, 840 S.W.2d 827 (Ky. App. 1992), sore ribs and having one's breath knocked out were held to be physical injuries. Id. at 829. In Covington v. Commonwealth, 849 S.W.2d 560 (Ky. App. 1992), a facial bruise and a scratch below the eye were held to be physical injuries. Id. at 564. Applying these precedents, we have no difficulty in holding that the bruises and discoloration of L.M.B.'s wrists were physical injuries. Thus, the evidence was sufficient to prove the physical injury aggravator necessary to convict Appellant of both robbery in the first degree and burglary in the first degree with respect to the offenses perpetrated against L.M.B.

III. REQUEST FOR RESENTENCING.

Appellant cites no authority for the proposition that the reversal of convictions and sentences for some jointly tried offenses requires reversal for resentencing of other convictions that do not otherwise require reversal, and we are aware of none. In United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), the United States Supreme Court reversed for resentencing a bank robbery conviction where the sentencing judge explicitly considered three previous felony convictions, two of which were later found to be constitutionally invalid because they were obtained without right to counsel, id. at 444-45, 448-49, 92 S.Ct. at 590, 592, which the Court characterized as "misinformation of a constitutional magnitude." Id. at 447, 92 S.Ct. at 592. That is a far

cry from what occurred here. During the sentencing phase of Appellant's trial, the jury had before it, in addition to the ride-around evidence, K.A.'s own testimony that Appellant burglarized her home and raped and robbed her, the evidence on which it convicted him of the crimes perpetrated against J.A. and L.M.B., and evidence of convictions of six prior felony offenses in 1982 and of another felony offense in 1996. We decline to hold that whenever one or more convictions of multiple jointly-tried offenses are reversed, every other conviction of a jointly-tried offense must also be reversed for resentencing.

Accordingly, we affirm Appellant's convictions and the underlying sentences imposed under Counts 1, 2, 3, 7, 8, 9, and 10 (PFO) of the indictment, but vacate the additional three-year conditional discharge sentence imposed for the rape convictions; and we reverse Appellant's convictions under Counts 4, 5, and 6 of the indictment and the sentences imposed therefor, and remand those charges to the Jefferson Circuit Court for a new trial in accordance with the content of this opinion.

Lambert, C.J.; Cooper, Johnstone, and Roach, JJ., concur. Wintersheimer, J., dissents by separate opinion, with Graves, and Scott, JJ., joining that dissent.

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Supreme Court of Kentucky

2004-SC-0469-MR

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from that part of the opinion which reverses the conviction under counts 4, 5 and 6 because the trial of this matter was fundamentally fair and another trial is not required.

The majority opinion accepts Boston's argument that his convictions for the rape, robbery and burglary of the second victim were rendered fundamentally unfair by the use of evidence obtained in violation of a court order that prohibited use of that evidence. I disagree.

On October 3, 1996, a circuit judge from the eighth division of the Jefferson Circuit Court entered an order that permitted the release of the defendant to the custody of a detective of the Louisville police department. The purpose of this order was to permit the defendant to "ride-around" with the detective and point out locations where crimes had occurred. Handwritten above the circuit judge's signature line is a sentence that reads, "Nothing Defendant says to be used against him." Also

handwritten on the order is the signature and name of the defense counsel in that case. There is no signature by anyone representing the Commonwealth.

In the present case, Boston filed a motion to suppress his statements to police made on October 3, 1996. The trial judge conducted an evidentiary hearing on the motion, at which the detective who conducted the ride-around testified, as did a former prosecutor and a defense attorney, both of whom were involved in the previous criminal case against Boston. The detective stated that he informed Boston of his Miranda rights before any statements were made during the ride-around and that the defendant did not indicate that he did not want to talk. He was unaware of any agreement that would preclude the use of any statements.

The former prosecutor testified that she did not make a deal with Boston precluding the use of his statements. She also stated that she would never make an immunity deal outside of what would be contained in a plea agreement. Her signature was not on the October 3, 1996 order. The former defense attorney stated that he would not have made the handwritten notation on the order without agreement and notice to the Commonwealth.

Citing Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), defense counsel argued that the statements made pursuant to the agreement should have been suppressed. She asserted that the defendant upheld his end of the bargain. The Commonwealth responded that there was a lack of evidence that an agreement existed. It also disagreed that Boston upheld his end of the bargain.

The trial judge initially noted that Kentucky prosecutors have no authority to immunize anyone from future prosecution for criminal offenses. Putty v. Commonwealth, 30 S.W.3d 156 (Ky. 2000). She then found that, although weak, there

was sufficient evidence to indicate that an agreement existed between Boston and the Commonwealth that his statements made pursuant the October 3, 1996 ride-around could not be used against him. However, the trial judge determined that other evidence in the record indicated that Boston lied to the detective and the Commonwealth about several burglaries and crimes in question. She concluded that because Boston did not keep his end of the bargain, the Commonwealth was not bound by the terms of the agreement and that Boston's statements could be used against him.

On appeal, Boston argues that the unambiguous order cannot be disregarded by testimony of two attorneys who could not recall whether an agreement was reached before entry of the order. This is a different argument than was presented to the trial judge and, thus, is not properly preserved for appellate review. Commonwealth v. Duke, 750 S.W.2d 432 (Ky. 1988).

A careful review of the record indicates there was sufficient evidence to support the findings of fact made by the trial judge. RCr 9.78. The evidence of any agreement may be weak, especially considering the lack of any signature by the Commonwealth on the order. Nevertheless, there is also evidence in the record that Boston lied to the detective and failed to uphold his part of the bargain. Consequently, the Commonwealth was not bound by the terms of the October agreement and it was permissible to use Boston's statements against him. The trial judge did not err in denying the motion to suppress.

Reversal on this aspect of the trial is not needed nor is re-trial.

Graves and Scott, JJ. join.