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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-000379-MR

DATE 9-14-06 EWA GRAVHPC.

HENRY GILBERT RODGERS, JR. — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. SHEILA R. ISAAC, JUDGE
INDICTMENT NO. 2003-CR-01455

COMMOWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Henry Rodgers, was charged and convicted by the Fayette Circuit Court on April 21, 2005 for 1) receiving stolen property; 2) two (2) counts of criminal trespass in the second degree; and 3) being a persistent felony offender in the first degree. He was sentenced to twenty (20) years. He now appeals his conviction to this Court pursuant to Ky. Const. § 110(2)(b) asking this Court to reverse his conviction and afford him a new trial.

FACTS

On July 31, 2003, Lexington Police Sergeant Scott May (Sgt. May) was on routine patrol when he saw the Appellant, Henry Rodgers, walk from behind the Coach House Restaurant carrying what appeared to be a couple of cases. As Sgt. May pulled up along the side of the building, the Appellant dropped the cases and began to run. Sgt. May radioed for backup and began chasing the Appellant. The Appellant ran through a gate in a fence and into a horse barn,

eluding Sgt. May. Officer Cornett had heard the radio dispatch and saw the Appellant run across the Red Mile race track and into a field on the Tattersal property. He caught up with the Appellant and told him to stop. The Appellant stopped and lay down in the field.

The officers then went back to the Coach House and retrieved the three cases left there by the Appellant. Inside they found various tools and office equipment and a business card with the names Ron Knight and C&C Contracting on it. Upon further investigation, the officers learned that someone had broken into a nearby construction trailer, and with that, the officers asked Mr. Knight to accompany them to the construction trailer.

Mr. Knight was the superintendent for Cromwell Development and was employed at the site to build the Spring House Suites Hotel. The trailer was his office and storage facility. He identified the property as his and gave the officers the purchase price of each of the items found in the cases. The items found in the cases included: a laptop computer ($800.00), computer case ($55.00), a home label maker ($19.00), three "talk around" radios ($30.00), a calculator ($10.00), a tape measure ($10.00), an electric staple gun ($25.00), a Palm Pilot and charger ($399.00, about a month old), AAA batteries, a pocket dimension master ($35.00), two screwdrivers ($10.00), a USB portable floppy, a cordless drill ($249.99, one year old), nail clippers, five compact discs, gloves, staples, file folders, several pens, and a socket set ($45.00).[1] Subsequently, the officers read the Appellant his Miranda rights and then interviewed him.

[1] The prices were what he paid for them when he bought the items. The computer and drill were purchased about a year before the theft; however, the palm pilot was purchased approximately one month before.

During the interview, the Appellant denied ever entering the trailer and claimed that he picked up the three cases behind a Waffle House restaurant as a favor for a friend named Patrick "Trick" Ingram (Trick). Specifically, the Appellant stated that he had met with Trick at Winn Dixie that evening, and that Trick had asked Appellant if he could hold some property for him. The Appellant claimed that he met with Trick behind the Waffle House where Trick gave him the cases in exchange for $21.00 and a pill. Although the Appellant stated that he had a feeling that the cases were stolen, he claimed that he did not know where or how Trick obtained the cases. During the trial, Trick appeared and corroborated the Appellant's testimony. However, he stated that the items were stolen by a man named Alan Morales (Morales).

On November 25, 2003, the grand jury of the Fayette Circuit Court indicted the Appellant, charging him with 1) burglary in the third degree, 2) receiving stolen property over $300, 3) criminal trespass in the second degree, 4) criminal trespass in the second degree, and 5) being a persistent felony offender in the first degree.

The Appellant was tried before a jury and the jury found him guilty of counts 2-5. On April 21, 2005 the Fayette Circuit Court entered a judgment against the Appellant sentencing him to imprisonment for a total of twenty (20) years. From these convictions the Appellant now appeals.

ARGUMENT

I. Prosecutor's conduct did not prejudice the Appellant

A. Comment on "thrift value"

At trial, the Commonwealth allowed Mr. Knight to testify regarding the purchase price of the stolen items. The amount of the items totaled $1660.00. During the Commonwealth's closing argument, the Commonwealth's attorney told the jury that the "thrift value" of the stolen property was one-third of the retail value. At a bench conference, the Commonwealth explained that she merely intended to argue that even by depreciating the total value of the property, the items would still be valued above $300.00. The Appellant objected and requested an admonition to be given to the jury. As requested, the trial judge admonished the jury not to consider the Commonwealth's statement that the thrift value was one-third of the purchase price. The Appellant did not ask for any additional relief.

The Appellant now asks the trial be reversed for this otherwise irrelevant comment. He concedes that this issue was not preserved for appeal, but argues that it is palpable error. We disagree.

"[R]elief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error." Partin v. Commonwealth, 918 S.W.2d 219, 224 (Ky.1996). And when counsel requests no further relief, he could not later complain on appeal. See Campbell v. Commonwealth 788 S.W.2d 260 (Ky. 1990) and Lynem v. Commonwealth 565 S.W.2d 141 (Ky. 1978). This is because an admonition by a trial judge will generally cure the erroneous admission of testimony or any other trial irregularity. See Hardy v. Commonwealth 719 S.W.2d 727 (Ky. 1986).

Here, Mr. Knight testified the total of all items was, in fact, more than $1600.00. Thus, even if the "thrift value" comment by the Commonwealth was

erroneous, the trial judge gave the requested admonition to cure it. The comment did not affect the substantial rights of the Appellant.

b. Closing argument comments on Trick

During trial, Trick testified that he received the property from another man, whom he identified as Morales. After receiving the property, he asked the Appellant to keep it for him. In closing, the Commonwealth's attorney commented:

> Trick was trying to trick us. He was trying to confuse us. The fact of the matter is that he's trying to help his friend out, but he doesn't want to take too much of the guilt. He just wants to say that a third party had him do this so he didn't really possess the property himself because he doesn't want to get any more charges on himself, and he was trying to also help out his friend. This Morales story he came up with is very convenient: a third party takes the blame. We've never heard of him before this day, and this happened July 31, 2003. It's been two years, almost two years, and we haven't heard of Morales.

After this, the Appellant's attorney asked to approach the bench. He argued that the comments were improper because they shifted the burden of reasonable doubt to the Appellant. The court gave an admonition to disregard the last statements and stated further that it was the Commonwealth's burden to prove the elements of the crime beyond a reasonable doubt.

A prosecutor or defendant may suggest to the jury that a certain witness is not believable. Medley v. Commonwealth, 704 S.W.2d 190 (Ky. 1985). See also Adkins v. Commonwealth 647 S.W.2d 502, 506 (Ky. App. 1982). Prosecutors enjoy considerable latitude in presenting arguments to a jury, and it is permissive to draw inference from the facts in evidence. Williams v. Commonwealth, 644 S.W.2d 335, 338 (Ky. 1982).

The comment made here by the Commonwealth's attorney was merely a suggestion that Trick was not a believable witness. There was no error.

c. Mischaracterization of evidence

Next, the Appellant argues that the Commonwealth mischaracterized the evidence in its closing argument. At trial, the Commonwealth's attorney stated, "[G]uilty people run. He doesn't work." The Appellant objected, but the trial court overruled the objection noting the Commonwealth's statement was supported by the evidence.

The Appellant, of his own accord, stated that he did not work anywhere and that his last job was about a week prior to the interview (at which time he worked for the Hyatt hotel). He further stated that the Hyatt had called him and told him they would call if they needed him, and he had not worked since. Although Trick testified that he had known the Appellant for about two and a half months and that he and the Appellant worked together at Command Staffing (a temporary employment service), there was no testimony that the Appellant was working during the time of this incident. Furthermore, the police citation indicates that the Appellant gave no place of employment at the time of his arrest. "It is the duty of the prosecuting attorney to confine himself to the facts in evidence and fair inferences that may be drawn therefrom." Williams, 644 S.W.2d at 338. Again, a "wide latitude is allowed the prosecuting attorney in his argument to the jury." Id. Therefore, this argument is without merit.

II. Permitting Cumulative evidence

The Appellant also argues that the trial judge erred by allowing needless presentation of cumulative evidence at trial. During the direct examination of Sgt.

May, the Commonwealth used an easel with various photos taped to it to depict the area where Sgt. May first observed the Appellant. Sgt. May pointed out on the photos the path that the Appellant took and where he sat the cases down before he ran. In the middle of this soliloquy, the Appellant objected, stating the witness had "gone a long time without a question." The trial court overruled the objection.

Next, the Commonwealth handed Sgt. May photos of the stolen property, which were shown to the jury. The Commonwealth then asked Sgt. May to draw on a flip chart where the officer found the items. A list of all the stolen items was then read to the jury. The Appellant objected claiming it was cumulative. Again, the trial court overruled the objection.

Trial judges have substantial discretion in performing KRE 403 balancing test for admission of evidence. In effect, the trial judge weighs the probative value of the evidence against the consideration of needless presentation of cumulative evidence. KRE 403. Furthermore, it is necessary to note that, in Kentucky, the law of evidence tilts heavily toward admission over exclusion. Lawson, The Kentucky Evidence Law Handbook § 2.05(II) p 53 (3rd ed. 1993).

The photos and descriptions given in the testimony of Sgt. May did not confuse the issues, mislead the jury, or inflict undue prejudice upon the Appellant. It was necessary for the Commonwealth to establish the path that the Appellant took for the criminal trespassing charges. Moreover, it was necessary for the Commonwealth to detail the stolen items so the jury could get an idea as to what the items were and what condition they were in so that they could

determine if the items together were valued over $300.00. This argument is without merit, and the trial court's rulings are affirmed.

III. Batson Challenge

The Appellant next argues that the Commonwealth violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d (1986), in selecting the jury.

During voir dire, the Commonwealth approached the bench and stated for the record that it had struck every prospective juror that had been accused of a crime. Concomitantly, four African-American jurors were striken. The Appellant's counsel argued to the trial court that being accused of a crime was not a racially-neutral explanation because African-American people are accused of crimes in a disproportionate number as compared to Caucasians. The trial judge ruled that it was a race-neutral reason for exclusion and struck the jurors.

Assuredly, it is true that an attorney cannot use its peremptory challenges to exclude members of the venire from the jury solely on the basis of their race. See Washington v. Commonwealth 34 S.W.3d 376 (Ky. 2000). In Batson, supra, the Supreme Court set up a three-step process for determining if race-based exclusion has occurred; 1) the defendant must establish a prima facie case of racial discrimination, 2) the Commonwealth must state a racially neutral explanation for having made the peremptory strikes, and 3) the defendant must show that the government engaged in purposeful discrimination.

In addition, "although a prosecutor theoretically could fabricate a demeanor-based pretext for a racially-motivated peremptory strike, the third step in Batson alleviates this concern by permitting the court to determine whether it believes the prosecutor's reasons." Thomas v. Commonwealth, 153 S.W.3d 772,

778 (Ky. 2004) (citing Yarborough v. State, 947 S.W.2d 892, 896 (Tex.Crim.App.1997) (en banc) ("[S]ubjective evaluations of venire members could be used to disguise violations of the Equal Protection Clause. But this does not mean that such evaluations must always be held to have no weight. Trial judges are not without ability to detect pretexts.")). "Given the trial court's unique ability to evaluate the demeanor of both the jurors and the prosecutor, its ruling stands unless clearly erroneous." Id. (citing Washington v. Commonwealth, 34 S.W.3d 376, 379-80 (Ky. 2000); Stanford v. Commonwealth, 793 S.W.2d 112, 114 (Ky. 1990)).

After examining this process, the Appellant's argument must fail. The first step of the Batson analysis examines an issue of law and fact. "Because the prosecutor stated his reasons for striking the four jurors in question, there is no need to determine if a prima facie showing was made; thus, we proceed to the second step." Thomas, 153 S.W.3d at 777 (citing Commonwealth v. Snodgrass, 831 S.W.2d 176, 179 (Ky. 1992) (internal citations omitted)).

As for step two, the Commonwealth informed the trial court that they struck everyone that had been accused with a crime. The Appellant argued that because African-Americans are arrested more than Caucasians, the Commonwealth's decision to strike them was not a race-neutral reason. The reason does not need to be "persuasive, or even plausible, so long as it is neutral." McCurdy v. Montgomery County, 240 F.3d 512, 521 (6th Cir.2001)). The decision here was reasonable, and further, did not deny prospective jurors equal protection. Upon consideration of step three, the Appellant must be able to show that the Commonwealth engaged in purposeful discrimination. Based on

the record, there is no evidence of purposeful discrimination; therefore, this argument must fail, and the trial court's ruling is affirmed.

IV. Directed verdict (receiving stolen property over $300)

The Appellant argues that the trial court erred in overruling his motion for directed verdict of acquittal as to his conviction for receiving stolen property over $300. He argues that the Commonwealth failed to prove that the property had a value of more than $300.00.

At the conclusion of the Commonwealth's case-in-chief, the Appellant moved for directed verdict as to count two (2), arguing that the Commonwealth failed to establish that the value of the property exceeded $300.00. The trial judge overruled the motion and stated that the evidence sufficiently proved that the value of the property was greater than $300.00. The Appellant again moved for a direct verdict at the close of all the evidence, and the motion was overruled.

"If under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." Trowel v. Commonwealth 550 S.W.2d 530, 533 (Ky. 1977). KRS 514.110 provides, in pertinent part, that a person is guilty of receiving stolen property when he receives the property, knowing, or with reason to know, that it has been stolen, and if the property is valued at over $300.00 dollars, it is a Class D felony. Further, the statute states that it is prima facie evidence of knowledge when the person possesses any recently stolen movable property, such as the three cases possessed by the Appellant. Id.

In this instance, the Commonwealth had more than enough evidence for a reasonable jury to find the Appellant guilty. The Appellant had the cases with

him. Once he had seen the police, the Appellant dropped them and ran from the police. Inside of the cases was stolen property that amounted to a value exceeding $300.00. Specifically, the amount that was determined was approximately $1660.00. Even if we devalued the property that was stolen by three-fourths (making the total $415.00), the $300.00 amount necessary for the charge would still stand. The trial court's ruling is affirmed.

V. Habit evidence

The Appellant next argues that the Commonwealth improperly introduced habit evidence in violation of Kentucky law. He asserts that the trial judge permitted Mr. Knight to testify that he habitually locked the door to his trailer although he had no specific memory of having locked the door. However, the Appellant did not preserve this issue for appellate review and, therefore, the issue must be reviewed under a palpable error standard.

If admittance of the evidence that Mr. Knight had a habit to lock the door was in error, it was harmless as the admission of the testimony did not affect the outcome of the trial. The testimony was used to establish an element of the burglary charge, i.e. that the Appellant broke into the locked building. Since the jury acquitted the Appellant of the burglary, the admission of the habit evidence could not have altered the outcome of the case.

VI. Directed verdict (criminal trespass in second degree)

The Appellant last argues that the trial judge erred by failing to grant his motion for directed verdict of acquittal as to count three (3) criminal trespass in the second degree, as to the Tattersal property. Specifically, the Appellant argues that he could not have trespassed when he entered the property because

he entered through a "man-gate," and therefore, he argues, it is not reasonable for the jury to convict him of second degree criminal trespass. At the conclusion of the case-in-chief, the Appellant moved for a directed verdict of acquittal stating that the "man-gate" precluded him from being charged with criminal trespass.

In response to the objection, the Commonwealth argued that the photos were enough proof that a reasonable juror could conclude that the opening was not intended to give the public ingress and egress to the Tattersall property. The trial court overruled the motion and told the Appellant he could argue that point to the jury. At the close of all evidence, the Appellant again moved for a directed verdict, which was also overruled.

KRS 511.070 states that "a person is guilty of criminal trespass in the second degree when he knowingly enters . . . upon a premise as to which notice against trespass is given by *fencing or other enclosure.*" (Emphasis added). "Adequate warnings of land or premises use restriction can be communicated constructively through the use of physical barriers such as . . . fences . . . which actually limit or bar access." 75 Am.Jur.2d Trespass §178 (2006).

When the Appellant ran from the police, he went through a gate onto the Tattersal property. Indeed, although he entered through a gate, he knew that he did not have a right to enter the property because it was fenced, which gave notice that the land was not to be entered upon. This argument is without merit.

CONCLUSION

The trial court's rulings and the Appellant's convictions are affirmed.

All concur.

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