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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0577-MR

DATE 11-9-06 [illegible] D.C.

COLEY BROWN APPELLANT

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
04-CR-00044

V.

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the Letcher Circuit Court convicted Appellant, Coley Brown, of second degree assault, first degree robbery, and being a second degree persistent felony offender. For these crimes, Appellant was sentenced to fifty 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 victim herein, Collin Rogers, is a Vietnam veteran who developed a drinking problem and post traumatic stress syndrome after his wife and daughter were killed by a drunk driver. On November 16, 2003, Rogers decided to hitchhike into Virginia to buy some beer on a Sunday. Early in the afternoon, Rogers was picked up by a man in a

green car who was later identified as Appellant. Appellant agreed to give Rogers a ride into Virginia for three dollars.

Instead of driving to Virginia, Appellant drove Rogers to Bald Mountain. During the drive, Appellant made several unusual comments which Rogers said made him uneasy. Appellant stopped to talk with a few people and picked up a man whom he introduced as "James Lee."[1] "James Lee" referred to Appellant simply as "Brown." "James Lee" began driving the vehicle and Rogers transferred to the back seat.

Eventually, the trio made it to Virginia, where Rogers purchased eight dollars worth of gas, two packs of cigarettes, a case of Milwaukee's Best Ice beer, and a fifteen-pack of Stroh's beer. After buying the beer, the men returned to Whitesburg where they ran the car through a car wash. At this point, Rogers asked to be dropped off at his home, but the men said they needed to run a few more errands. They then proceeded to stop by the trailer of Appellant's ex-wife. When Appellant and "James Lee" began to confer privately, Rogers testified that he became very nervous and tried to escape. Rogers stated that Appellant and "James Lee" stopped him and ordered him into the car. Once inside the car, Appellant and "James Lee" threatened Rogers and eventually stopped at a cemetery. At the cemetery, Rogers was frisked for weapons. The men then got back into the vehicle and drove Rogers to a spot near his home.

When Rogers got out of the vehicle, it was approximately 7:30 p.m. As he began to walk away, "James Lee" asked Rogers for a couple of the beers he had bought. Rogers responded to his request, but "James Lee" expressed displeasure over the type of beers he was given. At this point, "James Lee" got out of the car and began punching Rogers. Appellant soon joined "James Lee" and began hitting Rogers with a

[1] "James Lee" was later identified as co-defendant James Lee Fields.

lug wrench. At some point, Rogers took out his wallet and threw it into the bushes, telling the men that if they wanted it they were going to have to find it.

During the assault, a passerby stopped his vehicle to inquire about the commotion. Rogers called out, "Please, sir, help me! They're trying to kill me! They're robbing me!" The passerby, Larry Kelly, testified that he saw Rogers on his knees with his hands behind his head with a man standing behind Rogers (later identified as Appellant) and one sitting in a nearby car (later identified as "James Lee"). Appellant told Kelly that Rogers was just drunk. Mr. Kelly replied that he would take Rogers to the hospital. Appellant and "James Lee" then left the scene and Rogers was transported to the hospital where gashes on his head were cleaned and sutured. At the hospital, Rogers' blood alcohol level tested equivalent to .11.

Former Letcher County Deputy Sheriff, Shane Amburgy, testified that he interviewed Rogers at the hospital. After having an opportunity to calm down and have his wounds treated, Rogers described what happened to him and answered Amburgy's questions. Amburgy opined that Rogers was not so intoxicated as to prevent Rogers from accurately portraying the events of the day or answering the deputy's questions. Rogers directed Amburgy to the exact spot where he said a lug wrench, baseball cap, and flashlight were discarded by Appellant and "James Lee." Roger's wallet was also found in a location where he said it would be.

Rogers told Amburgy the names of some of the people he had come in contact with that day, including "Brown," "James Lee," and "Popeye." These names proved familiar to Amburgy and he later showed photos of three men to Rogers, namely pictures of Coley Brown, James Lee Fields, and Field's brother, known as "Popeye." Rogers picked out the photos of Appellant and Fields.

Appellant was thereafter arrested and convicted for the crimes set forth above. He now appeals his convictions to this Court, which we affirm for the reasons set forth herein.

Appellant first argues that the trial court erred when it overruled Appellant's motion for a mistrial during the Commonwealth's closing argument. In response to aggressive cross-examination of Rogers and other arguments regarding Rogers' drinking and emotional stability, the Commonwealth's attorney stated:

> He doesn't have family here to my knowledge. He probably doesn't have a lot of friends. He doesn't have anybody except himself, and now you people, the conscience of the community, to say 'we don't tolerate this.'

We have held that although the prosecutor has wide latitude in presenting a case to the jury, it is prejudicial error "to cajole or to coerce a jury to reach a verdict" simply because that verdict "would meet with the public favor." Stasel v. Commonwealth, 278 S.W.2d 727, 729 (Ky. 1955). For example, in Stasel, supra, this Court found prejudicial error where the prosecutor prodded the jury as follows: "[a]nd I want you to ask yourselves, what do you think the good people in Hart County would think of you if you turned that man loose, with this woman getting up out of her chair and walking over and taking a hold of him and said, 'This is the man that committed the crime on me.'" Id. at 728.

Upon review, we do not find the Commonwealth's argument in this case to be unduly coercive or cajoling like the argument made in Stasel, supra. In this case, the prosecutor in no way cajoled the jury into reaching a verdict simply because it would meet with public favor. Rather, the prosecutor called upon the jury to render a verdict despite the victim's unfavorable station in life. These circumstances simply do not rise to the level of reversible or prejudicial error. See Meyer v. Commonwealth, 472 S.W.2d

479, 486-487 (Ky. 1971) (no reversible error where the prosecutor told the jury that it should tell the "decent people of this community" that "what we have heard the last three days will not be tolerated, will not be permitted in this community"), overruled on other grounds by Short v. Commonwealth, 519 S.W.2d 828 (Ky. 1975); United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991) ("Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible.").

Appellant next alleges error in the trial court's refusal to merge Appellant's conviction for Second Degree Assault into his conviction for First Degree Robbery. Upon review of the jury instructions in this case, we find Appellant's argument to be without merit in accordance with the reasoning set forth in Taylor v. Commonwealth, 995 S.W.2d 355 (Ky. 1999).

After Appellant was convicted and the jury dismissed, Appellant moved for a new trial on the basis that certain jurors had allegedly lied about whether they knew him during *voir dire*. Appellant told the trial court that one juror had lived near his grandmother and that a second juror worked in a doctor's office where both his wife and ex-wife were patients. Appellant claimed that he had waited so late to make the motion because he did not himself recognize or know these people. The trial court denied Appellant's motion, reasoning that "[t]his is not proof the jurors lied under oath. The argument that is being advanced, that he didn't know them, yet they would have known him - I can't see that they were any more likely to know him than he is to know them." We agree with the trial court that not only was Appellant's motion untimely, Pelfrey v. Commonwealth, 842 S.W.2d 524, 526 (Ky. 1992) (holding that an objection to a juror's implied bias was waived if not raised during voir dire), but also it was without merit. See

Key v. Commonwealth, 840 S.W.2d 827, 830 (Ky. App. 1992) (no proof of juror bias when defendant failed to elicit testimony from juror in question and only evidence offered showed nothing more than speculation that juror was biased).

Appellant also alleges that he was substantially prejudiced and denied due process of law by the trial court's refusal to suppress evidence of Rogers' pretrial identification of Appellant. The Commonwealth concedes that the showing of a single mug shot for each suspect unaccompanied by other pictures was unnecessarily suggestive. See Moore v. Commonwealth, 569 S.W.2d 150,153 (Ky. 1978). However, we agree with the trial court that the identification was nonetheless reliable despite the suggestiveness.

Our determination as to whether Rogers' identification was independently reliable despite unnecessary suggestiveness "must be made in light of the 'totality of the circumstances' . . . and depends upon a number of factors including his opportunity to view the robbers at the time of the crime, his degree of attention, the accuracy of his prior description of the robbers, the length of time between the robbery and the pretrial photographic showup, and the level of certainty he demonstrated at the showup." Id.

In this case, Rogers spent several hours with Appellant over the course of an afternoon and early evening. Despite his intoxication by the time he reached the hospital, Rogers was able to give a detailed account of the crime and the afternoon, including describing the various events and people he encountered over the day. Moreover, Rogers testified that he did not begin drinking until after Appellant picked him up and the men were able to purchase alcohol in Virginia. Rogers was able to demonstrate a high degree of exactness in his description of the crime scene and his knowledge of the three suspects' names. Finally, Rogers indicated a high degree of

certainty at the time he was shown the photos approximately five days after the crime occurred. He immediately identified Appellant and his co-defendant, James Lee Fields, as the perpetrators and correctly noted that the third picture was Fields' brother, "Popeye," who was not involved with the crime but merely one of the people he met during the course of the afternoon. When these circumstances are considered in their totality, we agree with the trial court that Rogers' identification was independently and sufficiently reliable to permit its admission into evidence despite its inherent suggestiveness.

Appellant also argues he is entitled to an evidentiary hearing because the trial court failed to hold one outside the presence of the jury in accordance with RCr 9.78. Rather, the trial court made its ruling after simply listening to arguments by counsel at the time the motion was made at trial.[2] Even if there was error by the trial court, we have held that an evidentiary hearing on remand is unnecessary "if it is clear from the record on appeal" that "under the 'totality of the circumstances' the identification [of a defendant] was reliable even though the confrontation procedure was suggestive." Id. We find the record in this case to be sufficiently clear and thus, see no need to remand for an evidentiary hearing.

Finally, Appellant argues there is insufficient evidence to support his convictions. On appellate review, we will find insufficient evidence to support a conviction only where "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Appellant bases his arguments on the following claims; (1) Rogers' identification of Appellant was unreliable; and (2) there is no physical evidence linking Appellant to

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[2] RCr 9.78 was revised to provide for evidentiary hearings on witness identification issues just a few months prior to the start of Appellant's trial.

the crime scene. We have already found Rogers' identification to be sufficiently reliable. Moreover, Rogers' testimony was corroborated by evidence found at the scene of the crime and Rogers' knowledge of key details. Finally, Mr. Kelly, the passerby who rescued Rogers, was able to positively identify Appellant as one of the men at the scene of the crime through a photo of Appellant taken shortly after the assault and robbery. When the evidence as a whole is considered, it was not clearly unreasonable for the jury to find Appellant guilty of the crimes with which he was convicted.

For the reasons set forth herein, the judgment and sentence of the Letcher Circuit Court are affirmed.

All concur.

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