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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 22, 2007
NOT TO BE PUBLISHED

FINAL
DATE 5-24-07 E.A.Group P.C.

Supreme Court of Kentucky

2005-SC-000148-MR

DAMONE BUCKMAN — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
INDICTMENT NO. 02-CR-2640-002

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

Appellant, Damone Buckman, was convicted of five counts of robbery, five counts of impersonating an officer and one count of theft by unlawful taking over $300.00, and a total sentence of thirty-seven years was imposed. This matter is before the Court as a matter of right appeal. Finding no error on all but the theft charge, this case is affirmed in part. As to the theft charge, the conviction is reversed based on principles of double jeopardy.

I. Background

In August of 2002 a series of three unusual robberies began in Louisville which had the unusual feature of having the perpetrators pose as policemen in order to subdue the victims before robbing them. The first robbery occurred on August 30, 2002 when victims Ronny Culbreath and James Neal had their parked car blocked by a small green car with flashing police lights. Assuming this was an undercover police vehicle, Culbreath and Neal watched as two men exited, one black and one white. Culbreath

was ordered out of the car and handcuffed by the white man while the black man held a small older, rusty gun on Neal. The "officers" stole what was in the victims' pockets, and the white man stole Culbreath's car as they drove away.

On September 4, 2002, a white man knocked on the door of an apartment in the Arcade Apartment Complex, and tried to force his way in when the door was opened. He had a badge around his neck and claimed to be a police officer. The man who opened the door pushed him back outside, but was persuaded to let the "officer" in. The "officer" told three men who were visiting to step outside, where they spotted a white Crown Victoria with tinted windows and police lights. The "officer" lined the men up against the building on their knees, took their money, then ushered them back inside and left. A real police officer drove by shortly thereafter and was told of the robberies.

That same day, Demetrius Roundtree and some friends were outside the Iroquis Apartments when a large white man driving a white Crown Victoria with police lights stopped and got out. He wore a badge, pointed a gun at the men, and told them to lie on the ground. He asked if they had any money or drugs, and took everything they had. As the "officer" drove away, Roundtree chased him and saw another police car. He stopped it and explained that he had been robbed by a man in the police car ahead of them. The officers pursued the Crown Victoria until it stopped and two subjects, a white man and a black man, ran from it in different directions. Each officer pursued a suspect, and the white male later identified as Stephen Hirschauer was caught. The black man, later identified as Damone Buckman, the Appellant, got away and was later apprehended in Harrisburg, Pennsylvania.

Following the trail of the white Crown Victoria, the police determined it had been purchased by Paula Ohligschlager. Going to her work place, they talked with a co-

worker who said the carjacked vehicle (Culbreath's car) was behind her apartment, and that she had purchased the blue police lights for her boyfriend and an unknown black male. Later police learned of another woman at Ohligschlager's apartment, one Terreba Sanders, who was identified as Appellant's girlfriend. She gave the police a taped statement that implicated Hirschauer, Ohligschlager and Appellant. She was found with Appellant when he was arrested in Harrisburg, Pennsylvania.

These events led to the charges which are the subject of this appeal. At trial, Terreba Sanders did not appear, and her taped statement was admitted into evidence.

II. Analysis

Appellant alleges that the trial court erred when it allowed Terreba Sanders's taped statement to be played against him; that the prosecutor improperly testified when he stated suspicions that Terreba Sanders had been intimidated by another witness; that convictions for both robbery and theft violate principles of double jeopardy; that three convictions for intimidating a police officer in a single occurrence violate principles of double jeopardy; and that the trial court denied him due process by refusing to excuse an unqualified juror and excusing another who was qualified.

A. The Recording of Terreba Sanders's Statement

Appellant argues that the trial court denied him due process of law and his right to confront the witness against him when it allowed the Commonwealth to play the taped statement Terreba Sanders gave to the police. Terreba Sanders was alleged to have been Buckman's girlfriend at the time these offenses occurred. Detective Hellinger met Sanders when he went to Ohligschlager's apartment. Apparently Sanders and Ohligschlager had been living together. Sanders cooperated with Detective Hellinger and gave him a taped statement in which she implicated Hirschauer, Ohligschlager and

Buckman in the robberies. Appellant claims admitting this tape was error because he was not given the opportunity to cross examine Sanders.

The Sixth Amendment provides that a criminal defendant "shall enjoy the right...to be confronted with the witnesses against him." U.S. Const. amend. VI. This considerable interest will however, be extinguished where it can be shown that the defendant was involved in procuring the absence of the witness. KRE 804(b)(5). Recently, the U.S. Supreme Court held that the Confrontation Clause of the U.S. Constitution bars the introduction of testimonial statements against a person accused of a crime unless the declarant testifies and is subject to cross examination. Crawford v. Washington, 541 U.S. 36 (2004). Appellant claims that the factual situation in the case at bar is identical to that in Crawford, in that the defendant's own acts allegedly made the witness unavailable.

In Crawford, the Court held that the wife's statements were inadmissible as a violation of the Confrontation Clause. The Commonwealth, however, sought to admit Terreba Sanders's taped statement pursuant to KRE 804(b)(5), a hearsay exception which allows testimony normally excluded by the hearsay rule where the statement is offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the witness. This was expressly permitted by the Court in Crawford: "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds...." 541 U.S. at 62.

The Appellant's argument that the language in Crawford is dicta is simply incorrect. The Supreme Court recently reaffirmed these statements: "We reiterate what we said in Crawford: that 'the rule of forfeiture by wrongdoing...extinguishes

confrontation claims on essentially equitable grounds.' That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." Davis v. Washington, 126 S.Ct.2266, 2280 (2006).

Furthermore, once the proponent of the hearsay introduces evidence establishing good reason to believe that the defendant has intentionally procured the absence of the witness, the burden then shifts to the opposing party to offer credible evidence to the contrary. "[W]hen the determination [of admissibility] depends upon the resolution of a preliminary question of fact, the resolution is determined by the trial judge under KRE 104(a) on the basis of preponderance of the evidence and the resolution will not be overturned unless clearly erroneous...." Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001).

In this instance, the prosecutor clearly established by a preponderance of the evidence wrongdoing by Camille Ford that procured the absence of Terreba Sanders and that Buckman at the very least acquiesced in this. Both Ford and Detective James Hellinger testified that a charge of intimidating a witness was brought by Sanders against Ford. Detective Hellinger also testified to repeated phone calls from Ford to Sanders. The prosecution demonstrated that Ford's last known address was in the vicinity of where Appellant disappeared on foot from police following a high speed chase.

Appellant claims there was no proof of any contact between himself and Ford, or that he knew what, if anything, Ford was doing with regard to Sanders. There was plenty of evidence, however, for the trial judge to have determined otherwise. Ford is the mother of Buckman's child, she appeared in court on the day of trial to support Buckman, and was living in the area where he disappeared from police. That coupled

with the other facts in this case make it reasonable to infer that there was some level of involvement by Buckman.

It is true that the trial judge made no findings of fact on the record with regard to Buckman's involvement with Ford's activities. However, it is clear from his ruling to admit the Sanders tape that he believed the prosecution had shown by a preponderance of the evidence that Buckman had acquiesced. Furthermore, Buckman offered no evidence to the contrary. See Steele v. Taylor, 684 F.2d 1193 (6th Cir. 1982). The taped statement of Terreba Sanders was properly admitted.

Buckman raises the related issue that his right to due process was violated when the prosecutor introduced evidence of his suspicions that Ford intimidated Sanders in the presence of the jury. This issue was not preserved for appeal; however, Buckman believes the court should address it as a matter of first impression concerning how the foundation for a statement admitted pursuant to KRE 804(b)(5) should be introduced.

Unpreserved errors must satisfy the standard for palpable error under RCr 10.26, which allows such an error to be "revisited [only] upon a demonstration that it resulted in manifest injustice." 96 S.W.3d at 11. Palpable error must affect the substantial rights of a party and relief will only be granted if the reviewing court concludes that "there is a probability of a different result absent the error or error so fundamental as to threaten a defendant's entitlement to due process of law." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). Appellant's two major contentions are that Ford should have been questioned outside the jury's presence regarding her involvement with Sanders and that the jurors were terrified of Ford because they learned she was charged with intimidating Sanders.

Appellant claims that the prosecutor should have requested a hearing outside the presence of the jury. However, Appellant never requested that this hearing take place outside the jury's presence. Buckman further suggests that the jury was tainted by the testimony that Ford had been charged with intimidating Sanders to such a degree that they did not want Ford in the courtroom. The record suggests, however, that the jury became concerned with Ford after she became boisterous in the courtroom and that that is the likely reason they did not want her present. Appellant has not convinced this court that he was unduly prejudiced with respect to the prosecution's introduction of the Sanders tape. There has been no manifest injustice, and thus, no palpable error.

B. Double Jeopardy

The Appellant makes two double jeopardy claims that are not preserved. First he claims that he cannot be charged with both robbery and theft by unlawful taking for the same events, and that he cannot be convicted of three counts of impersonating a police officer during the course of one robbery. Though unpreserved, double jeopardy claims are not treated as waived and are still addressed on appeal. See Baker v. Commonwealth, 922 S.W.2d 371, 374 (Ky. 1996); Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977).

Count 1 of the indictment charged that Hirschauer and Appellant committed the offense of Robbery in the First Degree. In Count 6 of the indictment, Buckman was charged with Theft By Unlawful Taking Over $300. Appellant argues that his conviction and punishment for Theft By Unlawful Taking Over $300 is constitutionally and statutorily prohibited. This is correct. This Court has previously stated that "theft and attempted theft are lesser-included offenses of robbery." Roark v. Commonwealth, 90 S.W.3d 24, 38 (Ky. 2002).

At issue in this case is the theft of Ronny Culbreath's Oldsmobile. After Culbreath was pulled from his car and robbed, one of them asked, "What about the car?" Hirschauer jumped in the Oldsmobile and drove off. The Commonwealth argues that the theft of the Oldsmobile was not an included or a lesser included offense since Hirschauer and Appellant did not originally intend to steal the car, and that since the car was an afterthought, it should be considered a separate offense. The Commonwealth claims the charge was in regard to the money stolen from Culbreath.

Quite simply, it appears that the Commonwealth argued one thing at trial and is attempting to argue another now. It is clear from the given jury instructions that the theft of Culbreath's car was intended to be an element of the robbery charge. The pertinent instructions read as follows:

> You shall find the defendant, Damone Buckman, guilty of Robbery in the First Degree (Complicity), under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
> That in Jefferson County, Kentucky on or about August 30, 2002, the defendant, acting alone or in complicity with Stephen Hirschauer, stole or attempted to steal a 1983 Oldsmobile Cutlass and/or money from Ronnie Culbreath....

The Robbery instruction clearly indicates that the theft element of the First Degree Robbery covered both the car and the money. Since all of the elements of theft are incorporated into the robbery instruction, Appellant has been subject to double jeopardy by being charged and convicted with both. The theft charge should have been merged into the robbery offense, thus, the theft conviction must be set aside. The Commonwealth's argument that Appellant could have been convicted separately of the two offenses may have had merit had the Robbery instruction been predicated on only one of the thefts and the theft instruction on the other. However, the instructions clearly make theft of the car an element of both offenses.

Appellant claims a double jeopardy issue also arises from his conviction of 3 counts of impersonating a peace officer during the course of a single occasion of robbery. KRS 519.055(1) provides:

> A person is guilty of impersonating a peace officer if he pretends to be a peace officer, or to represent a law enforcement agency or act with the authority or approval of a law enforcement agency, with intent to *induce another* to submit to the pretended official authority or otherwise to act in reliance upon the pretense to his prejudice.

"The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." Commonwealth v. Bowles, 107 S.W.3d 912, 915 (Ky. App. 2003) (citing Commonwealth v. Harrelson, 14 S.W.3d 341 (Ky. 2002)). Where that intent cannot be determined, the statutory language will be interpreted by its plain meaning. This Court will not "speculate what the [legislature] may have intended but failed to articulate." Peterson v. Shake, 120 S.W.3d 707 (Ky. 2003) "[L]egislative intent is at best a nebulous will-o-the-wisp. Far better it is to be guided by the old adage, 'Plain words are easiest understood." Id.

The plain language of KRS 519.055(1) is clear. The use of the qualifying language "with intent to induce another..." indicates that a person who impersonates a peace officer is guilty of that offense each time he intends to pass himself off as a member of law enforcement to another. In this case, Hirschauer impersonated an officer to Hopper, Tucker and Hayes. He intended for *each* of them to believe he was an officer to facilitate the process of robbing *each* of them. In spite of the fact that the impersonations took place on the same occasion, they were nonetheless three separate offenses upon three different individuals. Appellant was properly charged with three counts of impersonating a peace officer and there is no double jeopardy issue.

C. Juror Excuses

Appellant's final issues concern the jury that was seated in his case. Appellant alleges that he was denied due process of law when the trial court judge refused to excuse a juror for cause who was a family friend of Paula Ohligschlager, one of the prosecution's witnesses.

"A trial court's decision whether to remove a juror from a panel that has already been seated is reviewed for abuse of discretion." Lester v. Commonwealth, 132 S.W.3d 858, 863 (Ky.2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. The juror at issue came to the bench during the testimony of Paula Ohligschlager. The juror informed the court that he did not know Ohligschlager, but had known her uncle and her grandfather. The juror stated that the grandfather had been deceased for approximately ten years and he had not spoken to the uncle in twenty years. The juror said that Ohligschlager came from a good family, but that his prior relationships with people in her family would not impair his ability to fairly and impartially decide the case.

It is clear that in this instance, there is no abuse of discretion. The juror did not know Ohligschlager and his relationships with her family members were tenuous and distant. See George v. Commonwealth, 885, S.W.2d 938 (Ky. 1994). The trial court correctly denied Buckman's motion to strike this juror.

Finally, Buckman asserts that the trial court erred by excusing another juror for cause. During voir dire, when the juror approached the bench, she told the judge, among other things, that an acquaintance of hers had been charged and found guilty of a crime. Furthermore, when the prosecutor asked her whether she could separate the

penalty from the facts, she replied, "I thought I could, but I'm not sure." This court has previously stated that:

> The trial court has the opportunity to observe the demeanor of a prospective juror, and therefore is in the best position to interpret the substance and nature of that person's responses to voir dire questioning. For that reason, the decision to exclude a juror for cause, or to refuse to excuse a juror for cause, lies within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of that discretion.

Wood v. Commonwealth, 178 S.W.3d 500, 515-16 (Ky. 2005).

In this case, the trial judge and attorneys had ample opportunity to question and observe the juror. The judge was in the best position to assess her answers. There is nothing to suggest that the trial judge abused his discretion in this instance and this Court will not second guess his ruling. The trial court properly struck this juror for cause. There was no abuse of discretion and no error.

Appellant's convictions are affirmed, except for his conviction for theft by unlawful taking over $300, which is reversed for a double jeopardy violation. The judgment of the Jefferson Circuit Court is affirmed in part and reversed in part.

Lambert, C.J.; Cunningham, Minton, Noble, Schroder and Scott, JJ., concur. McAnulty, J., dissents by separate opinion.

COUNSEL FOR APPELLANT:

Thomas M. Ransdell
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane – Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Clint Evans Watson
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204

RENDERED: MARCH 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000148-MR

DAMONE BUCKMAN — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
INDICTMENT NO. 02-CR-2640-002

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE McANULTY

I dissent with that portion of the opinion that states that the "forfeiture by wrongdoing" exception to the right of confrontation, as described in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), applied in this case. I do not believe appellant's mere knowledge of the actions of Camille Ford, his girlfriend, provided a sufficient nexus to establish by a preponderance of the evidence that appellant himself procured the absence of the witness. There is no evidence that Ford was under appellant's control or even that she was acting in accordance with his wishes. Respectfully, I feel that this falls far short of the preponderance of the evidence standard adopted by the Court in this case, and thus conclude that Crawford precludes use of the taped statement.