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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2005-SC-000629-MR

DATE 6-14-07 E.L.A. Greenwell P.C.

KELLY WAYNE GREENWELL

APPELLANT

V. ON APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, JUDGE
NO. 03-CR-00201

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Kelly Greenwell was sentenced in the Nelson Circuit Court to a term of imprisonment of twenty (20) years for attempted murder¹ and to twenty (20) years for Robbery in the First Degree,² with the sentences to be served consecutively for a total of forty (40) years. Appealing as a matter of right,³ Greenwell argues that the trial court committed reversible error by denying his motion to suppress the victim's photo identification of him, and by denying his requested jury instruction concerning missing evidence. For the following reasons, we affirm Greenwell's conviction.

This case began on June 5, 2003, when the victim, Mrs. Willett, went to the lake on her property with several family members. After her family members had gone, Willett remained at the lake. As she was packing things into her car to go home, Willett

¹ KRS § 506.010; KRS § 507.020.

² KRS § 515.020.

³ Ky. Const. § 110(2)(b).

noticed a man approaching with a shotgun pointed at her. She twice asked the man what he wanted, and he twice failed to respond. Willett then got into her vehicle and attempted to leave. However, the man appeared at the door of the vehicle and demanded the keys. After Willett refused to hand over her keys, the assailant took the keys from her. As Willett attempted to retrieve a second set of keys from her purse, the man repeatedly ordered her out of the car. She attempted to calm the assailant by relating her personal information. However, he continued to order her out of the vehicle, and when she refused to comply, the assailant shot Willett twice. She sustained serious wounds to her right shoulder and left hand.

After being wounded, Willet played dead and the assailant disappeared into the woods. She then phoned for help, and police and EMS personnel arrived shortly thereafter. Willett described the suspect as a relatively tall white male with a large build, wearing blue jeans and a bandana. After EMS transported Willett to the hospital, police officers began analyzing the crime scene. The officers took photographs and recovered two spent cartridges outside the driver's side car door. The following day, the officers released the car to Willett and her family had the car thoroughly cleaned. The person who detailed the car found one live ammunition round under the passenger seat. The defendant never had an opportunity to examine the vehicle under circumstances that could have led to discovery of relevant evidence.

Greenwell became a suspect. The investigating officer, Detective Snow, assembled a photo lineup. For the lineup, Snow obtained a photograph of Greenwell from the Nelson County Jail that was approximately one year old. The photo depicted Greenwell with a bandana on his head. Snow then found five photographs of other men

who resembled Greenwell. He placed the same type of bandana on each photo and made a black and white copy of the six-man photo array. Two days after the shooting, Snow presented the photo array to Willett. She identified Greenwell as a possible suspect, but then stated that another subject more closely resembled her assailant.

After Greenwell was arrested on unrelated charge, Detective Snow obtained the photograph taken of Greenwell upon his arrival at jail. Snow then assembled a new photo array with the subjects portrayed in color. However, none of the subjects in the first photo array – other than Greenwell – were included in the second photo array. After viewing the second set of pictures, six days after the shooting, Willett immediately identified Greenwell as her assailant.

Greenwell moved to suppress the out-of-court identification, and Willett's in-court identification, claiming an unduly suggestive procedure. The trial court denied Greenwell's motion, and the evidence was admitted at trial over his objection. Thereafter, at the close of all the evidence, Greenwell sought a missing evidence jury instruction based on the defense's inability to examine Willett's car. The defense argued that because the Commonwealth returned the car to Willett and failed to conduct a thorough examination of the car, the jury should be instructed that it could infer that missing evidence would have called into doubt the Commonwealth's factual assertions. The trial court refused to give Greenwell's proposed instruction on missing evidence.

Greenwell's first argument on appeal is that the trial court improperly denied his motion to suppress Willett's out-of-court photo identification and her in-court identification. The "clearly erroneous" standard applies to a trial court's factual findings on a motion to suppress evidence, and this Court's review of the admissibility of

evidence is pursuant to an abuse of discretion standard.⁴ We recognize that due process rights may be implicated by identification procedures that are so unduly suggestive as to create “a very substantial likelihood of irreparable misidentification.”⁵ Accordingly, we must initially examine the identification procedures utilized here to determine if they were unduly suggestive.⁶

There are no allegations that Detective Snow influenced Willett’s decision or that Greenwell’s picture was overtly distinct from the other subjects in either photo lineup. It is troubling, however, that Detective Snow replicated only Greenwell’s picture in the second photo lineup. Our concern is heightened by the fact that Willett was unable to make a definitive identification during the initial photographic lineup. Although she did indicate from the first photo lineup that the man who shot her resembled Greenwell, she also pointed to another man’s picture and said that his face looked more like the man who had shot her. Only when presented with the second photographic lineup that included Greenwell – but none of the other subjects from the initial lineup including the man she had earlier identified – did Willett conclusively identify Greenwell as her assailant.

Our principal concern is that Willett’s positive identification of Greenwell in the second photo array was influenced by her recognition of Greenwell’s picture from the first photo array. Moreover, as Greenwell’s picture was the only one that appeared in both photo arrays, Willett could have concluded that he was the Commonwealth’s main

⁴ King v. Commonwealth, 142 S.W.3d 645 (Ky. 2004).

⁵ Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381, 34 L.Ed.2d 401 (1972) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968)).

⁶ King, 142 S.W.3d 645.

suspect. Finally, by the exclusion of the other man's photograph from the second photo array, the message may have been conveyed that Willett's tentative selection of the other man was incorrect.

On the other hand, this Court has held that the duplication of a suspect's photograph is not unduly suggestive in certain situations. In Dixon v. Commonwealth,⁷ we allowed an identification that resulted from an array of ten to twelve photos that included two of the defendant. The Court found that the duplication of the defendant's photo was mitigated by the victim's unequivocal identification upon viewing both the first and the second photo.⁸ While using multiple photo arrays in which only the suspect's photograph appears in each is bad practice and will be subjected to heightened scrutiny when the evidence is presented at trial and on appeal, we are persuaded that in this case, the practice did not open the door to misidentification or infringe Greenwell's right to a fair trial.

The trial court found that replication of Greenwell's photo in the second lineup was not unduly suggestive because of the substantial differences in the two photos of Greenwell. Greenwell's picture in the second array was a color photograph, taken more recently than the picture in the first array and did not include his facial hair. The trial court noted the "stark difference" in the photographs and found that the court would have been unable to match the photographs. Because the second photo of Greenwell was substantially different from the first, the trial court found that its inclusion in second photo lineup did not constitute an unduly suggestive procedure.

⁷ 505 S.W.2d 771, 772 (Ky. 1974).

⁸ Id.

As victim identifications made close in time are devastating evidence at trial, this Court must be vigilant to ensure that procedures used to obtain identifications are not suggestive of the “right answer.” However, under the facts of the present case, we will defer to the trial court’s finding. Our confidence in this outcome is strengthened by the fact that Willett had ample opportunity to view her assailant as he approached her from a considerable distance and when he spoke with her from directly outside of her car. We are convinced that she was attentive and her description of her assailant matched Greenwell in all material respects. As such, the trial court did not err in admitting the photo array evidence or allowing Willett’s in-court identification of Greenwell as her assailant. Moreover, this Court has carefully reviewed the photographic evidence and confidently concluded that the trial court’s ruling was not clearly erroneous.

Greenwell’s second argument on appeal is that the trial court erroneously denied his request for a missing evidence instruction. Greenwell contends that since the Commonwealth released Willett’s vehicle to her, and because the vehicle was detailed shortly thereafter, he was denied the ability to conduct his own examination of the vehicle. Accordingly, Greenwell argues, the court should have given an instruction allowing the jury to infer that the evidence, if available, would have been adverse to the Commonwealth and favorable to the defendant.

A missing evidence instruction is used to cure potential Due Process violations that result “if the evidence was intentionally destroyed by the Commonwealth or destroyed inadvertently outside normal practices.”⁹ However, “absent a showing of bad faith, the Due Process Clause is not implicated by the failure of the State to preserve

⁹ Estep v. Commonwealth, 64 S.W.3d 805, 809 (Ky. 2002).

evidentiary materials of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.”¹⁰

Although Greenwell was unable to examine the vehicle, he has not alleged – nor does the record support – that the Commonwealth acted in bad faith by returning the vehicle to the Willett family. While it is true that having the car detailed may have destroyed potentially exculpatory evidence, there is no evidence that the car was detailed at the behest of the Commonwealth. In Johnson v. Commonwealth,¹¹ this Court considered and rejected the same argument made by Greenwell in the present case. Similar to the present case, the defendant in Johnson shot the victim while he was in his truck. The Commonwealth inspected and took photographs of the truck. Two days after the shooting, the Commonwealth returned the truck to the victim’s family where it was promptly repaired and repainted. The defendant raised the same argument on appeal that Greenwell now alleges, that the return of the vehicle to the victim’s family without an opportunity to conduct an independent examination entitled him to a missing evidence jury instruction. In rejecting Johnson’s argument, we noted that “there was absolutely no showing of bad faith on the part of [the Commonwealth].”¹² Without such a showing, we held, there was no basis for a missing evidence jury instruction.

Our decision in Johnson leads to a similar outcome in the present case. The Commonwealth took photographs of the vehicle which were made available to Greenwell. Additionally, the car was not detailed at the behest of the Commonwealth.

¹⁰ Id. at 810.

¹¹ 892 S.W.2d 558 (Ky. 1994).

¹² Id. at 561.

Absent such evidence that the Commonwealth acted in bad faith by returning the vehicle to the Willett family, the trial court properly denied Greenwell's request for a missing evidence jury instruction.

For the aforementioned reasons, we affirm Greenwell's conviction.

All sitting, all concur.

COUNSEL FOR APPELLANT:

Kimberly Brooks Tandy
104 East Seventh Street
Covington, KY 41011-2502

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Room 118, Capitol Building
Frankfort, KY 40601

Kristin N. Logan
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204