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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2005-SC-000986-MR DATE 9-13-07 E.A.C.

JENEEKA NELLUM — APPELLANT

V.

ON APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIA R. WARD, JUDGE
NO. 05-CR-000068

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Janeeka Nellum, was convicted of First-Degree Robbery and Persistent Felony Offender in the Second Degree (PFO II) for robbing a cab driver. Nellum assigns as error: the indictment contained the wrong date of the offense; the indictment was constructively amended at trial to include an element of the offense for which she was not indicted; the trial court erred in allowing a police witness to bolster the victim's testimony; and the trial court improperly allowed a lay opinion that invaded the province of the jury. Upon review of the record and the applicable law, we rule that it was error under KRE 701 and KRE 602 to allow the police witness to testify that Nellum's face contained a discoloration. However, because this was a fact that jurors could see for themselves at trial, we adjudge said error to be harmless. Finding no other error, we affirm.

At around 5:18 a.m. on December 31, 2004, cab driver Joshua Martin received a dispatch call to pick up a passenger at the Carryout Restaurant at 7th and Central in Newport. When Martin arrived at the location, his passenger walked in front of the cab to the passenger side of the vehicle and got into the back seat. Martin asked if the passenger was going to 532 Brighton Street. When the passenger answered in the affirmative, Martin proceeded to Brighton Street, six or seven blocks away. At 532 Brighton Street, the passenger directed Martin a little further down the street to 515 Brighton Street. As Martin moved the cab forward, the passenger slid over behind Martin in the back seat, put an arm around Martin's head and a knife to his throat, saying, "Give me all your money or I'm going to fucking kill you." Martin grabbed some money from his shirt pocket and threw it in the back seat. At that point, Martin grabbed the knife by the blade and pushed it away from his neck toward the back seat. When Martin let go of the knife, the passenger jabbed Martin in the shoulder with the knife and then fled the cab. Martin then saw the passenger go to 526 Brighton Street and knock on the door. When no one answered, the person ran across the street and disappeared down a walkway between two apartment buildings.

The Newport Police responded and Martin went with them to the Newport Police station where he gave a statement to Detective James Boyers. Martin then sought treatment at the hospital for his injuries. Martin sustained a small cut on his finger from grabbing the knife, and the jab wound in his shoulder required a butterfly bandage.

Newport Police questioned the residents of 526 Brighton Street, the apartment whose door the robber had knocked on after fleeing the cab. Misty Ewing, who lived in the apartment, testified at that around four or five o'clock in the morning or later, her uncle, David Elstock, who was staying with her, decided to go to White Castle. When

he opened the door to go outside, Nellum, whom Ewing knew from the neighborhood, was standing there and asked if she could use the telephone. After using the phone, Nellum asked for a ride home. Elstock agreed to drive her and took her to 7th Street by the jail, which was the same area where the robbery suspect had been picked up by the cab. Elstock testified that around four or five o'clock in the morning, prior to leaving to go to White Castle, someone had knocked on the door, but by the time he got to the door, no one was there.

Based on their investigation, Newport Police assembled a photographic lineup of six black females containing Nellum's picture. Martin picked out Nellum's photo as being the robber. Misty Ewing also picked out Nellum's photo as the person who came to her apartment on the night of the robbery. Following Nellum's arrest on January 4, 2005, Newport Police contacted Martin and asked him to observe the suspect through a two-way mirror. Martin again identified Nellum as the robber.

Nellum was indicted on charges of First-Degree Robbery and PFO II. At the jury trial on October 25, 2005, Nellum was found guilty of First-Degree Robbery and PFO II and sentenced to ten (10) years on the Robbery charge, enhanced to twenty (20) years for the PFO II. This matter of right appeal followed.

Nellum's first argument is that the indictment failed to charge a public offense because the indictment was returned before the date of the offense in the indictment. The indictment in this case was returned on February 10, 2005, and the date of the offense listed on the indictment was December 31, 2005. It is clear from the record that the year listed in the indictment was a clerical mistake. The police report and jury instructions both listed the date of the offense as December 31, 2004. And the

witnesses at trial testified that the date of the robbery was December 31, 2004.

RCr 8.18 provides:

> Defenses and objections based on defects in the . . . indictment or information other than it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceedings.

Contrary to Nellum's position, listing the wrong date of the offense on the indictment does not constitute failure to charge an offense. See Stephens v. Commonwealth, 397 S.W.2d 157, 158 (Ky. 1965) (amending indictment to show different date of offense is not substantive change in indictment and does not state an additional or different offense); Anderson v. Commonwealth, 63 S.W.3d 135, 140 (Ky. 2001). The indictment clearly charged Nellum with First-Degree Robbery and PFO II. Because Nellum did not raise this claim of defective indictment prior to trial, it was waived. Vickers v. Commonwealth, 472 S.W.2d 469 (Ky. 1971).

We next address Nellum's argument that the indictment was constructively amended at trial to include an element of the offense for which she was not indicted. Relative to the First-Degree Robbery charge, the indictment stated, "the above named defendant robbed Joshua Martin by using a dangerous weapon, a knife." The First-Degree Robbery instruction given at trial provided:

> You will find her 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 December 31, 2004, the Defendant stole or attempted to steal property from Joshua Martin; AND

B. That in the course of so doing, and with intent to accomplish the theft, she used or threatened the immediate use of physical force upon Joshua Martin. AND

C. That in the course of so doing, and with intent to accomplish the theft, she EITHER:

1. Caused physical injury to Joshua Martin,

OR

2. Was armed with a deadly weapon.

Nellum asserts that because the indictment did not include the element of causing physical injury to Martin pursuant to KRS 515.020(a) which was in the instructions, the indictment was constructively amended to include an element of the offense for which she was not indicted. We note there was no objection to the indictment or to the robbery instruction in this case.

Under RCr 6.16, an indictment may be amended anytime before the verdict "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Here no additional or different offense was charged, only a different theory of how the robbery was committed was presented in the instructions. In Washington v. Commonwealth, 6 S.W.3d 384 (Ky.App. 1999), the Court held that such variance between the indictment and the instructions would not constitute reversible error if the defendant was not "'misled, surprised, or thrown off guard'" and the "defendant's substantial rights were not affected." Id. at 386 (quoting Robards v. Commonwealth, 419 S.W.2d 570 (Ky. 1967)). In the instant case, we do not see how Nellum could have been surprised or misled by the inclusion of the "causing physical injury" element in the instructions, nor do we see that her substantial rights were affected. The record reveals that through pre-trial discovery, Nellum obtained a copy of the uniform citation, the police report, and the victim's interview, all of which stated that the defendant stabbed the victim in the shoulder with the knife during the robbery. Indeed, Nellum does not claim that the alleged constructive amendment prevented her

from adequately preparing her defense in this case. See Riley v. Commonwealth, 120 S.W.3d 622, 631 (Ky. 2003).

Further, robbing the victim by the use of a dangerous weapon, as provided by the indictment, could encompass causing physical injury to the victim.

> An indictment is sufficient under Kentucky law if it contains "a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged." RCr 6.10(2). The indictment need not detail the essential elements of the charged crime, so long as it fairly informs the accused of the nature of the charged crime . . . and if it informs the accused of the specific offense with which he is charged and does not mislead him.

Ernst v. Commonwealth, 160 S.W.3d 744, 751-52 (Ky. 2005) (internal quotations and citations omitted). Here the indictment gave Nellum notice that she was being charged with robbing Martin with a dangerous weapon, a knife. We do not believe this language would foreclose a finding that Nellum caused physical injury to Martin with the knife in the course of the robbery, and we do not believe this language was misleading or unfairly prejudicial to Nellum.

Nellum also argues that the trial court erred when it allowed a witness to bolster the testimony of Joshua Martin with his prior consistent statement. On direct, Martin testified that the person who robbed him was a female and that he told the police it was a female. On cross-examination, defense counsel impeached Martin with the police report of the incident which stated that Martin had reported that the suspect was a black male, six (6) foot tall, and weighing 250 pounds. When defense counsel asked whether he had made that statement to police, Martin replied, "I don't remember." Defense counsel then proceeded to ask Martin if he could explain the statement to police, whether he was drinking or on drugs on the night of the robbery, whether he thought the

police would "dummy" that up, and whether Martin had any visual impairment at that time.

On direct examination of Detective James Boyers, who interviewed Martin about the crime, the prosecution asked about the description of the suspect given by Martin. Defense counsel objected, arguing that allowing such testimony would permit Boyers to improperly bolster the testimony of Martin with his prior consistent statement. The trial court overruled the objection. Boyers then testified that Martin described the person who robbed him as a black female, 250-300 pounds, unshaven, with shadowing on the face or a five o'clock shadow. The Commonwealth asked if there was any discussion between Boyers and Martin about whether the suspect was male or female. Boyers explained that Martin told him he initially thought the person was a female, and at some point during the events referred to her as "ma'am". In response to that, the person said "I'm not a ma'am, I'm a sir."

Nellum argues that permitting Boyers to testify that Martin described the suspect as a female bolstered Martin's earlier testimony identifying the robber as a female, and constituted inadmissible hearsay. KRE 802. The Commonwealth counters that the testimony was proper under KRE 801A(a)(2) as a statement "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." The Commonwealth points to the defense questioning of Martin regarding his in-court identification of the suspect as a female as an implied charge of recent fabrication.

Defense counsel's argumentative line of questioning (whether Martin thought police would "dummy" the report up and whether Martin was drinking, on drugs or visually impaired at the time) was clearly intended to imply that Martin's trial testimony

that the robber was a female and that he told police the robber was a female was fabricated. See Woodall v. Commonwealth, 63 S.W.3d 104, 131 (Ky. 2001), cert. denied, 537 U.S. 835, 123 S. Ct. 145, 154 L. Ed. 2d 54 (2002). Accordingly, we believe that the prior consistent statement that Martin had previously identified the robber as a female to Boyers was admissible under KRE 801A(a)(2) as a statement offered to rebut the implied charge of recent fabrication.

Nellum's remaining argument is that the trial court erred in allowing Detective Boyers to give lay opinion testimony that invaded the province of the jury. After Boyers testified on direct that Martin had described the robber as having a five o'clock shadow or some shadowing on the face, the prosecution asked Boyers to look at the defendant and tell the jury if he thought there was any discoloration to the right side of her face. Defense counsel immediately objected, arguing that it was a determination for the jury to make. The objection was overruled. Detective Boyers then testified, "I see some darkness on the right side of her face, yes."

KRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
> (a) Rationally based on the perception of the witness; and
> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

It is Nellum's position that allowing Detective Boyers to testify that Nellum had darkness on her face was violative of KRE 701 because the jurors could see Nellum and decide for themselves if her face contained any discoloration. "KRE 701 must be read in conjunction with KRE 602, which limits a lay witness' testimony to matters to which he has personal knowledge." Mills v. Commonwealth, 996 S.W.2d 473, 488 (Ky.

1999), cert. denied, 528 U.S. 1164, 120 S. Ct. 1182, 145 L. Ed. 2d 1088 (2000). Here, there was no evidence that Detective Boyers had any personal knowledge of Nellum or the coloring on her face. Although the testimony was rationally based on Boyers' perception of Nellum's face, Boyers was in no better position than the jurors to determine whether it contained any discoloration. Thus, it was error to allow Boyers to so testify. "An error is harmless where, considering the entire case, the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result would have been different had the error not occurred." Greene v. Commonwealth, 197 S.W.3d 76, 84 (Ky. 2006), cert. denied, __ U.S. __, 127 S. Ct. 1157 (2007). Nevertheless, given that the jurors could see for themselves in court whether Nellum's face contained any discoloration, we do not see that Nellum's substantial rights were affected by the offending testimony. Hence, it was harmless error to allow Boyers to testify that Nellum's face contained discoloration.

For the reasons stated above, the judgment of the Campbell Circuit Court is affirmed.

All sitting. Lambert, C.J., Minton, Noble, Schroder, JJ., concur. Cunningham, J., concurs in result, in which Scott, J., joins, and sees no error in the testimony of Detective Boyers. It was simply an acceptable trial technique to emphasize to the jury the importance of the physical features of the defendant. There was nothing wrong with this type of demonstrative evidence.

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