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**NOT TO BE PUBLISHED OPINION**

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Supreme Court of Kentucky **FINAL**

2006-SC-000025-MR

DATE 12-13-07 EJA/Gow/HDC

CHARLES R. ROBERSON

APPELLANT

V. ON APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN HAYDEN, JUDGE  
NO. 04-CR-00411

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

A circuit court jury convicted Charles R. Roberson of first-degree robbery, and the trial court sentenced him to twenty years' imprisonment. He argues on appeal that the trial court erred by (1) denying his motion for a directed verdict and (2) sustaining the Commonwealth's objection to defense questioning of a witness about how the investigating officer's discovery of marijuana in her apartment motivated her to incriminate Roberson. We affirm because we find no reversible error.

I. FACTS.

A man hiding his face in the hood of the sweatshirt he was wearing robbed a grocery store at knifepoint. The store clerk reported that the robber also wore jeans, had a distinctive walk, and slurred his words a little. The clerk handed the robber approximately \$800 from the cash register—mostly in ten and twenty dollar bills. The

robber then left the store. The clerk summoned the night manager and called 911. The night manager ran out of the store in time to see the robber fleeing on foot. When police arrived, they were told that the robber had just entered a nearby woods.

The police secured the perimeter of the woods, and a canine unit began tracking the robber near the spot where he had entered the woods. Roberson soon emerged from the woods dressed in a pair of tan shorts, which was unusual attire for the cool, rainy early morning. Police searched him for weapons but found none. The search of Roberson produced \$100 in twenty dollar bills. Roberson told police that he was on his way back to his sister's home and that she had given him the money. He later stated that he had gotten the money from the place that manages his money after hearing that his sister denied giving him money. The canine and police search of the woods ultimately failed to uncover any clothing, money, or a knife.

Police took Roberson to the convenience store where the clerk thought Roberson's voice sounded like the robber's and that his walk looked like the robber's. But the clerk could not make a positive identification since the robber's face had been hidden from view by the sweatshirt hood.

Meanwhile, other officers proceeded to Roberson's sister's apartment. The sister told them that she had not given Roberson any money. She also said that he watched television with her, but he had left her apartment earlier that morning to go for a walk. When asked what he was wearing, she initially said she could not remember. But she eventually agreed, "yeah, I guess," after repeated questioning as to whether Roberson was wearing a dark blue hooded sweatshirt, jeans, and tennis shoes.

At trial, the sister eventually gave two explanations for agreeing to the questions about Roberson's apparel. At first, she contended that she finally relented to police insistence because she had been in bed asleep when the police arrived at her apartment; and she simply wanted to be allowed to go back to bed. Later, she testified that police found marijuana when entering her apartment. By avowal, she further stated that she agreed to what she thought the police wanted to hear about her brother's apparel because she feared going to jail herself.

## II. ANALYSIS.

### A. The Trial Court Did Not Err in Denying Roberson's Motion for a Directed Verdict.

Roberson contends that the trial court erred when it denied his motion for a directed verdict of acquittal. According to him, the Commonwealth failed to present "evidence of substance" and produced "no more than a mere scintilla of evidence" against him, thus, entitling him to a directed verdict of acquittal.<sup>1</sup> He argues in his brief that "[t]he evidence produced was not even a mere scintilla. The only evidence linking Roberson to this crime was being found at the scene within 10 minutes of the robbery."

We disagree with Roberson's characterization of the evidence and his contention that he was entitled to a directed verdict of acquittal. While the Commonwealth's case was largely circumstantial, it, nonetheless, presented more evidence than Roberson's presence at the scene near the time of the robbery.

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<sup>1</sup> Commonwealth v. Sawhill, 660 S.W.2d 3, 5 (Ky. 1983) ("It should be remembered that the trial court is certainly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. Obviously, there must be evidence of substance.").

Although the store clerk was unable to describe the robber's face, the clerk told police that Roberson's manner of walking and talking resembled the distinctive way in which the robber walked and talked. Furthermore, Roberson was seen leaving the woods within minutes of the crime's occurrence and after police had secured the perimeter of this area based upon an eyewitness report that the robber had fled there.<sup>2</sup> Despite cool temperatures and rain, he was wearing only shorts and was found in possession of a sum of money in twenty dollar bills. His sister stated at least once that she "guessed" he was wearing a hooded sweatshirt, jeans, and tennis shoes when he left her apartment that morning. Roberson notably changed his story concerning how he got the money after police told him his sister denied giving him money. Given this evidence, the trial court properly denied the motion for a directed verdict of acquittal.<sup>3</sup>

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<sup>2</sup> Roberson cites Hodges v. Commonwealth, 473 S.W.2d 811 (Ky. 1971), as stating that there was insufficient evidence to sustain a conviction where "the defendant was seen five hours after the burglary emerging from a hole in the wall of the building that was burglarized." However, Hodges actually found there was sufficient evidence to convict the one defendant (Moore) who had been seen emerging from the hole in the building's wall shortly after a burglar alarm rang but was not apprehended until five hours later when he was found lying under a log with the other defendant (Hodge). *Id.* at 812. The evidence was only insufficient as to Hodge, who was not seen emerging from the building's hole but, rather, was found under a log with Moore five hours later. *Id.* at 814. So the Hodge case would not support a directed verdict of acquittal for Roberson.

<sup>3</sup> Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). ("On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.")

B. No Reversible Error in Not Permitting Specific Question on Sister's Motivation for Her Statement to Police Regarding Roberson's Clothing.

Roberson argues that the trial court deprived him of his rights under the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution when it did not permit defense counsel to ask his sister about how the investigating police officers' awareness of the marijuana in her apartment may have motivated her statement to police regarding the clothing he wore when leaving the apartment the morning of the robbery. Having carefully reviewed the record concerning this issue, we conclude that no reversible error occurred.

The Commonwealth called Roberson's sister to testify in its case-in-chief. She testified that she was in bed asleep when police came into the apartment in the pre-dawn hours on the day of the robbery. She stated that the investigating detective asked her three times what clothing Roberson had been wearing when he left the apartment earlier that morning. According to her testimony, she told the detective more than once that she did not know what he was wearing because she had not paid attention to his attire. But she testified that she eventually relented to answer "yes" or "yeah, I guess" when the detective asked her if he had been wearing a dark blue hooded sweatshirt, jeans, and tennis shoes when leaving the apartment because the detective would not take no for an answer. She testified at that time that police did not find anything in her apartment despite a search. She did not further elaborate on her reasons for eventually relenting to police insistence about Roberson's attire other than stating that she wanted the police to leave so she could go back to bed.

During Roberson's case, defense counsel called Roberson's grandmother to introduce a prior inconsistent statement by Roberson's sister. Defense counsel explained to the trial court that Roberson's grandmother had been present at a meeting with defense counsel in which Roberson's sister had stated that police found marijuana in her apartment on the morning of the robbery and that she felt compelled to say what police wanted because she feared reprisal. Defense counsel argued that the sister had denied saying anything more to counsel in her earlier testimony but that this denial was inconsistent with statements she had made in the meeting with defense counsel. Counsel sought to question the grandmother about the statement.

The trial court suggested that as an alternative, defense counsel should question the sister more directly about her statements, rather than calling the grandmother to testify.

Defense counsel then called the sister to testify. In response to defense counsel's question about what else, other than watching television, she might have been doing in her apartment that morning, the sister admitted that she had been smoking marijuana with her boyfriend and Roberson that morning before the police arrived. She testified that the marijuana was in her bedroom when the first police officer arrived. Although expressly cautioned by counsel not to repeat what the police officer might have said, she was then asked what she might have done in response to a statement from the police. She stated that she "put it up, hid it." Counsel then asked, in essence, how being caught with marijuana in her apartment might have affected what she told police—particularly in relation to what she said about what Roberson was wearing that morning.

At that point in the questioning, the Commonwealth objected to this question as self-serving and repetitive and expressed a concern that the sister's own Fifth Amendment rights might be implicated. After a bench conference concerning what defense counsel intended to show and requesting clarification as to the exact question defense counsel wished to ask, defense counsel stated that she intended to ask the sister whether "after she hid the marijuana, what effect, if any, did this have on her statement?" The Commonwealth repeated its objection, which the trial court sustained. Defense counsel declined to question the sister further but requested the trial court's permission to proceed with an avowal, which was granted.

On avowal, the sister clearly stated that she hid the marijuana because she was afraid she would be charged with a crime. She also testified that due to this fear, she wanted to get the police out of her apartment and that she told the police what they wanted to hear to get them to leave.

We agree with Roberson that cross-examination into any motives that might have affected this witness's statement is certainly important, and we recognize that a fear of being charged with a crime could be a compelling reason to change one's statement to police—more so than her originally stated reason of wanting to go back to sleep. The trial court abused its discretion when it sustained the Commonwealth's objection. But we agree with the Commonwealth that Roberson had the opportunity to argue to the jury the potential impact on the sister's statement of the police discovery of marijuana in her apartment. We view the error as harmless.<sup>4</sup>

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<sup>4</sup> Kentucky Rules of Criminal Procedure (RCr) 9.24; Kentucky Rules of Evidence (KRE) 103(a).



## II. CONCLUSION.

For the foregoing reasons, the judgment of the Henderson Circuit Court is hereby affirmed.

All sitting. Lambert, C.J.; Abramson, Minton, Schroder, and Scott, JJ., concur.

Noble, J., dissents by separate opinion in which Cunningham, J., joins.

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# Supreme Court of Kentucky

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## DISSENTING OPINION BY JUSTICE NOBLE

The trial court's refusal to allow Roberson to cross-examine his sister about her motive to tell the police what they wanted to hear could not be harmless error given the extremely circumstantial nature of the evidence in this case.

While Roberson's sister was first being questioned by police, she repeatedly stated that she was not sure what Roberson had been wearing on the morning of the robbery. When the police continued to ask the sister whether Roberson had been wearing jeans, she eventually gave in and admitted that he had. This statement, when combined with the store clerk's testimony about what the robber had been wearing, amounted to an identification of Roberson as the perpetrator of the crime. As such, the sister's testimony was a significant portion of the scant evidence of Roberson's guilt.

Roberson was allowed to begin exploring his sister's motive for relenting to the police, but the trial court severely limited the testimony to the fact that the sister possessed marijuana on the morning the police spoke with her. The trial court prevented her from testifying that she feared the police would find out about the marijuana and charge her with a crime. More importantly, the trial court prevented her

from testifying that because of the marijuana, she wanted to get the police out of her apartment as fast as possible, and that this was why she ultimately told them what they wanted to hear.

The majority agrees that the trial court's refusal to allow the sister to testify in this regard was error. Nevertheless, the majority finds the error harmless because Roberson had the opportunity to argue to the jury that his sister's admitted marijuana possession colored her statement to the police.

However, mere argument that could appear speculative about a witness's motive for answering police questioning in a certain way is no substitute for direct evidence from the witness explaining why she answered as she did. The evidence offered by Roberson on avowal directly revealed his sister's motive to tell the police what they wanted to hear and showed that her changed answer was not necessarily the result of a decision to finally tell the truth. Had Roberson been able to test his sister's testimony in the way he proposed (and demonstrated on avowal), its weight with the jury likely would have been reduced significantly. This would have undercut a significant portion of the Commonwealth's circumstantial case, namely the evidence identifying Roberson as the perpetrator.

The trial court's error, then, had a reasonable probability of affecting the verdict by allowing a significant portion of a weak case to go unquestioned. This cannot be harmless error. For this reason, I dissent.

Cunningham, J., joins this dissenting opinion.