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RENDERED: DECEMBER 20, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000733-MR

DATE 1-10-08 D.C.

JASON RICHARDS — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 06-CR-00204

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Jason Richards appeals as a matter of right[1] from a judgment convicting him of third-degree burglary and sentencing him to an enhanced term of twenty years' imprisonment as a first-degree persistent felony offender (PFO1). We find no reversible error and affirm the judgment.

I. FACTS.

Responding to a security alarm after normal business hours, a police officer arrived at a day care center to see a white male inside the center's perimeter fence. Seeing the officer, the man entered the center's building, exited on the opposite side of the building, and ran through a hole in the perimeter fence. With other officers assisting, the man was quickly arrested. Richards admits that he was the man arrested.

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[1] Ky. Const. § 110(2)(b).

Police found that the center's door through which the officer saw Richards exit was still halfway open. Police also found a broken window in the area where the first-responding officer first saw Richards and saw a tire iron on the ground outside directly beneath the window. Inside, they found muddy shoeprints on construction paper on a table underneath the broken window. Tests later revealed that fingerprints left on the broken window were Richards's, but the tire iron produced no identifying prints. Tests of the muddy shoeprints were inconclusive.

Police discovered that Richards lived in the neighborhood. They noted on their reports that Richards was under the influence of alcohol or drugs at the time of arrest because he told them that he had been using drugs and drinking.

Richards was indicted on charges of third-degree burglary and of being a PFO1. His defense at the jury trial was voluntary intoxication. At trial, he testified that he had drunk a bottle of brandy and taken two methadone pills at his home that night. Richards said that he started to hallucinate and remembered going out to the porch of the home. That is the last thing he remembered, he said, before being at the police station after his arrest.

The jury rejected Richards's voluntary intoxication defense and found him guilty of third-degree burglary and PFO1. The trial court followed the jury's recommendation and sentenced Richards to three years' imprisonment on the burglary charge, enhanced to twenty years as a PFO1.

Richards raises three issues on appeal.

II. ANALYSIS.

A. The Trial Court Did Not Err in Refusing to Grant a Mistrial for Officer Offering His Opinion that Shoeprint Came from Richards.

The first-responding police officer testified to finding a fresh, muddy shoeprint on construction paper inside and beneath the broken window. In an apparent attempt to introduce into evidence the paper containing the shoeprint, the Commonwealth showed it to the officer and asked him if he was sure that the paper was the evidence he had collected at the scene. In a non-responsive answer, the officer volunteered that he thought the prints were made by Richards's boots because of the distinctive triangle shape and ridges of the muddy print. Richards's counsel objected, alleging that the officer did not have a basis for, or the expertise to draw, this conclusion and that this amounted to the officer stating his belief in Richards's guilt.

The Commonwealth responded that it was simply trying to authenticate the item for evidentiary purposes and agreed that the court could give the jury a curative admonition. But Richards's counsel declined the admonition, contending that an admonition would not cure the error. Richards moved for a mistrial. The trial court denied this motion, stating that the officer was explaining why he thought it wise to collect the paper at the scene. The trial court assured Richards's counsel that he could thoroughly cross-examine the officer as to this matter. Upon further questioning, the officer admitted that the crime laboratory was unable to match the muddy print to the boots that Richards had been wearing on the night of the arrest and conceded that he had no formal training in identifying shoeprints.

Richards contends that the trial court erred in denying his motion for a mistrial. We disagree. A mistrial is an extraordinary remedy that is only warranted in cases of manifest necessity.[2] Although not directly argued to the trial court, it appears that the testimony at issue may well have qualified as proper lay witness testimony under Kentucky Rules of Evidence (KRE) 701.[3] In essence, the witness related that he believed the fresh muddy shoeprints were left by Richards because he saw Richards wearing muddy boots at the scene. The officer's testimony on this issue did not establish all elements of the offense but simply indicated his belief that the shoeprints belonged to Richards. And any prejudicial effect was tempered by the officer's admission that he was not an expert on identifying shoeprints and that the crime laboratory had been unable to establish conclusively that the prints came from Richards's boots. More importantly, any prejudicial effect could have been cured by an admonition.[4] Since Richards did not deny being in the building but, rather, defended on a lack of memory and lack of criminal intent brought on by voluntary intoxication, any error was harmless.[5]

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2 Maxie v. Commonwealth, 82 S.W.3d 860, 863 (Ky. 2002).

3 The version of KRE 701 in effect at the time of trial allowed lay witnesses to testify to their opinions so long as these opinions are "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." The current version of KRE 701 further requires that the lay witness's opinion be "[n]ot based on scientific, technical, or other specialized knowledge within the scope of Rule 702" (which allows expert testimony on matters of "scientific, technical, or other specialized knowledge"). Since the officer observed Richards wearing muddy boots at the time he was apprehended, he properly testified to his *belief* that the muddy prints found inside the building were those of Richards. Such opinion was rationally based on his own perceptions and possibly helpful to the jury's understanding of the facts at issue so it was probably permissible under the then-effective version of KRE 701.

4 Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005) (since an admonition would have easily cured any error in admission of that particular type of evidence, there was no manifest necessity for a mistrial).

5 Kentucky Rules of Criminal Procedure (RCr) 9.24.

B. The Trial Court Did Not Err in Admitting Numerous Photographs of Crime Scene.

Richards contends that the trial court erred in overruling his objection to the admission of approximately twenty photographs of the day care center. Even if such evidence were cumulative, we could not grant relief for this on appeal unless it constituted error that affected Richards's substantial rights in some manner.[6] We note Richards does not even allege or argue any prejudicial effect to his rights other than his assertion that the evidence was cumulative. Since these photographs were not sensational or gruesome or otherwise inflammatory,[7] we find no indication that their introduction into evidence would have abridged Richards's substantial rights.

We find no abuse of discretion in the trial court's admission of these photographs.[8] Although they were numerous, the photographs showed various areas of the center at various angles. Presumably, these photos helped the jury envision the witnesses' reported observations of the crime scene[9] and Richards's entrances into and exits from various points on the premises.

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6 RCr 9.24.

7 Although Richards does not assert this argument on appeal, we note that his trial counsel argued to the trial court that the appearance of children's toys in the photographs might elicit an emotional reaction in jurors. But, as the Commonwealth argued to the trial court, the presence of toys was simply due to the nature of the building as a day care center. We find no abuse of discretion in allowing in photographs showing toys in the center.

8 Johnson v. Commonwealth, 184 S.W.3d 544, 551 (Ky. 2005) (trial court's decision to admit evidence subject to abuse of discretion standard of review).

9 We note that these photographs were not taken on the evening in question but, rather, were taken during daylight hours a few days before trial—apparently, in a different season of the year. Nonetheless, the photographs would enable the jury to visualize the general layout of the premises.

C. Any Error in Allowing Officer to Testify About Richards's Statement at the Crime Scene was Harmless.

A few days before trial, the first-responding officer gave the Commonwealth's attorney a memorandum recounting a statement allegedly made to him by Roberts at the arrest scene. The statement was not audiotaped or videotaped, nor did Richards sign a written statement. Rather, the officer's memorandum simply recounted his recollections of Richards's oral statement to him on the night in question. The statement was then furnished to the defense in discovery.

At a hearing before the trial court, both sides agreed that the Commonwealth would not attempt to introduce the statement during its case-in-chief because the statement was disclosed late. But the Commonwealth argued that it should be allowed to use the statement to impeach Richards. The defense countered that the statement should not be used at all. The trial court ruled that the Commonwealth could use Richards's statement if Richards testified at trial and his testimony was inconsistent with this statement.

During Richards's testimony, the Commonwealth asked him if he remembered making a statement to the first-responding officer. Richards replied that he did not remember making a statement.

Accepting the Commonwealth's argument that Richards's lack of memory of the statement was enough to trigger its use, the trial court allowed the Commonwealth, in its rebuttal, to bring the first responding officer back to the stand for the purpose of introducing Richards's statement.

The officer testified that Richards said he was upset about something on the day of his arrest. He had been drinking that day, and he was heading home. He used a

shortcut through the premises of a nearby fire station. The officer then testified about why he did not believe Richards's story, citing neighboring high school students' habit of cutting through the center's parking lot to get to school and certain geographic features of the surroundings. The officer stated that he did not notice any signs of Richards being intoxicated at the scene even though the officer had checked "under the influence" on his report after Richards reported drinking and drug use. On cross-examination, the officer admitted that people who had been using drugs or drinking often did not remember things correctly and that he did not investigate all the geographic features of the surroundings that night.

Although we may question whether Richards's claimed lack of memory rose to the level of an inconsistent statement under the trial court's earlier ruling, we cannot say that the ruling was an abuse of discretion. More importantly, we find that the effect of admitting this testimony was, at most, a harmless error. This statement did not amount to an admission of actually entering the building without authorization or of intending to commit a further crime,[10] and the officer was thoroughly cross-examined about his belief that Richards's statement "didn't add up." Furthermore, in light of the overwhelming evidence of Richards's guilt, any error in the admission of statements made to the first-responding officer was certainly harmless.[11]

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[10] "A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." KRS 511.040(1).

[11] RCr 9.24.

III. CONCLUSION.

For the foregoing reasons, the circuit court's judgment is AFFIRMED.

All sitting. Lambert, C.J.; Abramson, Cunningham, Minton, Schroder, and Scott, JJ., concur. Noble, J., concurs in result only because appellant's prior statement, which was disclosed late and under court order to be used in rebuttal only, was improperly admitted in the Commonwealth's case in chief; but it is harmless error because there was no reasonable probability that it affected the verdict.

COUNSEL FOR APPELLANT:

Euva D. May
Assistant Public Advocate
Appellate Division
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Kenneth Wayne Riggs
Assistant Attorney General
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601