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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-11-08 ELAGraham, DC.

2006-SC-000865-MR

DERWIN NICKELBERRY — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
NO. 05-CR-003685

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment in which Appellant was convicted of fifteen (15) counts of First-Degree Robbery and three (3) counts of Theft by Unlawful Taking Over $300 for the armed robberies of a series of businesses in the Louisville area in 2003. Appellant assigns as error that: he was not tried within the 180-day time period in KRS 500.110; his co-defendant's confession was not corroborated as required by RCr 9.60; the evidence was insufficient to support the convictions because it was based solely on the testimony of two accomplices; the Commonwealth did not offer the testimony of the victims, in violation of his right to confrontation; and he was denied the correct number of peremptory challenges. We reject the claimed errors due to their lack of merit or the failure to preserve the error for appellate review. Hence, we affirm.

In late summer/early fall of 2003, a string of armed robberies was committed in the Louisville area. The businesses robbed were a Sonic restaurant, a Waffle House,

an Applebee's, a Dairy Queen, a Burger King, a Kentucky Fried Chicken, a Wendy's, and a Blockbuster Video store. On December 14, 2005, Appellant, Derwin Nickelberry (along with several co-defendants) was indicted in connection with the robberies on one (1) count of Criminal Syndication, three (3) counts of Theft by Unlawful Taking Over $300, and thirty-nine (39) counts of First-Degree Robbery. A portion of these counts were tried before a jury on October 2 - 6, 2006. Co-defendant Antiwan Tillman also stood trial with Nickelberry. Two other co-defendants, Tommy Hardin and Jeannine Spicer, accepted plea deals and testified at trial. Nickelberry was ultimately convicted of three (3) counts of Theft by Unlawful Taking Over $300 and fifteen (15) counts of First-Degree Robbery, and was sentenced to an aggregate of seventy (70) years imprisonment.

KRS 500.110

KRS 500.110 provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in any jurisdiction of this state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

At the time of Nickelberry's indictment in this case (December 14, 2005), he was serving a ten-year prison sentence pursuant to prior judgments entered on June 24, 2005 and September 19, 2005. Nickelberry's counsel filed a speedy trial motion in the present

case on March 23, 2006, and Nickelberry was tried October 2 – 6, 2006. Nickelberry argues that because he was not tried within the 180-day time period in KRS 500.110, his indictment should have been dismissed.

It appears from the record that the first time the issue of KRS 500.110 was raised was before this Court. While defense counsel filed a speedy trial motion, that motion was based on state and federal constitutional grounds, not on statutory grounds. Issues not raised before the trial court cannot be raised for the first time on appeal. Grundy v. Commonwealth, 25 S.W.3d 76, 84 (Ky. 2000).

In any event, KRS 500.110 would not apply in this case because it appears from the record that a detainer was not filed relative to the indictment in this case. The existence of a detainer is a strict requirement for the activation of KRS 500.110. Donahoo v. Dortch, 128 S.W.3d 491, 493 (Ky. 2004).

RCr 9.60

Nickelberry argues that his conviction for First-Degree Robbery of the Sonic restaurant was not supported by sufficient evidence because the testimony of Tommy Hardin, which implicated Nickelberry in the robbery, was not corroborated as required by RCr 9.60. RCr 9.60 provides, "[a] confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed."

It is undisputed that the only evidence of Nickelberry's involvement in the Sonic robbery was from the testimony of Tommy Hardin, one of Nickelberry's co-defendants in the case who pled guilty and agreed to testify at Nickelberry's trial. Unlike the other robberies, there was no testimony by the victim in the Sonic robbery. It is Nickelberry's position that because the only evidence against him in the Sonic robbery was the

testimony of Hardin, which Nickelberry maintains was a confession of a defendant, said testimony could not constitute sufficient evidence to convict him of the crime under RCr 9.60.

From our reading of RCr 9.60, "[a] confession of a defendant" refers to the confession of the defendant who is challenging his conviction under RCr 9.60, not the confession of a co-defendant, and Nickelberry did not give a confession in this case. There is no authority for application of RCr 9.60 to a confession of a co-defendant. In fact, as we shall discuss further below, even the uncorroborated testimony of a co-defendant is sufficient evidence to support a conviction of the defendant. Hodge v. Commonwealth, 17 S.W.3d 824, 841 (Ky. 2000), cert. den., 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). The purpose of RCr 9.60 is to insure proof of corpus delicti, beyond the out of court confession of the accused, which was established in the instant case. See Lofthouse v. Commonwealth, 13 S.W.3d 236, 242 (Ky. 2000); Taylor v. Commonwealth, 461 S.W.2d 920, 922-23 (Ky. 1970). In any event, Hardin testified in open court against Nickelberry regarding his involvement in the Sonic robbery.

A trial court's decision regarding a directed verdict motion is reviewed under the standard articulated in 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.

Hardin testified that late in the evening of July 29, 2003, he, Spicer and Nickelberry drove to an area next to the Sonic restaurant. After the restaurant closed, a white male employee exited the restaurant and began walking to his car. Hardin and Nickelberry, armed with a pellet gun, forced the employee back into the restaurant. Once inside, the employee tripped the security alarm, and it began to sound. According to Hardin, Nickelberry became angry and started beating the employee about the head with the pellet gun. Nickelberry and Hardin then fled the scene without stealing any money from the restaurant.

Detective Bryan Arnold testified that when he arrived at the scene of the Sonic robbery, there was a large amount of blood present and the victim had already been transported to the hospital by ambulance. Detective Arnold stated that the victim did not identify either of the robbers.

Viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence for a reasonable juror to believe that Nickelberry was guilty of First-Degree Robbery of the Sonic restaurant. Accordingly, the motion for directed verdict was properly denied.

ACCOMPLICE CORROBORATION

Nickelberry next argues that the evidence was insufficient to support his convictions because they were based solely on the testimony of his two accomplices, Hardin and Spicer. Nickelberry asks this Court to adopt an accomplice corroboration requirement and, in the alternative, maintains that juries should be given a cautionary instruction on the use of accomplice testimony. Nickelberry admits that he did not specifically raise the issue of accomplice corroboration, but rather only argued generally that Hardin's and Spicer's testimony was insufficient to support his convictions.

Even if we accept that the issue was preserved for review, we adjudge that it has no merit. While Kentucky previously had an accomplice corroboration requirement, RCr 9.62, said requirement was abolished in 1980. In 1980, Kentucky returned to its common law view that the testimony of an accomplice was competent, and that any issue of the witness' credibility was for the jury. See Murphy v. Commonwealth, 652 S.W.2d 69, 72 (Ky. 1983), abrogated on other grounds by Carmel v. Texas, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000). As recently as 2000, this Court reaffirmed the rule that a conviction can be solely supported by the uncorroborated testimony of an accomplice. Hodge, 17 S.W.3d at 841. We see no reason to depart from this view today.

As for Nickelberry's contention that the jury should have at least received a cautionary instruction on accomplice testimony, Nickelberry did not request such an instruction or object to the failure to give such an instruction. See RCr 9.54(2). Therefore, this issue is precluded from our review. Fulcher v. Commonwealth, 149 S.W.3d 363, 373 (Ky. 2004).

We likewise reject Nickelberry's argument that he was denied his constitutional right to confront the witnesses against him as to those charges where the victims of the robberies did not testify. U.S. Const. amend. VI. There is no requirement that the victim of the crime testify at trial. As discussed above, Nickelberry's convictions were sufficiently supported by the testimony of other witnesses to the crimes: his accomplices, Hardin and Spicer. See Hodge, 17 S.W.3d at 841. And both Hardin and Spicer were subject to the rigorous cross-examination by Nickelberry. Hence, there was no Confrontation Clause violation.

PEREMPTORY CHALLENGES

Nickelberry claims that the trial court incorrectly calculated the number of peremptory challenges to which he was entitled. Nickelberry claims that under RCr 9.40, the defense was entitled to a total of thirteen (13) peremptory challenges, instead of the eleven (11) allotted by the trial court.

At the conclusion of voir dire, the trial court brought up the subject of how many peremptory challenges each party should receive in this case. The prosecutor and Nickelberry's counsel agreed that each defendant got nine (9) strikes to share between them, and then each defendant got one (1) additional strike to exercise independently from the other. After consideration of the issue, the court agreed and allotted a total of eleven (11) peremptory strikes to the defense. The defendants used all of their peremptory strikes.

According to this Court's reading of RCr 9.40 in Springer v. Commonwealth, 998 S.W.2d 439, 444 (Ky. 1999), because the two defendants were tried jointly, and two alternate jurors were seated, the defendants were indeed entitled to a total of thirteen (13) peremptory strikes in this case. However, as conceded by Nickelberry, this issue was not preserved for appellate review. Nickelberry seeks review of the error under RCr 10.26.

This Court in Shane v. Commonwealth, 243 S.W.3d 336 (Ky. 2007), has recently revisited the issue of peremptory strikes and returned to the rule espoused in Thomas v. Commonwealth, 864 S.W.2d 252 (Ky. 1993), that prejudice is presumed when a defendant is forced to exhaust a peremptory challenge on a prospective juror who should have been excused for cause, overruling Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006). In the instant case, however, Nickelberry does not claim that he was

forced to use a peremptory strike on a juror who should have been excused for cause. In fact, he has no complaint about the jury in his case. Rather, Nickelberry contends that it was palpable error that the defense was not allotted the two (2) other peremptory strikes to which he was entitled under RCr 9.40.

In Mills v. Commonwealth, 95 S.W.3d 838, 843 (Ky. 2003), this Court stated, "we have repeatedly held that an improper allocation of peremptory challenges is reversible error 'if the issue is properly preserved by the adversely affected litigant.'" (quoting Kentucky Farm Bureau Mutual Insurance Co. v. Cook, 590 S.W.2d 875, 877 (Ky. 1979)). Shane neither eliminated the requirement of preservation of a peremptory calculation error, nor elevated said error to automatic palpable error status. In the case at bar, Nickelberry not only failed to object to the number of peremptory challenges allotted him, but was one of the parties responsible for misadvising the court as to the correct number of peremptory strikes. That fact, coupled with the fact that Nickelberry has no complaint on appeal about the jury, leads this Court to conclude that there was no palpable error.

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

All sitting. All concur, except Venters, J., not sitting.

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