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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000930-TG

CHARLES H. SULLIVAN — APPELLANT

V.

ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
NO. 06-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal[1] from a judgment of the Meade Circuit Court convicting Appellant of 23 counts related to a series of break-ins. Appellant argues (1) that testimony presented by the Commonwealth improperly allowed the jury to consider Appellant's exercise of his Fifth Amendment right to remain silent, and (2) that the introduction into evidence of a hat with marijuana symbols was more prejudicial than probative. We affirm the judgment of the circuit court.

This case arose out of a series of break-ins at schools, churches, vehicles, residences, and businesses in Meade County, Kentucky beginning in August 2005. No

[1] This appeal was originally filed in the Kentucky Court of Appeals. Because Appellant's total sentence was 20 years imprisonment, the Court of Appeals concluded that this Court was the proper venue. See KY. CONST. § 110(2)(b). On Appellant's motion, the Court of Appeals made a Recommendation of Transfer, and this Court thereafter granted transfer.

leads came in the case until January 2006. At that time, one of the victims, whose credit card had been stolen, reported the theft to her credit card company. The company informed her that her card had been used at two area Wal-Marts. From the credit card number, police were able to obtain duplicate receipts from Wal-Mart, as well as security camera footage from the time that the purchases were made. The security camera footage showed two men, with the taller of the two men wearing a coat and a hat depicting a marijuana leaf. The men's faces, however, were not clearly visible.

The security camera footage also depicted the men leaving in a purple pickup truck. This truck, which belonged to Michael Lee, eventually led police to Lee's home, where he lived with his fiancée Kathy Mullins, Mullins's children, and Appellant. After finding some of the stolen and fraudulently purchased items in Lee's truck, police obtained a warrant and searched Lee's home. Mullins and Appellant were present when police conducted the search.

When police questioned Appellant at the home, Appellant admitted to using stolen credit cards at Wal-Mart. He stated that Mullins and Lee used the cards as well, and that Lee had stolen some of the cards. Lee, meanwhile, admitted to involvement in the burglaries, but claimed that he would drop Appellant off at the location to be burglarized, and then pick up Appellant when he was finished. Appellant denied involvement in the burglaries until police confronted him with a shoe print matching his shoe, which police had taken from the snow outside one of the burglarized schools. Appellant then admitted to being involved in that burglary, and to using police scanners taken from the school.

Police recovered stolen and fraudulently purchased property from the home, Lee's truck, and Lee's booth at a nearby flea market. Police also recovered the coat and "marijuana hat" worn by the taller man in the security camera footage.

Appellant and Lee were each charged with a number of counts related to the burglaries and use of the stolen credit cards. Lee pleaded guilty as an accomplice to each count, and testified against Appellant. At Appellant's trial, 51 counts were submitted to the jury. The jury convicted Appellant of 23 counts, and of being a persistent felony offender. The jury recommended a total sentence of 45 years imprisonment, but the trial court imposed a 20-year sentence due to statutory limitations.[2] This appeal followed.

DEPUTY SHERIFF'S COMMENT THAT APPELLANT DID NOT "OFFER A WHOLE LOT OF COOPERATION"

At trial, Deputy Sheriff Mike Robinson testified extensively about the burglary investigation. During direct examination by the Commonwealth, he discussed the interview that he and other police officers conducted with Appellant. Deputy Robinson testified that Appellant "didn't offer a whole lot of cooperation," and that the interview "did not last very long at all." The prosecutor then asked whether "the cooperation of suspects in this case [was] helpful" in recovering stolen property for the victims. Deputy Robinson indicated that Lee and Mullins were helpful through their cooperation, but that Appellant was not helpful.

Defense counsel objected, and the parties discussed the issue at length in chambers. The trial court was concerned that comments about Appellant's cooperation were an inference of guilt, resulting from Appellant's exercising his right to remain silent. The Commonwealth argued that the questions about Lee's and Mullins's cooperation

[2] KRS 532.110(1).

were in anticipation of Appellant's defense. Specifically, the Commonwealth anticipated that Appellant would argue that Lee was lying on the witness stand in order to implicate Appellant and obtain a lesser sentence.

Further, the Commonwealth explained that the questions were not intended as a comment on Appellant's remaining silent. Deputy Robinson testified in chambers that at no time did Appellant choose to remain silent, nor refuse to speak to police. Robinson clarified that, by saying Appellant "didn't offer a whole lot of cooperation," he was referring to the fact that Appellant's answers were not helpful, and that police eventually ended the interview.

The trial court ruled that Robinson could testify as to what Appellant said, but that he could not testify as to what Appellant did *not* say, and that Robinson could not suggest that Appellant was uncooperative due to his silence. The court then offered to give the jury a curative admonition "that a person doesn't have to talk to the police." Defense counsel declined the admonition, stating that he did not want to draw any more attention to Deputy Robinson's statements.

Appellant argues that Deputy Robinson's statement that Appellant "didn't offer a whole lot of cooperation," when combined with his statements that other suspects (specifically Lee and Mullins) *were* helpful, amounted to a comment on Appellant's exercising his right to remain silent.

We conclude that this issue is not properly preserved for appellate review. A party must make known to the court the action it desires the court to take. RCr 9.22. Appellant failed to request an admonition or a mistrial. Appellant therefore waived the issue. Coulthard v. Commonwealth, 230 S.W.3d 572, 578 (Ky. 2007); Brock v. Commonwealth, 391 S.W.2d 690, 692 (Ky. 1965). See also Howell v. Commonwealth,

163 S.W.3d 442, 447 (Ky. 2005); West v. Commonwealth, 780 S.W.2d 600, 602 (Ky. 1989) ("RCr 9.22 imposes upon a party the duty to make known to the court the action he desires the court to take or his objection to the action of the court. Failure to comply with this rule renders an error unpreserved.") (internal quotations omitted).

In addition, the trial court specifically asked defense counsel whether he wanted a curative admonition "that a person doesn't have to talk to the police." Defense counsel declined the admonition, not wanting to bring further attention to Deputy Robinson's statements. Failing to request an admonition is generally regarded as trial strategy, and therefore waives the issue on appeal. See Ernst v. Commonwealth, 160 S.W.3d 744, 759 (Ky. 2005); Hall v. Commonwealth, 817 S.W.2d 228, 229 (Ky. 1991), overruled on other grounds by Commonwealth v. Ramsey, 920 S.W.2d 526 (Ky. 1996). While Ernst and Hall discuss the failure to request a limiting admonition, we believe that the same logic applies to curative admonitions. Because Appellant declined a curative admonition and did not request any other relief, the issue was not properly preserved for appeal.

In reviewing the claim under RCr 10.26 for palpable error, we note that, when counsel's failure to preserve an issue is the result of trial strategy, the matter generally does not rise to the level of palpable error. Alexander v. Commonwealth, 220 S.W.3d 704, 710 (Ky.App. 2007). In any event, we cannot say that the testimony about Appellant's lack of cooperation resulted in manifest injustice in this case. The testimony was not clearly a comment on Appellant's silence and, considering all of the evidence, did not rise to the level of "shocking or jurisprudentially intolerable." Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006).

INTRODUCTION OF "MARIJUANA HAT" INTO EVIDENCE

During the direct examination of Deputy Robinson, the Commonwealth sought to introduce into evidence a baseball cap, which depicted a large marijuana leaf on the front, as well as a smaller marijuana leaf on the back. In addition, the word "Marijuana" was written across the bill of the hat. This "marijuana hat" was worn by the taller of the two men in the Wal-Mart security camera footage (Appellant is taller than Lee). Police recovered the hat from the home shared by Lee, Mullins, and Appellant.

The trial court specifically asked defense counsel if he had any objection to the admission of the hat; defense counsel stated that he had no objection. At this point, the trial court examined the hat, and *sua sponte* called the parties into chambers for further discussion. The court expressed its concern that the hat's probative value would be outweighed by its prejudicial effect. The Commonwealth explained that the hat was unique, visible in the Wal-Mart security footage, and worn by the taller of the two men in the footage. The Commonwealth also noted that Appellant is taller than Lee. The trial court then ruled that the hat, while prejudicial, had probative value and could be admitted as evidence. At no point did defense counsel object.

Appellant now argues that the trial court erred in admitting the marijuana hat, because its probative value is substantially outweighed by its prejudicial effect. See KRE 403. First, the error was unpreserved, because defense counsel failed to make any objection to the admission of the hat. See RCr 9.22; West, 780 S.W.2d at 602.

Secondly, even if the issue was preserved, we cannot say it was error to admit the hat. The standard of review for KRE 403 (and other evidentiary rulings) is whether the trial court has abused its discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky.1999). "The test for abuse of discretion is whether the trial judge's decision was

arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. The marijuana hat, while somewhat prejudicial, was also highly probative. The security camera footage never clearly showed the men's faces. The hat was therefore probative of the identity of the taller of the two men, i.e., Appellant.

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

All sitting. All concur.

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