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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED: FEBRUARY 10, 2009
RENDERED: JANUARY 22, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000672-MR

DAMON STUCKEY — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
NOS. 05-CR-002507 AND 07-CR-002076

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING IN PART

After a jury trial, Appellant was found guilty of first-degree robbery (two counts), first-degree assault, possession of a handgun by a convicted felon, third-degree terroristic threatening, and being a persistent felony offender in the second degree, and he was sentenced to thirty-two years in prison. On appeal, Appellant raises four issues, but none constitute reversible error for his felony convictions. Therefore, even though Appellant's misdemeanor conviction for terroristic threatening is reversed, his felony convictions are affirmed.

I. Background

On June 30, 2005, Joseph McPherson, a 72 year-old man, was carjacked and shot in the legs, requiring surgery under general anesthesia. When police first arrived at McPherson's home, he was lying on the curb and told the officers that his black Cadillac had On-Star vehicle tracking. McPherson died of unrelated cancer before the trial in this case and was unable to testify about

his injuries, although 200 pages of his medical records were introduced into evidence.

Soon after McPherson's Cadillac was stolen, it was used to drive to the residence of Shervon Robinson. As Robinson got in her van in front of her residence, and while her two young children sat in the back seat, a man she later identified as Appellant robbed her and stole her purse at gunpoint. When she told the robber she did not have any money in her purse, he threatened to kill her and her children, and so she turned over the purse. The robber did not wear a mask and when he ordered Robinson to get out of the "damn car" and demanded that she turn over her purse, he was standing directly in front of her face. After he left, Robinson called 911 and gave a brief description of the robber, the car he was driving, and part of the license plate number. She gave a more detailed description of the robber when police arrived on the scene, and she recalled that the gun used by the robber was black without a barrel.

Using On-Star, the Cadillac was soon located at an apartment complex within 75 yards of the apartment of Appellant's mother. Detective Kenneth Nauert determined that Appellant was a possible suspect, and he returned to the station to put together a photo-pack, which Robinson used to identify Appellant. Detective Nauert contacted Appellant's mother at her apartment, and she told him that Appellant did not live at her apartment. After securing a search warrant, her apartment was searched and two unopened letters addressed to Appellant at that apartment (one undated, and the other a year old) were recovered. Even though Appellant was not present when his mother's apartment was searched, his brother Desmond was present and was arrested

for possession of a firearm by a convicted felon. The gun recovered at the apartment had a black handle and a silver barrel, which was different from the black gun without a barrel described by Robinson. A photograph of the gun recovered from the apartment was introduced at trial.

The next day, after Detective Nauert sent a wanted poster for Appellant through the police department e-mail system, he received information that police unsuccessfully chased a vehicle believed to be occupied by Appellant. Over a week later, police received information that Appellant was at a specific house, and they surrounded it, called for his exit with a public address system, and as the occupants left the house, he was the last to emerge and was arrested.

At trial, Appellant called his mother as a witness. Among other things, she testified that Appellant did not live at her apartment, that the gun found at her apartment was silver, and that it was Desmond's.

Appellant was convicted by a jury and sentenced to thirty-two years in prison. His appeal to this Court, therefore, is a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Character Evidence

Appellant's first claim of error is that he was substantially prejudiced in two different ways by the introduction of inadmissible character evidence under KRE 404(a) and KRE 404(b), through familial propensity evidence and other crimes evidence of his brother. While cross-examining Appellant's mother and over Appellant's objection, the Commonwealth introduced a photograph of a

gun belonging to Appellant's brother Desmond that was recovered in the search of the mother's apartment, in addition to evidence that at the time of the trial Desmond was incarcerated. Even though evidence of Desmond's current incarceration was irrelevant and inadmissible, when Detective Rick Polin was on the stand and Appellant tried to point the finger for the robberies at Desmond, Appellant opened the door to the Commonwealth introducing a photograph of Desmond's gun.

While cross-examining Detective Polin, counsel for Appellant elicited that Desmond was present and was arrested when the apartment of Desmond and Appellant's mother was searched. On re-direct examination, the Commonwealth elicited that Desmond was arrested for possession of a handgun by a convicted felon and not for the two robberies. On re-cross examination, counsel for Appellant had Detective Polin confirm that Desmond was arrested and that Desmond admitted the gun found in the apartment was his. Thus, since counsel for Appellant brought up the issue of Desmond's arrest and his possession of a gun taken by the police on the day of the robbery, it appeared to the Commonwealth that Appellant was trying to blame Desmond for the robberies because he was arrested very near McPherson's stolen vehicle and he was in possession of a gun similar to the gun described by the second victim, Robinson.

Appellant objects that the above evidence was impermissible character evidence because it showed a sort of familial propensity to commit crimes in violation of KRE 404(a), in addition to it being impermissible other crimes evidence under KRE 404(b). First, though Appellant argues that the

Commonwealth introduced evidence about Desmond to show evidence of Appellant's character through a familial propensity to commit crimes, this argument has no merit because evidence of Appellant's character was not introduced, in addition to the fact that Appellant opened the door to this line of attack by attempting to implicate his brother. As Professor Lawson has noted:

> [The] concept commonly known as "opening the door" involves a somewhat broader form of waiver. It is typically described as follows:
>
> > The term "opening the door" describes what happens when one party introduces evidence and another introduces counterproof to refute or contradict the initial evidence. . . . If the first party objects to the counterproof, or loses the case and claims error in admitting it, typically the objection or claim of error is rejected because he "opened the door."

Robert G. Lawson, The Kentucky Evidence Law Handbook § 1.10[5], at 43 (4th ed. 2003) (quoting 1 Mueller & Kirkpatrick, Federal Evidence § 12 (2d ed. 1994) (footnote omitted) (omission in original).

Second, similar to Appellant's first character evidence claim, the "other crimes" evidence of which Appellant complains was introduced against Desmond, not Appellant, and it does not fall under KRE 404(b), in addition to the fact that it was only introduced after Appellant had opened the door. Appellant elicited that Desmond was present and arrested when their mother's home was searched, thus opening the door to the Commonwealth clarifying that Desmond's arrest was for other crimes and not for the robberies Appellant was standing trial for.

Since Appellant opened the door on these issues through his attempt to shift blame for the robberies to his brother, the Commonwealth was justified in

introducing evidence to rebut Appellant's theory. One of the victims, Robinson, testified that the robber's gun was black with no barrel. The mother of Desmond and Appellant testified that Desmond's gun was silver, and the photograph of the gun introduced into evidence showed it had a black handle, but a silver barrel. Therefore, the photograph was relevant to show that Robinson's description of the robber's gun did not match Desmond's gun, and it helped to show the identity of the robber (as Appellant and not Desmond). In fact, the Commonwealth used the photograph of Desmond's gun along with Robinson's testimony in its closing argument to show that Desmond's gun was not the one used in the robberies and that Desmond was not the robber.

In addition, since Desmond was not called to testify by the defense at trial, the Commonwealth introduced evidence that Desmond was currently incarcerated. Even though Appellant had attempted to implicate Desmond for the robberies, the fact he was incarcerated at the time of trial was not relevant to show that he could have been called to testify by the defense, but that he was not. However, there is no reasonable possibility this affected the verdict and therefore this error was harmless.

Even though the introduction of this evidence may have cast Appellant in a bad light, its primary purpose was to directly contradict Appellant's theory that Desmond committed the robberies. Therefore, Norris v. Commonwealth, 89 S.W.3d 411 (Ky. 2002), and Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998), are distinguishable. In Norris, "the evidence of Mrs. Norris's alleged incest with Ronnie Jr. was inadmissible character evidence. It did nothing more than insinuate that Appellant was probably guilty of incest with his

daughter because everybody in the family routinely committed incest with each other." Norris, 89 S.W.3d at 415 (emphasis added). In Jarvis, "the Commonwealth did not introduce any evidence" that testimony regarding the buying of a controlled substance "played any part in [the victim's] death" and this Court concluded, "The evidence was only used to paint Jarvis in a bad light. The evidence should have been excluded under KRE 404." Jarvis, 960 S.W.2d at 471 (emphasis added). The evidence offered by the Commonwealth against Appellant's brother, if it was character evidence at all, was also offered to rebut Appellant's theory that Desmond committed the robberies. The evidence was neither "nothing more" nor was it "only used" to show a propensity to commit the robberies by Appellant.

B. Discovery Violation and Evidence of Flight

Appellant's second claim of error is that the Commonwealth intentionally withheld information subject to discovery, and thus when Detective Polin testified about a phone conversation he had with the Appellant, the Commonwealth was able to benefit from its discovery violation by putting additional evidence of flight before the jury. Even though the Commonwealth concedes that the prosecutor had in fact failed to disclose the phone call that occurred between Detective Polin and Appellant when the officer told the prosecutor on the morning of trial about the call, the Commonwealth argues on appeal that this evidence was only brought up on re-direct examination in order to correct the earlier response to a question asked by the defense and that the trial court's sustaining of the defense's objection was sufficient to cure any error. Further, it argues that a mistrial was unnecessary. This Court

finds the Commonwealth violated its discovery obligations, but, in this case, the trial court's exclusion of the substance of the conversation was sufficient to cure the error.

As an initial matter, the Commonwealth had a continuing duty to provide discovery. RCr 7.24(8). This duty required the Commonwealth to turn over "any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness. . . ." RCr 7.24(1); Jefferson Rules of Practice Rule 803(A)(3). Contrary to the finding of the trial court, the Appellant's conversation with Detective Polin was evidence of flight (and thus evidence of guilt). In Rodriguez v. Commonwealth, 107 S.W.3d 215, 219 (Ky. 2003), this Court noted the historical basis for admitting evidence of flight: "This common-law rule is based on the inference that the guilty run away but the innocent remain . . . ."

The three instances of "flight" claimed in this case are: first, testimony from Detective Nauert that police unsuccessfully chased a vehicle it believed was occupied by Appellant soon after the robberies; second, testimony from Lieutenant Colbert that when Appellant was eventually arrested, the police surrounded the house and called for him, and he was the last man to exit; and third, Detective Polin's reference to a phone conversation that occurred between him and Appellant soon after the robberies. Appellant argues on appeal that introduction of the fact that this conversation occurred constitutes reversible error.

Evidence of flight passes the KRE 401 relevancy test. "By definition, the common-law rule regarding the admissibility of evidence of flight is a rule of

relevancy. That is, evidence of flight is admissible because it has a tendency to make the existence of the defendant's guilt more probable: a guilty person probably would act like a guilty person." Id. Therefore, testimony that Appellant was unsuccessfully chased by police soon after the robberies and that he was the last to emerge from a surrounded house when he was arrested was relevant. See KRE 401 ("[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Here, the first two instances of flight described above were relevant and admissible, but the basis for the Commonwealth's third flight argument—that Appellant spoke to Detective Polin, but refused to turn himself in and told him "good luck" in catching him—was not produced in discovery, and thus it was not admissible.

Though on appeal the Commonwealth relies on Brady v. Maryland, 373 U.S. 83 (1963), the statement at issue in this case is inculpatory, and thus subject only to the discovery rules. Under these rules, however, the Commonwealth's purported justification that it only brought up the conversation on re-direct examination does not change the fact that it was evidence offered by the Commonwealth in violation of the discovery rules. This Court passed upon the same issue recently in Chestnut v. Commonwealth, 250 S.W.3d 288, 297 (Ky. 2008), where "[t]he Commonwealth assert[ed] that even if the failure to disclose the statements was a discovery violation, the statements could be used in rebuttal." This Court responded, "the duty of discovery imposed by RCr 7.24(1) to disclose incriminating statements does not end at

the close of the Commonwealth's case in chief. Rebuttal does not offer a protective umbrella under which prosecutors may lay in wait." Id.

In Chestnut, this Court read RCr 7.24 in line with its plain meaning and held that an incriminating oral statement by a defendant does not have to be written down in order to be subject to discovery. Id. at 296 ("[W]e find that it is apparent from a reading of the language of the rule that RCr 7.24(1) was intended to apply to both oral and written statements, which were incriminating at the time they were made."). Therefore, the "nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1), since it was plainly incriminating at the time it was made." Id. This is clearly the case here, since part of the Commonwealth's case relied on evidence of Appellant's flight. However, the analysis does not end here; "[t]he United States Supreme Court has held that a discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence were disclosed the result would have been different." Id. at 297.

During re-direct examination by the Commonwealth, Detective Polin said, "We talked on the phone," and a proper and timely objection was made. Though the Commonwealth put the fact that Detective Polin and Appellant spoke soon after the robberies before the jury, it was not permitted to delve into the substance of the conversation. Thus, the jury did not hear that when Polin told Appellant he was looking for him, Appellant told him "good luck" and that he was not turning himself in. The jury only heard that Detective Polin spoke

to Appellant without disclosing the contents of the conversation. The trial court granted the defense's motion to exclude the contents of the phone conversation and denied the defense's motion for a mistrial. This was the correct course of action under these circumstances, and any prejudice was cured by excluding the conversation's contents.

Here, the fact that this conversation took place (without the disclosure of the contents of the conversation) is insufficient for this Court to find it reasonably likely that had the evidence been disclosed the result of the trial would have been different. In addition to the eyewitness testimony of one of the victims and the fact that the stolen car was found very near Appellant's mother's home, there were two other instances of flight tending to show consciousness of guilt.

Even though the Commonwealth violated the discovery rules, the trial court was not required to declare a mistrial. "Whether to grant a mistrial is within the sound discretion of the trial court, and 'such a ruling will not be disturbed absent . . . an abuse of that discretion.'" Bray v. Commonwealth, 177 S.W.3d 741, 752 (Ky. 2005) (quoting Woodard v. Commonwealth, 147 S.W.3d 63, 68 (Ky. 2004)). "A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." Id. Here, the trial court denied the defense's motion for a mistrial, and it did not abuse its discretion under the circumstances, given the amount and types of additional evidence against the Appellant. Id. The trial court correctly excluded the conversation, and properly did not declare a mistrial.

C. Evidence of Serious Physical Injury

Appellant's third claim of error is that there was insufficient evidence to support a serious physical injury as required for a conviction of first-degree assault. During the first robbery, Joseph McPherson was shot in the leg and wounded. Though he remained conscious after he was shot, the 72-year-old victim was taken to the hospital where he was placed under general anesthesia. The bullet had traveled through his left thigh, fracturing his femur, and it then continued into his right calf. His bullet wounds were cleaned, surgery was performed on his patella tendon, and a surgical nail and screws were used to repair his femur. The next day he was able to walk twenty feet with a walker, and by the third day after surgery he was able to walk forty feet with a walker. He was discharged to a rehabilitation center five days after having surgery. Because McPherson died of unrelated cancer before Appellant's trial, he was unable to testify about his injuries.

Since the Commonwealth did not call anyone else with personal knowledge of McPherson's injury, Appellant argues that the 200 pages of medical records introduced into evidence regarding McPherson's shooting injury were insufficient to support the severity of injury required for first-degree assault. First-degree assault requires serious physical injury, which "means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ." KRS 500.080(15). Physical injury "means substantial physical pain or any impairment of physical condition." KRS 500.080(13).

Appellant cites Prince v. Commonwealth, 576 S.W.2d 244, 246 (Ky. App. 1978), for the proposition that the infliction of serious physical injury requires "a fairly strict level of proof." Prince, however, also notes that this level of proof "must be met by sufficient evidence of injury, medical and/or non-medical, taken as a whole, before an instruction on first-degree assault may be given." Id. Here, 200 pages of medical records recounting the nature of his injuries and the medical procedures to treat them provided ample evidence, as a whole, for an instruction on first-degree assault. "The seriousness of a physical injury depends upon the nature of the injury as well as the victim's characteristics." Schrimsher v. Commonwealth, 190 S.W.3d 318, 329 (Ky. 2006). At 72 years of age, McPherson suffered a bullet wound in both legs and was put under general anesthesia, a dangerous procedure for anyone, but especially for a man of advanced age. Even though there was no testimony or evidence about McPherson's condition after his initial hospital stay, the jury did see the medical records from the initial stay. The records showed that his bullet wounds were cleaned, his leg was repaired with a surgical nail and screws, he was using a walker, and he was sent to a rehabilitation center. Under these circumstances, the medical records were sufficient for the jury to be instructed McPherson would have a "prolonged impairment of health" sufficient to satisfy the required serious physical injury for first-degree assault.

The situation here is different from cases like Luttrell v. Commonwealth, 554 S.W.2d 75, 77 (Ky. 1977), cited by Appellant, where a police officer was shot in the chest with bird shot and spent five days in the hospital and six

weeks recuperating for "superficial" injuries. In Luttrell, this Court noted, "While Officer Phillips suffered from his wounds he was not seriously injured in the statutory sense." Id. at 78-79. Though one can be expected to make a full recovery from a "superficial" bird shot wound, the bullet in this case broke McPherson's leg, requiring it to be held together with pins and screws. McPherson's injury caused "prolonged impairment of health" that a reasonable jury could believe he may never have healed from at his age. Therefore, it was correct to instruct the jury in this case on assault in the first degree.

D. Terroristic Threatening

Appellant's fourth claim of error is that the Commonwealth failed to prove he committed the misdemeanor offense of third-degree terroristic threatening within twelve months of the indictment. Appellant acknowledges this claim was not argued before the trial court and asks that it be reviewed under the palpable error rule, RCr 10.26.

The Commonwealth concedes that no evidence was presented to the jury concerning when the indictment was returned. Additionally, it concedes that there was no evidence upon which the jury could have found the misdemeanor offense was committed within twelve months of the indictment. The Commonwealth claims, however, that even though Appellant's misdemeanor conviction was based upon insufficient evidence, it should be upheld because it does not cause a manifest injustice which this Court recently clarified is the key in defining a palpable error under RCr 10.26. Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

In Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836-37 (Ky. 2003), this Court considered an unpreserved insufficiency issue. As here, in Schoenbachler, "Appellant admit[ted] that he failed to properly preserve the issue he presents [on appeal]." Id. at 836. This Court described the law as follows:

> A palpable error is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court, and "[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." We recognize not only that "the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude, but also that the nature of the error alleged is such that, if the trial court did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubtably [sic] have affected Appellant's substantial rights.

Id. at 836-37 (citations omitted). After summarizing the law, this Court concluded that the Appellant's claim of insufficiency of the evidence was a palpable error. Id. at 837 ("[T]he trial result necessarily would have been different if the trial court had directed a verdict in Appellant's favor."). Here, if the error was corrected at trial it would have resulted in a directed verdict of acquittal on the third-degree terroristic threatening charge, instead of the wholly different result of a conviction. Thus, it constitutes a manifest injustice and was a palpable error. Martin, 207 S.W.3d at 3 ("[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.").

Since the Commonwealth concedes there was no evidence offered to support this misdemeanor conviction, there was no basis for a reasonable juror

to find guilt and Appellant was entitled to a directed verdict of acquittal for terroristic threatening in the third degree. See Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Therefore, Appellant's conviction for third-degree terroristic threatening is reversed.

III. Conclusion

In conclusion, Appellant has not pointed to any errors that require reversal of his felony convictions.

First, when Appellant tried to point the finger for the robberies at his brother, Appellant opened the door to a closer examination of the evidence and circumstances surrounding his brother's arrest. Second, though the Commonwealth violated the discovery rules in failing to inform the defense of Appellant's conversation with Detective Polin, the defense asked for exclusion of the conversation and the trial court granted the motion, curing any error. Since Detective Polin did not testify about the substance of the conversation, the error did not create a manifest necessity sufficient to require a mistrial, and the error was insufficient to create a reasonable probability of a different outcome. Third, 72-year-old Joseph McPherson's gun shot wound to his legs, requiring surgery under general anesthesia and the use of a surgical nail and screws, was sufficient to constitute a serious physical injury for purposes of first-degree assault. Fourth, since the Commonwealth concedes no evidence was presented to support Appellant's misdemeanor conviction, the third-degree terroristic threatening conviction constitutes a palpable error, and is reversed. However, since the sentence for the misdemeanor conviction was run

concurrently with the other convictions by operation of law, this does not affect the length of Appellant's sentence of thirty-two years.

For the foregoing reasons, Appellant's conviction and the judgment of the Jefferson Circuit Court for third-degree terroristic threatening is reversed, but his felony convictions and the judgment for first-degree robbery, first-degree assault, possession of a handgun by a convicted felon, and being a persistent felony offender in the second degree are affirmed.

All sitting. All concur.

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER

On the Court's own motion, the Memorandum Opinion of the Court rendered January 22, 2009 shall be modified on page 13, lines 1 and 3. Pages 1 and 13 shall be substituted, as attached hereto, in lieu of pages 1 and 13 of the Opinion as originally rendered. Said modification does not affect the holding.

Entered: February 10, 2009.

CHIEF JUSTICE