

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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 27, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000082-MR

DATE 9/17/09 Kelly Klaker D.C.  
APPELLANT

LEONEL MARTINEZ

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
NO. 06-CR-00601

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellant, Leonel Martinez, was convicted by a Daviess Circuit Court jury of murder, committed by being complicit, and two counts of first-degree robbery, committed by being complicit. For these crimes, Appellant received a sentence of twenty-four years for the murder count and ten years on each robbery count all to run concurrently for a total of twenty-four years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts four arguments on appeal: 1) that the trial court erred in not granting him a continuance before trial; 2) that the trial court prevented him from presenting a full and complete defense; 3) that the trial court erred in not granting him directed verdicts of acquittal on the complicity charges; and 4)

that the trial court improperly allowed evidence regarding his invoking of his right to remain silent and his reaction to the police interview to be heard by the jury. For the reasons set forth herein, we now affirm Appellant's conviction and sentence.

On March 23, 2006, an armed robbery occurred at the Jewelry Chest in Owensboro, Kentucky. Working that day was the store owner, Samuel Garrett, and manager, Lisa Edge. At about 12:30 p.m., Edge, who was working in the back of the store while Garrett was in the showroom, heard the front door open and saw two Hispanic men enter. She recognized one of the men as a previous customer who had inquired about selling a bracelet, which later investigation indicated likely belonged to Appellant. A few seconds later she heard a commotion in the front of the store and noticed a third and fourth Hispanic man. The men ordered Edge to the ground and stole a ring from her. They also stole a chain and watch from the store. While on the ground, Edge heard continued fighting in the showroom, followed by a single gunshot, and then silence.

Once she was sure the robbers had left, Edge went to the showroom and discovered Garrett lying face down on the floor, bleeding. He had been shot in the chest, but was still alive. Edge locked the front door of the store and called 911. The police arrived quickly and performed first aid on Garrett, but despite their efforts, he died.

The police investigation turned up several witnesses to the robbers'

escape. These witnesses all indicated that the robbers escaped from the area in a teal-colored car. The next day, the car was found in the parking lot of a local factory. A surveillance tape from the factory showed that after abandoning the car, the suspects jumped into a white car identified as the “Latino Taxi” owned and operated by Appellant. Evidence indicated that after picking up the suspects, Appellant drove them to Portland, Tennessee, and then returned to Owensboro. As he returned to Owensboro, the police called Appellant on his cell phone and asked if his taxi service had picked up anyone matching the description of the suspected robbers. Appellant falsely replied that he was in Nashville at the time of the robbery.

The police quickly found the robbery suspects: Johnny Gama, Douglas Herrero, and Miguel Velazquez. Suspicion also focused on Appellant because of the factory surveillance video of his car picking up the suspects and because he made several inconsistent statements to the police. All three suspects and Appellant were indicted for the crime. Prior to Appellant’s trial, Gama, Herrero, and Velazquez pled guilty and agreed to testify against Appellant.

I. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING  
APPELLANT’S MOTION FOR A CONTINUANCE

Appellant first argues that the trial court erred by denying his motion for a continuance filed November 8, 2007, five days prior to the scheduled start of trial. Appellant’s motion argued that he needed a continuance to review the plea agreements from Herrero and Velazquez which were made in October

2007, and Gama's plea agreement which was to be filed that day. Appellant's counsel stated that while he had received Herrero and Velazquez's statements a month earlier, the recordings were of poor quality and partially in Spanish. Appellant's counsel also argued that he had been out of town during October and had just recently realized the Commonwealth turned over the statements. Appellant suggested that his trial be moved to November 26, 2007, which was scheduled to be the date of Gama's trial. The Commonwealth ultimately joined Appellant's motion.

The trial judge, in denying the motion, noted that there was already a prior continuance granted in this trial which gave Appellant's counsel several additional months to prepare his defense. The trial judge believed that Appellant's counsel was aware that co-defendants have a propensity to make plea agreements prior to trial, and could have planned accordingly. Further, the trial judge said he could suppress any evidence which was provided in untimely discovery. The trial judge also cited to the fact that translators, necessary to interpret testimony, were already scheduled for the upcoming trial date.

On the morning of trial, November 13, 2007, Appellant's counsel renewed his motion for a continuance on the grounds that due to the late plea agreements he was not prepared for trial. Appellant's counsel also cited to a late witness statement he had not adequately reviewed. The trial judge again denied the motion. Appellant's counsel announced at the beginning of trial

that he was “ready.”

Pursuant to RCr 9.04, “[a] continuance will be granted upon a showing of sufficient cause.” Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991)(overruled on other grounds by Lawson v. Commonwealth, 53 S.W.3d 534 (Ky. 2001)). A trial judge should consider the following factors when determining whether to grant a continuance: 1) the length of delay; 2) whether there have been previous continuances; 3) the inconvenience of the continuance to the litigants, witnesses, counsel, and the court; 4) whether the delay is purposeful or caused by the accused; 5) the availability of competent counsel, if at issue; 6) the complexity of the case; and 7) whether denying the continuance would lead to any identifiable prejudice. Id. “The decision to grant or deny a continuance rests within the sound discretion of the trial court. Only an abuse of that discretion would justify disturbing the trial court’s ruling.” Lovett v. Commonwealth, 858 S.W.2d 205, 208 (Ky. 1993). “The test for an abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

In this matter, the trial judge did not abuse his discretion by denying Appellant’s motion for a continuance. Appellant’s main argument in favor of the continuance was that he did not have adequate time to review the statements provided by Herrero, Velazquez, and Gama prior to trial. However, Herrero and Velazquez’s statements had been provided a full month earlier to

Appellant's counsel and Gama's statement was to be turned over by the Commonwealth that very day. Thus, Appellant's counsel had adequate time to review these statements prior to trial. Further, even though Appellant recommended moving his trial date to a date which was reserved for his co-defendant's trial, we cannot say with certainty that delaying Appellant's trial would not have inconvenienced witnesses, counsel, or the court. Additionally, an earlier continuance had already been granted in this trial. Thus, reviewing the trial judge's decision under the Snodgrass factors, we find that the trial judge did not abuse his discretion by denying Appellant's motion for a second continuance.

II. THE TRIAL COURT DID NOT PREVENT APPELLANT FROM PRESENTING A FULL AND COMPLETE DEFENSE

Appellant next argues that the trial judge committed two errors which prevented him from presenting a full and complete defense. The first alleged error is that the trial judge did not strike a portion of Owensboro Police Detective Ed Krauwinkel's testimony. Detective Krauwinkel testified that he believed the "Latino Taxi" sign, usually on Appellant's car, was not on the car when Appellant picked up his co-defendants after the robbery. Detective Krauwinkel based his opinion on photos made from the factory surveillance video. When asked on cross-examination if it was possible the "Latino Taxi" sign was not visible simply due to the poor quality of the still photo, Detective Krauwinkel answered no. Detective Krauwinkel eventually admitted during

cross-examination that it was possible that the “Latino Taxi” sign was not visible due to the photo’s quality.

Later that day, Appellant’s counsel asked to approach the bench. In the ensuing bench conference, Appellant’s counsel stated that he was concerned about Detective Krauwinkel’s testimony, because it implied that Appellant had removed the “Latino Taxi” sign to cover up his actions. Appellant’s counsel also was concerned because the Assistant Commonwealth Attorney earlier indicated to him that the poor picture quality was the reason the “Latino Taxi” sign did not appear in the photos. Appellant requested pursuant to KRE 1003 to see the original surveillance video footage. The Commonwealth responded that Appellant’s counsel already had the original, undistorted photos, and that the “Latino Taxi” sign was not visible in those photographs. Appellant then moved to strike Detective Krauwinkel’s testimony or in the alternative asked for a mistrial because an admonition would not cure any error. The trial judge denied the motion.

Upon review of the record, we see no reason to conclude that the trial judge should have declared a mistrial or suppressed Detective Krauwinkel’s testimony regarding the “Latino Taxi” sign. Detective Krauwinkel’s testimony regarding the presence of the “Latino Taxi” sign was responsive to the questions asked of him. Mills v. Commonwealth, 996 S.W.2d 473, 485 (Ky. 1999). While the Assistant Commonwealth’s Attorney may have believed that the “Latino Taxi” sign was not present due to pixel distortion in the photos, he



did not speak for everyone who testified at trial. Further, Detective Krauwinkel admitted during cross-examination that it was possible that distortion caused the “Latino Taxi” sign to not be visible in the photos. The presence of the “Latino Taxi” sign was a factual issue for the jury to determine. Appellant presented sufficient counter-evidence that the sign was visible on Appellant’s car the day of the robbery. There is no error here.

The second alleged error is that the trial judge should have delayed the trial so that Appellant could further cross-examine Owensboro Police Sergeant Tim Clothier. Sergeant Clothier testified that Appellant was told during an interview with police, that the photos from the factory surveillance video indicated that the “Latino Taxi” sign was not on his vehicle. Sergeant Clothier stated that upon hearing this, Appellant became angry and accused the police of doctoring the photos. Subsequently, Sergeant Clothier testified he obtained an arrest warrant for Appellant.

During Sergeant Clothier’s cross-examination, Appellant’s counsel asked him whether he was aware that several witnesses testified that they saw the “Latino Taxi” sign on Appellant’s car the day of the robbery. Sergeant Clothier stated he had not heard the testimony. Appellant’s counsel further asked if he was aware of testimony that the pixel resolution from the still photos caused the “Latino Taxi” sign to not appear in the photographs, and that this testimony meant that Appellant’s anger at the police interview may have been well-founded. The Commonwealth objected to this question as rhetorical and

the trial judge sustained.

On the morning that the jury was to be instructed, Appellant moved that the trial be briefly recessed so that Sergeant Clothier could be further cross-examined. Appellant's counsel discovered that in the affidavit for the arrest warrant issued for Appellant, Sergeant Clothier stated that the taxi cab had the "Latino Taxi" sign on it in the factory surveillance video pictures.

Unfortunately, Sergeant Clothier was out of town and the trial judge denied the motion to postpone the trial or admit the affidavit. The trial judge believed that the presence of the "Latino Taxi" sign on the car at the time of the robbery was a factual issue and that the evidence Appellant already presented adequately supported his contention.

We agree with the trial judge. The decision to recess a trial is up to the trial judge's discretion. Brawner v. Commonwealth, 344 S.W.2d 833, 836 (Ky. 1961) (holding that a trial judge did not abuse his discretion in denying a continuance or recess). Here the trial judge did not abuse his discretion because the presence of the "Latino Taxi" sign was a factual issue which must be decided by the jury. A delay for further cross-examination of Sergeant Clothier was not warranted. There is no error here.

### III. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTIONS FOR DIRECTED VERDICTS OF ACQUITTAL

Appellant next argues that the trial court erred by denying his motions for a directed verdict of acquittal. Appellant argues that there was insufficient

evidence presented to support his complicity convictions because the only evidence of his acting in complicity came from his co-defendants' testimony. Appellant argues that their testimony was inadequate because they received deals from the Commonwealth in exchange for their testimony. Thus, he argues the evidence the Commonwealth presented lacks the "atmosphere of verisimilitude" and fitness to produce a conviction.

"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."

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The trial judge is to review all of the evidence in the light most favorable to the Commonwealth.

Id. Reviewing the evidence presented in this case, it would not be unreasonable for a jury to determine beyond a reasonable doubt that Appellant was guilty. Notably, each and every co-defendant implicated Appellant as part of the planning and execution of the robbery. The credibility and weight to be given their testimony was within the province of the jury. Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). Even though the evidence provided by Appellant's co-defendants amply supported the trial court's refusal to grant a directed verdict, other evidence also linked Appellant to the crimes. He admitted that the bracelet found at the Jewelry Chest after the robbery resembled a bracelet that was given to him by his wife. The fact that Appellant drove the co-defendants to Tennessee after the robbery was not disputed at

trial. The trial court properly denied Appellant's motion for a directed verdict.

IV. THE COMMONWEALTH DID NOT IMPERMISSIBLY INTRODUCE  
EVIDENCE OF APPELLANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT

Appellant's last argument is that the Commonwealth improperly introduced evidence which informed the jury that he exercised his right to remain silent. Appellant admits that this alleged error is unpreserved, and so we review under our palpable error standard. RCr 10.26. During trial, Owensboro Police Detective Bruce Burns testified about the circumstances surrounding Appellant's statement to police on March 24, 2007. Detective Burns testified that in his opinion Appellant reacted to the police interrogation in a manner which indicated guilt. The Commonwealth then played a videotape of the police interrogation, stopping it at the point where Appellant requested an attorney. Detective Burns later testified that when Appellant requested an attorney the interview ended.<sup>1</sup>

Appellant now argues that Detective Burns' opinion testimony and the playing of the videotape were improper comments on Appellant's invocation of his right to remain silent. Doyle v. Ohio, 426 U.S. 610 (1976). However, as the record reflects, the evidence introduced by the Commonwealth was not of Appellant's silence, but of his voluntary statements. Since Appellant's statements were voluntary, the Commonwealth was entitled to use them at

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<sup>1</sup> Evidence indicates that after Appellant requested an attorney, Detective Burns stopped the interrogation, however, in violation of Miranda v. Arizona, 384 U.S. 436 (1966), the interrogation was resumed by other officers. The statements gathered from the illegal interrogation were properly suppressed at trial.

trial. Additionally, the jury was not instructed to draw any negative inference from Appellant's request to obtain a lawyer. There is no error here.

The admittance of Detective Burns's opinion testimony, however, is error, but does not rise to the level of palpable error. Detective Burns's testimony was effectively lay testimony regarding Appellant's guilt. A witness not testifying as an expert may testify to matters "(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." Cuzick v. Commonwealth, 276 S.W.3d 260, 265 (Ky. 2009) (citing KRE 701). KRE 602 further limits lay testimony to matters of which the witness has personal knowledge. Here, Detective Burns's testimony that Appellant acted guilty was not appropriate because he had no personal knowledge that Appellant was guilty, only a belief, and his belief Appellant was guilty was not useful to helping the jury understand Appellant's statements. However, no matter how inappropriate Detective Burns's testimony may have been, we cannot find that it rose to a manifest injustice. RCr 10.26. Detective Burns's statements constituted a small portion of the trial and the evidence presented against Appellant was substantial. Detective Burns's testimony is not palpable error.

For the above reasons, we affirm the conviction and sentence of the Daviess Circuit Court jury.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Emily Holt Rhorer  
Department of Public Advocacy  
100 Fair Oaks Lane  
Suite 302  
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway  
Attorney General

Michael Louis Harned  
Assistant Attorney General

William Robert Long, Jr.  
Assistant Attorney General  
Office Of Attorney General  
Criminal Appellate Division  
1024 Capital Center Drive  
Frankfort, Kentucky 40601-8204