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RENDERED: JUNE 11, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000787-MR

JOSHUA C. JOHNSON — APPELLANT

V.

ON APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN PECKLER, JUDGE
NO. 13-CR-00064

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Joshua C. Johnson, the Appellant, was convicted in Boyle Circuit Court of three counts of first-degree criminal mischief, three counts of third-degree burglary, and two counts of theft by unlawful taking over $500. He was also found to be a second-degree persistent felony offender. He was sentenced to twenty years' imprisonment.[1] On appeal, Johnson asserts that the trial court erred (1) by denying his pre-trial motion to suppress evidence seized from his purportedly unlawful arrest, (2) by allowing Sheriff Curt Folger to testify as to hearsay statements made by a special deputy prior to the traffic stop, (3) by permitting Officer Chris Stratton to testify regarding the contents of a surveillance video that was unavailable at the time of the trial, and (4) by

[1] Johnson was tried with co-defendant Daniel Stovall, whose conviction and sentence have already been affirmed in an unpublished opinion by this Court. *See Stovall v. Commonwealth*, 2013–SC–000788–MR, 2014 WL 7239876 (Ky. Dec. 18, 2014).

placing Johnson in leg restraints during the trial. For the following reasons this Court affirms.

I. Background

On February 25, 2013, a series of burglaries occurred in Boyle and Lincoln Counties.

The first burglary occurred at the Parksville Country Store in Boyle County. A deputy sheriff responded to a call from a security company about an alarm at the store at about 2:00 a.m. Upon arriving at the scene, the deputy viewed a security video of the burglary but did not obtain a copy of it. The video was apparently later deleted, and no copy was ever produced for the defense.

Later that same morning, officers from the Junction City Police Department responded to a call about a burglary at a gas station, also in Boyle County. Some of this burglary was also captured on security footage. This time, police obtained a copy of the video, which showed what appeared to be a black male and a white male, both wearing hooded jackets or sweatshirts, dark pants, and distinctive sneakers. The video also showed the men leaving in what appeared to be a dark-colored sports utility vehicle (SUV). A safe taken from the store was later found abandoned.

Still later that morning, another Boyle County sheriff's deputy responded to a call about a burglary at the Old Bridge Golf Club. Some of this burglary was also captured on surveillance video. Instead of getting a copy of the video, the deputy recorded the playback of the video with his cell phone. Nothing was taken from the club, but damage to the building was estimated to be over $8,000.

This string of burglaries continued in nearby Lincoln County.[2] Based on the various security videos of the burglaries, police suspected that one black male and two white males were responsible for the burglaries. Acting on this information, Sergeant Thacker of the Lincoln County Sheriff's department attempted to pull over a black SUV around 3:45 a.m., but the driver evaded him. The SUV was found abandoned a short time later. After obtaining a search warrant for the SUV, the police found a substantial amount of cash and other items from the burglarized stores. They also found a wallet containing a driver's license for Billy Roach of Indiana, and a photograph of a young boy. The SUV had Indiana license plates, though this information was not disclosed during the subsequent suppression hearing.

Sometime in the late morning or afternoon,[3] Sheriff Curt Folger of the Lincoln County Sheriff's Department received a report that a black male, later identified as Daniel Stovall, was going door to door in northern Lincoln County, about one and a half to two miles from where the SUV had been abandoned, attempting to obtain a ride in various businesses. The sheriff testified at a suppression hearing that he spoke with people he knew in that area and "told them what they were looking for," referring to the black male and two white males who had been seen in the security videos. A short time after this, the

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[2] Any charges that may have been brought in connection to the Lincoln County offenses were not the subject of the trial from which this appeal arises.

[3] The trial court stated that there was only a "short time" between the SUV being found and the sheriff's receiving reports about the man going door to door. But the testimony suggests that this actually occurred as much as twelve hours after the burglary in Lincoln County, which had occurred sometime in the early morning. The uniform citation filled out at the time of Johnson's arrest states the time of arrest as 4:00 p.m.

sheriff received a call from a friend of his, a "special deputy" named Hal Akers, who stated that he had seen a black male getting picked up by a green taxi on U.S. 27 somewhere between Lancaster and Stanford, and that the taxi was heading south toward Stanford (in Lincoln County). The taxi stopped to pick up another person, who turned out to be Johnson, and headed back north on U.S. 27 toward Garrard County. According to Sheriff Folger, it was "very unusual" for people to hale or be picked up by a taxi in that area.

Sheriff Folger notified Lancaster city police of the taxi. Lancaster police officers found it and began following it, while the sheriff headed north to catch up to them. Shortly after the taxi entered Garrard County, they pulled the taxi over. They found only the taxi driver, Stovall, and Johnson in the taxi.

At the suppression hearing, Sheriff Folger stated that he and the other officers took Johnson and Stovall out of the taxi and "secured them for their safety and ours, too." He then stated the men were taken to his office and the officers "started the investigation."

The sheriff testified that he believed the men were the same men that had been seen in the surveillance video based on their clothes and unique shoes, which included a pair of black sneakers with red markings and white soles.[4] At the suppression hearing, he stated that the shoes and their markings were especially important in identifying the men.

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[4] The sheriff was also asked if there was "something about them that ultimately keyed [him] in on them as potentially the people who were involved in [the Lincoln County burglary]." He said yes, noting that Johnson had a picture in his wallet identical to the one found in the wallet that had been left in the SUV. It is not clear from the record when the sheriff saw the photo in the wallet other than it was "while he [Johnson] was getting his ID out for the investigation."

After taking Johnson and Stovall to the police station, law enforcement officers learned that they were from Indiana, and that the abandoned SUV was registered in Indiana. Sheriff Folger also discovered a photograph in Johnson's wallet that was identical to the one found in the abandoned SUV. Pursuant to a warrant, police fingerprinted the suspects and collected DNA samples. Johnson's fingerprints matched those on a black plastic bag located in the SUV.

Johnson filed a motion to suppress evidence discovered by police after his arrest on the grounds that the police illegally stopped the green taxi and arrested him. This motion was denied by the trial court, and the case proceeded to trial.

At trial, Sheriff Folger testified that Special Deputy Hal Akers had informed him of Stovall going from business to business, entering the green taxi, and picking up Johnson. Sheriff Folger further testified that this information led to the stop of the taxi. Johnson also objected to Officer Chris Stratton's testimony about what he had seen on the surveillance video from one of the burglarized stores, because the video was not produced in discovery or played for the jury at trial. These objections were overruled.

This was discussed at the suppression hearing, but the timing of this discovery was not established at that time. It was later revealed at trial that the picture was discovered after the men had already been arrested and taken back to the sheriff's office.

When confronted with the photo, Johnson apparently stated that the child in the photo was his nephew. When the sheriff told Johnson that the same photo had been found in an abandoned SUV that had been involved in a burglary, Johnson "threw his head down."

Johnson was convicted of the aforementioned charges and sentenced to twenty years in prison. Johnson further contends that the trial court abused its discretion by placing leg restraints on him during the jury trial.

II. Analysis

A. The trial court did not err by denying Johnson's motion to suppress.

Johnson first asserts that the trial court improperly denied his motion to suppress evidence obtained after his unlawful arrest. This evidence included his fingerprints. Johnson contends that police lacked requisite probable cause to arrest him, and therefore evidence obtained following the arrest was inadmissible.

The standard of review when addressing a motion to suppress evidence from an alleged illegal search or seizure is two-fold: "First, historical facts should be reviewed for clear error, and the facts are deemed to be conclusive if supported by substantial evidence. Second, determinations of reasonable suspicion and probable cause are mixed questions of law and fact and are, therefore, subject to *de novo* review." *Bauder v. Commonwealth*, 299 S.W.3d 588, 591 (Ky. 2009) (internal citations omitted); *see also* RCr 9.78. In applying this test, appellate courts "are bound to give 'due weight to inferences drawn from those facts by resident judges and local law enforcement officers.'" *Bauder*, 299 S.W.3d at 591 (quoting *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

At the suppression hearing, the trial court heard the testimony of only one witness, Sheriff Folger. Based on that testimony, the trial court found that the police had evidence that a black male and two white males driving a dark

SUV had committed the burglaries and that the police had discovered the abandoned SUV containing items from the burglaries earlier. This evidence prompted police to search for the men in a close proximity to the SUV. Within twelve hours of the last burglary, Stovall was seen less than two miles from the SUV attempting to find a ride by going door to door before entering a taxi, which proceeded to pick up Johnson.

This Court has consistently held that a law enforcement officer's testimony alone is enough to constitute "substantial evidence." *See, e.g., Payton v. Commonwealth,* 327 S.W.3d 468 (Ky. 2010); *Chavies v. Commonwealth,* 354 S.W.3d 103 (Ky. 2011); *Williams v. Commonwealth,* 364 S.W.3d 65 (Ky. 2011). As such, there was substantial evidence to support the trial court's findings of fact, and they are conclusive. There was no clear error by the trial court in regard to its factual findings.

The next question is whether the trial court appropriately applied its findings of fact to the law by holding that there was probable cause for Johnson's arrest.

Johnson first argues that the stop of the taxi itself was illegal. At trial, however, his counsel expressly stated that he was not challenging the stop of the taxi, which would have required only a showing of a reasonable, articulable suspicion under *Terry v. Ohio,* 392 U.S. 1 (1968), and was instead challenging only the arrest, which required a showing of probable cause. Thus, to the extent that he claims the initial investigatory stop itself was illegal, that claim is not preserved for our review.

Instead, he attempts to run the vehicle stop together with the arrest, claiming that the men were arrested from the beginning and that the police did not conduct an evidentiary stop of the taxi. This, he suggests, would have required the police to have full probable cause before even stopping the taxi. This approach, however, is incorrect. At trial, the lawyers for both sides distinguished between the stop of the taxi and the subsequent, albeit very shortly thereafter, arrest of the two men, with only the latter being challenged. Any evidence discovered after the stop but before the arrest was properly considered in determining the existence of probable cause to arrest.

Thus, we are left with Johnson's primary argument, namely, that even if the stop were lawful, the ensuing arrest was not. Johnson notes properly that he could be arrested without a warrant only on probable cause that he had committed a felony. He, of course, argues that the evidence available to the police at the time of his arrest fell short of that standard. This Court disagrees.

"To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 540 U.S. 366 (2003) (internal citations omitted); *see also Commonwealth v. Jones,* 217 S.W.3d 190 (Ky. 2006). "Probable cause for arrest involves reasonable grounds for the belief that the suspect has committed, is committing, or is about to commit an offense." *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky 2009).

Although we are treating the challenge to the taxi stop itself as unpreserved, the facts leading up to it are nonetheless relevant in the probable-cause-to-arrest analysis. The police knew they were looking for a black male and two white males, and two of those three were seen entering the taxi. Johnson argues that the taxi was only stopped because it contained one black male passenger and one white male passenger, and that no criminal activity was occurring at the time of the stop. But probable cause is determined by looking at the totality of the circumstances. The race of the passengers in the taxi was one of many factors that led police to make the stop and later informed their decision to arrest. *See Hampton v. Commonwealth*, 231 S.W. 3d 740 (Ky. 2007) (discussing that innocent behavior combined with other circumstances can amount to reasonable suspicion).

What is important is that the stop occurred during an ongoing investigation, with law enforcement in active pursuit of the suspects from a series of felony burglaries that occurred approximately twelve hours earlier. Video surveillance footage showed two white males and one black male burglarizing the stores. An SUV, which had earlier evaded the police, was later discovered abandoned with evidence of the burglary in plain sight. A short distance from the SUV, Special Deputy Akers observed a black male, Stovall, on foot going door to door in a business area on U.S. 27 in search of a ride. Shortly thereafter, the man was seen getting into a taxi, which then proceeded south to pick up Johnson and then turned back north. Sheriff Folger testified

that this was an unusual occurrence for the area, and that Special Deputy Akers had proven to be a reliable source for receiving such information.[5]

And, more importantly, after stopping the taxi, Sheriff Folger was able to identify that Johnson and Stovall matched the description of the burglars. Specifically, they were dressed the same as the burglars in the surveillance video and Stovall was wearing the same distinctive shoes that were seen in the video.[6] This evidence was discovered in the course of the short investigative stop and added to the evidence that had at that point given rise to the sheriff's reasonable suspicion that Stovall and Johnson had been involved in the burglaries.

We hold that these facts, viewed in their totality from the perspective of a reasonably objective police officer, established probable cause for Sheriff Folger to believe that Johnson was a participant in the burglaries. Because the stop of the taxi and the subsequent arrest of Johnson were both lawful, all evidence following from the arrest was obtained legally. Thus, we hold that the trial court did not err in denying Johnson's motion to suppress.

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[5] Though the issue is not preserved, as discussed above, there is no question that these circumstances gave the officer a reasonable suspicion that the men in the taxi had been involved in the burglaries the night before. The proximity in time and space to the burglaries and the abandoned SUV, along with the unusual behavior of Stovall in trying to get a ride and then summoning a taxi that took a southern detour to pick up Johnson, gave rise to more than a mere hunch that these men were associated with the burglaries. When taken together the facts indicate "at least a minimal level of objective justification for the stop." *Bauder*, 299 S.W.3d at 591. Sheriff Folger had a reasonable, articulable suspicion that the occupants of the taxi were responsible for the burglaries, and thus were subject to seizure for violation of the law.

[6] The Commonwealth also argues that the photo found in Johnson's wallet further establishes probable cause. That photo, however, was not discovered until after the arrest and is not properly considered in evaluating probable cause in this case.

B. Johnson waived any claim of error with respect to Sheriff Folger's testimony about Special Deputy Akers' Statements.

Johnson next claims that the trial court erred by permitting Sheriff Folger to testify as to what he had been told by Special Deputy Akers about the two men who turned out to be Johnson and Stovall in their efforts to get a ride in northern Lincoln County. Johnson asserts the trial court committed reversible error by allowing this testimony, as Akers' statements were inadmissible hearsay. Johnson further contends that his right under the Sixth Amendment's Confrontation Clause was violated because he did not have an opportunity to cross-examine Akers.

There is first a question whether this alleged error was preserved for review. In his brief, Johnson cites as evidence of preservation only a portion of the record in which his trial counsel stated that he intended to join co-counsel's objections at trial and portions of Sheriff Folger's testimony at the suppression hearing. He does not cite to where an objection to this alleged hearsay was made at trial (nor does he cite to the sheriff's trial testimony). Such an objection was made, however, by Stovall's counsel when Sheriff Folger began testifying as to what he learned from Special Deputy Akers. As the Commonwealth notes, however, Johnson's counsel said in response to Stovall's counsel's objection: "It's hearsay. I say let it in. I don't care. I think it only helps."

Thus, while Johnson's counsel had made clear his intent to generally join his co-counsel's trial objections, it appears that he had a difference of opinion as to this portion of the testimony. Far from having joined the

objection, Johnson's counsel advocated in favor of admitting this testimony. This alleged error "w[as] not merely unpreserved, [it was] invited." *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 37 (Ky. 2011). And "[g]enerally, a party is estopped from asserting an invited error on appeal." *Id.* Such an error is not a forfeited error, subject at least to palpable-error review; rather, it "amount[s] to a waiver ... [and is] not subject to appellate review." *Id.* Thus, this Court will treat the alleged error as waived and will not examine the merits of the claim.

C. The trial court did not err by permitting Officer Stratton to testify to the contents of a lost surveillance video.

Johnson next contends that the trial court committed reversible error when it permitted Officer Chris Stratton to testify about the lost surveillance video from the Parksville Country Store. Absent an abuse of discretion the trial court's evidentiary ruling will not be disturbed. *Kerr v. Commonwealth*, 400 S.W.3d 250, 261 (Ky. 2013).

Officer Stratton testified that he personally viewed the video which showed three males in hooded sweatshirts breaking into the store and ransacking it. However, this video was never produced to Johnson, and it was not played for the jury at trial. Johnson argues that the failure to present the original video recording violates the best-evidence rule, KRE 1002, and that the officer's testimony was inadmissible hearsay and violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. We address each argument in turn.

Johnson is correct that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except

as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute." KRE 1002. This Court has said that "this rule requires a party to introduce the most authentic evidence which is within their power to present." *Savage v. Three Rivers Med Ctr.*, 390 S.W.3d 104, 114 (Ky. 2012). Johnson points out that this video was never turned over in discovery and cites testimony from the store owner that he did not remember the police ever asking for a copy of it.

But as KRE 1002 itself notes, it does not apply if another rule allows admission of something other than the best evidence. "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if ... [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith ...." KRE 1004(1).

The offering party bears the burden of proving that the original was lost or destroyed. To meet this burden the party must call the last known custodian to testify regarding the loss or destruction of the original. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 7.25[2][b], at 537 (5th ed. 2013). It is then within the trial court's discretion to determine whether the loss was in bad faith. *Id.*

The Commonwealth met this requirement by calling the store owner to testify that he had inadvertently lost or recorded over the surveillance footage. Further, Officer Stratton also testified that he watched the video before it was destroyed, giving him personal knowledge as to its contents.

Johnson cites the store owner's testimony that he did not recall an officer asking for a copy of the video, perhaps to suggest bad faith on the part of the

police, which would make this exception inapplicable. But as the officer testified, he did return at a later date to get a copy, only to find that the video had been destroyed. Moreover, the video was never in the Commonwealth's possession, and the rule requires that the proponent of the proof (here, the Commonwealth) have lost or destroyed the evidence in bad faith before the exception becomes inapplicable. The evidence was lost or destroyed by the store owner, not the Commonwealth or the police. Johnson, therefore, cannot show that the Commonwealth or the police acted in bad faith.

Moreover, any possible prejudice was eliminated because the trial court gave a missing evidence instruction, allowing the jury to infer that the lost video would be favorable to Johnson's case if it were available.

The trial court did not abuse its discretion in allowing Officer Stratton to testify about the contents of the security video.

The next question is whether Officer Stratton's testimony about the video violated the hearsay rules or the Confrontation Clause. But the simple fact is that Officer Stratton's testimony was not hearsay. Hearsay is "(1) [a]n oral or written assertion; or (2) [n]onverbal conduct of a person, if it is intended by the person as an assertion." KRE 801(a). Officer Stratton did not repeat any statements made by anyone appearing in the video, thus his testimony did not convey an oral or written assertion. He did, however, describe the conduct of the burglars in the video. But the burglars' conduct was not intended as an assertion. Thus, Officer Stratton's description of that conduct was not hearsay. *See Davis v. Civil Service Com'n of the City of Philadelphia,* 820 A.2d 874, 879 n. 3 (Pa. Commw. Ct. 2003) (holding a surveillance videotape of a store showing

defendant stealing was not hearsay "because nonverbal conduct of a person is only hearsay if it is intended by the person as an assertion"); *McDougal v. McCammon,* 455 S.E.2d 788, 794 (W.Va. 1995) (holding a surveillance videotape of a plaintiff was not a "statement" and thus was not hearsay).

Johnson's Confrontation Clause claim must fail for similar reasons. The Confrontation Clause is only implicated by out-of-court statements repeated at trial or by live witness testimony. The conduct Officer Stratton described was not a statement. And the video itself was not witness testimony. (For the Confrontation Clause to be implicated, the video itself would be subject to cross-examination—a clearly absurd suggestion.) Johnson had the opportunity to cross-examine Officer Stratton about his recollection and account of the video. That satisfied the requirements of the Confrontation Clause.

D. The trial court did not abuse its discretion in placing leg restraints on Johnson during trial.

Johnson also asserts that the trial court abused its discretion by placing a leg restraint on him during trial. The court allowed the use of a "stiff-leg" restraint, which was not visible to the jury. To justify the use of the restraint, the court stated there was a security concern and that the stiff-leg restraint was the "least restrictive alternative" to handcuffs and shackles.

Criminal Rule 8.28(5) provides that "except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for his physical restraint." While the use of shackles is appropriate in exceptional cases, it is condemned as a general practice, and such restraint shall not be used in the absence of a necessity. *Commonwealth v. Conley,* 959

S.W.2d 77, 77 (Ky. 1997). Nevertheless, this Court has held that the decision to place a criminal defendant in shackles even while in the presence of the jury is within the "sound and reasonable discretion" of the trial judge. *Id.* at 78; *Tunget v. Commonwealth*, 198 S.W.2d 785, 786 (Ky. 1946). But to reach the decision that shackles are to be used, the trial court must review the entire record for "some good grounds for believing such defendants might attempt to do violence or escape during their trials." *Conley*, 959 S.W.2d at 78.

We cannot say that the trial court's decision to leave Johnson in the restraints was an abuse of discretion in this case. The court justified the restraints with a generic concern about security, which would be insufficient grounds for shackles, manacles, or other forms of visible restraint. Such restraints, when seen by the jury, undermine the presumption of innocence. *E.g.*, *Hill v. Commonwealth*, 125 S.W.3d 221, 233 (Ky. 2004). To employ such restraints, a court would be required to make particularized findings about the need for them, and cannot rely on a generic concern for security.

But the law on this subject has been primarily concerned with traditional, *visible* restraints, such as chains and shackles. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 630 (2005) ("*Visible shackling* undermines the presumption of innocence and the related fairness of the fact finding process." (emphasis added)). The restraints employed in this case were apparently invisible to the jury, having been placed under Johnson's pants leg, and the jury was not otherwise on notice that he was in the state's custody. The use of non-visible restraints is not *per se* prejudicial as the prejudice usually comes

from their being seen by the jury and, apparently, we now have functional restraints that cannot be readily seen.

Although trial courts should be cautious in employing such invisible restraints without good cause, if only to avoid an affront to "dignity and decorum of judicial proceedings that the judge is seeking to uphold," *id.* at 631 (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)), this Court cannot say there was an abuse of discretion here. And even if there was, the fact that the jury never observed the restraints, and Johnson has not identified any other actual prejudice, means that their use was harmless and not reversible.

E. There was no cumulative error.

Finally, Johnson urges that this Court grant relief under a theory of cumulative error. Cumulative error exists only "where the individual errors were themselves substantial, bordering, at least, on the prejudicial." *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010). We have noted that "[w]here ... none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of prejudice plus the absence of prejudice somehow adds up to prejudice." *Id.* In this case, we have found only one claim (the leg-restraint claim) that even borders on error, and it was harmless. There was no cumulative error.

III. Conclusion

For the aforementioned reasons, we affirm Johnson's convictions and sentence.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Richard Lenn Bottoms
Commonwealth Attorney
119 South Main Street
Harrodsburg, Kentucky 40330

Thomas Allen Van De Rostyne
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204