RENDERED: March 26, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001967-MR

ANTHONY EDMONTSON — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 02-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment convicting appellant of first-degree robbery and receiving stolen property under $300. Appellant's sole argument on appeal is that the trial court erred in allowing a prior consistent written statement of a witness to be admitted as an exhibit. From our review of the record and the applicable law, we adjudge that said issue was not properly preserved. However, even if it was

error to allow said statement to be admitted, we deem it to be harmless error. Hence, we affirm.

On November 19, 2001, at around 9:30 p.m., Kimberly Braun was working at the Clinton Citgo gas station/store as a clerk when two masked black men entered the store armed with handguns. Braun testified at trial that the men demanded money from the cash register as one of the men pointed his gun at her chest, while the other man pointed his gun at her head. She also recalled one of the men yelling that she was a "slow bitch." The men ultimately got $150 in cash and three individual box-type packs of Newport cigarettes. Braun was not asked to identify appellant as one of the robbers during the trial. However, she did testify that she noticed a bright pink car drive by the gas station approximately fifteen minutes before the store was robbed.

Wesley Massey was talking to his girlfriend on the pay phone outside the well-lit front door of the Citgo station as the two robbers entered the store. Just prior to the robbers entering the store, one of them stuck a gun into Massey's back and warned, "If you say anything, I'll kill you." Massey testified that he got a clear look at the robber who put the gun in his back just before he pulled his mask down upon entering the store. Massey thereafter positively identified that robber from a photo pack lineup as appellant herein, Anthony Edmontson.

Massey also identified Edmontson as the robber at trial. Massey likewise testified that he saw a bright pink car drive past the Citgo approximately five minutes before he saw the robbers appear from behind the gas station. After the two men entered the store, Massey told his girlfriend to call the police after which he ran for his truck.

Officer Randy Sparks responded to the 911 call of the robbery at the Citgo station. At the scene, he interviewed Braun and Massey and got partial descriptions of the robbers. Sparks was then called away from the Citgo robbery investigation to respond to a burglary call. Upon returning from his run pursuant to the burglary call, Sparks encountered a pink Pontiac Grand Prix driving suspiciously in the area. Sparks testified that what made him suspicious was that it seemed to be cruising on differing streets and away from the streets that people normally cruised on in Clinton. He had also received information from other officers that they had seen this car driving around town.

Sergeant Sparks pulled the car in question over at 9:50 p.m. Edmontson was a passenger in the car, and the driver identified herself as Chandra Martin, a cousin of Edmontson's. Sparks testified that Edmontson's appearance matched the general description of one of the robbers he had gotten from Braun and Massey. Edmontson was wearing a "wife beater" white t-shirt and

dark pants and had a goatee. When Sparks did a pat-down search of Edmontson, a box of Newport cigarettes was found in his pants pocket. The tax stamp on this box of cigarettes matched the carton tax stamp from the Newports stolen from the Citgo station. There was evidence presented that none of the other packs of Newports from the same carton had been sold on the night of the robbery. When questioned as to how he came to possess the pack of Newports, Edmontson explained to police that he saw the cigarettes in the road while riding with Martin and stopped to pick them up.

At trial, the Commonwealth called Martin as a witness. She testified that she picked Edmontson up in Tennessee at around 8:30 p.m., and drove him to Clinton, arriving there around 8:40 p.m. She stated that they went to her house for a few minutes, then drove to her sister's house where they stayed for around twenty-five minutes. According to Martin, during this period, Edmontson remained outside in the car. Thereafter, Martin drove to a Texaco station/store where she purchased some items. She maintained that Martin at no time ever left her car. After that, Martin stated that she and Edmontson simply went riding around town until they were stopped by police.

During Martin's testimony, the prosecutor asked her why she had not told the police about stopping at the Texaco station when she gave her written statement to them. The

prosecutor then showed Martin her written statement. Martin examined the document and pointed out where her statement had in fact referenced the stop at the Texaco station. After he finished his line of questioning, the prosecutor moved the trial court to enter Martin's written statement as Exhibit #9 for the Commonwealth. At this point, Edmontson's counsel objected to it being admitted as an exhibit on grounds of relevance. The trial court overruled the objection and allowed the statement to be admitted.

The jury found Edmontson guilty of both charges against him, one count of first-degree robbery and one count of receiving stolen property under $300. He was sentenced to a total of nineteen (19) years' imprisonment. This appeal followed.

Edmontson contends that the trial court committed reversible error when it allowed Martin's written statement to be admitted as an exhibit. He maintains that as a prior consistent hearsay statement, it should not have been admitted. See KRE 801A(a).

While Edmontson claims on appeal that the written statement constituted inadmissible hearsay, as noted earlier, the basis of Edmontson's objection below was that it was irrelevant. The appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate

court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). Accordingly, the argument was not adequately preserved. RCr 9.22. Nevertheless, even if we did review the argument and adjudge the admission of the written statement to have been in error, we do not believe it rose to the level of reversible error. RCr 9.24.

Edmontson claims that the written statement of Martin prejudiced his case because it improperly bolstered her testimony that he did not get out of the car, which contradicted his claim that he acquired the pack of Newport cigarettes when he saw them in the road. First, we do not see that the written statement of Martin was introduced for the purpose of bolstering Martin's testimony about Edmontson never leaving the vehicle. From our review of the record, it is apparent that the prosecutor mistakenly sought to introduce the statement as a prior inconsistent statement of Martin because he believed she had failed to mention their stop at the Texaco station when she gave her written statement. Secondly, the evidence at issue, Martin's assertion in the written statement that Edmontson never left the car, was simply cumulative of what she had already testified to on direct. It has been held that error in the admission of certain evidence will not be reversible if it is simply cumulative of evidence properly admitted at trial. Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998); Patterson v.

Commonwealth, Ky. App., 555 S.W.2d 607 (1977). Further, the evidence regarding Edmontson's possession of the cigarettes was not the only evidence that he was one of the robbers. Most significant was the eyewitness testimony of Wesley Massey identifying Edmontson as one of the robbers at trial and prior to trial in the photo lineup. Moreover, the evidence about which Edmontson complains was alternately helpful to his case in that it helped to establish his alibi, i.e., if he never got out of the car, he could not have robbed the Citgo station. In reviewing all of the evidence the jury had before it, we do not believe the outcome would have been different had Martin's written statement not been admitted at an exhibit. See Richardson v. Commonwealth, Ky. App., 559 S.W.2d 738 (1977). Hence, we affirm.

ALL CONCUR.

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