RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002212-MR

ERIC SHAWN SMITH — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 03-CR-00718 & 03-CR-00969

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

McANULTY, JUDGE: Appellant Eric Shawn Smith (Smith) was convicted in the Fayette Circuit Court of assault in the first degree and robbery in the first degree following a jury trial. He was sentenced to ten years on each charge, to run concurrently. He now appeals that verdict.

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The facts of the case may be summarized as follows:

Pat Dyer was living at the Day's Motel in Lexington. On the night of April 25, 2003, she was returning from the store with an acquaintance, Maria Reyes, when she saw Smith at the top of the stairs of the motel building hitting the stair railing with an aluminum baseball bat. She had seen Smith around the motel for two or three days hitting things with the aluminum bat. When she got close to the top of the stairs, with Reyes behind her, Smith asked her for money or dope. According to Dyer, Smith said something to the effect of "Do you have any money?" or "Give me some money." Dyer answered that she didn't have any. She said that Smith swung the bat back, she put her hand up as a shield, and the last thing she remembered was being struck on the hand. The next thing she remembered was waking up in her room where she had been taken after she lost consciousness. Police and emergency medical technicians were present. Dyer was subsequently taken to the hospital.

Reyes testified that Smith was like family to her, and that she did not remember much about the events of that night because she was drunk. Her tape recorded police statement was played for the jury. On the tape she stated that Smith wanted them to give him some money, and that he swung the bat and they fell down the stairs. She said that Smith came down the stairs to them and said to Ms. Dyer, "Die, bitch, die." A neighbor of

Ms. Dyer's testified that he spoke to Smith after the encounter. He said he had told Ms. Dyer not to come up the stairs unless she had some dope or money. When she walked up anyway, he swung the bat. Smith told the neighbor that he didn't know if he had hit Ms. Dyer or not, but she fell down the stairs. He admitted walking down the stairs and yelling, "Die, bitch, die," at Dyer. Smith did not testify in his own behalf.

Smith claims that he should have been granted directed verdicts on the charges of assault in the first degree and robbery in the first degree. The Commonwealth responds that the argument is not preserved for appellate review because Smith made only a general motion for directed verdict at the close of the Commonwealth's case. We agree that the claim of error is unpreserved.

CR 50.01 requires a motion for directed verdict to "state the specific grounds therefor," and failure to do so forecloses appellate review of those grounds not raised before the trial court. Pate v. Commonwealth, 134 S.W.3d 593 (Ky. 2004). Smith's counsel stated an intention to make a "general" motion for directed verdict on the assault and robbery charges, and a specific argument addressing the charge of intimidating a participant in a legal proceeding. Smith's specific arguments on assault and robbery charges are now foreclosed. Smith asks

that we review under RCr 10.26, but we do not perceive any palpable error.

Next, Smith argues that his convictions for both robbery and assault violate the proscription against double jeopardy. While this argument also is not preserved, our Supreme Court continues to adhere to the rule that double jeopardy questions may be reviewed on appeal despite failure to preserve the issue in the trial court. Beaty v. Commonwealth, 125 S.W.3d 196 (Ky. 2003); Baker v. Commonwealth, 922 S.W.2d 371, 374 (Ky. 1996); Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977). Therefore, we review this claim.

In Kentucky, the test for determining whether multiple prosecutions are impermissible for the same course of conduct parallels the federal rule announced in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). See Beaty, 125 S.W.3d at 210; Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996). In Blockburger, the Supreme Court determined that:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304, 52 S. Ct. at 182. This test was expressly adopted by the Kentucky Supreme Court as the pertinent test in Burge, and was codified in KRS 505.020.

The analysis of the Blockburger test requires examination of the elements in the jury instructions. Barth v. Commonwealth, 80 S.W.3d 390, 399 (Ky. 2001). The instruction on robbery in the first degree required the jury to find that Smith attempted to commit a theft against the victim; that "in the course of so doing and with intent to accomplish the theft, he used or threatened the immediate use of physical force upon Pat Dyer with a baseball bat"; and that the baseball bat was "a dangerous instrument" as otherwise defined in the instructions. The instruction for assault in the first degree required that the jury find that Smith intentionally caused a serious physical injury to Dyer; by striking her with a baseball bat or swinging the bat at her and causing her to fall; and that the baseball bat was a dangerous instrument.

Convicting Smith of robbery in the first degree required intent to accomplish a theft, an element not required in the assault charge. Conviction for assault in the first degree required a finding of serious physical injury, which was not an element in the robbery charge. Thus, each offense required proof of a fact which the other did not. Under the

Blockburger test, prosecution of Smith for both of these offenses did not constitute double jeopardy.

Next, Smith argues that the instructions on the assault charges did not present his theory of the case. The jury was instructed on assault in the first, second, and fourth degrees. Smith believes that it was error for the jury not to be instructed on his factual claim that he never swung the bat at Dyer, but only at the railing of the stairs. In addition, Smith argues that the assault in the first degree instruction was defectively worded. In this case, Smith made no requests for additional instructions which were not given, and the Commonwealth urges us to reject both these arguments as unpreserved. Smith asserts both defects he alleges as to the instructions constituted palpable error under RCr 10.26.

We decline to review these claims, even as "palpable error," since Smith's counsel participated in crafting these instructions and expressly approved the instructions as given. Thus, not only were the alleged errors unpreserved, they were waived. Davis v. Commonwealth, 967 S.W.2d 574, 578 (Ky. 1998). Furthermore, we do not agree that the allegations of errors in the instructions rise to the level of palpable error. Davis v. Commonwealth, 967 S.W.2d 574, 578 (Ky. 1998).

Finally, Smith argues that his counsel was constitutionally ineffective at trial. The issue of ineffective

assistance of counsel must be raised at the trial court level, generally by means of a post-trial motion, for it to be considered on appeal since it is necessary that the issues be presented to and ruled on by the trial court. Humphrey v. Commonwealth, 962 S.W.2d 870, 873 (Ky. 1998). Smith did not raise these issues below. Thus, he may not be heard on his ineffective assistance claims in this direct appeal.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky