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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000598-MR

DENISE C. BARKER

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 03-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND McANULTY, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Denise Barker (Barker) brings this appeal from a judgment of the Greenup Circuit Court entered March 4, 2004, upon a jury verdict. She was adjudged guilty of first-degree robbery² and sentenced to ten years imprisonment. We affirm.

On the evening of December 8, 2002, Joyce Worthington was working behind the counter of the Raceland BP store. At

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

² Kentucky Revised Statutes 515.020, class B felony.

10:40 p.m., while speaking on the phone with fellow BP employee Tina Wylie, it is undisputed that Barker pulled up to the drive-through window in her car. She was wearing a gray sweatshirt. Both Worthington and Wylie were well acquainted with Barker, having spoken with her on up to seventy-five or one-hundred occasions; once Barker and Wylie discussed their children for forty minutes. Worthington put the phone down to wait on Barker, and Wylie could hear Barker ask Worthington whether she was afraid to close at night. While Barker purchased cigarettes, she asked Worthington several questions which resulted in Barker knowing that 1) Worthington was getting ready to close the store; 2) she closed alone; 3) the store did not have a silent alarm; 4) she did not get scared; and 5) she would not resist if she was robbed. After the sale, Worthington hung up the phone, turned off the outside lights (the store closed at 11:00 p.m.), and started mopping the floor.

When someone approached the door several minutes later, Worthington gestured to them to enter as she had not yet closed the register. The person who entered was stooped over, wearing a gray sweatshirt, darker gray sweat pants, a black knit ski mask with a large opening that exposed the nose and eyes, and black gloves. Although Worthington could not positively identify the person as Barker, she thought it was Barker as soon as she entered based on her eyes, complexion, general appearance

and the sound of her voice. The robber carried a green bank bag with a drawstring, and pointed a knife at Worthington while screaming for her to turn over the money. Worthington gave the robber approximately \$850.00 from the register. The robber ordered Worthington to lie down on the floor in the drive-through window area; Worthington, scared, sat down and scooted against the wall.

Worthington called 911 to report the robbery. When the police arrived, she told them that the robber had a green bank bag and a knife, and was wearing a ski mask, a gray sweatshirt and gray sweat pants. Based on information from Worthington, the police issued an "attempt to locate" on the car Barker was known to use. Worthington also drew a picture of the knife for the police.

After the robbery Wylie came into the store and viewed the videotape from the store's security camera. She identified Barker to the police from the robber's voice, body build, and arm movements when hurriedly walking, as she had seen at their children's baseball games.

The police went to Barker's home several times looking for her. After consenting to a search of the residence, her husband volunteered that a knife was missing from the "block" where it was usually stored in the kitchen. When asked about a ski mask with a large opening, her husband told police about one

on the table belonging to the children; which, when he looked for it, was gone. When asked if he had a green bank bag with a drawstring, the husband looked for it in a drawer on the microwave only to discover that it was also missing.

Almost four hours after the robbery, in the early morning hours, an officer spotted Barker's car at the drive-through of the SuperQuik in Greenup and followed her south on U.S. 23. At 3:05 a.m. he initiated a traffic stop. Barker had difficulties getting out of the car; she was limping and slumped over; and her speech was slurred but there was no smell of alcohol. She was wearing a sweatshirt under a jacket and dark, patterned, baggy pants. (According to the police, the sweatshirt was gray, although it would later look white in the photograph taken at the police station.) She had \$57.00 in her purse. She told the police that she had spent several hours waiting (without signing in) at Mercy Hospital in Portsmouth, Ohio, hoping to have a prescription filled, but eventually gave up and left. Barker was charged with driving under the influence and transported to the police station. A search of her vehicle revealed a WalMart bag containing cleaning supplies and a black, nylon glove.

At the police station, Barker told police that after going through the drive-through window at the Raceland BP store she went to the hospital in Portsmouth because of leg or back

pain; talked to a nurse; waited a long time; never signed in; and left. Barker admitted asking Worthington questions at the drive-through about a robbery, but denied committing the robbery and indicated that she asked the questions out of concern for Worthington.

Before us, Barker alleges violations of federal and state constitutional provisions and state court rules and precedent regarding 1) sufficient evidence, 2) the appointment of the prosecutor, 3) the voice identification of Barker by Wylie on the store security videotape, 4) change of venue, 5) jury tampering, 6) an inattentive and sleeping juror, and 7) the introduction of hearsay. We affirm.

Addressing first Barker's insufficient evidence allegation, we agree with the Commonwealth that this issue is not preserved for our review. In her directed verdict motion before the trial court, Barker argued insufficient evidence as to the use of force, more specifically insufficient proof that the knife was a dangerous instrument. Before us, Barker argues insufficient evidence as to identity, which fails to preserve the issue for our review. Anastasi v. Commonwealth, 754 S.W.2d 860, 862 (Ky. 1988).

Although this issue is unpreserved, we will review it for a palpable error that affects Barker's substantial rights and results in manifest injustice. Kentucky Rules of Criminal

Procedure (RCr) 10.26. As to sufficiency of the evidence, the standard of review is as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

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).

Looking at the evidence as a whole, it was undisputed that Barker was at the drive-through window minutes before the robbery, asking the clerk questions about the security of the store at closing. According to the clerk, Barker was wearing a gray sweatshirt, as was the robber several minutes later. Barker was familiar to the clerk. Although not able to positively identify Barker as the robber, the clerk thought it was Barker because of her eyes, complexion, general appearance, and the sound of her voice. Another store employee, also familiar with Barker, identified her through the security videotape from her body build and manner of walking. Within a

couple of hours after the robbery, Barker's husband noticed that a knife, ski mask, and green bank bag with a drawstring that had been in the house earlier were missing. When arrested four hours after the robbery, Barker was wearing a sweatshirt similar to that worn by the robber, and a single black nylon glove was found in her car. She was under the influence of drugs. To account for her time, Barker told the police that after purchasing cigarettes at the Raceland BP she had gone to the hospital in Portsmouth, Ohio, to get a prescription filled but after waiting for a long period had left, without signing in. Thus, we conclude that under the evidence as a whole, it was not clearly unreasonable for the jury to find that Barker was the one who robbed the Raceland BP store. As such, there was no palpable error that affected Barker's substantial rights resulting in manifest injustice.

Barker next contends constitutional error in the appointment of the prosecutor. According to the record before us, a special prosecutor from another judicial circuit was appointed due to an unspecified conflict; the Greenup mayor and council members petitioned the Attorney General to reappoint the recused prosecutor because the still unspecified conflict no longer existed and the special prosecutor was unable to "devote sufficient time" to the case; the special prosecutor answered the petition by letter to the mayor indicating that he was

offended by the petition as it was not based on correct facts, but in any event intended to ask the recused prosecutor to assume the prosecution; the Attorney General rescinded the appointment of the special prosecutor; and Barker's counsel objected on the record to the reappointment of the recused prosecutor as follows:

Judge, it's just been brought to my attention that Clifford Duvall is going to be the prosecution. For the record, my client objects because of a conflict. He disqualified and that conflict still remains. It cannot be waived. It cannot be corrected since Mr. Cantrell has left his office. Therefore, for the record, I would object to Mr. Duvall being the prosecutor in this case because there was a conflict and that was the reason why he was disqualified

. . .

to which the prosecutor answered that an unspecified "Hot Line" "(did not) see any problem with it," and the judge noted the objection for the record.

On appeal, Barker admits that the record is silent as to the original conflict that caused the recusal, as well as the manner in which the conflict was or was not resolved, leaving us nothing to review. As stated in Commonwealth v. Thompson, 697 S.W.2d 143, 144 (Ky. 1985), "(i)t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court."

Barker's next allegation of constitutional error pertains to Tina Wylie's identification during the trial of Barker's voice as the robber's voice on the security videotape, arguing that it was impermissibly suggestive because of generally questionable reliability of ear-witness testimony and the "surprise at trial and the defense counsel's lack of opportunity to address the issue in a pre-trial motion due to lack of notice."³ Given Wylie's undisputed familiarity with Barker through numerous conversations with her, her identification of Barker's voice as the robber's on the security videotape was admissible. See generally Clifford v. Commonwealth, 7 S.W.3d 371, 376 (Ky. 1999), citing Kentucky Rules of Evidence (KRE) 901(b)(5); United States v. Robinson, 707 F.2d 811, 814 (4th Cir. 1983); and, Howard v. Commonwealth, 787 S.W.2d 264, 265 (Ky.App. 1989). Further, Barker's suggestion that she was "surprised" at trial by this evidence is refuted in the record by the Commonwealth's supplemental discovery of the security videotape and notice given of Tina Wylie's address and phone number because:

Tina Wiley (sic) is the person to whom Joyce Worthington was talking on the telephone

³ The Commonwealth argues that this issue is not preserved because the bench conference discussion after Barker's objection to Wylie's testimony focused on refreshing Wylie's memory with the security videotape. Given that Barker continued to object after the trial court indicated that Wylie's testimony was admissible for voice identification purposes, although she did not voice a specific objection to the introduction for voice identification purposes, it appears from the context of the bench conference that the issue is ripe for our review.

when Denise Barker came thru the drive-thru at the Raceland BP Mart and she heard Denise ask if Joyce was working late. Tina Wiley (sic) worked at the Raceland BP Mart and Tina viewed the security tape after the robbery and identified the voice and body build as that of Denise Barker and overheard Joyce Worthington say that she was sure it was Denise Barker who robbed her.

There was no error.

Addressing next Barker's allegation of error by the trial court in failing to investigate allegations of jury tampering, the record establishes that when it came to the court's attention that, while waiting to testify, Tina Wylie had spoken to two jurors in the lobby outside the courtroom, the court questioned both the jurors and Wylie. The attorneys questioned Wylie, but declined to question the jurors. This questioning revealed that Wylie and the jurors spoke for several minutes about matters unrelated to the case. Barker's alternative motions to exclude Wylie's testimony or to have the two jurors struck and the case mistried, both grounded in prejudice because of improper contact with jurors, were denied.⁴ Because the trial court questioned the witness and the jurors, it is difficult to agree with Barker's argument that the trial court inadequately investigated the allegation. Additionally, while Kentucky Revised Statutes (KRS) 29A.310(2) provides that "(n)o officer, party, or witness to an action pending, or his

⁴ After this occurrence the trial court had the jurors take their remaining breaks in the jury room.

attorney or attorneys shall, without leave of the court, converse with the jury or any member thereof upon any subject after they have been sworn," a violation can be harmless and a mistrial unwarranted where the conversation between the witness and the juror was innocent and matters of substance were not involved. Talbott v. Commonwealth, 968 S.W.2d 76, 86 (Ky. 1998). Based on the record before us, we can find no trial court error.

Barker belatedly admits in her reply brief that the remaining issues are unpreserved, but asks that this Court review them for palpable error under RCr 10.26. Upon our review, we see no error, palpable or otherwise.

First, although she alleges constitutional violations for the trial court's failure to change venue, *sua sponte*, we can find no error, as the argument was never made to the trial court, and her underlying facts or inferences in support of a change of venue are totally unsupported by the record before us.

Second, regarding Barker allegation of a deprivation of constitutional rights by the trial court's failure to investigate an inattentive and sleeping juror, Barker failed to bring this matter to the attention of the trial court until the end of the Commonwealth's proof, and did so by indicating that the juror had been sleeping on and off through the trial, although not that particular day. After closing arguments,

Barker brought the matter again to the court's attention, asking that the juror be stricken, at which time the court stated that it had been watching the juror and the juror had not been sleeping but resting her eyes.⁵ We cannot conclude that the trial court erred in failing to further investigate Barker's claims, in that by waiting until a day after the alleged action, she failed to bring the matter to the court's attention in a timely fashion. In Shrout v. Commonwealth, 226 Ky. 660, 11 S.W.2d 726, 727 (1928), the court commented that a defendant "could not sit by and see the juror sleeping, without asking the court to arouse him from his slumbers, and then complain about it after the trial was over."

Lastly Barker alleges constitutional violations because of the introduction of the clerk's handwritten statement through a police officer's testimony, arguing prejudice because she was unable to cross-examine the clerk as to unspecified differences in her statements. Although Barker asks this Court to review this issue for palpable error under RCr 10.16, we are unable to do so because the statement complained of was not included in the record before us. As the complete record is not before us, we must assume that the omitted record supports the decision of the trial court. Thompson, *supra*.

⁵ According to the record and the context of the objections, we assume that Barker is only objecting to one juror, although she refers to the juror at first as juror "Lacy" and later as juror "Skaggs."

For the foregoing reasons, the judgment of the Greenup
Circuit Court is affirmed.

ALL CONCUR.

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