RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000428-MR

MARK WAYNE TAYLOR — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 04-CR-01018

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND VANMETER, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

VANMETER, JUDGE: Mark Wayne Taylor appeals from the Fayette Circuit Court's judgment sentencing him to sixteen years' imprisonment after a jury found him guilty of first-degree burglary. For the following reasons, we affirm.

Shannon Bradshaw testified at trial that she traveled to Lexington on June 7, 2004, to attend a real estate class. Taylor approached Bradshaw as she was carrying her things to her

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

room at the Red Roof Inn, offered to help, and carried her dog cage to just outside her door. Later that evening, Taylor approached Bradshaw as she walked her dog.

On June 9, Bradshaw entered her room and locked the door. Immediately, there was a knock on the door, which Bradshaw opened a few inches. Outside was Taylor, who asked to talk to Bradshaw. She declined, saying that she had to study. Taylor then removed a picture from his wallet and showed it to Bradshaw. Sensing that something was wrong, Bradshaw handed the picture back to Taylor, who pushed the door open with his shoulder and then slammed Bradshaw's wrist in the door. When Taylor entered the room and locked the door, Bradshaw fell down and screamed. Taylor explained that he would not hurt Bradshaw if she would go into the bathroom, but she refused. When Taylor pinned Bradshaw against the wall, she screamed and her dog bit her on the leg. Then Taylor let her go and left, explaining that he had just wanted to talk to her. Bradshaw locked the door, called the hotel's office, and then called 911. She ultimately found the wallet which Taylor had dropped and gave it to Officer Scott Givens, who responded to the 911 call.

Taylor testified, by contrast, that he checked out of the Red Roof Inn on June 8. On June 9, he traveled to Bradshaw's room to show her a picture they had discussed in their previous encounters. Bradshaw answered the door and said

that she was busy studying. Taylor replied that he was on his way back home to Clay County and wanted to show her a picture. He handed the picture to Bradshaw, who then stepped back. Taking this as an invitation into the room, Taylor gently pushed open the door the rest of the way, entered the room, and found Bradshaw lying on the floor.[2] When Taylor offered to help her up, Bradshaw began to struggle with him and kicked the door shut. Bradshaw then told Taylor to leave, but he instead told her to go to the bathroom, believing that they were both scared and she would follow him out of the room if he left. Bradshaw did not comply, but Taylor walked out of the room, telling Bradshaw that he had just wanted to talk to her and was sorry if he hurt her. Taylor then went to Central Baptist Hospital to be with his uncle, who had undergone surgery.

After the jury found Taylor guilty of first-degree burglary, the trial court sentenced him to sixteen years' imprisonment. This appeal followed.

I. Jury Selection

Taylor's first argument is that the trial court erred by failing to strike Juror 135 for cause. We disagree.

In response to the Commonwealth Attorney's questioning during voir dire, Juror 135 indicated that about thirteen years

[2] Later in his testimony, Taylor testified that he apparently pushed the door open harder than he thought and knocked down Bradshaw.

earlier he and his family were traumatized when they were the victims of at least four home burglaries. As a result of the burglaries, his family lost a great amount and moved. Still, Juror 135 indicated, "to answer the assumed question, 'can I be fair about this,' I just felt like I need to tell that, and I will do my best to be fair in that. But I think I should let it be known." Subsequently, when Taylor moved to strike Juror 135 for cause, the Commonwealth objected because home burglaries were different from the facts at hand. The trial court denied Taylor's motion as follows:

> I would hope when a man of the cloth stands up here and tells us that even despite the history he thinks he can be fair, I think he would have been forthcoming if he'd thought it truly would have an effect on him.

Taylor proceeded to use one of his peremptory challenges to strike Juror 135.

In deciding whether to strike a juror for cause, the trial court must discern from the totality of the circumstances whether the juror possesses the requisite mental attitude of appropriate indifference.[3] The trial court's inquiry is not "limited to the juror's response to a 'magic question.'"[4] On review, a trial court's decision regarding whether to strike a

[3] *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).

[4] *Id.*

juror for cause "will not be disturbed absent a clear abuse of discretion."[5]

In *Butts v. Commonwealth*,[6] the Kentucky Supreme Court held that the trial court in a prosecution for first-degree burglary, fourth-degree assault, and first-degree persistent felony offender did not abuse its discretion by failing to strike for cause a juror "who had been raped at her home three months before [the trial] by a perpetrator who had not yet been caught." The court continued as follows:

> In the instant case, appellant argues that the juror was too close factually to such a situation to serve on the jury without bias. However, the juror stated upon questioning that she could view the facts impartially. She went on to point out several differences between the case at hand and what had happened to her. In the instant case the victim knew appellant, there were no allegations of rape, and there was a charge of burglary, while in the juror's experience, she did not know the perpetrator, the incident was three months prior in time, no burglary was committed, and the perpetrator remained at large.[7]

Similarly, in the matter now before us, the juror's experience as a crime victim occurred some thirteen years earlier and involved home burglaries, rather than an alleged hotel room burglary as in Taylor's case. Moreover, the juror indicated

---

[5] *Barth v. Commonwealth*, 80 S.W.3d 390, 399 (Ky. 2001).

[6] 953 S.W.2d 943, 944-45 (Ky. 1997).

[7] *Id.* at 945.

that he would do his best to be fair. While the juror did not expressly state that he could be fair, he was never asked that nor any other question, as all that was known by the court regarding his situation was volunteered by him. Given the totality of these circumstances, we cannot say that the trial court abused its discretion by failing to strike Juror 135 for cause.

II. Examination of Officer Givens

The Commonwealth asked Givens on direct examination whether he responded on June 9 to a dispatch regarding a burglary complaint. Givens responded that he had actually responded to a dispatch regarding an assault complaint, but he went on to explain that when he spoke to Bradshaw, he determined that the circumstances "sounded more like a burglary than an assault." Although the alleged error was not preserved for review, Taylor argues that the admission of Givens' statement resulted in palpable error.[8]

Even if we assume without deciding that the admission of Givens' statement was erroneous because it was akin to investigative hearsay[9] or to the giving of an opinion on an ultimate issue,[10] in the absence of any objection below Taylor is

[8] RCr 10.26.

[9] *See Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988).

[10] *See Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985).

entitled to relief only if the error was palpable. That determination requires this court to "consider whether on the whole case there is a substantial possibility that the result would have been any different."[11] In light of all of the evidence in the matter now before us, we cannot say that, absent Givens' statement, there is a substantial possibility that the result would have been different. Givens was merely explaining that despite the dispatch regarding an assault, the police ultimately instead charged Taylor with burglary given Bradshaw's description of the events.

Taylor also argues that the court's admission of the tape recording of Givens' questioning of Taylor[12] resulted in palpable error. Although there is no transcript of the tape recording in the record, and it is difficult to understand the portion of the tape which was recorded on the videotape of the trial, Taylor's brief isolates the following remarks made by Givens on the tape as resulting in palpable error:

- The victim tells a different story. She has no reason to say anything negative about you. She has nothing to gain from it.

- You started off by lying to us.

[11] *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002) (citing *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983)).

[12] The questioning occurred in a room at Central Baptist Hospital after Givens spoke with Bradshaw and hotel office personnel.

- It sounds like you wanted to do more than show her a picture.
- It sounds like you all had quite a struggle.
- There's no reason for her to make this up.
- I'm just having a hard time understanding this.

In *Lanham v. Commonwealth*,[13] the Kentucky Supreme Court addressed whether the trial court had erred in allowing the Commonwealth to play an unedited audiotape of the defendant's interrogation, in which the interrogating detective made at least fifteen statements regarding whether the defendant was telling the truth. After discussing several other jurisdictions' opinions on the issue, the court recognized that

> such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.
>
> We also agree, however, that such comments are not admissible for the truth of the matter that they appear to assert, i.e., that the defendant is lying.[14]

The court went on to hold that the "remedy to any possible adverse inference by the jury is a limiting admonition given by

[13] 171 S.W.3d 14, 19 (Ky. 2005).

[14] *Id.* at 27.

the court before the playing of the recording."[15] Further, while the detective's comments on the tape in *Lanham* "would have been sufficient to require the giving of a limiting instruction or admonition to the jury[,]" the court declined to review the error, because the defendant did not request an admonition at trial.[16] Likewise, Taylor did not request an admonition in the matter now before us. Further, having reviewed the record, we do not believe that manifest justice[17] has resulted.

Further, Taylor argues that palpable error[18] occurred when Givens testified as to the responses Taylor gave to questions asked after he invoked his *Miranda*[19] rights. More specifically, Givens asked Taylor in the police car whether he locked the door after he entered Bradshaw's hotel room. Givens testified that Taylor became defensive and said he did not "want to talk about it anymore." Still, Givens later repeated the question to Taylor while they were either in the car or at the jail, and Taylor responded that he did not lock the door. Again, even if we assume without deciding that the admission of this evidence was erroneous, we do not believe that there is a

[15] *Id.* at 28.

[16] *Id.*

[17] *See* RCr 10.26.

[18] RCr 10.26.

[19] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

substantial possibility that the result would have been different if this testimony had been excluded. Indeed, the testimony was cumulative since Taylor testified on direct examination that Bradshaw kicked the door closed, and on cross-examination he testified that he neither shut nor locked the door.

III. Evidence of Taylor's Prior Misdemeanor Convictions

Finally, Taylor argues that reversible error occurred during the penalty phase of the trial when the Commonwealth introduced evidence of six prior misdemeanor judgments against him, despite failing to disclose the evidence during discovery pursuant to RCr 7.24. We disagree.

RCr 7.24(2) provides in part that:

> On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable.

Here, the trial court's pretrial conference order indicates that the defendant requested and the Commonwealth agreed to provide discovery pursuant to RCr 7.24.

Taylor objected when the Commonwealth moved during the penalty phase to introduce the misdemeanor judgments, noting

that the Commonwealth had not produced them during discovery. Accordingly, the trial court was vested with the discretion to impose a sanction for the discovery violation pursuant to RCr 7.24(9), which provides as follows:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

As Taylor did not respond when the Commonwealth offered him time to review the records, we cannot say that the trial court abused its discretion[20] in overruling Taylor's objection. This is especially true since Taylor has not offered any evidence contesting the accuracy of the judgments.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Gene Lewter Lexington, Kentucky	Gregory D. Stumbo Attorney General of Kentucky
	Perry T. Ryan Assistant Attorney General Frankfort, Kentucky

[20] *St. Clair v. Commonwealth*, 140 S.W.3d 510, 549 (Ky. 2004).