

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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001609-MR

JENNIFER R. SMITH

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 05-CR-00018

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MINTON AND SCHRODER, JUDGES; MILLER, SPECIAL JUDGE.<sup>1</sup>

MILLER, SPECIAL JUDGE: Jennifer R. Smith appeals from a judgment of the Bell Circuit Court entered upon a jury verdict convicting her of one count of third-degree burglary and sentencing her to five years imprisonment. Smith contends that the trial court erred by limiting her opportunity to present mitigating evidence during the sentencing phase of the trial. Because the issue is not preserved for our review, we affirm.

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<sup>1</sup> Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

On October 7, 2004, Smith and her boyfriend burglarized Lees BP & Food Mart located on Binghamtown Road in Bell County. Following her arrest, Smith signed a confession admitting her involvement in the crime, though she also alleged that her boyfriend had forced her into the endeavor.

On February 2, 2005, Smith was indicted for third-degree burglary.<sup>2</sup> She was tried on the charge on June 2, 2005. Smith's defense was that any participation by herself in the burglary was a product of coercion by her boyfriend. She was nevertheless convicted and the jury recommended a sentence of five-years imprisonment. On July 7, 2005, the trial court entered final judgment and sentencing in accordance with the jury's verdict and sentencing recommendation. This appeal followed.

Before us, Smith contends that the trial court erred by preventing her from introducing, during the penalty phase of the trial, evidence of her family situation that would have supported her request for leniency.

In the penalty phase of the trial, after the Commonwealth presented its case, Smith testified on her own behalf. On direct examination Smith was asked questions about her family, and gave the names of her family members, including the names and ages of her four children. Smith also testified

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<sup>2</sup> Kentucky Revised Statutes 511.040.

that the children's father had little contact with them. The following exchange then occurred between Smith and defense counsel:

Counsel : You currently provide for all the children's needs?

Smith : Yes.

Counsel : And they all live with you, correct?

Smith : Yes.

Counsel : Is there very much input from their fathers into their lives?

Smith : No.

Counsel : Is there anyone who takes care of your children other than you?

Comm. : Objection, relevance.

Judge : Sustained.

Direct examination then continued.

A trial court ruling excluding evidence must be preserved for appellate review by an avowal of the witness. KRE<sup>3</sup> 103(a)(2); Commonwealth v. Ferrell, 17 S.W.3d 520 (Ky. 2000). Otherwise, the reviewing court has no way of knowing exactly what testimony was excluded and whether the exclusion was prejudicial to the offering party. Ferrell, supra.

Smith did not enter into the record by avowal what her answer would have been to the question "is there anyone who takes care

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<sup>3</sup> Kentucky Rules of Evidence.

of your children other than you?" Hence, we are unable to review the issue on the merits.

Further, while it seems to us that a defendant's family situation is relevant to mitigation, and it is somewhat surprising that the Commonwealth would object to this line of questioning, nevertheless, we note that Smith was able to place before the jury significant evidence concerning her children and their care. Hence, regardless of her answer upon avowal, it is unlikely we would have found prejudice. The jury was generally aware of this aspect of Smith's situation.

For the foregoing reasons the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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