

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001383-MR

RYAN SCOTT HODGE

APPELLANT

v. APPEAL FROM LARUE CIRCUIT COURT  
HONORABLE CHARLES C. SIMMS III, JUDGE  
ACTION NO. 06-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.<sup>1</sup>

THOMPSON, JUDGE: Ryan Scott Hodge appeals his conviction in the Larue Circuit Court for first-degree burglary and theft by unlawful taking of property valued over \$300. For the reasons set forth herein, we affirm.

On December 9, 2004, Elizabeth Perkins returned home from work and discovered that her residence had been burglarized. Several items were missing from

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<sup>1</sup> Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

her residence including the following: small television monitors; over one hundred compact discs; several hunting knives; a diamond engagement ring; two or more bottles of alcohol; and two shotguns with one bearing the initials "CLE."

Subsequently, Hodge was questioned by Kentucky State Police Officers Tom Walsh and Jason Probes regarding a murder investigation in which Hodge, Roy Morgan, and Maurice Hodge were suspects. Thereafter, Hodge led the two officers to the two stolen shotguns. The shotgun bearing the initials CLE, believed to be the murder weapon involved in the homicide, was recovered in a culvert off Kentucky Highway 224 in Upton. The second shotgun was found in the bedroom closet in Hodge's girlfriend's apartment in Elizabethtown.

Later, while investigating the burglary, Larue County Sheriff's Deputy Russell McCoy secured a written statement from Hodge that he and Morgan went to Perkins' residence to visit Jason Lee, who lived with Perkins. However, when they arrived and discovered that the residence was unattended, Morgan burglarized the residence as Hodge watched. Hodge further stated that Morgan drove him home after the burglary and took the stolen items to his mother's residence.

On March 20, 2006, Hodge was indicted by a Larue County grand jury for burglary in the first degree; complicity (with Morgan) to commit burglary in the first degree; theft by unlawful taking of property valued over \$300; and complicity (with Morgan) to commit theft by unlawful taking of property valued over \$300.

On May 19, 2006, during a pre-trial conference, Hodge was offered a comprehensive plea agreement to resolve all the cases then pending against him. If Hodge pled guilty in these cases, he would receive a total effective sentence of twenty-five (25) years' imprisonment. These cases included murder, first-degree robbery, first-degree trafficking in a controlled substance, and first-degree burglary. After consulting with his counsel, Hodge rejected this plea offer.

On the morning of trial, on May 30, 2006, Hodge's counsel informed the court that she had met with Hodge the previous week and that they had discussed the evidence and law of his case over and over again in preparation for trial. However, Hodge then contacted her the Friday before trial and informed her that he wanted to accept the plea offer. Consequently, she had not prepared for trial over the weekend because she believed that a guilty plea would be entered on the day of the trial.

However, on the morning of trial, Hodge informed his counsel that he no longer desired to plead guilty but wanted to proceed to trial. Based on Hodge's new decision and her failure to prepare for trial, his counsel requested a continuance. After discussing the issue further, the trial court asked Hodge if he wanted to go to trial, and Hodge nodded affirmatively. The trial court then denied the motion to continue.

During trial, Morgan, who had decided to cooperate with the Commonwealth, testified that Hodge initiated the burglary. According to Morgan's testimony, Hodge stated that Jason Lee owed him money, and he asked Morgan to drive him to Perkins' residence to get his money from Lee. However, after finding the

residence unattended, Morgan testified that Hodge burglarized the residence with his participation.

At the conclusion of the trial, the jury found Hodge guilty of first-degree burglary and theft by unlawful taking of property valued over \$300. The trial court sentenced Hodge to eleven years for burglary and two years for theft. The trial court ordered that the sentences be served consecutively for a total effective sentence of thirteen years' imprisonment. This appeal follows.

Hodge's first contention is that the trial court erred when it failed to grant his motion for a continuance after his defense counsel informed the court that she was unprepared for trial. Specifically, Hodge contends that the trial court improperly applied the standard for granting a continuance, as set out in *Snodgrass v. Commonwealth*, 814 S.W.2d 579, 581 (Ky. 1991), overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), by failing to properly apply the factors enunciated therein.

Kentucky Rules of Criminal Procedure (RCr) 9.04 permits courts to postpone trials upon a showing of sufficient cause. *Id.* "Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case." *Id.* When determining whether to grant a continuance, trial courts should consider the following factors: the length of the requested delay; inconvenience to the litigants and other parties involved in the case; previous continuances; whether the delay was purposeful or caused by the accused; the complexity of the case; and whether

denying the continuance will lead to identifiable prejudice to the moving party's case.

*Id.*

On appellate review of a trial court's denial of a motion to continue, we will not disturb the ruling unless a clear abuse of judicial discretion is found which denies a defendant substantial justice. *Bowling v. Commonwealth*, 80 S.W.3d 405, 420 (Ky. 2002). After reviewing the record and considering the applicable factors, we conclude that the trial court did not abuse its discretion by denying Hodge's motion for a continuance.

Although the length of the requested continuance was presumably minimal, the Commonwealth had most of its witnesses present and ready to testify on the first day of trial. As for his case-in-chief, presented during the second day of trial, Hodge only called one witness, his mother. Further, while this was the first request for a continuance, Hodge's alternating decisions on whether to accept the plea offer were the cause of the motion to continue.

Moreover, Hodge's case was not as complex as he contends. In a written statement, he admitted to being at the residence when it was burglarized but contended that Morgan committed the burglary. However, Morgan, the only other eyewitness to the crime, testified that Hodge burglarized Perkins' residence with his assistance. Ultimately, the trial's outcome hinged on whether the jury believed Hodge's or Morgan's version of the facts.

Hodge has also not cited any legitimate instance of identifiable prejudice caused by the denial of his motion. While he contends that the denial prevented him from impeaching Officer Probes' testimony, Hodge has not cited which of Probes' factual assertions were subject to impeachment. Even months after the trial, having had sufficient time to review all the evidence, Hodge has failed to cite the factually incorrect portions of Probes' testimony and how such testimony prejudiced his trial.

Finally, while we recognize that Hodge's defense counsel made a good-faith decision not to engage in trial preparation during the three days preceding trial, this fact did not necessitate the granting of Hodge's motion for a continuance because the denial did not deprive him of substantial justice. By her own words, Hodge's counsel admitted that she had reviewed the facts and the law of Hodge's case with him multiple times during the week before trial.

Hodge's second contention is that the repeated references to his pending murder case which involved one of the stolen firearms violated Kentucky Rules of Evidence (KRE) 404(b) and prejudiced his case. First, under KRE 404(b), Hodge contends that evidence of his prior crimes and bad acts should have been excluded as improper. Second, Hodge contends that references to his murder case prejudiced his burglary case.

Although Hodge contends that KRE 404(b) rendered the evidence of his prior crimes and bad acts inadmissible, we conclude that there was no evidence of any of his prior crimes or bad acts admitted during the trial. For example, the testimony of

KSP officers that Hodge led them to the stolen firearms did not constitute evidence of his prior conduct related to the murder case. Although one of the shotguns was believed to be a murder weapon, this fact was never intimated to the jury. Hodge's knowledge of the location of the firearms went to his involvement in the burglary and not the murder case.

Additionally, when the initialed shotgun was admitted into evidence, the testifying officer presumably inadvertently read the case number from a label attached to the gun which happened to be the case number of Hodge's murder case. A bench conference was immediately conducted and the trial court informed both parties that nothing related to Hodge's other cases was to be presented to the jury.

However, the trial court denied Hodge's motion for a mistrial because it ruled that the reading of the murder case number, without more, was not sufficient to inform the jury of his pending murder case. Based on these facts, we conclude that the trial court's evidentiary rulings were proper.

Hodge makes three additional arguments regarding the admission of evidence implicating his murder case which Hodge concedes are unpreserved. Therefore, our review is governed by the palpable error standard provided in RCr 10.26. Pursuant to palpable error review, our Supreme Court has held that a palpable error affecting the substantial rights of an individual, even if insufficiently raised or preserved, is reviewable, and, upon a conclusion that it has resulted in manifest justice, reversible. *Herndon v. Herndon*, 139 S.W.3d 822, 827 (Ky. 2004).

An error is palpable only when it is “easily perceptible, plain, obvious and readily noticeable.” *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). A palpable error must be so serious that it would seriously affect the fairness to a party if it were not corrected. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Fundamentally, palpable error analysis comes down to whether the appellate court believes there is a “substantial possibility” that the result in a case would have been different without the error. *Id.*

After reviewing the record, we conclude that there is no palpable error. Deputy McCoy's testimony that officers from another investigation advised him to speak with Hodge about a firearm, his testimony that he located Hodge at the county jail, and Officer Probes' testimony that Hodge made additional statements beyond the burglary but that he could not recall the content of the statements did not so seriously affect the fairness of the trial that there is a “substantial possibility” that the result in his case would have been different without the error.

Hodge's next contention is that prejudicial prosecutorial misconduct occurred when the Commonwealth improperly shifted the burden of proof to Hodge during its closing argument. Specifically, Hodge contends that the Commonwealth improperly informed the jury that Hodge had the right to subpoena witnesses that he believed were the missing link in the Commonwealth's proof. Hodge further contends that the Commonwealth improperly stated that he had failed to factually counter some of its proof.

When an appellate court reviews claims of prosecutorial misconduct, we must focus on the overall fairness of the trial and may reverse a conviction only if the prosecutorial misconduct was so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings. *Id.* Furthermore, during closing arguments, the Commonwealth and the defendant may properly comment on motives, tactics, evidence, and the falsity of a defense. *Norton v. Commonwealth*, 37 S.W.3d 750, 753 (Ky. 2001). Parties have great latitude to make arguments during their closing arguments. *Berry v. Commonwealth*, 84 S.W.3d 82, 90 (Ky.App. 2001).

After reviewing the record, we conclude that the Commonwealth did not commit prosecutorial misconduct. The Commonwealth's arguments did not shift the burden of proof but merely refuted claims offered during Hodge's closing argument. For example, Hodge's counsel faulted the Commonwealth for failing to call Hodge's girlfriend and Jason Lee, who were witnesses that she believed were vital to the case. In its closing argument, the Commonwealth informed the jury that the defense also had the right to subpoena these witnesses. Further addressing the failure to call Lee, the Commonwealth argued that Hodge had not offered evidence that Morgan had been to Perkins' residence before the burglary; thus, eliminating the need for Lee's testimony.

Under the circumstances, it was legitimate for the Commonwealth to inform the jury that Hodge also had subpoena power to make clear that it was not preventing the jury from hearing all of the facts. Moreover, even if we assume that the

Commonwealth's comments were improper, the comments were not so egregious as to have undermined the overall fairness of the trial. *Brewer*, 206 S.W.3d at 349.

Hodge's fourth contention is that the trial court failed to instruct the jury on the whole law of the case by refusing to give an instruction on theft by unlawful taking of property valued under \$300. Hodge contends that he was entitled to this instruction as a lesser included offense, in effect a defense to unlawful taking of property over \$300.

"A trial court is required to instruct on every theory of the case that can reasonably be supported by the evidence, but there is no duty to instruct on a theory that lacks an evidentiary foundation." *Meadows v. Commonwealth*, 178 S.W.3d 527, 533 (Ky.App. 2005). The evidence demonstrated that a diamond ring with a stated value of \$1,000, at least two television monitors, several hunting knives, hundreds of compact discs, unopened bottles of alcohol, and two shotguns were stolen. Moreover, the defendant did not present a single witness to establish the value of the ring beyond Morgan's testimony during cross-examination that he had pawned the stolen ring with another ring for fifty dollars.

From these facts, the trial court had no duty to instruct on the theft by unlawful taking of property under \$300. Because the jury could not have reasonably doubted the defendant's guilt of taking property over \$300 and yet believe beyond a reasonable doubt that he was guilty of taking less than \$300 based on the evidence as a whole, no lesser included instruction was required. *Id.* While we recognize that the trial

court denied giving the instruction on a different theory, an appellate court may affirm the decision of a trial court for any reason sustainable under the record. *Brewick v. Brewick*, 121 S.W.3d 524, 527 (Ky.App. 2003).

Hodge's final contention of error is that the cumulative impact of all the errors in his case denied him a fair trial and warrants the reversal of his conviction. However, we have reviewed each of his contentions of error and conclude that there were none. Consequently, because there were no individual errors, there can be no cumulative error. *Epperson v. Commonwealth*, 197 S.W.3d 46, 66 (Ky. 2006).

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky  
  
Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky