IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

MODIFIED: JANUARY 25, 2007
RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000487-MR

LESTER BOBBITT — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. F. KENNETH CONLIFFE, JUDGE
INDICTMENT NO. 04-CR-1509-001 AND 04-CR-3285

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On March 14, 2005, the Appellant, Lester Bobbitt, was tried and convicted of complicity to robbery in the first degree. The jury recommended an enhanced sentence of thirty (30) years due to him being a persistent felony offender in the first degree.[1] The Jefferson Circuit Court sentenced the Appellant to twenty (20) years. He now appeals his conviction to this Court pursuant to Ky. Const. § 110(2)(b) asking this Court to reverse his conviction and afford him a new trial.

FACTS

On April 2, 2004, the Family Dollar Store on Portland Avenue in Louisville, Kentucky was robbed. Soon after the store had closed for the evening, the assistant

[1] KRS 532.080(3) provides that a persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies.

manager, Daphne Clarkson, locked the doors and placed the day's cash on top of the safe, while waiting for the time-delay lock to open. Nikisha Robinson, a cashier at the store, told Clarkson she saw money lying outside on the sidewalk. When she unlocked the front door to get the money, a man wearing a ski mask entered the store, grabbed Clarkson's arm, and yelled "Go Go!" Clarkson told the man where the money was and he let her go. She ran to the office and triggered the silent alarm. While in the office, she saw Robinson, on the security monitor, hide behind a jewelry case while the man emptied the cash from the safe. The man took $5280.91 and fled the store.

When Detectives Bryan Arnold and Dwane Colebank of the Louisville Metro Police Department arrived at the store, they took a statement from Clarkson. She told them Robinson acted suspiciously that day and she received several phone calls at work, including one around 8 p.m. from her boyfriend, William Kinnard. Clarkson also said the voice that yelled "Go Go" was the same as Kinnard's.

When the detectives interviewed Robinson, she admitted she had a role in the robbery. She said the Appellant, a friend of Kinnard's, had approached her about setting up a robbery. She agreed to help and they set up the robbery without Kinnard's knowledge. She said the robbery was supposed to have occurred between 4-5 p.m.. The plan was that she would tell Clarkson she needed change, and then, signal the Appellant that the safe was open. However, the Appellant got scared and did not enter when Clarkson saw him approaching the store. She also said she did not know that the Appellant was going to return to the store that evening, and that when she opened the door to get the money on the sidewalk, she did not know he would enter wearing a ski mask and take the cash.

After Robinson's statement, the detectives executed a search of the room she shared with Kinnard at his mother's house. On the front porch, the police found a sweatshirt and headband which was worn by the suspect during the robbery. Inside Kinnard and Robinson's padlocked room, the detectives found two handguns, spent shell casing, and three bindles of crack cocaine.

Based on the evidence found during the search, Robinson was charged with robbery in the first degree. On the same day, Kinnard was arrested and charged with trafficking in a controlled substance and possession of a firearm by a convicted felon. However, he was not charged in connection with the robbery, even though Clarkson identified him as the perpetrator.

The detectives learned that the Appellant had an outstanding warrant and went to arrest him. However, the Appellant did not surrender and a foot chase pursued. After he was apprehended, Det. Arnold attempted to question him about the robbery, but instead could not since Appellant had to first be treated for injuries he incurred when he was eluding the police. Then, at the hospital, Det. Arnold read the Appellant his Miranda rights and questioned him about the robbery. He stated that he knew of the robbery, but was not involved. He was then arrested and charged with robbery in the first degree. Indictments were returned charging the Appellant and Robinson, each with one count of complicity to robbery in the first degree.

On August 27, 2004, Robinson entered a plea of guilty to complicity to robbery in the first degree. In her plea agreement, she agreed to cooperate and testify truthfully in all proceedings related to this matter and to not commit any new offenses. In return, the Commonwealth agreed to amend the charge to facilitation to robbery in the first degree and to recommend a sentence of five years. Further, the Commonwealth agreed not to

object to supervised probation or her being released from jail on her own recognizance pending sentencing. Although the plea was being made pursuant to North Carolina v. Alford, she admitted that in Jefferson County on 4204 April 2, 2004, she knowingly assisted Appellant in carrying out a robbery of employees at the Family Dollar store at 3022 Portland Avenue.

However, the night before she was scheduled to testify against the Appellant she changed her story. She called Det. Arnold and admitted that Kinnard had planned the robbery, not the Appellant. She stated that Kinnard recruited the Appellant to perform the robbery, but she was not sure whether the Appellant or Kinnard entered the store and stole the money. As a result of this new information, the trial was continued for two weeks, until November 30, 2004.

On the morning of trial, the court noted that Kinnard had entered a plea agreement and his case would be continued for a separate sentencing. Upon hearing this information, the Appellant moved to continue the trial pursuant to Eldred v Commonwealth, 906 S.W.2d 694 (Ky. 1994), arguing that he would need to conduct additional investigations. The motion was denied and jury selection began.

Trial started on March 3, 2005. The Commonwealth called Clarkson, whose testimony was the same as what she had told them previously. She also testified that earlier on the day of the robbery, she saw the Appellant come to the window in a hooded sweatshirt.

When Robinson took the stand, she testified that Kinnard had discussed, planned, and executed the robbery. She claimed that the initial plan was devised on April 2, 2004, when they decided that Kinnard would stay in the car while the Appellant robbed the store. She testified that the Appellant, however, got spooked when he

started to execute the plan because Clarkson had got "two good looks at his face." She admitted she lied to the detectives previously because, at the time, she was in a relationship with Kinnard and was pregnant with his baby, and he had threatened her to keep her from telling the police about his role. At the time of the interview, she had a black eye from an assault by Kinnard. She also admitted to receiving approximately $300 from the robbery.[2]

On March 14, 2005, the jury found the Appellant guilty of complicity to robbery in the first degree. The jury recommended a sentence of twenty years but enhanced the sentence to thirty years based on the Appellant's conviction as a PFO. On May 9, 2005, the Appellant was sentenced to twenty years. He filed a timely notice of appeal on June 16, 2005.

ARGUMENT

A. The trial court did not abuse its discretion in not granting the continuance.

The Appellant argues that the trial court abused its discretion by denying the Appellant's motion for continuance due to Kinnard's plea agreement.

The Appellant had moved for continuance relying on Eldred, *supra*, on grounds that: "I believe now he [Kinnard] is a witness, so, whether or not he still has Fifth Amendment privileges as to those charges he might be willing to talk to us, we can investigate what he would say what he might say about Mr. Bobbitt's involvement or lack of involvement." The Commonwealth pointed out that Eldred did not apply because it was not going to use Kinnard against Appellant. This was apparently one of the conditions of his plea agreement. The Commonwealth further noted that Kinnard could assert his Fifth Amendment right not to testify, if called.

[2] The Appellant put on no evidence at trial.

RCr 9.04 states that a court may grant a continuance upon "sufficient cause shown." "The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of the case. Eldred v. Commonwealth at 699 (overruled on other grounds by Commonwealth v. Barroso 122 S.W.3d 554 (Ky. 2003); (citing Snodgrass v Commonwealth 814 S.W.2d 579, 581 (Ky. 1991)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Woodard v. Commonwealth, 147 S.W.3d 63, 67 (Ky. 2004).

In Eldred, the defendant, on the morning of trial, found out that the co-defendant made a plea agreement. There, the continuance was granted and the defense was given an additional week to prepare for trial. However, the co-defendant's plea in Eldred included an obligation for her to testify against Eldred, and the Commonwealth had not provided any statements from her. Because of the sudden change in circumstances, Eldred's counsel was going to have to interview more witnesses, consider the effects of an insurance policy on the codefendant's conduct, review documents from the extensive investigative file on her, and explore the co-defendant's psychiatric history, given that she had been previously examined pursuant to court order at her own request.

Contrary to the circumstances in Eldred, the guilty plea here did not suddenly change the circumstances the Appellant was facing at trial before he found out about the plea. Appellant was aware as of at least the first pre-trial on July 7, 2004, that the Commonwealth intended to join Kinnard as a co-defendant in this case. The plea agreement did not alter his defense strategy. The Commonwealth produced the exact same evidence it was going to produce if they had been tried together, or as they would

have without the plea agreement. See Estep v. Commonwealth, 663 S.W.2d 213 (Ky. 1983)(where evidence would not have affected the final outcome of the trial, the trial court did not abuse its discretion in not granting a continuance). Nor did Kinnard testify against the Appellant, as occurred in Eldred.

Therefore, the court did not abuse its discretion in not granting a continuance.

B. Allowing a portion of the surveillance tape to be played was harmless error.

Appellant argues that the court abused its discretion when it allowed the Commonwealth to play a portion of the surveillance video to the jury.

The Appellant was arraigned on May 26, 2004, at which time the court entered its order of discovery. In the Commonwealth's June 18, 2004 response to the discovery order it stated, "The Commonwealth is also in possession of a surveillance video. The video may be examined by arrangement with the undersigned." Also attached was a full report from Det. Arnold stating he had collected the surveillance video from the Family Dollar for the day of April 2, 2004. Rather than viewing the tape, the Appellant sent a blank VHS tape to the Commonwealth for a copy. The Commonwealth made a copy of the tape it had, which at the time was only of the robbery time zone – not the full day surveillance - and provided it to the Appellant. Det. Arnold, however, kept possession of the complete tape. At the time, the Commonwealth's theory of the case was that the appellant had committed the robbery.

The Commonwealth filed several supplemental responses to the discovery order. Pertinent to this case, on November 19, 2004, the Commonwealth stated Clarkson, now identified Kinnard, as the robber based upon his voice. And the Appellant was now an accomplice. Then on December 2, 2004, the Commonwealth provided the Appellant with another statement from Robinson in which she stated that she, Kinnard, and the

Appellant had planned the robbery. **She also noted the appellant had come to the store around 5 p.m. to commit the robbery, but turned away when the manager "got two good looks" at his face.**

During plea negotiations the day before trial, the Appellant learned that there was an "afternoon portion" of the surveillance video that showed a person coming to the window of the Family Dollar and walking away. This corroborated testimony of the Commonwealth's two witnesses that the Appellant was there at that time.

The next day at trial, the Appellant moved to exclude this portion of the surveillance video because it had not been provided. The Commonwealth argued it had provided the Appellant with a copy of the surveillance tape it had at the time, i.e., the portion showing the evening robbery. The full surveillance video was in Det. Arnold's custody, but if the Appellant had requested to view it, he could have.

During lunch recess, the court, Commonwealth, and the Appellant reviewed the tape. The court said it agreed, "to a certain extent," that the Commonwealth had failed to properly disclose that portion of the tape. But, it held that "the probative value is a little higher than the prejudicial value, both of which are low," because the person in the video was not clearly portrayed. On this analysis, the court permitted the Commonwealth to introduce the tape.

The Appellant, thus, argues that he was not provided with the whole surveillance tape, and therefore, it was a violation of the court's discovery order. We agree. The discovery order stated:

> The Commonwealth shall permit the defendant to inspect and copy or photograph books, papers, documents, or tangible objects or portion that is in the possession, custody, or control of the Commonwealth or its agents and which are material to the preparation of his defense. (Emphasis added).

The Commonwealth complied with the order to a "certain extent." It provided the tape it had in its possession to the Appellant. However, the Commonwealth cannot claim "no foul" because the detective had it. Det. Arnold was an agent doing investigation for the Commonwealth and therefore, the Commonwealth had a duty, pursuant to the court discovery order, to make it available or provide the Appellant with a complete surveillance video. See Anderson v. Commonwealth, 864 S.W.2d 909, 912-913 (Ky. 1993)(officers are agents of the Commonwealth).

Admittedly, the trial court has broad remedial powers under RCr. 7.24(9). Here, the trial court did evaluate the tape and decided it was a "little more probative than prejudicial, both of which are low," pointing out that the tape merely showed an unidentifiable person walking up to the window and walk away. However, given the failure to provide the full tape as ordered and requested, we believe it was error to have allowed its admission. Yet, "[a] discovery violation justifies setting aside a conviction 'only where there exists a reasonable probability that had the evidence been disclosed the result at trial would have been different.'" Wood v. Bartholomew, 516 U.S. 1, 5 116 S.Ct. 7, 10 133 L.Ed.2d 1 (1995); see also Kyles v. Whitley, 514 U.S. 419, 432-36, 115 S.Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995); United States v. Bagley, 473 U.S. 667, 682 105 S.Ct. 3375, 3383-84, 87 L.Ed.2d 481 (1985).

Here, the appellant relies on Akers v. Commonwealth, 172 S.W.3d 414 (Ky. 2005). In Akers, the Commonwealth failed to provide a police report that was crucial to the defense. There, the defendant's sole strategy at trial was that the incident in question never occurred, and he necessarily relied on the absence of any evidence because the Commonwealth had disclosed a police report in which the "no injury" box was checked. However, when a contrary report was brought out at trial, the defendant's entire defense

was "unquestionably 'gutted,'" and thus, his conviction was overturned. Id. at 417. Here, the tape made no such difference.

Had the video not been admitted into evidence, the Commonwealth still had two witnesses who did testify that the Appellant walked up to the window around 5 p.m. to do the robbery, but got spooked and walked away. Testimony also provided evidence that he planned and discussed the robbery. As of November 19, 2004, almost five months before trial, the Appellant knew that he was being charged with complicity to the robbery. He knew he had been there – as the witnesses and the tape would show. He knew about the tape the day before trial. His trial counsel had reviewed the undisclosed portion by the time the trial court allowed the Commonwealth to show it to the jury. He had time to plan his strategy accordingly, unlike the defendant in Akers, whose defense was "gutted" by the unexpected evidence introduced *during* the trial. Here, the Appellant did not ask for a continuance, nor did he argue he could have cross-examined witnesses differently or changed his defense strategy. Unquestionably, he knew the day's earlier events were an issue he would have to defend.

Therefore, even though the Commonwealth violated the discovery order and the tape should not have been admitted, the evidence was merely cumulative, and therefore, the error was harmless.

C. The trial court's jury instructions were proper.

The Appellant claims that the trial court failed to properly instruct the jury in a manner consistent with the presumption of innocence and burden of proof. He states that the jury instructions should have been phrased in the negative.

The jury instructions began as follows: "You will find the defendant Lester Lee Bobbitt guilty of robbery in the first degree under this instruction if and only if you believe

from the evidence beyond a reasonable doubt all of the following." The instruction was taken from Cooper's instruction book and followed the form instruction. See W. Cooper, Kentucky Instructions to Juries, Criminal, §6.14 (1999). The Appellant argues that the instruction should have stated. "you will find the Defendant not guilty unless..." But, the jury was given an instruction on the presumption of innocence which stated: "the law presumes a defendant to be innocent of a crime and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty if upon the whole case you have a reasonable doubt that he is guilty you shall find him not guilty."

The presumption of innocence instruction given here is in line with proper language provided in RCr 9.56(1)[3] and Cooper *supra* §2.02. This court has held that such a presumption of innocence instruction is sufficient. See Mills v. Commonwealth, 996 S.W.2d 473, 491; Sanders v. Commonwealth 801 S.W.2d 665 (Ky. 1990). There was no error.

CONCLUSION

In conclusion, the judgment and sentence of the Jefferson Circuit Court sentencing the Appellant to twenty (20) years is affirmed.

All concur.

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[3] RCr. 9.56(1) provides: "In every case the jury shall be instructed substantially as follows: "The law presumes the defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him or her. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he or she is guilty. If upon the whole case you have a reasonable doubt that he or she is guilty, you shall find him or her not guilty."

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COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

The petition for rehearing filed by the Appellant is hereby denied.

On the Court's own motion, the original opinion rendered herein on September 21, 2006, is modified by changes to pages 7 and 10 of that opinion. Due to pagination, the attached unpublished opinion substitutes in full for the previously rendered opinion. Said modification does not affect the holding.

All concur.

Entered: January 25, 2007.

CHIEF JUSTICE