RENDERED: JANUARY 27, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000351-MR

DANIEL KERR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CR-002052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Daniel A. Kerr has directly appealed from the judgment of the Jefferson Circuit Court convicting him of second-degree robbery and sentencing him to six-and-one-half years' imprisonment pursuant to the jury's verdict. Having carefully considered the record and the parties' arguments in their briefs, we affirm.

On July 14, 2009, the Jefferson County grand jury indicted Kerr on one count of second-degree robbery that arose from an incident on May 31, 2009, when he used physical force in the course of the robbery of David Norris, a Pizza Hut deliveryman. The matter proceeded to a trial by jury on November 3 and 4, 2010. Kerr's theory of the case was mistaken identity.

At the trial, Mr. Norris testified to the events of the early morning hours of May 31, 2009, when he was delivering pizza to 5502 Del Maria Way in Louisville.[1] As he approached the common area of the apartment complex, he saw a group of people who told him they had ordered the pizza. He read the order out and told them the price. At that point, he was asked if he had change for a $100.00 bill. Mr. Norris reached into his pocket, but did not remove any money because he felt that something was not right. The men then demanded that he give them his money. Kerr grabbed Mr. Norris and held him against the brick wall of the apartment building. He was hit on his head, and Kerr ripped the cash he had out of his pocket. Seventy-three dollars in cash fell to the ground, and Kerr picked it up. Kerr then let Mr. Norris leave. As Mr. Norris walked away, he was hit on the back of his head and he began running to his car. He did turn around to retrieve his Pizza Hut visor. Mr. Norris returned to Pizza Hut, reported the incident, and called the police department to report the crime. He gave his statement to a police officer. A few days later, Detective Joshua Hash of the Louisville Metro 6th Division contacted him and asked him to look at several photo-paks. Mr. Norris

[1] Kerr lived in the same apartment complex at 5500 Del Maria Way #8.

was able to identify Kerr as the person who grabbed him, held him against the brick wall, and took his money. Mr. Norris stated that despite it being dark at the time of the robbery, he was able to see Kerr's face clearly because he was very close to his face and the light in the common area above his head provided illumination. While he was able to positively identify Kerr, he was not able to positively identify any of the other participants in the crime.

Detective Hash testified that he was assigned to investigate the robbery. Mr. Norris had reported being attacked by three black males in their 20's. Detective Hash identified Kerr, among others, as a possible suspect and put together a photo-pak pursuant to department policies. Detective Hash went to Mr. Norris' residence on June 5, 2009, to show him the photo-paks, noting that the persons who attacked him may or may not be in the photo-paks. Mr. Norris positively picked out Kerr from one of the photo-paks. Once he made the identification, Detective Hash had probable cause and charged Kerr with the crime. On cross-examination, Detective Hash explained the procedure he used to put together the photo-paks that he presented to Mr. Norris.

Once the Commonwealth closed its case, Kerr moved for a directed verdict based upon lack of evidence. The Commonwealth objected, and the trial court denied the motion based upon the eyewitness identification that would permit a reasonable jury to determine that Kerr was guilty beyond a reasonable doubt. The parties then discussed the jury instructions with the court, and Kerr requested the inclusion of lesser-included offenses. The court denied this request because it

could not identify any basis for lesser-included offenses as the evidence stood, but indicated it would permit Kerr to reargue the issue if he testified during his case-in-chief and presented such evidence. Kerr did not object to any other aspect of the jury instructions other than a few typographical errors in numbering. After a recess, Kerr informed the court that he opted not to testify and did not call any witnesses. Kerr then renewed his motion for a directed verdict, which was again denied.

At the conclusion of the trial, the jury convicted Kerr of second-degree robbery as he was charged in the indictment. Following the penalty phase, the jury recommended a sentence of six-and-one-half years' imprisonment. Kerr moved for a new trial or for a judgment notwithstanding the verdict, arguing that the trial court impermissibly struck a juror for cause on the Commonwealth's motion and denied his request to include any lesser-included offenses in the jury instructions. The trial court ultimately sentenced him in accordance with the jury's recommendation, effectively denying Kerr's post-trial motion. This appeal follows.

On appeal, Kerr presents three arguments: 1) that the trial court made improper comments to the jury at the beginning of the trial; 2) that the robbery instruction denied him a unanimous verdict by including a theory of guilt not supported by the evidence; and 3) that the trial court improperly struck a potential juror for cause. We note that the first and second arguments are not preserved for appellate review.

Kerr's first argument addresses explanatory comments the trial court made to the jury prior to the start of the trial. These comments came directly after the court swore in the jury and were meant to orient the jury about how the trial would proceed; in other words, a "roadmap" of the proceedings. Kerr contends that these comments invaded the jury's exclusive right to judge the facts. Both Kerr and the Commonwealth in their respective briefs provided the historical background addressing this issue of law. In his reply brief, Kerr requested that this matter be decided as either a matter of constitution law under § 7 of the Kentucky Constitution or under common law.

After Kerr filed his reply brief, the Supreme Court of Kentucky issued the opinion of *Walker v. Commonwealth*, 349 S.W.3d 307 (Ky. 2011), which became final on October 13, 2011. This case is the subject of Kerr's motion for leave to file and notice of binding authority, which this Court has granted. We have reviewed this recent opinion and note that the trial judge in *Walker* is the same trial judge in the present case and that virtually identical comments were made in each case. Furthermore, the issue was not preserved in either case. Accordingly, we hold that the Supreme Court's holding in *Walker* is determinative as to this issue, and we shall set forth the applicable portion of the opinion below:

> Walker also contends that his trial was rendered unfair by comments the trial court made to the jury immediately prior to the attorneys' opening statements. Having sworn in the jury, the trial court sought to orient it by providing what the court styled a "roadmap" of the proceedings. The court briefly described the phases of the trial and the roles of the participants. In explaining

the jury's role as the finder of fact, the court noted that the jury was the sole arbiter of the weight to be given the various pieces of evidence and the sole judge of the various witnesses' credibility. The court then advised the jury that a witness's credibility might be assessed by considering such factors as the witness's interest or lack of interest in the outcome of the proceeding, the clarity of the witness's recollection, the witness's demeanor, his or her opportunity for observation, and the overall reasonableness of the witness's testimony. Walker maintains that this latter advice purporting to tell the jury how to carry out its role amounted to a judicial invasion of the jury's province and thus undermined the integrity of his trial. Again, Walker did not preserve this issue by means of a timely objection, and so our review is limited under RCr 10.26 to asking whether the "how to" portion of the trial court's preamble was clearly improper, prejudiced Walker, and was so contrary to our ideal of fair and impartial proceedings as to be manifestly unjust. *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010). Walker attempts to evade this strict standard by asserting that the trial court's error was of constitutional magnitude—a violation of sections 7 and 11 of the Kentucky Constitution—but even alleged constitutional errors, if unpreserved, are subject to palpable error review. *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010). Since the alleged error here does not meet the palpable error standard, it does not entitle Walker to relief.

As Walker correctly notes, in jury trials the practice in Kentucky, since statehood it appears, has been to disapprove judicial comment on the evidence and to leave exclusively to the jury the finding of facts. *Allen v. Kopman*, 32 Ky. 221, 2 Dana 221 (1834); *Howard v. Coke*, 46 Ky. 655, 7 B.Mon. 655 (1847); *Cross v. Clark*, 308 Ky. 18, 213 S.W.2d 443 (1948); *Allen v. Commonwealth*, 286 S.W.3d 221 (Ky. 2009). Although we reject Walker's suggestion that this practice of eschewing judicial comment is a constitutional requirement,[2] it is nevertheless firmly rooted in our

[2] Section 11 of our Constitution guarantees criminal defendants prosecuted by indictment or information "a speedy public trial by an impartial jury of the vicinage." Judicial comment

common law, as noted, and in our rules. RCr 9.54 and 9.58, for example, provide that the court shall decide and instruct on questions of law. Implicit in those provisions is the understanding that questions of fact are for the jury.

Notwithstanding, then, the broad discretion accorded trial courts to control the proceedings before them, *Transit Authority of River City (TARC) v. Montgomery*, 836 S.W.2d 413 (Ky. 1992), and the obvious desirability of giving jurors at the outset of trial some idea of what to expect and what will be expected of them, we agree with Walker that the trial court's instructions regarding how credibility is to be assessed strained, at least, the line judicial comment is not to breach. In *Stewart v. Commonwealth*, 9 Ky.Op. 793, 794 (1877), our predecessor Court considered an instruction the trial court had given at the close of proof, in which

> the jury were told that they were the judges of the credibility of the witnesses and the weight of the evidence, and in determining these questions they should take into consideration the demeanor of the witnesses on the witness stand, their intelligence or

---

threatens not the impartiality of the jury, however, which is sought to be assured by voir dire, but possibly the jury's independence. Section 7 of our Constitution provides that "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." The "ancient mode" of trial by jury is generally regarded as the common law practice in England, and particularly that practice immediately prior to the adoption of the federal constitution. *Wendling v. Commonwealth*, 143 Ky. 587, 137 S.W. 205 (1911). It so happens that the English common law judges regularly commented on the evidence, even to the extent of offering their opinions to the jury as to weight and credibility. Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 Wm. & Mary L.Rev. 195 (Oct. 2000). A plausible argument can be made, therefore, that far from prohibiting judicial comment, Section 7 guarantees it. Robert O. Lukowsky, *The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence*, 55 Ky. L.J. 121 (1966–67). Neither our predecessor Court nor this one, however, has ever read the constitutional provisions as dictating the details of jury practice beyond the requirements, in felony cases, that the jury consist of twelve persons and that its verdict be unanimous. *Short v. Commonwealth*, 519 S.W.2d 828 (Ky. 1975) (quoting from *Wendling*, *supra*). *But see Lucas v. Commonwealth*, 118 Ky. 818, 82 S.W. 440 (1904) (holding that the court may not direct a verdict of guilty in a criminal case and opining that rules under the old Criminal Code assigning matters of law to the court and matters of fact to the jury were in furtherance of Section 7). We decline to depart from that reading here. [Footnote 1 in original.]

> want of intelligence, the relation to or interest in the prosecution or defense, the opportunities or want of opportunities of knowing the facts about which they testified, and that by these tests, and from all the facts and circumstances allowed to go into evidence, they should give to the evidence such weight as they might believe it entitled to.

Although not faulting this instruction as an incorrect statement of the law, the Court nevertheless reversed the appellant's murder conviction because by specifying factors the jury was to consider the instruction risked emphasizing certain items of evidence and suggesting to the jury the court's attitude toward certain witnesses. The "safer and a better practice," the Court concluded, was "to withhold instructions upon matters relating to the credibility of witnesses and the weight of evidence, or the rules by which the jury should be governed in passing upon either." *Stewart*, 9 Ky.Op. at 795.

Similarly, in *Barnett v. Commonwealth*, 84 Ky. 449, 1 S.W. 722 (1886), the Court addressed an instruction providing that

> [t]he jury are the sole judges for themselves of the weight of the testimony and credibility of the witnesses, and may attach such weight to any and all parts thereof as they may think proper, and if they believe that any witness or witnesses have willfully sworn falsely as to any material fact, they may, if they deem proper, disregard the entire testimony of such witness or witnesses.

Barnett, 1 S.W. at 723. "Theoretically, this is all true," the Court allowed, "and yet this Court has repeatedly condemned such an instruction, because it in effect invades the province of the jury." *Id*.

> Here, of course, the trial court's advice about assessing credibility came before rather than after the witnesses had testified, and no doubt that lessened the risk that the instruction might be perceived as inviting scrutiny of any witness's testimony in particular. Here, too, the trial court took scrupulous care to impress upon the jury that it intended no comment on the evidence and that the jury was to disregard anything that might seem like such a comment. Walker has suggested no way in which the court's pre-opening statement witness credibility remarks might have distorted the jury's findings. We cannot say, then, notwithstanding the tension we have noted between the trial court's practice here and the practice Kentucky courts have long observed, that the court's advice about assessing credibility amounted to a palpable error. Our case law does not appear to have addressed this sort of pre-opening instruction, so we cannot say that the trial court clearly or palpably abused its discretion. Moreover, Walker does not appear to have been prejudiced by the court's comments, much less substantially so; indeed, it cannot reasonably be maintained that the court's facially neutral and carefully chosen comments rendered Walker's trial manifestly unjust. Therefore, Walker is not entitled to relief on this ground.

Walker, 349 S.W.3d at 313-15.

For the reasons set forth by the Supreme Court in *Walker*, we hold that the trial court did not commit any error, palpable or otherwise, in its explanatory comments prior to the start of the trial.

Kerr's second argument addresses the jury instructions and whether the robbery instruction prevented the jury from reaching a unanimous verdict. Because Kerr did not object to this particular aspect of the instruction, we must review this issue for palpable error pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26.

The instruction at issue provides in pertinent part as follows:

> You will find the defendant, Daniel A. Kerr, guilty under instruction No. 1, if and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> (a) That in Jefferson County, Kentucky, on or about the 31st day of May, 2009, the defendant stole seventy dollars ($70.00) from Joseph David Norris; AND
>
> (b) That in the course of so doing and with the intent to accomplish the theft, the defendant used *or threatened the immediate use of* physical force upon Joseph Norris. [Emphasis added.]

The instructions also included a definition of physical force: "'Physical Force' means force used upon or directed toward the body of another person." Kerr contends that the evidence presented at trial did not include any indication that Kerr made any type of threats, but rather applied force to Mr. Norris by grabbing him, holding him against the brick wall, and hitting him. Thus, the jury could mistakenly have convicted him on the portion of the instruction regarding threats rather than actual physical harm. The Commonwealth argues that it did present evidence of threats, specifically arguing that the threat of harm was at least implied when the men demanded Mr. Norris give them his money, likening this to the situation addressed by the Supreme Court in its recent decision of *Tunstull v. Commonwealth*, 337 S.W.3d 576, 583 (Ky. 2011):

> A threat does not have to be actual words, but can be communicated by conduct or a combination thereof. *Lawless*, 323 S.W.3d 676. As recognized previously, a person rushing into a bank, wearing a ski mask or otherwise disguised, and aggressively demanding money, carries with it an implied threat of physical force against

> the person(s) from whom the money is demanded if they do not comply.

In making his argument, Kerr cites to *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010), in which the Supreme Court addressed a similar situation related to superfluous language in the penalty phase PFO instructions which had not been preserved by an objection. As pointed out by both Kerr and the Commonwealth, the Supreme Court held:

> [T]he error resulting only from superfluous language does not present a pure unanimity problem. On the contrary, such flawed instructions only implicate unanimity if it is reasonably likely that some members of the jury actually followed the erroneously inserted theory in reaching their verdict. If that can be shown, then a unanimous verdict has been denied and the verdict must be overruled. However, if there is no reasonable possibility that the jury actually relied on the erroneous theory—in particular, where there is no evidence of the theory that could mislead the jury—then there is no unanimity problem. Though such a case presents an error in the instructions, namely, the inclusion of surplus language, the error is simply harmless because there is no reason to think the jury was misled.

Travis, 327 S.W.3d at 463. Kerr suggests that the holding related to the determination of whether the jury was misled is problematic and inconsistent because it requires judges to "become mind readers" and disregards a fundamental presumption about jury instructions. He essentially argues that this Court should not follow that holding. However, the Commonwealth correctly points out that this Court, as an intermediate appellate court, is bound by the Supreme Court's opinion on this issue. As an intermediate appellate court, we cannot overturn

precedent as set forth by the Supreme Court of Kentucky. "The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Rules of the Supreme Court (SCR) 1.030(8)(a). *See also Fields v. Lexington-Fayette Urban County Gov't*, 91 S.W.3d 110, 112 (Ky. App. 2001) (stating that the Court of Appeals is without the authority to overturn a decision of the Supreme Court of Kentucky even if it were inclined to do so). Accordingly, Kerr cannot establish any palpable error on this issue.

Finally, Kerr argues that the trial court abused its discretion in striking a juror for cause. The juror in question responded to the trial judge's question during voir dire and indicated that Kerr's defense counsel was her neighbor. The juror stated that their driveways ran into each other and that they had talked and waved to each other from their yards or while walking. Upon further questioning, the juror stated that her knowing defense counsel would not impact her ability to listen to the evidence and impartially weigh what was presented at trial. The Commonwealth moved to strike this juror for cause, arguing that despite her response that she could remain impartial, she might lean toward the defense because she would see defense counsel on a regular basis in the neighborhood. Defense counsel objected, stating that she barely knew the juror and that they lived across the street from each other. The trial court opted to strike the juror for cause, reasoning that there was a sufficient closeness or proximity between the two. Kerr

argues that this constituted an abuse of discretion and provided the Commonwealth with an additional peremptory challenge.

RCr 9.36(1) addresses challenges to potential jurors and provides that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Kerr argues that the trial court did not utilize this standard in striking the juror, but rather decided the issue on "sufficient closeness." The Supreme Court addressed juror disqualification in *Rankin v. Commonwealth*, 327 S.W.3d 492 (Ky. 2010), cited by both parties. *Rankin* instructs that:

> In making this determination, the trial court is to consider the prospective juror's voir dire responses as well as his or her demeanor during the course of voir dire, and is to keep in mind that generally it is the totality of those circumstances and not the response to any single question that reveals impartiality or the lack of it.

Rankin, 327 S.W.3d at 496, *citing Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). Further, *Rankin* provides:

> Although we review the trial court's rulings on motions to strike for abuse of discretion, *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003), substantial doubts about a prospective juror's impartiality should be decided against the juror, and where such doubts are patent on the record we will not hesitate to find that discretion has been abused. *Shane*, *supra*.

Rankin, 327 S.W.3d at 497.

We agree with the Commonwealth that the trial court did not abuse its discretion in striking the juror for cause. The trial court carefully considered the

totality of the circumstances and the potential juror's answers to all of its questions before deciding that she had a sufficiently close tie to defense counsel to justify her being stricken for cause. We therefore hold that the court did not commit any error in this ruling, and we need not address the question of any possible prejudice arising from the erroneous striking of a potential juror.

For the foregoing reasons, the judgment and sentence of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. David Niehaus
Office of the Louisville
Metro Public Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky