

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002646-MR

GERALD LEE FERGUSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 01-CR-0447

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE and McANULTY, Judges; JOHN WOODS POTTER, Special Judge¹.

McANULTY, JUDGE: Gerald Lee Ferguson (hereinafter appellant) was convicted following a jury trial of three counts of burglary in the second degree, possession of burglar's tools, and being a persistent felony offender in the first degree. This appeal follows.

We find that appellant's right against self-incrimination and right to an attorney were not shown to have been violated. Further, we conclude that appellant was not

¹Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution.

entitled to a directed verdict of acquittal, and the trial court properly instructed the jury. Therefore, we affirm.

Appellant first alleges that his right against self-incrimination was violated when he was questioned by police without first being advised of his rights. Appellant complains of statements that the investigating officer testified to which were made by appellant before the officer advised him of his rights. The officer first testified that prior to any questioning appellant asserted that the burglary victim Brian Payne claimed that appellant had a gun and appellant denied having one. Defense counsel objected to the testimony and the trial court held that it was admissible because appellant made the statement voluntarily. The officer testified neither the victim nor the arresting officer agreed that they had mentioned a gun to appellant so this seemed out of place to her.

The officer then testified that appellant, without being asked any questions, offered the information that he was in the Cherokee Road area to visit a friend. The officer stated that she asked him for the address and phone number of the friend. Defense counsel objected on the basis that appellant was subjected to questioning before he was read his rights. The trial court asked for clarification as to when appellant was read his rights. The officer stated that appellant was picked up by the arresting officer at 1:15 and she read him his rights at 2:22, so there was some time lag there. The trial court ruled

that the officer could only testify to those statements that appellant made after being informed of his rights.

We agree with the Commonwealth that as the trial court sustained the defense objection, there is no basis for appeal. Appellant did not request an admonition or a mistrial as to those statements of appellant's that the officer had already testified to. Furthermore, while appellant again objected at the close of all the evidence to the officer's testimony, appellant did not make any particular demand for relief and did not obtain a ruling on the later objection. A party making an objection must insist that the court rule on it, or it is waived. Bell v. Commonwealth, Ky., 473 S.W.2d 820 (1971). Therefore, appellant received all the relief by the trial court that he requested, and we find no error.

Furthermore, appellant's allegation that he was interrogated while in custody for almost an hour before his rights were read to him is not supported by the record. Although almost an hour elapsed from the time that he was placed in custody to the time he was read his rights, Detective Fredericks testified he was with her only about ten minutes before she read his rights to him. The testimony showed that the rest of that time appellant was being transported to the precinct and placed in the detective's custody.

Appellant also argues he was subjected to the functional equivalent of interrogation after he declined to

waive his rights when officers conducted an investigation of the crimes he was charged with in front of him. Interrogation includes "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect . . . focusing primarily upon the perceptions of the suspect, rather than the intent of the police." Wells v. Commonwealth, Ky., 892 S.W.2d 299, 302 (1995), citing Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The officer testified that after appellant invoked his right to remain silent, they conducted their investigation, including placing calls to the victims. The officer testified that appellant made statements during this time. The officer stated that when they called Cynthia Landes to tell her that they had found a ring on appellant, appellant offered an explanation that he had had the ring for a long time. Appellant argues the investigation was purposely done in front of him in an effort to elicit statements from him.

The Commonwealth contends that appellant never objected to the statements at issue below on the ground that appellant was being interrogated at the time. We agree that there was no specific objection to the officer's testimony on that basis. Therefore, we find no error.

Next, appellant argues that his sixth amendment right to counsel was violated when he was subjected to the functional

equivalent of interrogation after he expressly stated that he wanted an attorney. We agree with the Commonwealth that appellant has not shown that this claim of error was preserved in the trial court. Appellant does not show where in the record the claim of a sixth amendment violation was presented to the trial court. Therefore, we decline to review this claim.

Appellant's third allegation is that the trial court erred in denying his motion for a directed verdict of acquittal. In ruling on a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Id. The appellate standard of review for a directed verdict is, A[i]f under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal.@ Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983).

On appeal, appellant raises three claims to support this allegation. First he alleges that the trial court should have granted the directed verdict on the burglary counts due to faulty identification by two of the victims, Brian Payne and Helga Schutte. We disagree. Appellant argues that he was never placed at the scene of the Brownsboro Road property where two of

the burglaries occurred. Helga Schutte testified that she saw a man walking out of her garage at that address on the day of the burglaries. The man informed her he was looking for a friend. She later learned that there had been a burglary that day.

Ms. Schutte was unable to identify appellant in a photo identification lineup. The jury was informed of this and was told that Ms. Schutte was not given a second chance to pick out the person she saw even though she said she wanted another try. We do not believe appellant has any basis for arguing that the photo lineup was unduly suggestive when no witness in this case made an identification from the photos.

Ms. Schutte's description of appellant to police was in many respects consistent with appellant's appearance, especially as to his race, his hair style and the fact he wore glasses. Ms. Schutte explained any discrepancies by stating that she was kneeling down when she saw the man and it was pouring rain at the time that she observed appellant. She also noted that she had no reason to know at the time that seeing him there was significant since she did not know her neighbors' apartments had been burglarized.

Nevertheless, appellant was placed at the scene of the Brownsboro Road burglary by other evidence in the case. When arrested, appellant was in possession of a ring that was identified as one that was stolen from Cynthia Landes' apartment at the Brownsboro Road address. Therefore, it was not crucial

for Ms. Schutte's testimony to place appellant at the scene. From the whole of the evidence, we find that it was not unreasonable for the jury to find that appellant was at the scene and committed these offenses. Therefore we find no basis for a directed verdict.

Next, appellant argues that the identification by Brian Payne was flawed. We disagree. Brian Payne testified that he was wearing glasses at the time he observed appellant in his backyard minutes after his roommate informed him someone was trying to break in through the front door. He spoke to the man outside. He testified that when he observed appellant walking down his street a month later he was 100% positive it was the man he had seen outside his apartment. He said that appellant was wearing the same clothes as the man he observed before, but he did not assert that all of the clothing was identical. When viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence on which a reasonable juror could find that the defendant committed the burglary at the Cherokee Road address.

Next, appellant argues that he was entitled to a directed verdict because the Commonwealth failed to prove that the intruder entered the apartment on Cherokee Road. The evidence showed that the person had to enter a foyer area through a door in order to get to the door which was pried open. Brian Payne testified the door was pried open with a tire tool, and he

observed the door standing open with the deadbolt lock lying on the floor.

A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling. KRS 511.030. In Stamps v. Commonwealth, Ky., 602 S.W.2d 172 (1980), the Kentucky Supreme Court examined the prior cases of Gaddie v. Commonwealth, 117 Ky. 468, 78 S.W. 162 (1904) and Price v. Commonwealth, Ky., 129 Ky. 716, 112 S.W. 855 (1908) as an aid to defining entry in the burglary statutes. The court quoted Gaddie: An entry must be made into the house with the head, foot, or an instrument with which it is intended to commit a felony.@ 602 S.W.2d at 173, citing Gaddie, 78 S.W. at 163. The Court found that any breaking into a building which allows the defendant to take property out is a sufficient breaking for a burglary. Id.

The jury could reasonably find that appellant inserted the tool into the dwelling in order to break the deadbolt lock and cause it to fall to the floor. Indeed, from the facts, it would not have been unreasonable for the jury to believe that appellant entered the apartment but left immediately upon hearing Brian Payne and his roommate inside. Therefore, we find that the trial court did not err in denying the motion for directed verdict on that basis.

Next, appellant argues that the trial court erred in not granting a motion for directed verdict on the count of

possession of burglar's tools. Appellant did not request a motion for directed verdict as to that count and so we will not review that claim for relief.

Finally, appellant argues that the trial court erred in not instructing the jury on the lesser included offenses of attempted burglary and possession of stolen property. We agree that this claim is not preserved for appeal. Appellant made no objection to the instructions and failed to request that instructions on these offenses be given. Nevertheless, we review for palpable error. Clifford v. Commonwealth, Ky., 7 S.W.3d 371 (1999).

The Commonwealth's evidence was that appellant entered the apartment, through the foyer or with the tool that he was using, therefore, we do not find that an attempt instruction was appropriate. Additionally, there was no evidence that appellant received the ring as stolen property. Appellant did not offer any evidence to support that claim. The detective testified that appellant explained his possession of the ring by stating that he had had it a long time. This is not evidence which would show that appellant received it as stolen property. Therefore, we find no palpable error since the evidence at trial did not support instructions on attempted burglary or possession of stolen property.

For the foregoing reasons, we affirm appellant's convictions for three counts of burglary in the second degree,

possession of burglar's tools, and being a persistent felony offender in the first degree.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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