

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000605-MR

CHARLES WALKER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART
REVERSING IN PART AND REMANDING
** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Charles Walker appeals from the judgment of the McCracken Circuit Court sentencing him to seventeen years' imprisonment after a jury convicted him of burglary in the third degree and being a persistent felony offender in the first degree. Walker argues that the trial court erroneously failed to instruct the jury on the misdemeanor offense of receiving stolen property and improperly denied his motions for a mistrial and for a directed verdict on the burglary charge. Walker

further contends that the Commonwealth introduced inadmissible evidence during the sentencing phase of the trial. After a thorough review of the record, we affirm the trial court with respect to all issues which occurred during the guilt phase of the trial; however, we reverse with regard to errors committed during the sentencing phase and remand for a new sentencing phase.

The burglary in question occurred at approximately 1:00 a.m. on November 21, 2000, at Kevil Eagle's Club in McCracken County, Kentucky. Officers responded to the silent alarm at the club and found the bar area ransacked and the cigarette machine emptied of its products as well as money. Trooper Mike Turnbow and his bloodhound, BeBe, found Walker's car 100 feet away from the club. BeBe identified a scent from Walker's car which she tracked into the club and then to a winter wheat field behind the club where Trooper Turnbow found three sets of muddy footprints and a pair of gloves.

Meanwhile, Deputy Kevin Lynn patrolled Woodville Road behind the wheat field where he encountered three people walking along the road less than half a mile away from the club. When they saw the police car, the three jumped into a ditch beside the road. The deputy stopped his car and radioed for assistance. When additional officers arrived, Wes Thompson, his juvenile son, J.T., and Walker were ordered out of the ditch.

They were all wearing wet, muddy clothing and each was carrying items apparently stolen from Eagle's Club. When BeBe was brought to the location of the three suspects, she identified Thompson as the scent she had been tracking.

The three were arrested and, while riding in the police cruiser, Thompson made a statement that Walker had assisted with the burglary and had driven the car to the club. J.T.'s statement at the station also asserted that Walker had helped burglarize the Eagle's Club. Walker was the only suspect who did not give a statement to police. Prior to their preliminary hearing, Thompson sent Walker's counsel a letter stating that Walker was not involved in the burglary. While Thompson and Walker were in jail, they communicated by letter and Walker constantly asked Thompson to inform the Commonwealth's Attorney and the trial court that Walker was innocent.

At trial, both Thompson and J.T. testified against Walker. J.T. stated that he heard his father and Walker discussing the planned burglary around 8:00 a.m. the morning before they broke into the Eagle's Club. According to J.T., his father and Walker pried open the door while he acted as the lookout. J.T. also testified that Walker was the one carrying the change box removed from the cigarette machine.

Thompson testified that Walker had helped with the burglary and that he had written prior affidavits to the contrary after Walker pressured him to clear Walker's name. The Commonwealth introduced the correspondence between Thompson and Walker to bolster the theory that Thompson felt threatened or intimidated into signing a statement that Walker was not involved in the burglary. According to Thompson, Walker had stolen the beer and cigarettes Walker was carrying when the police stopped the trio.

Although Walker himself did not testify, he introduced evidence from two witnesses in support of his alibi. Walker's employer, Ray Abernathy, testified that he picked Walker up for work the morning before the burglary between 7:00 and 7:30 a.m., which was prior to the time J.T. allegedly heard Thompson and Walker planning the burglary. Shelia Whitaker testified that she stopped by Walker's house around 12:45 a.m. on the morning of the burglary and found him asleep on the couch with his car missing. Walker's trial counsel attempted to persuade the jury that Thompson and J.T. had taken Walker's car without permission while he was asleep and that Walker had gone to look for them when he woke up and discovered that his car was missing. Nevertheless, the jury convicted Walker of burglary in the third degree and being a persistent felony offender in the first

degree and recommended a sentence of seventeen years' imprisonment. This appeal followed.

Walker first argues that the jury should have been instructed on the misdemeanor offense of receiving stolen property. The Commonwealth counters by pointing out that this issue was not preserved and, therefore, it is not properly before this Court pursuant to Kentucky Rule of Criminal Procedure (RCr) 9.54(2). Walker concedes that trial counsel failed to preserve the issue after requesting an instruction on receiving stolen property; however, he contends that the trial court should have given the instruction on its own initiative.

"In a criminal case, it is the duty of the trial judge to prepare and give instructions on the whole law of the case, and this rule requires instructions applicable to every state of the case deducible or supported to any extent by the testimony." Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 360 (1999). At trial, Walker attempted to establish an alibi for the time of the burglary through testimony which put him at home asleep with his car missing immediately before the burglary occurred. He claims that a jury could reasonably doubt his guilt on the offense of burglary and yet find him guilty of receiving stolen property because "possession . . . of any recently stolen movable property [is] prima facie evidence that [the possessor] knew such property was stolen." Brown v. Commonwealth, Ky.

App., 914 S.W.2d 355, 357 (1996). However, this argument ignores the fact that Thompson and J.T. both testified at trial that Walker was involved in the burglary. The circumstantial evidence introduced at trial--that Walker's car was abandoned in front of the Eagle's Club, and that he was found hiding in a ditch with Thompson and J.T., carrying some of the stolen property away from the Eagle's Club, in the club's immediate vicinity, shortly after officers arrived at the scene to investigate--does not support Walker's argument that a jury could have reasonably convicted him of receiving stolen property alone. Moreover, receiving stolen property is not a lesser-included offense of burglary. Macklin v. Commonwealth, Ky. App., 687 S.W.2d 540 (1984). Therefore, had the trial court instructed the jury on receiving stolen property, it could have convicted Walker of that charge in addition to burglary. Sebastian v. Commonwealth, Ky., 623 S.W.2d 880 (1981). Consequently, Walker has failed to demonstrate any harm he suffered from the trial court's refusal to instruct the jury on the offense of receiving stolen property.

In addition, Walker contends that the trial court erroneously failed to grant his motions for a directed verdict of acquittal on the charge of burglary in the third degree. The standard of review for failure to grant a directed verdict of acquittal is whether

under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Only then is a defendant entitled to a directed verdict of acquittal. Cf. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence. Murphy v. Sowders, 801 F.2d 205 (6th Cir. 1986). On review, the appellate court should not reevaluate the evidence or substitute its judgment of the credibility of the witnesses for that of the jury. Commonwealth v. Jones, Ky., 880 S.W.2d 544 (1994).

Commonwealth v. Suttles, Ky., 80 S.W.3d 424, 426 (2002). In the case sub judice, we are confronted with two witnesses who testified to Walker's participation in the Eagle's Club burglary in addition to a significant amount of circumstantial evidence pointing to his involvement. The trial court was not required to direct a verdict in Walker's favor on the basis of the evidence introduced by the Commonwealth at his trial.

Walker also claims that the trial court denied him due process of law when it refused to grant his motion for a mistrial during Thompson's testimony. The Kentucky Supreme Court has previously determined that "in order for a mistrial [to be declared], there must appear in the record 'a manifest necessity for such action or an urgent or real necessity,'" and trial courts are "in the best position to determine whether any

remedial action [is] necessary to . . . ensure a fair trial." Grundy v. Commonwealth, Ky., 25 S.W.3d 76, 82 (2000). (Citations omitted.)

The Commonwealth introduced the correspondence between Walker and Thompson to support its theory that Walker had pressured Thompson into giving the statement which exonerated Walker from the burglary. Pursuant to a pretrial motion in limine, all references to Walker's prior felonies were redacted from the letters and Thompson was instructed not mention Walker's criminal history. Nevertheless, one of Walker's letters contained a statement to the effect that he had been through this before and his trial counsel did not request that it be redacted prior to trial.

At trial, when that statement was read to the jury, defense counsel objected and requested a mistrial. The trial court denied the request and gave the following admonition:

Ladies and gentlemen, there was a statement just made in reading that letter, something to the effect that Mr. Walker wrote that he'd been through this before or something to that effect. You should not infer from that he's had any criminal charges before or he's been in this same position before. I can't, I don't know exactly what the statement means, but it's instructing you that you cannot infer from that he's been in trouble before or tried to influence anyone or anything of that nature.

(VT 1, 10/30/01, 13:25:26).

The Kentucky Supreme Court previously determined that there was no manifest necessity for a mistrial where a law enforcement officer improperly testified that the defendant had been featured on the "America's Most Wanted" television program. Bray v. Commonwealth, Ky., 68 S.W.3d 375 (2002). Even if the statement from Walker's letter was improperly admitted, errors of this type are easily cured by an admonition such as the one given by the trial court. Graves v. Commonwealth, Ky., 17 S.W.3d 858 (2000). Our courts have previously held that the burden is on Walker to overcome the presumption that the jury followed the trial court's admonition. Mills V. Commonwealth, Ky., 996 S.W.2d 473 (1999); Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993). Consequently, Walker's failure to offer any evidence to rebut this presumption is fatal to his claim that the trial court abused its discretion in failing to grant a mistrial.

We turn now to Walker's argument that the Commonwealth was permitted to introduce inadmissible evidence during the penalty phase of his trial. Commonwealth's Exhibits 10, 11, and 12 were placed before the jury pursuant to our truth-in-sentencing statute which allows the prosecution to introduce evidence of a convicted defendant's prior criminal record to assist the jury in determining an appropriate sentence. Exhibits 10 and 11 each contained an indictment and a final

judgment sentencing Walker to a period of imprisonment. Exhibit 12 consisted of a uniform citation, docket sheet, and district court case jacket establishing that Walker had pled guilty to operating a motor vehicle on a suspended license. The Commonwealth's witness did not read the indictments to the jury; however, they were admitted into evidence and the jury had access to them during its deliberations.

Walker's trial counsel expressly stated that there was no objection to the admission of this evidence; nevertheless, Walker has asked us to review the admission of this evidence under the palpable error rule, RCr 10.26. "A palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court. . . ." Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003). We have upheld Walker's conviction on the charge of burglary in the third degree, a Class D felony carrying a sentence of one to five years' imprisonment. However, the jury also found that he was a persistent felony offender in the first degree and recommended an enhanced sentence of seventeen years' imprisonment. If the jury had access to improperly admitted evidence during the persistent felony offender and sentencing phase of the trial, Walker's rights were substantially affected. Consequently, we will review this argument under the palpable error standard.

Turning first to the indictments, we note that, in addition to containing a general description of the offense charged, each indictment charged Walker with being a first degree persistent felony offender and listed predicate felony offenses. The judgment in McCracken Circuit Court indictment number 79-CR-159 indicates that Walker was convicted of burglary in the first degree and being a second degree persistent felony offender and sentenced to ten years' imprisonment. In addition, in 79-CR-160, Walker was only convicted of burglary in third degree and sentenced to five years' imprisonment to run concurrently with his other sentence. This second indictment also contains the allegation that Walker's co-defendant was a juvenile.

Kentucky Revised Statute (KRS) 532.055(2)(a) provides that, during the sentencing phase of a felony trial, the Commonwealth can inform the jury of the defendant's prior misdemeanor and felony convictions and the nature of any offenses of which he has previously been convicted. The Kentucky Supreme Court has previously ruled that KRS 532.055 "permits the introduction of prior convictions of the defendant, not prior charges subsequently dismissed." Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854 (1996). Here, each unredacted indictment, which the jury was allowed to view, included a charge of being a persistent felony offender in the

first degree against Walker; however, he was never convicted of this charge in either prior case. The introduction of this evidence, we believe, violates the principle enunciated in Robinson.

Next, we examine the uniform citation introduced as part of Commonwealth's Exhibit 12. It contains a description of the factual circumstances which led to Walker's car being stopped on suspicion of driving under the influence. The arresting officer noted that Walker had been drinking, although he did not charge Walker with driving under the influence because his blood alcohol level was well beneath the legal limit. Additionally, the citation contained information that Shelia Whitaker, Walker's main alibi witness in the case at bar, was a passenger in the car when he was stopped and was drunk herself. This specific type of evidence presented to the jury exceeds the limitations set forth in Robinson and therefore, pursuant to the holding in Hudson v. Commonwealth, Ky., 979 S.W.2d 106 (1998), we must reverse and remand for the trial court to have a new sentencing phase.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed as to Walker's conviction for burglary in the third degree; however, we reverse and remand for a new determination of his status as a persistent felony offender and sentencing phase.

SCHRODER, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT IN PART AND FILES
SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN RESULT: I concur with the Majority Opinion on all issues except Walker's request for a jury instruction on receiving stolen property. I concur in the result reached by the Majority on that issue, but I would deny relief on the grounds that the issue was not properly preserved for appellate review and that receiving stolen property is not a lesser-included offense of burglary. Walker certainly was not entitled to a jury instruction on an offense that was either not charged or did not constitute a lesser-included offense of a charged offense.

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