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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000265-MR

JAMES MICHAEL PETREY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 02-CR-00111

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a judgment entered by the Harlan Circuit Court after a jury found appellant James Michael Petrey guilty of burglary in the first degree, wanton endangerment in the first and second degrees, two counts of menacing, stalking in the second degree, and assault in the second degree. Appellant contends that the trial court erred in permitting the indictment against him to be amended at trial, and in failing to grant directed verdicts in his favor on the

counts of burglary in the first degree and assault in the second degree. For the reasons stated hereafter, we reverse the judgment insofar as it pertains to assault in the second degree. We affirm in all other respects.

Although appellant had no history of physically abusing his ex-wife Jennifer Petrey, he did threaten to commit suicide in front of her on several occasions. The Harlan District Court issued a Domestic Violence Order (DVO) on December 1, 2000, ordering appellant to stay at least 50 feet away from Jennifer at all times, effective until December 1, 2003. In a separate matter, the Harlan Circuit Court entered an agreed order on February 21, 2002, releasing appellant from the Harlan County Detention Center on the conditions that he *inter alia* "not be within the boundaries of Harlan County, Kentucky until further orders of the Court," and that he "not have in his possession a firearm of any type."

On April 23, 2002, appellant went to Jennifer's workplace (CitiFinancial) in Harlan County, Kentucky where Jennifer, four of her co-workers, and a customer were present. Appellant asked Jennifer to speak privately with him in a back room, and she refused. Instead, she picked up the telephone to call the police. Appellant hung up the phone, telling Jennifer that she was not going to call anyone. Jennifer shouted for a co-worker to call the police as appellant tried to force her

into the back room. At that point Jerry Gibson, Jennifer's co-worker, intervened despite Jennifer's request that he not do so because she knew that appellant always carried a gun. Jerry freed Jennifer from appellant's hold, and she ran from the room. Appellant then pulled out a gun. Jerry and appellant wrestled for control of the gun, firing it into an empty office. They continued to wrestle for control of the gun and although appellant bit Jerry's hands, Jerry eventually gained control of the gun and unloaded it.

Appellant was indicted on August 20, 2002, on charges of burglary in the first degree, six counts of wanton endangerment in the first degree, stalking in the first degree, assault against Jennifer in the fourth degree, and attempted assault against Jerry in the second degree. By agreement of the parties, the indictment was amended on October 10, 2002, prior to the start of appellant's jury trial, to reflect that the charge of attempted assault in the second degree was a class A misdemeanor rather than a class B felony as the indictment erroneously indicated.

During appellant's trial, the Commonwealth made a motion at the close of its case in chief requesting that the court amend the charge of attempted assault in the second degree to assault in the second degree. The trial court granted the Commonwealth's motion over appellant's objection, finding that

the Commonwealth's evidence suggested that Jerry's injuries were serious enough to warrant the amendment. The jury returned a verdict on October 10, 2002, finding appellant guilty of burglary in the first degree, wanton endangerment in the first and second degrees, two counts of menacing, stalking in the second degree, and assault in the second degree. Pursuant to the jury's recommendation, appellant was sentenced to serve ten years in the penitentiary. This appeal followed.

First, appellant argues that the trial court erred in granting the Commonwealth's motion to amend the class A misdemeanor charge of attempted assault in the second degree to the class C felony charge of assault in the second degree. We agree.

"Substantive due process requires that a defendant be informed of [his] acts alleged [to be] criminal and the crime with which he is charged." *Malone v. Commonwealth*, Ky., 30 S.W.3d 180, 183 (2000). An indictment satisfies this requirement as it informs an accused "of the essential facts of the charge against him so he will be able to prepare a defense." *Id.* at 182. Once a grand jury chooses which charges shall be made against a defendant, "the defendant has no absolute right nor does the trial court have jurisdiction to change [the charges] except as authorized by RCr 6.16." *Coleman v. Commonwealth*, Ky. App., 501 S.W.2d 583, 584 (1973). RCr 6.16

provides that a "court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

Accordingly, a trial court may properly amend an indictment to change "the designation of the subsection of the statute under which" a defendant is charged. *Schambon v. Commonwealth*, Ky., 821 S.W.2d 804, 810 (1991). Similarly, an indictment may be amended to add a missing element of an offense where it technically does not charge a defendant with a crime because an element of the charged offense was omitted. *Basham v. Commonwealth*, Ky. App., 703 S.W.2d 480, 481 (1985) (adding "with intent to defraud" to food stamp trafficking indictment). Moreover, courts may in some instances amend indictments to correct details such as the date of the alleged offense, the name of the victim, or the name of the person charged. *Veach v. Commonwealth*, Ky., 572 S.W.2d 417, 419 (1978); *Commonwealth v. Doe*, Ky. App., 524 S.W.2d 630, 631 (1975); *Stephens v. Commonwealth*, Ky. App., 397 S.W.2d 157, 158 (1965). More substantially, an indictment may be amended to include an enhancement provision, because such a provision is not a separate or additional offense. *Luna v. Commonwealth*, Ky. App., 571 S.W.2d 88, 89 (1977) (drug trafficking offense was submitted to the jury as a second offense of its type after defendant

testified at trial that he previously had been convicted of drug trafficking).

Nevertheless, a Kentucky "trial court has no authority to amend an indictment to charge an additional or different offense." *Coleman*, 501 S.W.2d at 584 (emphasis added). Thus, if a defendant is charged as a principal in the commission of a crime, a court may not amend the indictment to instead charge him as being an aider and abettor of the same offense. *Brown v. Commonwealth*, Ky. App., 498 S.W.2d 119, 120 (1973). Nor may an indictment charging a defendant with forgery be amended to charge him instead with uttering a forged instrument. *Frizzell v. Commonwealth*, Ky. App., 511 S.W.2d 200, 201 (1974).

Clearly, the trial court's amendment of the indictment against appellant in the matter before us resulted in his being tried for an offense other than the one for which he was originally indicted. Not only did the amendment result in appellant being charged with a class C felony rather than a class A misdemeanor, but the amended charge required additional proof in the form of evidence that the assault was completed and that serious physical injury resulted. As an indictment may not be amended under RCr 6.16 to charge a different offense, the conviction on the charge of assault in the second degree must be reversed. Further, given this conclusion, appellant's

contention that the trial court erred in failing to grant a directed verdict for him on this charge is rendered moot.

Next, appellant argues that the trial court erred by failing to grant a directed verdict in his favor on the charge of burglary in the first degree. We disagree.

The standard on review is that appellant is entitled to a directed verdict of acquittal "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt." *Commonwealth v. Benham*, Ky., 816 S.W.2d 186, 187 (1991). Here, appellant was charged under KRS 511.020(1), which provides as follows:

A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Accordingly, the initial elements of burglary in the first degree may be satisfied if the Commonwealth shows that appellant knowingly either entered CitiFinancial unlawfully or remained there unlawfully. Appellant contends that the

Commonwealth failed to prove either scenario. First, he argues that even if he violated the DVO and agreed order by approaching Jennifer at CitiFinancial, he did not enter the premises unlawfully because he never specifically had been barred from entering CitiFinancial. Second, appellant argues that he did not remain at CitiFinancial unlawfully because neither the owner nor any authorized person directed him to leave.

Regardless of whether appellant knowingly entered CitiFinancial unlawfully, it is clear that the evidence was sufficient to show that he remained there unlawfully.¹ The official commentary to KRS 511.020 provides that "any person who enters property under privilege may still commit an offense of burglary if he remains on that property beyond the termination of his privilege." Such a privilege may "be revoked by conduct other than [sic] express words." *Hedges v. Commonwealth, Ky.*, 937 S.W.2d 703, 706 (1996). Under the evidence as a whole, it was not clearly unreasonable for the jury to infer that appellant's privilege to be at CitiFinancial was revoked, and that he knew it was revoked, when Jennifer told him that she was calling the police. It follows, therefore, that the evidence

¹ While we believe that the evidence was such that the jury could have found that appellant's entry into CitiFinancial was unlawful because in doing so he intended to violate and did violate the DVO and agreed order, we need not further address this issue since it is clear that the evidence was sufficient to show that appellant remained unlawfully in CitiFinancial.

was sufficient to support a finding that appellant thereafter knowingly remained unlawfully in the building.

Appellant argues, however, that even if his presence was unlawful, the Commonwealth failed to prove that he intended to commit a crime while he remained unlawfully in CitiFinancial. In support, appellant relies on testimony that he went into CitiFinancial intending merely to speak with Jennifer, as well as the fact that in the past he had threatened harm only to himself.

KRS 501.020 provides that a person has intent to commit a crime "when his conscious objective is to cause that result or to engage in that conduct." Further, "the intentions of an accused may be ascertained from the surrounding facts and the jury is allowed a reasonably wide range in which to infer intent from the circumstances." *Rayburn v. Commonwealth, Ky. App.*, 476 S.W.2d 187, 189 (1972). It is true, as appellant asserts, that a "mere violation of [a] DVO without intent to commit an independent crime [cannot] support a finding of burglary." *Hedges*, 937 S.W.2d at 706. However, the evidence in the matter before us showed that appellant had been ordered to stay away from Jennifer and to stay out of Harlan County, Kentucky. Such orders "are relevant as evidence of motive or state of mind, and also as part of the immediate circumstances bearing on the crimes charged." *McCarthy v. Commonwealth, Ky.*,

867 S.W.2d 469, 470 (1993). Moreover, while still subject to said orders, appellant entered Jennifer's workplace armed with a loaded gun. Under these facts, it would not be clearly unreasonable for a jury to find that appellant intended to commit harm, either to Jerry or to Jennifer, when he unlawfully remained in CitiFinancial. Accordingly, the court did not err by failing to grant a directed verdict for appellant on the charge of burglary in the first degree.

We reverse the judgment insofar as it pertains to assault in the second degree. We affirm the judgment in all other respects.

ALL CONCUR.

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