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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001791-MR

EUGENE COLLINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NOS. 04-CR-00137 AND 04-CR-00147

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

BUCKINGHAM, JUDGE: Eugene Collins appeals from a judgment of the Fayette Circuit Court convicting him of the crimes of third-degree burglary and possession of burglar's tools and sentencing him to three years in prison. We affirm.

Eric Elliott testified at Collins's trial that on the morning of December 29, 2003, he was in bed when he heard the

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

doorbell ring. Not wanting to get up at the time, Elliott stayed in bed and ignored it until it rang again. Elliott stated that he then got out of bed and looked out the window, where he saw a person walking across his yard and around the side of his house.

Elliott then walked to the back of his house and observed a person removing items from his garage. He immediately called the police and related that a black male was attempting to steal items from his garage. He also gave a description of the person.

Within minutes, the police arrived at his house and informed him that they had a person in custody. Elliott looked into the police car and identified the suspect as the person he had seen in his garage. Also, a pressure washer taken from his garage was found in his neighbor's driveway. Elliott testified that he had seen the pressure washer in the possession of the person in his garage.

Officer John Toler of the Lexington Police Department also testified at Collins's trial. He stated that he responded to the burglary-in-progress call and that he observed a man fitting the description given by Elliott walking down the street away from the Elliott residence. When the man saw Officer Toler, he immediately turned and went between two houses. Officer Toler stated that he got out of his vehicle and pursued

the man, finding him crouched down beside a vehicle parked in a driveway. Upon being discovered by Officer Toler, the man fled but was soon captured.

When Officer Toler told the man (Collins) why he was being detained, Collins related that he and a friend had attempted to break into the garage but that he changed his mind and decided to ring the front doorbell and let the owner know what was going on. Collins had a pair of pliers in his pocket when he was apprehended, and he told the officer that his friend had used the pliers to pry the garage door open. Although police officers searched the area, no other suspects were found.

Collins testified on his own behalf and admitted going to Elliott's residence. However, he denied having any criminal intent. Collins stated that he had been a few blocks away smoking crack cocaine with some people when a man named Mike asked him if he wanted to go to the man's uncle's house to get some items to pawn so that they could buy more crack cocaine. Collins stated that he agreed to go with the man, but he soon discovered that the man intended to break into the garage in order to remove the items. He testified that the man threw the pliers down and that he picked them up and put them in his pocket.

Collins further testified that he then walked around to the front of the house and rang the doorbell twice in an

effort to alert the owner. He stated that when no one answered, he decided to retrieve the property and place it on the front porch of the residence. Collins also testified that he was in the process of doing this when the owner of the residence came outside and saw him. He stated that he later ran from the police because he had "dope" and a "pipe" but that he managed to throw these items away before he was apprehended by Officer Toler.

At the conclusion of the trial, the jury found Collins guilty of third-degree burglary, a Class D felony, and possession of burglar's tools, a Class A misdemeanor. Prior to sentencing on the felony charge, Collins accepted an offer to be sentenced to 12 months on the misdemeanor charge, with the understanding that the sentence would run concurrently with the sentence he would receive on the felony charge. Thereafter, the jury fixed Collins's sentence at three years in prison for third-degree burglary but found him not guilty of the PFO charge. The court then sentenced Collins to three years in prison on the burglary charge and to 12 months in jail on the burglar's tools charge, with the sentences to run concurrently with each other. This appeal followed.

Collins's first argument is that the trial court erred by denying his motion for a directed verdict on the possession of burglar's tools charge. He asserts that the pliers are not

burglar's tools and that the Commonwealth failed to prove that the pliers were intended to be used, or were used, in this case.

The test for a directed verdict is set out in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991), as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.

KRS² 511.050 sets forth the crime of possession of burglar's tools. The pertinent part of the statute states as follows:

(1) A person is guilty of possession of burglar's tools when he possesses any tool, instrument or other thing adapted, designed or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking under circumstances which leave no reasonable doubt as to his:

² Kentucky Revised Statutes.

- (a) Intention to use the same in the commission of an offense of such character;
- or
- (b) Knowledge that some other person intends to use the same in the commission of an offense of such character.

Id.

The first part of Collins's argument concerning the denial of his motion for a directed verdict is that these were ordinary pliers that are not designed for or commonly used for burglaries. He thus maintains that the court should have granted his motion for a directed verdict because common pliers do not fall within the meaning of burglar's tools as described in the statute.

Elliott testified that his garage had been locked with a hasp and a padlock, but that after the break-in he found that the hasp had been pried off. Further, Officer Toler testified that when Collins was apprehended, he told the officer that his friend had used the pliers to pry the garage door open.

The Commonwealth argues that Collins did not preserve this issue for appellate review because his directed verdict motion made no mention of the burglar's tools offense nor did the motion raise the specific argument that he now raises here. Among other cases, the Commonwealth cites Springer v. Commonwealth, 998 S.W.2d 439, 446 (Ky. 1999), wherein the

Kentucky Supreme Court stated that “[a] new theory of error cannot be raised for the first time on appeal.”

CR³ 50.01 states in part that “[a] motion for a directed verdict shall state the specific grounds therefor.” This rule is applicable to criminal cases as well as civil cases. See RCr⁴ 13.04. Because Collins did not raise this issue before the trial court, we conclude that it was not preserved for our review. See also Pate v. Commonwealth, 134 S.W.3d 593, 597-98 (Ky. 2004).

Even though the issue has not been preserved for our review, we nevertheless conclude that Collins’s arguments are without merit. As we noted, Collins asserted that common pliers are not burglar’s tools and even if they were, the Commonwealth failed to prove that the pliers were intended to be used, or were used, in this case.

In Commonwealth v. Riley, 192 Ky. 153, 232 S.W. 630 (1921), the appellate court addressed a similar argument as follows:

[T]he tools or implements and other things in the possession of the defendant, in this character of prosecution, need not be articles especially manufactured and designed for the use of burglars alone, but they may be any tools, implements, or things which in the language of the statute are

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Rules of Criminal Procedure.

"used by burglars for housebreaking, forcing doors, windows, locks, or buildings," etc., although they may be such as are adapted for use in the accomplishment of lawful and legitimate purposes. If the language of the statute should be construed so as to require that such as tools, etc., should be specially manufactured and designed for burglarious purposes, we doubt if any defendant could ever be convicted under the statute, not only because, as we surmise, that there is no such manufacturing establishment, but also because of the great difficulty which the commonwealth would encounter in proving that fact, to say nothing about the strained construction of the statute which that interpretation would require. If the tools are such that they may be used to commit burglary, and the circumstances be such as to lead a reasonably prudent man to believe beyond doubt that the intention of their possessor was to use them for that purpose, the offense is complete. We feel that this interpretation of the statute is so plain as to need no fortification of authorities.

232 S.W. at 632-33. Although the statute was worded differently at that time, we conclude that the reasoning in the Riley case applies with equal force to this case. See also the Commentary to KRS 511.050.

Collins's contention that the Commonwealth failed to prove that the pliers were intended to be used, or were used, in this case is also without merit. Collins himself testified that the pliers were used in the burglary. Further, even if Collins himself did not use the pliers and they were used by this other person to whom Collins referred, the evidence was sufficient for

the jury to convict him under KRS 511.050(1)(b). In short, we conclude the trial court did not err when it denied Collins's motion for a directed verdict on the possession of burglar's tools charge.

Collins's second argument is that the trial court erred by denying his motion for a directed verdict on the PFO charge. He maintains that the Commonwealth failed to prove all the elements of the offense and that the trial court's failure to grant his motion for a directed verdict resulted in his being prejudiced when the jury fixed his sentence on the burglary charge at three years.⁵ Collins makes this argument despite the fact that the jury found him not guilty on the PFO charge. He contends that because the charge was submitted to the jury rather than being dismissed pursuant to his motion, the jury obviously reached a compromise verdict and sentenced him to three years in prison. He speculates that had the jury not had the PFO charge to consider, it would likely have sentenced him to less than three years.

First, since the jury found him not guilty of the offense, we conclude that any error by the trial court concerning this matter was harmless. Collins's argument that

⁵ The jury was instructed to set Collins's sentence for third-degree burglary at not less than one nor more than five years.

the jury would have sentenced him to less than three years had the PFO charge not been submitted is pure speculation.

Second, his argument is without merit at any rate. Collins correctly notes that the Commonwealth was required to prove either that he was on probation, parole, or conditional discharge at the time he committed the burglary offense or that he had been discharged from probation, parole, or conditional discharge within five years prior to the commission of the burglary offense. See KRS 532.080(2)(c). Here, the Commonwealth proved that Collins was convicted of an offense in 1996 and was placed on probation for five years. Because this burglary crime was committed on December 29, 2003, Collins would have been discharged from probation within five years prior to the commission of this offense. However, citing Hon v. Commonwealth, 670 S.W.2d 851 (Ky. 1984), Collins argues that the Commonwealth did not actually prove that he had been discharged from probation within that time and that it was impermissible to draw such an inference based only on the Commonwealth's evidence.

The fallacy in Collins's argument is that the Hon case has been overruled in part by the Kentucky Supreme Court. See Martin v. Commonwealth, 13 S.W.3d 232, 234 (Ky. 1999). In fact, this same situation has since been addressed by the Kentucky Supreme Court in Shabazz v. Commonwealth, 153 S.W.3d 806 (Ky.

2005). Therein, the court held that evidence of the date of the prior conviction and the fact that the sentence was probated for five years supported a reasonable inference, under the facts of that case, that the present offense occurred within five years of the discharge of the defendant from probation. Id. at 813-15. In short, the court here did not err.

Collins's third argument is that the trial court erred by informing the jury of the PFO charge before sentencing him on the misdemeanor conviction for possession of burglar's tools. After the jury returned verdicts of guilty on the burglary charge and the burglar's tools charge, and before beginning the sentencing phase of the trial, the court informed the jury of the PFO charge against Collins. The Commonwealth concedes that the court did not follow the proper procedure set out in Commonwealth v. Philpott, 75 S.W.3d 209 (Ky. 2002). Since the jury in this case found Collins guilty of both a felony and a misdemeanor offense, the court was required to bifurcate the sentencing proceeding and immediately proceed to have the jury sentence Collins on the misdemeanor charge without additional evidence being submitted. See id. at 213-14.

We agree with Collins that the trial court erred by informing the jury of the PFO charge before the sentencing hearing on the misdemeanor charge. We also agree that Collins

preserved our review of this matter by making a timely objection. However, we conclude that the error was harmless.

As we have noted, after raising his objection, Collins agreed to take a 12-month sentence on the misdemeanor charge since it would run concurrently with the sentence on the felony charge. By accepting the 12-month sentence, he waived any defect in the proceeding. Furthermore, since the sentence was to run concurrently with the felony sentence by law, we fail to see how Collins could have been prejudiced in any manner.

Collins's fourth and final argument is that he was deprived of a fair trial due to prosecutorial misconduct in that the prosecutor argued during her closing statement that Collins had a motive to lie because he was facing a prison sentence. During her closing argument, the prosecutor stated, "he did testify in this particular case and he gave you a version of the facts, but again, I want you to consider his motivation to lie. He's looking at a burglary charge, and possession of burglary tools."

First, Collins's attorney failed to preserve any error in this regard by failing to make a contemporaneous objection. "[A]n objection to improper statements made during closing arguments must be contemporaneous." Weaver v. Commonwealth, 955 S.W.2d 722, 728 (Ky. 1997). Since the issue was not preserved for review, Collins urges us to consider it under the palpable

error rule of RCr 10.26. We conclude that any error in this regard does not constitute palpable error affecting Collins's substantial rights.

Second, we are not persuaded that the prosecutor's statement was improper. Collins cited no legal authority to support his argument. Furthermore, the case relied upon by the Commonwealth, Tamme v. Commonwealth, 973 S.W.2d 13, 38-39 (Ky. 1998), affirmed that a prosecutor's argument that the defendant had a motive to lie was not improper but was allowed as an attack on the defendant's credibility where he testifies as a witness on his own behalf.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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