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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002572-MR

ANDRE DRAPER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
INDICTMENT NO. 04-CR-001369

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

MINTON, JUDGE:

I. INTRODUCTION.

Andre Draper brings this direct appeal from his conviction of second-degree burglary and for being a first-degree persistent felony offender (PFO 1). We reject Draper's arguments that the evidence supported additional jury instructions on lesser-included offenses of second-degree burglary. And even though the trial court improperly instructed

the jury on PFO 1, we hold that this error was not preserved for appellate review and does not rise to the level of palpable error. Therefore, we affirm the judgment of conviction and sentence.

II. FACTUAL AND PROCEDURAL HISTORY.

In March 2004, Detective Stuart Owen of the Louisville Metro Police Department responded to a call concerning a burglary at 4014 Berkshire Avenue. Upon arriving in his unmarked car, Owen saw three men loading items into a U-Haul truck that was parked in a driveway. Owen then saw two of the men run away on foot while one drove away in the U-Haul. Owen followed the U-Haul to a K-Mart parking lot where he stopped it and questioned the driver, Draper. Draper told Owen that the U-Haul had contained some items at the time he rented it. Draper then opened the rear door of the U-Haul, revealing a DVD player, two televisions, and a video game system, all of which, it was later determined, belonged to the occupant of 4014 Berkshire Avenue.

Draper further told Owen that he met a couple of men the preceding day who asked him to rent a U-Haul to help them move furniture in exchange for $40.00. Owen agreed, rented the U-Haul in his own name, and drove the U-Haul to Berkshire Avenue to meet the men.

Draper was later indicted on two counts of burglary in the second degree and for being a PFO 1. The trial court granted Draper's motion for a directed verdict on one of the burglary counts but denied his requests for jury instructions on felony and misdemeanor receiving stolen property and facilitation of second-degree burglary. The jury convicted Draper of the remaining burglary charge and of being a PFO 1. He received a ten-year sentence on the burglary charge, which was enhanced to twelve years on the PFO. Draper then filed this appeal.

III. ANALYSIS.

Draper first contends that the trial court erred by denying his requested instructions on receiving stolen property and facilitation of burglary. Next, he argues that the PFO 1 instructions were erroneous because they permitted the jury to convict him on a theory not supported by the evidence. Finally, he argues that the Commonwealth erred in the PFO 1 stage of the trial by failing to produce competent evidence to prove his age. We will address each argument separately.

A. Lesser Included Offense Instructions.

Draper first argues that the trial court erred by instructing the jury that it could convict him of receiving stolen property and facilitation of second-degree burglary, which he considers to be lesser-included offenses of second-

degree burglary. Draper's argument is not a new one as this Court long ago held that receiving stolen property is not a lesser-included offense of second-degree burglary.[1] Because Draper invites us to re-examine that holding, we will briefly examine its legal underpinnings.

KRS[2] 505.020(2) provides that an offense is a lesser-included offense of the charged offense when:

> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
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> (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
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> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
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> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

Section (a), the only section seemingly applicable in this case, codifies the familiar Blockburger v. United States[3] test for

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[1] Macklin v. Commonwealth, 687 S.W.2d 540 (Ky.App. 1984). *See also* Sebastian v. Commonwealth, 623 S.W.2d 880 (Ky. 1981) (holding that a person may be convicted of burglary and of retaining possession of property stolen during that burglary).

[2] Kentucky Revised Statutes.

[3] 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

determining whether a person may be convicted of multiple offenses stemming from a single course of conduct.[4] Thus, a court must compare the offenses to see whether one requires proof of an additional fact that the other does not.[5]

In order to be guilty of burglary in the second degree, a person must: 1) enter or remain in a dwelling; 2) without permission; and 3) with the intent to commit a crime while there.[6] Conversely, in order to commit the crime of receiving stolen property, it must be shown that: 1) the accused received, retained, or disposed of property belonging to another; 2) that the property had been stolen and that the accused knew that fact; and 3) that the accused did not receive, retain, or dispose of the property with the intent to restore it to its rightful owner.[7] Additionally, the value of the stolen property is a factor in determining the penalty for committing that crime.

Clearly, burglary and receiving stolen property require proof of different facts. For example, there is no requirement in the receiving stolen property statute that one enter or remain in a dwelling. Similarly, there is no require-

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[4] Mack v. Commonwealth, 136 S.W.3d 434, 438 (Ky. 2004).

[5] *Id.*

[6] KRS 511.030. *See also* 1 Cooper, Kentucky Instructions to Juries (Criminal) § 5.08 (4th ed. 1999).

[7] KRS 514.110. *See also* 1 Cooper at § 6.53.

ment in the burglary statute relating to possession of stolen property. Because it is based on sound legal principles, we decline to overrule Macklin.

Draper's request for a facilitation instruction is also without merit. One is guilty of criminal facilitation "when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime."[8]

An instruction on a lesser-included offense is appropriate "only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense."[9] In the case at hand, Owen testified that Draper rented the U-Haul, drove it to the location of the robbery, helped load stolen property into the U-Haul, and then drove the U-Haul away from the scene of the burglary. Those actions are not consistent with being "wholly indifferent"[10] to the completion of the crime. Furthermore,

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[8] KRS 506.080(1).

[9] Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993).

[10] Perdue v. Commonwealth, 916 S.W.2d 148, 160 (Ky. 1995) (holding that "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime.").

those actions definitively show that Draper did far more than just provide another with the means to commit the burglary, meaning that an instruction on facilitation was not warranted by the evidence.[11]

B. PFO 1 Instructions.

Draper contends that the trial court erred by submitting a PFO 1 instruction that allowed the jury to convict him based on a theory unsupported by the evidence. Before we may determine whether the instruction is, in fact, erroneous, we must first address the Commonwealth's argument that Draper did not preserve this issue for appeal.

The PFO phase of this trial was relatively short. First, the Commonwealth made a brief opening statement outlining for the jury that it would prove that Draper had four prior felony convictions. Next, the Commonwealth called a probation and parole officer to the stand to elicit very broad and general testimony regarding parole eligibility. Finally, the Commonwealth called a detective to testify as to Draper's age (a necessary element for PFO status).

At the close of the Commonwealth's case in this phase of the trial, Draper's attorneys moved for a directed verdict on

[11] Skinner, *supra* at 298 (holding that a defendant, who drove the burglar's car to the site of the burglary held open the door while others loaded stolen items into a wheelbarrow and accompanied the other burglars in flight from the scene of the burglary, was not entitled to a facilitation instruction).

the PFO 1 charge, arguing, correctly, that the Commonwealth had presented no evidence to support the charge in the indictment that "[Draper] was on a form of legal release from at least one of the [four prior] felony convictions on the date of the commission of the offenses charged in this indictment." Without attempting to counter that argument, the Commonwealth simply orally moved to amend the indictment. After a discussion at the bench, the trial court did not explicitly rule on either motion: the court merely said, "Denied." Then the court stated that it would instruct the jury in accordance with the law. Neither side pressed the court for clarification of the ruling. At the conclusion of the bench conference, the court proceeded immediately to instruct the jury on the possible penalties and PFO; and the parties made their closing arguments. Curiously, Draper made no contemporaneous objection to the trial court's instructions. In fact, the only objection to the instructions is found in one confusing paragraph of Draper's post-trial motion for judgment notwithstanding the verdict.[12]

[12] In its entirety, the section of the motion dealing with jury instructions provides as follows: "The Court erred by instructing the jury on the Persistent Felony Offender count in a differently [sic] than what the Commonwealth alleged in its indictment. The Commonwealth's indictment asserted Mr. Draper was [a] PFO [1] because he was on some form of legal release on two prior felonies when this felony was [committed]. The Commonwealth failed to prove its own assertion. However, when Mr. Draper moved the Court for a directed verdict, the Court denied the motion." Record at 175.

On appeal, Draper does not argue that the Commonwealth's proof on the PFO charge was at variance with the indictment. Rather, he contends that the trial court's PFO 1 instruction gave the jury the option to find Draper guilty if it were satisfied that he was on a type of legal release from one of the prior felonies when he committed the underlying burglary. According to Draper, under the evidence presented, this PFO 1 instruction violates the rule of law that a criminal conviction must be by a unanimous verdict. We agree.

The relevant PFO 1 instruction to the jury provides, in pertinent part, as follows:

> You will find the Defendant guilty of being a First-Degree Persistent Felony Offender under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
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> (A) That prior to March 12, 2004, the Defendant was convicted of Possession of a Controlled Substance, a felony, by final Judgment of the Jefferson Circuit Court on October 16th, 1998;
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> OR
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> (B) That prior to March 12, 2004, the Defendant was convicted of Criminal Possession of a Forged Instrument in the Second Degree, a felony, by final Judgment of the Jefferson Circuit Court on October 1st, 1997;
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> AND
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> (C) That prior to committing the offense for which he was convicted on October 1st, 1997, he was convicted of

trafficking in a Controlled Substance, a felony by final Judgment of the Jefferson Circuit Court on December 17th, 1990;

(D) That he was 18 years of age or older when he committed both of the two offenses of which you believe he was so convicted;

(E) That pursuant to those two convictions, he was sentenced to a term of imprisonment of one year or more for each conviction;

(F) (1) That he completed the service of the sentence imposed on him pursuant to a [sic] least one such prior conviction no more than five years before March 12th, 2004;

OR

(2) That he was discharged from parole or probation from the sentence imposed on him pursuant to at least one such prior conviction no more than five years before March 12th, 2004;

OR

(3) ***That he was on probation or parole from at least one such prior conviction at the time he committed the offense of which you have found him guilty in this case;***

AND

(G) That he is now twenty-one years of age or older.[13]

[13] Record, p. 145, 147 (emphasis added).

RCr[14] 9.54(2) cautions that "[n]o party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection." So since Draper did not make a timely objection to the PFO 1 instructions, any objection he has to those instructions are untimely and, consequently, unpreserved.[15] In addition, Draper's argument is unpreserved because he did not raise the unanimity problem before the trial court to give the trial court an opportunity to rule on it.[16] Thus, we may only review Draper's argument for palpable error under RCr 10.26.[17]

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[14] Kentucky Rules of Criminal Procedure.

[15] Ernst v. Commonwealth, 160 S.W.3d 744, 766 n.5 (Ky. 2005) ("RCr 9.54(2) requires that objections to instructions be made before the jury is instructed.").

[16] Gabow v. Commonwealth, 34 S.W.3d 63, 75 (Ky. 2000) ("Where a party specifies his grounds for an objection at trial, he cannot present a new theory of error on appeal.").

[17] RCr 10.26 provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.").

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable."[18] A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]"[19] A palpable error must be so serious in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings.[20] Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been different without the error.[21] If not, the error cannot be palpable.

The instruction allowed the jury to find Draper to be a PFO 1 if it found, among other factors, that he was on some form of legal release from one of the earlier felony convictions when he committed the instant offense. As stated earlier, however, the Commonwealth had not presented any proof whatsoever that Draper was on any form of legal release when the underlying burglary occurred. Thus, the trial court erred by including language in the instruction that gave the jury an option to find Draper guilty under a theory unsupported by the evidence. Such

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[18] Burns v. Level, 957 S.W.2d 218, 222 (Ky. 1997) (citing Black's Law Dictionary (6th ed. 1995)).

[19] Ernst, 160 S.W.3d at 758.

[20] *Id.*

[21] Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969)).

an error presents a classic case of a unanimity theory problem since "[a] defendant is denied a unanimous verdict when the jury is presented with alternate theories of guilt in the instructions, one of which is totally unsupported by the evidence."[22]

Having found that the trial court's PFO 1 instructions created a unanimity problem, we must now determine if that problem is serious enough to rise to the level of being a palpable error. We must reject Draper's contention that a unanimity problem can never be harmless error. Draper's argument is an unwarranted extension of the Kentucky Supreme Court's holdings as that Court has only ruled that a properly preserved unanimity problem is not subject to a harmless error analysis.[23] Since the error in this case is unpreserved, it would appear to be subject to a harmless error analysis.

Draper's prior felony convictions would be sufficient to satisfy the requirements for PFO 1 status. In other words,

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[22] Burnett v. Commonwealth, 31 S.W.3d 878, 882 (Ky. 2000). *See also* Davis v. Commonwealth, 967 S.W.2d 574, 582 (Ky. 1998) ("Nothing less than a unanimous verdict is permitted in a criminal case. Unanimity becomes an issue when the jury is instructed that it can find the defendant guilty under either of two theories, since some jurors might find guilt under one theory, while others might find guilt under another. If the evidence would support conviction under both theories, the requirement of unanimity is satisfied. However, if the evidence would support a conviction under only one of two alternative theories, the requirement of unanimity is violated.") (internal citations omitted).

[23] Burnett, 31 S.W.3d at 883.

if the jury had been properly instructed, it could have permissibly found Draper to be a PFO 1 under the evidence admitted at trial. Thus, absent the erroneous instruction, Draper would, in all probability, have been found to be a PFO 1. Accordingly, it must follow that there is not a substantial possibility that the ultimate result in Draper's case would have been different without the error, meaning that the erroneous jury instruction is not a palpable error.[24]

C. Proof of Draper's Age.

Finally, Draper contends that he should have been granted a directed verdict because the Commonwealth failed to adduce competent evidence of his date of birth in order to show his age at the time the previous and current offenses were committed. We note that the only evidence presented to the jury as to Draper's age came from the terse testimony of a detective, who did not explain the basis for his knowledge of Draper's date of birth. Thus, it would appear that Draper is arguably correct that the Commonwealth failed to lay the proper foundation for the detective's age-related testimony.[25]

But even if we were to assume that such testimony was error, that error is harmless. The record clearly shows that

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[24] Schoenbachler, 95 S.W.3d at 836.

[25] *See, e.g.,* Kentucky Rule of Evidence 602, which generally requires a witness to testify from personal knowledge.

Draper was, in fact, over eighteen when he committed the prior felony offenses and over twenty-one when he committed the burglary. Thus, "we recognize that remanding for a new penalty phase would accomplish nothing. The Commonwealth would simply prove Appellant's age in the correct manner. Therefore, any error by the Commonwealth was harmless. . . . The mistake is therefore immaterial, and since Appellant was not harmed, a new penalty phase is not required."[26]

IV. DISPOSITION.

For the foregoing reasons, Ronald Draper's conviction and sentence are affirmed.

SCHRODER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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[26] Maxie v. Commonwealth, 82 S.W.3d 860, 864 (Ky. 2002).