

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000924-MR

JAMES L. LENNON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CR-002260

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** * ** * **

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Appellant, James L. Lennon, was convicted of third-degree burglary following a jury trial in Jefferson Circuit Court. He received a sentence of seven and one half years' imprisonment. On appeal, Lennon argues that the trial court erred by: (1) improperly admitting evidence of prior bad acts; (2) denying his motion for

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

a directed verdict; and (3) sentencing him outside the range prescribed by law. We affirm in part, vacate in part, and remand.

On January 19, 2004, Michelle Francis, an employee of Pat's Steak House, in Louisville, Kentucky, noticed that the alarm was dismantled and that a lock was broken. She also discovered that the tray from a cash register was missing and that the money from an automatic cash machine inside the premises was taken. The phone lines were also disabled so Ms. Francis phoned police and Pat Francis, the owner, on her cell phone. Later that day after the phone lines were reconnected, Ms. Francis received a telephone call from a neighbor, Holly Bell, who stated that she had witnessed the break-in and had observed a man with blond hair and a slim build leave the restaurant and drive away in a white tow truck down Brownsboro Road.

Several months later, police responded to a burglary in progress at the Wash-O-Rama car wash business. Police apprehended the female perpetrator, but her male accomplice eluded the officers. The female subject was identified as Katherine Snyder. During their investigation, police discovered that Lennon was Snyder's step-father and both shared a residence. The police also determined that Lennon worked at a towing company and they suspected that he was involved with the burglary at Pat's Steak House. Lennon was ultimately charged with both burglaries and for being a persistent felony offender in the second degree (PFO).

Lennon was tried before a jury in Jefferson Circuit Court on March 14, 2006. Prior to the trial, the Commonwealth moved to introduce Lennon's prior

convictions for burglary into evidence pursuant to KRE 404(b). The trial court allowed the introduction of the prior convictions to prove identity and modus operandi. Lennon was found guilty of one count of third-degree burglary for the crime at Pat's Steak House, but was acquitted of the count relating to the burglary at Wash-O-Rama. Pursuant to an agreement with the Commonwealth, Lennon waived jury sentencing and the trial court sentenced him to seven and one half years' imprisonment. This appeal follows.

Lennon first argues that the trial court erred by admitting evidence of seven of his prior burglary convictions. He contends that the crimes were not sufficiently similar or specific to constitute evidence of modus operandi and were used solely to prove a criminal predisposition.

KRE 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

This list is illustrative rather than exhaustive. *Tamme v. Commonwealth*, 973 S.W.2d 13, 29 (Ky. 1998). Trial courts undergo a three-part analysis to determine whether evidence of prior bad acts should be admitted pursuant to KRE 404(b). *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994). First, the court inquires whether the proposed evidence is relevant for some other purpose than to prove the defendant's criminal predisposition. *Id.* Second, the court inquires whether the evidence of the prior act is sufficiently

probative of its commission. *Id.* Third, the court must balance the probative value of the evidence against the potential for undue prejudice. *Id.* The Supreme Court of Kentucky has stated the additional requirements for the introduction of modus operandi evidence as follows:

In order to prove the elements of a subsequent offense by evidence of modus operandi, the facts surrounding the prior misconduct must be so strikingly similar to the charged offense as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same *mens rea*. If not, then the evidence of prior misconduct proves only a criminal disposition and is inadmissible.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Additionally, “it is not the commonality of the crimes but the commonality of the facts constituting the crimes that demonstrates a modus operandi.” *Commonwealth v. Buford*, 197 S.W.3d 66, 70 (Ky. 2006). The standard of review concerning the admission of evidence is abuse of discretion. *Id.* However, the exceptions contained in KRE 404(b) must be applied cautiously because the rule is exclusionary in nature. *Id.*

In this case, the trial court admitted seven of Lennon's prior burglary convictions. The court limited the use of this evidence to prove identity and modus operandi. Lennon argues that there is nothing unique about these crimes and that they are simply common burglaries. The common elements of each burglary were that: (1) each was a place of business; (2) the phone and alarm wires were disabled; (3) and the safes were emptied of their contents on the premises after being precisely broken into using power tools. The Commonwealth presented photographs of each broken safe and all had

been cut in an almost identical manner. These facts are sufficiently similar to the charged crimes as to constitute a modus operandi. The evidence of these prior crimes is certainly relevant and probative. Nor can we conclude that the probative value is outweighed by the potential for undue prejudice. The trial court did not abuse its discretion in admitting evidence of Lennon's prior burglary convictions.

Next, Lennon argues that he was entitled to a directed verdict. The standard of review for a directed verdict is well established:

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.

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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Although the evidence was primarily circumstantial, we cannot conclude that it was clearly unreasonable for the jury to find Lennon guilty in this case. Viewed in the light most favorable to the Commonwealth, the evidence tended to demonstrate that a man fitting Lennon's physical description was seen fleeing from the scene of the burglary in a white tow truck. It was also established that Lennon was in possession of a white tow truck on the day of the burglary. The jury was permitted to hear evidence of Lennon's prior convictions for

burglary and were admonished to view these convictions purely as evidence of identity and modus operandi. The trial court did not err by denying the motion for a directed verdict.

Finally, Lennon argues that the the trial court erred by sentencing him to a penalty outside the range prescribed by law. After the guilt phase of the trial, Lennon agreed to waive jury sentencing and accepted a sentence of seven and one half years' imprisonment. This sentence is clearly in excess of the maximum penalty of five years' imprisonment for third-degree burglary. KRS 532.060. However, Lennon was also facing a PFO II charge that could potentially have enhanced the penalty to ten years' imprisonment. The record does not reflect that the PFO charge was adjudicated or disposed of by a guilty plea. The Commonwealth correctly notes that a defendant may knowingly and voluntarily accept a sentence unauthorized by law. *Myers v. Commonwealth*, 42 S.W.3d 594, 598 (Ky. 2001).

However, in this case, the record only indicated that Lennon waived jury sentencing for the underlying offense. Although Lennon's trial counsel proposed the unauthorized sentence and the trial court accepted it, no mention was ever made of the PFO charge at the time of the waiver, at final sentencing, or in the trial court's written judgment and sentence. The agreement to waive jury sentencing was made orally on the record and was not reduced to writing. While it may have been the parties' intent to incorporate a plea to the PFO charge into the sentencing agreement, such cannot be presumed from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). While a

PFO charge is an enhancement rather than a separate offense, the Commonwealth must nevertheless prove each element of the charge beyond a reasonable doubt. *Martin v. Commonwealth*, 13 S.W.3d 232, 235 (Ky. 1999). Since the PFO charge was not clearly disposed of or adjudicated, we vacate the sentence imposed and remand this matter for proceedings consistent with this opinion.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

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