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(FILE NO. 2007-SC-0561-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001099-MR

STANLEY LAND

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CR-00071

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: NICKELL, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Stanley Land appeals his conviction of second-degree burglary and second-degree persistent felony offender (PFO). Land raises five issues on appeal: that the trial court erred in denying a mistrial for introduction of evidence of a felony charge during the sentencing phase of the trial, that a Commonwealth witness's unsolicited hearsay prejudiced Land, that the trial court erred in denying Land's pretrial

motion in limine, that the jury's failure to complete properly the sentencing form prior to their discharge resulted in error, and that cumulative error requires reversal. We affirm.

On January 27, 2006, Land was indicted on one count each of burglary second degree and PFO second degree. This indictment stemmed from a burglary at a residence in Lexington, Kentucky, where a fingerprint matching Land's left ring finger was found on an overturned jewelry box.

Upon Land's arrest, he was interviewed by police. At first he denied any knowledge of the burglary, but he later changed his story, contending that one Josh Burns committed the crime. Land stated that at Burns' request, Land dropped Burns off at a Lexington residence. When Land returned to pick up Burns, Burns handed Land a jewelry box and asked if he wanted to buy it. Land stated that he did not want the box, returned it to Burns and left the residence. Land described Burns as being 21 years old with dark hair and "messed up" front teeth.

Police searched for Burns, but did not find him. They did, however, find a Josh Windburn who fit the description of Burns. Windburn knew Land, had lived on the same street as Land, and was in police custody at the time of the robbery.

On March 21, 2006, the trial commenced. Before the proceedings began, Land's counsel made a motion in limine to exclude any testimony pertaining to Windburn, claiming that since Burns committed the crime, any testimony about Windburn would be irrelevant. The motion was denied. The Commonwealth called five

witnesses during the trial and the defense called none. The jury returned a verdict of guilty of burglary second degree.

During the sentencing phase of the trial, the Commonwealth introduced certified portions of Land's previous convictions. However, in introducing a Fayette District Court conviction, the Commonwealth Attorney read: "theft of mail matter, he received . . . the charge was amended to receiving stolen property and he received thirty days in jail with credit." Land's motion for a mistrial, on the basis that the conviction but not the charge should have been read, was denied. The jury returned a verdict of 20 years on the PFO charge. The trial court asked trial counsel if either wished to inspect the form of verdict or poll the jury, and both declined. The jury was then discharged.

Immediately after the jury left, the Commonwealth's Attorney noticed a discrepancy on the jury sentencing form. The jury had apparently completed the portion of the form recommending a punishment for PFO, but had left blank the section for recommending a punishment for the underlying crime of burglary second degree. All but one of the members of the jury were found and brought back to the courtroom. The defense objected and moved for a new jury to be empaneled. The trial court denied the motion and informed the jury that there was a problem with the verdict forms. The jury was then admonished and told to return two days later. The judge called the missing juror, left him a message regarding what had happened, admonished him not to discuss the case with anyone, and told him to return two days later.

On March 23, the jury reconvened. Land again objected and moved for a new jury. After the motion was denied, the jury again deliberated and returned a verdict of 10 years for burglary in the second degree, enhanced to 20 years for PFO second degree.

On April 21, Land was sentenced. Upon the motion of counsel, the sentence was reduced to 10 years, enhanced to 12 years by the PFO conviction. This appeal followed.

Land's first argument is that the trial court erred in failing to grant his motion for a mistrial due to the admission of evidence during the sentencing proceeding, of a charge on which he was not convicted. As noted above, the Commonwealth, in addition to listing Land's other convictions, read: "theft of mail matter, he received . . . the charge was amended to receiving stolen property and he received thirty days in jail with credit." In denying Land's motion for a mistrial, the court noted that the two charges were similar and that the jury would not think one was greater than the other.

Under KRS¹ 532.055(2)(a)(2), the Commonwealth is permitted to introduce "[t]he nature of prior offenses for which he was convicted[.]" The Supreme Court in *Robinson v. Commonwealth*, 926 S.W.2d 853, 855 (Ky. 1996), stated:

We hold that all that is admissible as to the nature of a prior conviction is a general description of the crime. In this case, it would be sufficient to introduce the judgment with testimony that defendant assaulted the woman with whom he had been living. We anticipate that counsel for the defense and prosecution can, with negotiation, agree on the language

¹ Kentucky Revised Statutes.

to be used in the vast majority of cases. If they cannot, the trial judge will make that determination.

Contrary to Land's argument, *Robinson* does not mandate that only the offense may be designated and disclosed to the jury. Instead, the Commonwealth is permitted to divulge some details of the indictment or charge. *Maxie v. Commonwealth*, 82 S.W.3d 860, 865-66 (Ky. 2002); *see also Blair v. Commonwealth*, 2005 WL 387274 (Ky. Feb. 17, 2005) (evidence during sentencing, that defendant had previously been convicted of raping and sodomizing his own children, did not exceed the scope of information permitted by *Robinson*).

Under the holding of *Robinson*, the Commonwealth undoubtedly could have stated the defendant had been convicted of receiving stolen property in a case involving the theft of mail matter. Thus, the trial court did not err in denying Land's motion for a mistrial based on the Commonwealth's description of his prior conviction for receiving stolen property. Furthermore, in this case, we agree with the trial court that a generic mention of a charge of "theft of mail matter," while admittedly the mention of a Class D felony, would be insignificant to a jury. Thus, any error in reading the charge prior to amendment would have been harmless. RCr² 9.24.

Land's second argument is that unsolicited hearsay in regard to the Josh Windburn/Josh Burns situation prejudiced him. This argument revolves around a statement made by Detective White in response to defense counsel's cross-examination question about Windburn. The detective stated that Windburn "said in the past he had

²Kentucky Rules of Criminal Procedure.

lived on Dalton Court and that is where he knew Stanley from.” There was no objection to this hearsay evidence and Land admits that the issue was not preserved for review. However, Land claims that this testimony was so egregious that it amounts to palpable error under RCr 10.26, which states:

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.

The Kentucky Supreme Court has interpreted this rule and its “manifest injustice” provision to require that “the error must have prejudiced the substantial rights of the defendant, i.e., a substantial possibility exists that the result of the trial would have been different.” *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997) (citations omitted). Stated differently, “the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.” *Id.* Following this interpretation of the rule, we cannot see how the hearsay in question so upset the balance and integrity of the proceedings as to amount to palpable error. Even without the hearsay evidence about Windburn knowing Land, the facts that Burns and Windburn had similar names, fit the same description, and Windburn lived on the same street as Land were before the jury and left the viability of the “Josh Burns did it” defense in the jury’s hands.

Land’s third argument concerns an oral motion in limine presented to the court moments before the trial began. Defense counsel argued that any testimony about Windburn would be irrelevant and unduly prejudicial because Land claimed that Burns,

rather than Windburn, committed the crime. In determining whether to exclude evidence, a court should consider three factors: the probative worth of the evidence; the probability that the evidence will have undesirable consequences, such as undue prejudice, confusion of the issues, or misleading of the jury; and whether the harmful effects substantially outweigh the probative worth of admission. *See Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (quoting Robert Lawson, *The Kentucky Evidence Law Handbook*, 2.10 (3d ed. 1993)). When dealing with the exclusion of evidence, a trial court is given broad discretion and its decision should not be overturned absent an abuse of that discretion. *Id.* “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Here, we cannot see that any harmful effects substantially outweighed the probative worth of the testimony. The Commonwealth investigated Land’s allegations that someone else committed the crime, and found someone who both knew Land and fit the description of the supposed criminal. Land had the opportunity to question the detective in order to point out that Windburn was not the person he identified. We cannot see any abuse of discretion in this instance, as discrediting a potential alibi is part and parcel of a prosecution.

Land's fourth argument is that error resulted from the jury’s failure to properly complete the sentencing form, i.e., the jurors' failure to impose a punishment for burglary in the second degree, before the panel's discharge. Although the defense

objected once the incomplete form was discovered, after the jury was discharged, the Commonwealth asserts this objection was untimely and therefore not preserved. We agree.

In *Montgomery v. Commonwealth*, 819 S.W.2d 713, 720 (Ky. 1991), the court held that a jury's failure to set a penalty for the underlying offense, even while imposing the maximum sentence authorized under the PFO statute, did not violate the provisions of the PFO statute. The court rejected the argument that such sentencing was jurisdictional and not subject to waiver by a failure to object, holding instead that the jury's failure to set a penalty for the underlying offense was "at most a procedural matter which was unobjected to at the time of trial and which did not result in an enhancement of the penalty." *Id.* at 721. The court distinguished its holding from an earlier case, *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985) in which the defendant had received a sentence which was longer than that allowed by the law.

Similarly, in the case now before us, the jury set the penalty within the range authorized by the PFO statute, and Land received a sentence which was authorized by law. In addition, the parties declined the trial court's offer to review the jury's verdict prior to the jury's discharge. Thus, the jury's failure to complete the sentencing form for the underlying offense was a procedural rather than a substantive defect, and further sentencing deliberations were unnecessary after the jury was discharged. The trial court's reconvening of the jury does not affect the fact that the jury's recommended sentence on the PFO charge was, and remained, 20 years.

Land's fifth and final argument is that even if the previous counts of error do not individually require reversal, their cumulative effect does. To receive a reversal for cumulative error, the court must determine that Land was denied a fundamentally fair trial. *Bowling v. Commonwealth*, 942 S.W.2d 293, 308 (Ky. 1997). As this court has found no error in the proceedings, no cumulative error occurred that would require the reversal of the trial court's judgment.

The Fayette Circuit Court's judgment of conviction is affirmed.

NICKELL, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, CONCURRING: I concur with the opinion of the majority but write separately to discuss an issue that was raised by the Appellant but not addressed in the opinion. As noted in the opinion, the jury verdict forms were left incomplete by the jury when it failed to assess a punishment for the underlying crime of burglary second degree. Instead, the jury imposed only a sentence on the PFO charge. Not noticing the incomplete form, the trial court dismissed the jury without objection from counsel for the defense and the prosecution. The defect was noticed quickly and the Court attempted to recall the jury but one juror had already left the building. Defense counsel objected to the attempt to reconvene the jury but was overruled. The missing juror was contacted and the jury was reconvened two days later, at which time it deliberated to impose a sentence of 10 years on the burglary charge, enhanced to twenty for the PFO charge.

Appellant raised the question of whether the jury could in fact be reconvened after its discharge. Kentucky case law is clear on this point. “Once a jury is discharged, it cannot reassemble if the jurors have separated and have left the presence of the courtroom. If a discharged jury attempts to reconvene to consider a subject previously considered by it it becomes a tainted jury.” *Burchett v. Commonwealth*, 734 S.W.2d 818, 820 (Ky.App. 1987) (citations omitted). Also, “[i]f a complete verdict has not been rendered or if the verdict is otherwise irregular, jurisdiction to reconvene the jury depends on whether the jury has left the court’s control. If it has, there is no jurisdiction; if it has not, the jury may be reconvened.” 75B Am. Jur. 2d Trial § 1896. In the instant case, the jury had left the courtroom and one juror could not be found on the premises of the courthouse. It is clear that the jury had left the presence and control of the court and could therefore not be reconvened to consider the punishment for the burglary conviction. The proper action for the court to have taken in this instance would have been to impanel a new jury and conduct a new sentencing phase for Appellant.

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