RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2666-MR

BILL R. THOMAS APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 96-CR-000014

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: Bill R. Thomas appeals from his conviction of three counts of burglary. He was sentenced to three years imprisonment on each of the three burglary counts, and those sentences were directed by the trial court to run consecutively for a total of nine years.

In March 1996, a Mason Circuit Court grand jury returned two indictments charging appellant and others with three counts of third-degree burglary involving England's Food Market (England's) in Mays Lick, Kentucky. Indictment 96-CR-014 charged appellant with burglarizing England's on February 15, 1996.

Indictment 96-CR-015 charged appellant with two counts of burglary involving England's. Count 1 charged appellant with burglarizing England's on February 13, 1996, and count 2 charged appellant with burglarizing England's on February 15, 1996. Thus, appellant was charged with one count of burglary involving England's on February 13, 1996, and two counts of burglary involving that same store on February 15, 1996.

On February 13, 1996, England's was burglarized, and a substantial quantity of alcohol, cigarettes, work gloves, and other items totaling $1,130.39 in value were stolen. On February 15, 1996, England's was again burglarized, and again a substantial quantity of beer, cigarettes, cigarette lighters, work gloves, and other food items having a total value of $2,725.75 were taken. Appellant was indicted along with Orville Allen Doyle (Doyle) and Jeff Pilosky (Pilosky). Pilosky subsequently pleaded guilty and testified at the joint trial of Doyle and appellant.

At trial, Pilosky testified that, on February 13, 1996, he, Doyle and appellant burglarized England's and stole a quantity of goods from that store. He testified that he, Doyle and appellant returned to the store on February 15th and again broke into it. He testified that they removed items from the store and drove them to Doyle's trailer. He testified that they then returned to the store, again entered it, and removed more items.

Appellant raises two arguments for reversal: (1) his conviction of two counts of burglary resulting from the February 15, 1996 break-in of England's violated the prohibition against double jeopardy; and, (2) during the penalty phase of the trial, appellant should have been permitted to tell the jury that he had received a plea offer from the Commonwealth and to explain why he did not accept that plea offer.

First, we do not agree that appellant was placed in double jeopardy. Here, he was not charged with the violation of two separate statutory offenses. Rather, he was charged with two violations of the same statutory offense on the same night. While this issue has not been preserved, it may be raised for the first time on direct appeal. Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977); Baker v. Commonwealth, Ky., 922 S.W.2d 371 (1996).

Appellant argues that all of the facts alleged in each of the burglary counts charged in indictment 96-CR-014 and count 2 of indictment 96-CR-015 are charges related to a single burglary on February 15th. However, we do not agree. Rather, we believe the evidence demonstrates two distinct burglaries of England's. This is not a case where multiple trips were made for the purpose of loading goods into a vehicle. Here, the burglars broke in, loaded a vehicle with goods, and transported the goods to Doyle's trailer. Thereafter, they left the trailer, returned to the store, re-entered, and removed more goods. In our opinion, each entry constituted a separate and completed offense.

Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984). We do not believe the prohibition against double jeopardy was violated in this instance.

Next, appellant argues the trial court erred in ruling that, during the sentencing phase of the trial, he could not discuss the Commonwealth's plea offer to him. Appellant argues that, even though evidence of offers to compromise are ordinarily not admissible, such evidence may be admissible when it is offered in mitigation. Appellant notes that, during the guilt-innocence phase of the trial, the jury learned that Pilosky had entered a plea of guilty. Appellant appears to argue that he should have been permitted to explain to the jury why he had not also accepted the Commonwealth's offer. However, we disagree.

KRS 532.055(2)(b) reads:

> The defendant may introduce evidence in mitigation. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency. This section shall not preclude the introduction of evidence which negates any evidence introduced by the Commonwealth[.]

We do not see how testimony that appellant refused to accept the Commonwealth's plea offer has any relevance as mitigating evidence. The record does not tell us what information appellant sought to impart to the jury as to why he refused to accept the plea offer. Since we are not shown the relevance of any such testimony, we conclude that this argument lacks merit.

Accordingly, we affirm the judgment of the Mason Circuit Court.

BUCKINGHAM, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

MILLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur in part and dissent in part. I am of the opinion that conviction upon two counts of burglary for the February 15, 1996 break-in constitutes double punishment. I would remand for resentencing reflecting a conviction upon a single count for the February 16, 1996 entry.

BRIEF FOR APPELLANT:

Michael M. Losavio
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky