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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003476-MR

PHILLIP WAYNE YOUNG — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 96-CR-0023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: DYCHE, KNOPF, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Phillip Wayne Young (Young) has appealed from a final judgment of the Nelson Circuit Court entered on December 9, 1996, convicting him of the offense of burglary in the first degree in violation of Kentucky Revised Statutes (KRS) 511.020, and sentencing him to serve fifteen years in prison. We affirm Young's conviction, but reverse the sentence imposed and remand for a new penalty phase hearing.

The events which led to Young's indictment and conviction occurred late on the evening of January 15, 1996, in Bardstown, Kentucky. Robert Smith (Smith) saw three people going in and out of the home of his neighbor, Brian Bullock (Bullock),

while Bullock was at work. Smith could not make out facial features, but noticed that the three suspected intruders were wearing hooded jackets and that two people had on dark pants and one person had on light pants. He saw all three people carrying items out of the house and placing them under a tree near his property. Suspecting that a crime was underway, Smith called the police and officers were dispatched to the scene. Officer John Royalty (Officer Royalty) of the Bardstown Police Department parked approximately a block away from the scene so as not to alert the burglars. Officer Royalty saw two persons wearing hooded jackets running through back yards near the Bullock house. He chased and apprehended one of them, the appellant, Young. Officer Greg Ashworth (Officer Ashworth) went directly to the house and found the items Smith had seen being removed from the house in the yard, including a .12 gauge shotgun. The police noticed that a window at the back of the house where the burglars had apparently initially obtained entry was open. This window was sent to the Kentucky State Police lab where it was determined that one of the prints on the windowpane matched Young's right index finger.

Young was arrested and transported to the police department where he was questioned by Officer Tom Roby (Officer Roby). According to Officer Roby, Young at first denied being involved in the burglary and stated that he was just out jogging in that area. Young later told Officer Roby that he was running from a dog. Finally, Young modified his story to state that he was returning from a relative's house. No one else was arrested

in connection with the burglary. Young was indicted on charges of burglary in the first degree and theft by unlawful taking over $300. KRS 514.030. The latter charge was dismissed prior to trial.

Young was tried before a jury on November 1, 1996. The police officers testified consistent with the facts set out above. Young testified in his own behalf and denied that he had participated in the crime. He testified that he saw Officer Royalty's vehicle but did not think anything about it because he had not done anything wrong. He stated that he had been at an aunt's house, which is in the same neighborhood as the house that was burglarized, and that he was running to get home because it was cold. He testified that he was not running through any yards and that he had not told Officer Roby that he had been jogging or running from a dog. When asked why Officers Royalty and Roby would testify to such things, Young suggested that they were out to get him and, in fact, testified that he had heard from some girls on the street, whose names he did not know, that Officer Royalty had predicted that he would "catch" Young "doing something." When asked how his fingerprint got on the victims' windowpane, Young answered, "I'm not sure."

The trial court instructed the jury that it could find Young guilty of burglary in the first degree as either a principle or as an accomplice. After the jury found Young guilty, the penalty phase commenced during which the only evidence presented was a document outlining parole eligibility. During his closing argument, the prosecutor urged the jury not to

give Young, who had no criminal history, the minimum sentence of ten years, but urged it to give Young a sentence of between 15 and 20 years. The jury complied and recommended that Young serve a fifteen-year prison sentence.

Young has raised two issues for this Court's consideration. His first allegation of error concerns the trial court's refusal to direct a verdict of acquittal on the charge of burglary in the first degree. In this regard, Young argues that the Commonwealth's evidence was insufficient to support a verdict of guilt on that charge. KRS 511.020 defines this crime as follows:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon. . . .

Specifically, Young contends the Commonwealth failed to present evidence linking him to the shotgun removed from Bullock's house during the burglary to establish the element that he, or another participant, was armed during the burglary. See Baker v. Commonwealth, Ky., 860 S.W.2d 760, 762 (1993). Further, he argues that because his fingerprint was only discovered on the outside of the windowpane, and because Smith could not identify him, there was no evidence that he was ever in Bullock's house.

"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, Ky., 816 S.W.2d 186, 187 (1991). Also, a motion for a directed verdict should be granted only "when the defendant is entitled to a complete acquittal—i.e., when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses." Campbell v. Commonwealth, Ky., 564 S.W.2d 528, 530 (1978) (emphasis in original).

Clearly, as is evident from our recitation of the facts, there was circumstantial evidence, particularly Young's fingerprint on the windowpane where the burglars gained entry to the Bullocks' house, and Young's presence in the vicinity of the crime scene late at night wearing clothing identical to the burglars, that point to his involvement in the burglary. This evidence was sufficient for the jury to find Young guilty, as they were instructed, under a complicity theory. If Young believed it was unreasonable for the jury to find that he removed the shotgun from the house, or that he was aware that one of the others had removed it, he should have requested an instruction on burglary in the second degree. See Skinner v. Commonwealth, Ky., 864 S.W.2d 290, 295 (1993). He did not, however, request a lesser included offense instruction. Accordingly, we find no error in the trial court's refusal to direct a verdict of acquittal on the charge of burglary in the first degree.

Next, Young alleges that the prosecutor made improper arguments during the penalty phase which so inflamed the jury as

to render the proceedings fundamentally unfair. We agree. While Young did not contemporaneously object to some of the remarks made by the prosecutor to which he now takes exception, he did object to the following commentary by the Assistant Commonwealth's Attorney:

> He was only eighteen. That's how long it took [him] to commit a felony. . . . He had a chance to tell the truth today. He did not do that. He had a chance to tell the truth that night to policemen. He did not do that. He had a chance between that time and this time to tell the truth, to tell who the other two people were that were involved and he didn't do that. Consequently, think of all the effort that's been put in by the police department, the Commonwealth Attorney's office, by everybody involved in the case, the court, by everybody involved in investigating this case, when it would have been a lot simpler if he had come in and been truthful from the start.

Young's counsel objected and argued that this was not a proper argument. The trial court disagreed and overruled the objection. While we agree that reference to Young's not telling the truth was an appropriate point for the prosecutor to have argued, we believe the trial court erred in overruling the objection as to the reference to the effort expended in prosecuting this case.

The trial court having ruled in the Commonwealth's favor, the Assistant Commonwealth's Attorney a few moments later returned to this line of argument as follows:

> If this defendant doesn't want to come in and tell us who else is involved in this case, I submit to you, that he should be doing their time. All of them were going to get ten years if they came in and "fessed up." They would have each gotten ten years, that's thirty years. He still owes his and some more. If he doesn't want to tell who did it,

> he can do their time. He had the chance to do that.
>
> The Assistant Commonwealth's Attorney later stated:
>
> [Burglary] is the one crime that is probably the ultimate violation of a family's peace and security. . . . It ranks up there, as far as I'm concerned, with rape, robbery or anything else. . . . What is the next step? If they already have criminal intent, what is the next step to keep them from shooting someone, from raping somebody, from killing somebody? There has to be a message sent to them--we're not going to tolerate it.

There was no objection by Young's counsel to these statements.

"Great leeway is allowed to both counsel in a closing argument. It is just that—an argument. A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of a defense position." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 412 (1987) (emphases in original). Reversal for inappropriate conduct is indicated only where the "conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." Id. at 411.

A similar argument made by a prosecutor was condemned and resulted in reversal of the sentence imposed in Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 163 (1995), where the Supreme Court stated as follows:

> Further, during the penalty phase, the Commonwealth turned what was a matter of fact concerning appellant's decision to go to trial, supra, into an attack on his character because of his demand for a trial. During the penalty phase closing, the Commonwealth stated that, although Melton took her punishment, "[t]his man didn't do that. He didn't 'fess' up. He didn't come in here and tell you the truth." It is flatly improper to refer to the "time and trouble" occasioned

> by a plea of not guilty and the resulting trial.

In Norton v. Commonwealth, Ky., 471 S.W.2d 302, 306 (1971), referred to by the Court in Perdue, our highest Court cautioned the Commonwealth's Attorney on remand to "avoid reference to the time and trouble caused him and the special judge because of the defendant's plea of not guilty."

The purpose for bifurcating the guilt phase from the penalty phase is to "provid[e] the jury with information relevant to arriving at an appropriate sentence for the particular offender." Williams v. Commonwealth, Ky., 810 S.W.2d 511, 513 (1991); see also Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854 (1996). The Commonwealth's reliance on Templeman v. Commonwealth, Ky., 785 S.W.2d 259 (1990), and Conklin v. Commonwealth, Ky., 799 S.W.2d 582 (1990), is misplaced as those cases concern the introduction of evidence of other crimes during the penalty phase. Those cases do not remotely suggest that a defendant's penalty should be enhanced for failing to cooperate with the police by admitting his own involvement or identifying other participants in the crime.

We believe that as a whole the prosecutor's argument under the circumstances of this case was egregious. Clearly that portion of the closing argument concerning the effort expended in prosecuting this case to which Young's counsel did object was improper and the trial court erred in failing to sustain the objection and in allowing that line of argument to continue. It was inappropriate to suggest to the jury that Young's punishment should be predicated on the work he caused the police,

the investigators, the court, and the Commonwealth Attorney's office because of his plea of not guilty. The trial court's failure to sustain Young's objection to that argument resulted in reversible error, Perdue, supra, entitling Young to a new trial on the issue of the appropriate penalty.

Although Young did not object to the prosecutor's closing argument referring to other crimes, since this matter may arise again at the re-sentencing proceeding, we believe it appropriate to address this issue. There was no evidence submitted in this case that would allow the jury to infer that merely because Young had the intent to commit burglary he was also inclined to commit other serious and heinous crimes such as rape, robbery, or murder. This argument lacked a factual basis and could only have served to inflame the jury and distract it from making the type of analysis contemplated by KRS 532.055 in determining the punishment to be imposed. Thus, it was improper.

Accordingly, the judgment of the Nelson Circuit Court is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Kim Brooks
Covington, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler III
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