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NOT TO BE PUBLISHED

NO. 96-CA-2612-MR

ORVILLE ALLEN DOYLE — APPELLANT

v.

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

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

* * *

BEFORE: BUCKINGHAM, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: Orville Allen Doyle appeals from his conviction in Mason Circuit Court of three counts of third-degree burglary and persistent felony offender in the second degree. Appellant received sentences of six years on each count of third-degree burglary as enhanced by his second-degree persistent felony offender conviction. His three six-year sentences were ordered to run consecutively for a total of eighteen (18) years.

In March 1996, a Mason County grand jury issued two indictments charging appellant, along with Bill R. Thomas (Thomas) and Jeffrey W. Pilosky (Pilosky), with a total of three

counts in conjunction with burglaries of England's Food Market (England's). Indictment 96-CR-014 charged appellant and the two codefendants with one count of burglary alleged to have occurred on February 15, 1996. Indictment 96-CR-015 charged appellant and the two codefendants with two counts of burglary, one alleged to have occurred on February 13, 1996, and the other alleged to have occurred on February 15, 1996, the same date as charged in indictment 96-CR-014. In addition, appellant was charged in both counts with the offense of persistent felony offender in the second degree.

On February 13, 1996, England's was burglarized. Over 40 cases of beer, 38 cartons of cigarettes, over 50 pairs of work gloves, and miscellaneous food items totaling $1,130.39 in value were taken. On February 15, 1996, England's was again burglarized. On that date, 38 12-packs of beer, 21 cases of beer, several cartons of eggs, 12 dozen pairs of work gloves, 85 lighters, 137 cartons of cigarettes, and various other items totaling $2,725.75 in value were taken.

The burglaries were investigated by Deputy Sheriff Joe Kinney of the Mason County sheriff's department. Acting on information that a large quantity of beer, cigarettes, bologna, and bacon were in appellant's trailer, Deputy Kinney obtained a search warrant to search the trailer. There, Deputy Kinney found a 12-pack of Budweiser beer, three Budweiser cartons, a quantity of egg cartons and several pairs of new work gloves.

Sometime later Deputy Kinney stopped Pilosky, who was indicted as a codefendant in the burglaries. At the time, Pilosky was driving a white El Camino, which Deputy Kinney testified he had seen at appellant's trailer the morning of the second burglary at England's. Upon searching Pilosky's car, Deputy Kinney discovered 24 12-packs of beer and several pairs of work gloves. Pilosky then took Deputy Kinney to appellant's father's farm in nearby Robertson County. Some 100 yards or so behind a barn on the property, Pilosky showed Deputy Kinney a tarpaulin covering several cases of beer and a Bic cigarette lighter rack near the beer. Linda Garrett, England's store manager, was able to identify goods found in appellant's trailer, in Pilosky's car, and behind the barn on appellant's father's property as the goods taken from England's, based upon price labels she had placed on the goods.

Appellant argues the following grounds for reversal: (1) the Commonwealth violated appellant's right to be free of double jeopardy by punishing appellant twice for a single burglary which occurred on February 15, 1996; (2) the trial court erred in refusing to give a jury instruction on the offense of receiving stolen property under $300.00; (3) the trial court erred when it refused to give a jury admonition after appellant's admission on the stand that he had been convicted of a felony; (4) the trial court erred when it failed to conduct a suppression hearing upon appellant's motion to suppress and when it allowed evidence seized without a warrant from appellant's father's farm;

and, (5) appellant's right to a fair trial was violated when the trial court refused to continue the case after the jury saw appellant enter the courtroom in handcuffs.

Appellant argues he was subjected to punishment for the same offense twice when he was indicted and tried for two separate burglary offenses which allegedly occurred on the same date, February 15, 1996. At trial, Pilosky testified that, on February 15, 1996, he, Doyle, and Thomas broke into England's and removed a quantity of items. They then left the market, and took the items back to appellant's trailer across the nearby county line into Robertson County. After a short period of time, they returned, entered the store again, and removed more items. Appellant takes the position that this conduct constituted a single act or impulse to burglarize the store, and consequently, can constitute only one offense of burglary rather than two. The Commonwealth takes the position that, since Pilosky's trial testimony demonstrates that appellant came to the store from different locations on two different occasions, two separate offenses of burglary were committed.

First, we note that this issue was not preserved for review. However, the rule in Kentucky appears to be that failure to object on grounds of double jeopardy does not constitute a waiver of the right to raise that issue for the first time on appeal. Baker v. Commonwealth, Ky., 922 S.W.2d 371 (1996); Sherley v. Commonwealth, Ky., 558 S.W.2d 615 (1977).

We believe the circumstances surrounding the February 15th entries into England's justify two separate instructions for third-degree burglary and that the prohibition against double jeopardy was not violated. The trial court heard evidence that appellant and his colleagues unlawfully entered England's and loaded a quantity of goods into a vehicle. They then left the area of the market for appellant's trailer in nearby Robertson County. We believe, at that point, an offense of third-degree burglary had been committed and completed. See Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984). The trial court further heard evidence that after a lapse of time, and after appellant and his codefendants had delivered the goods to appellant's trailer, the three returned, and again entered England's and removed more goods. We believe this entry constituted a second offense of burglary. Although appellant was charged with two separate burglaries of the same store within a short period of time, it is our opinion the circumstances of this case justify a conclusion that the prohibition against double jeopardy was not violated.

At the close of the proof, appellant sought an instruction on the offense of receiving stolen property under $300.00. He argued that, in view of his position that he took no part in the burglary, but rather, Pilosky and Thomas had delivered the goods to his trailer; therefore, he was entitled to such an instruction. However, we disagree. The offense of receiving stolen property is not a lesser included offense to the

charge of burglary. Moser v. Commonwealth, Ky., 799 S.W.2d 21 (1990); Phillips v. Commonwealth, Ky., 679 S.W.2d 235 (1984). Since receiving stolen property is not a lesser included offense of burglary, the trial court did not commit error in refusing to give an instruction on receiving stolen property. Hart v. Commonwealth, Ky. App., 768 S.W.2d 552 (1989).

Next, appellant complains the trial court erred when it refused to admonish the jury after appellant, in response to his attorney's questioning on direct examination, admitted he had been convicted of a felony. This issue arose when appellant's own trial counsel asked appellant if he had ever been convicted of a felony. Appellant answered that he had. When appellant's trial counsel then sought to request an admonishment that the admission by appellant of his prior felony may be considered only as it affects his credibility as a witness, the trial court responded, "Well, since you are the one asking the questions I don't think the admonition is appropriate." The Commonwealth argues the trial court did not abuse its discretion in refusing to admonish the jury since the question was posed by the defense rather than by the Commonwealth as the impeaching party. We do not agree that the admonition need not be given where the defense elicits testimony from the defendant that he has committed a prior felony:

> In future cases, the rule will be construed essentially as in *Cowan*[1], *supra*, so that a

[1]Cowan v. Commonwealth, Ky., 407 S.W.2d 695 (1966).

> witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. If the witness answers "No" to this question, he may then be impeached by the Commonwealth by the use of all prior convictions, and to the extent that *Cowan* limits such evidence to *one* prior conviction, it is overruled. After impeachment, the proper admonition shall be given by the court.

Commonwealth v. Richardson, Ky., 674 S.W.2d 515, 517-18 (1984).

It does not appear to be an uncommon practice for defense counsel to elicit that the defendant has previously been convicted of a felony. As a matter of strategy, many defense counsels wish to minimize the impact of the Commonwealth eliciting that fact on cross-examination. In determining the necessity of giving the admonition, however, we do not read Richardson as making any distinction between whether defense counsel elicits the response or the Commonwealth elicits it. We do not believe any such distinction is justified since the very purpose of giving the admonition is to emphasize to the jury that a defendant's felony conviction may only be considered insofar as it affects the defendant's credibility as a witness, if it does so. We do not believe the purpose of the admonition is dependent upon whether the defendant's felony convictions are elicited by the defense or by the Commonwealth. We agree with the Commonwealth that Richardson envisions that the Commonwealth will be the impeaching party. However, impeachment occurs only if the

defendant untruthfully answers the inquiry, in which event Richardson permits the Commonwealth to impeach the defendant by using all of his prior felony convictions.

In this case, appellant took the position that he did not participate in the burglaries, and that the stolen goods carried into his trailer were delivered there by the actual participants, Thomas and Pilosky. In Richardson, the Court recognized the particular prejudice resulting to a defendant by disclosure of past felonies. Id. at 698. Under the circumstances of this case, where no admonition was given limiting the impact of the disclosure upon the jury, we cannot say that appellant was not prejudiced. We believe the failure to give the admonition is reversible error.

Next, appellant argues the trial court erred in failing to schedule a suppression hearing upon his motion to suppress certain goods which were found on his father's farm. The record reflects that Pilosky led Deputy Kinney to an area some 100 yards from a barn located on appellant's father's farm to show Deputy Kinney where certain goods stolen from England's had been hidden. Both appellant and the Commonwealth agree that RCr 9.78 places a mandatory duty upon the trial court to conduct a suppression hearing once one has been requested. However, the Commonwealth argues that under Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982), the failure to hold a suppression hearing may be considered harmless error if it is obvious from the record that the motion could not be successful. However, since this case

will be remanded for a new trial, we do not believe it is necessary for this Court to determine whether it is obvious that such a motion could not be successful. Rather, we instruct the trial court, should appellant so move, to conduct a suppression hearing.

Last, appellant complains he was prejudiced when he was led into the courtroom with handcuffs. Again, since this case is being remanded for retrial, we believe it is unlikely that such an event will reoccur.

For the foregoing reasons, we reverse and remand for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Jackson Balliet
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky