RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1900-MR

JAMES MOORE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 96-CR-0634 & 96-CR-1105

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * *

BEFORE: ABRAMSON, BUCKINGHAM, and EMBERTON, Judges.

ABRAMSON, JUDGE: James Moore appeals from his conviction for burglary in the third degree and for being a persistent felony offender (PFO) in the second degree and the resulting seven-year sentence. Moore claims on appeal that the trial court erred when it: (1) refused to strike for cause a juror who said that he would have a problem acquitting a defendant who did not testify in his own behalf; (2) refused to instruct the jury on the offense of criminal trespass in the third degree; (3) arraigned Moore on a persistent felony offender indictment after the burglary trial had begun, and permitted the Commonwealth to consolidate the charges for trial; (4) permitted the grand jury

to return the aforementioned PFO indictment; and (5) sentenced him under the second-degree PFO statute which unconstitutionally prohibits probation, while the more serious first-degree PFO statute does allow a sentencing court to grant probation. Having reviewed the evidence presented at the trial and the applicable law, we affirm with respect to all issues.

Moore was indicted in March 1996 for burglary in the third degree arising out of a December 21, 1995 entry of an office building located at 121 South Seventh Street, Louisville, Kentucky. On the first day of his May 1996 trial, after jury selection but before opening statements, Moore was arraigned on the PFO charge. The jury found Moore guilty on both the burglary charge and the PFO charge and recommended a one-year sentence for the burglary, enhanced to seven years as a consequence of his PFO status. Moore appeals from the June 25, 1996 Judgment of Conviction and Sentence, wherein the trial court sentenced him in accordance with the jury's recommendation.

During voir dire, the trial court denied Moore's motion to strike Juror No. 129 for cause. The juror's answers suggested that, if a defendant did not testify, he would probably find the defendant guilty. The pertinent part of the dialogue between defense counsel and Juror No. 129 follows.

> Def. Counsel: And would you still regardless of whether or not Mr. Moore decided to testify, can everyone still hold the prosecution to their burden to prove every element beyond a reasonable doubt? Can everyone promise that, this is, I mean, we're talking legalese, I know and yes, sir.
>
> Juror: I couldn't.

Def. Counsel: You couldn't what?

Juror: If he wouldn't testify, I couldn't.

Def. Counsel: You'd have a hard problem, you'd have a problem with that?

Juror: Yes, I would.

Def. Counsel: Okay. Would that be, tell me a little bit why.

Juror: Well, if he says, if he doesn't say he didn't do it, I'd have a problem with it.

Def. Counsel: Do you understand, that just by going to trial, he is saying, "I didn't do it"? He pled not guilty, I didn't do it.

Juror: Yeah.

Def. Counsel: And I understand if you do, that's why I asked the question. I think it's kind of natural, also. So, would you think if he didn't testify, you'd find him guilty?

Juror: Probably.

Def. Counsel: What's your number, again?

Juror: 129, excuse me.

Approximately seven and one-half minutes later, another juror informed the trial court that she "would be a little uncomfortable if the defendant didn't testify." At that time, the court instructed the jurors that the defendant's failure to testify "is not to be held against him in any way." More pointedly, the court told the jurors:

Judge: Well, I'm going to correct something, okay. Let me tell you this and there was no objection to it so I let counsel go on. I would instruct you and under our law, a person that's accused of a crime does not have to testify. And the question that you'd have, assuming that an individual did not testify and no one's ever certain as it relates to that and I don't think defense

counsel's even trying to inject at this time that her client may or may not testify. But I would instruct you that it is not to be held against him in any manner. Could you follow that law? Could you set that aside? Could you do that?

Juror: [Inaudible]

Judge: Okay. And, I guess, along those lines, obviously, no matter what your own personal beliefs are as it relates to what the law is, if I tell you what the law is, I expect you all to follow that law even if you do disagree with it. It's sort of hard sometimes, isn't it? That's what the law is, as I see it anyway.

Although Moore maintains that these remarks were addressed to a single juror our review of the videotape supports the Commonwealth's contention that the court was speaking to all of the jurors. No one expressed misgivings about his or her ability to follow the court's instructions.

In response to defense counsel's motion to strike Juror No. 129 one and one-half minutes later, the trial court stated that there was a good basis for striking the juror, but that counsel would have to use a peremptory challenge to strike that juror. The trial court added that counsel's questions had been improper, and he had been surprised that the prosecutor had not objected to the questions. Defense counsel used a peremptory challenge to remove Juror No. 129 from the jury, and she also used all of her peremptory challenges.

A trial court exercises considerable discretion in its decisions about whether to excuse individual jurors for cause. Simmons v. Commonwealth, Ky., 746 S.W.2d 393 (1988), cert. denied 489 U.S. 1059, 109 S. Ct. 1328, 103 L. Ed. 2d 596 (1989). To

show an abuse of the trial court's discretion, this court must find that the trial court's decision was clearly erroneous. Commonwealth v. Lewis, Ky., 903 S.W.2d 524 (1995). In order to show prejudice from an abuse of discretion, the party challenging the juror must use all peremptory challenges. Calvert v. Commonwealth,, Ky. App., 708 S.W.2d 121 (1986).

Moore may allege an abuse of discretion by the trial judge because his counsel used all available peremptory challenges. However, we do not believe that the trial court abused his discretion here. First, a juror's questions or apparent misunderstanding of a legal principle does not constitute an automatic basis for a challenge for cause. As the Kentucky Supreme Court stated in Mabe v. Commonwealth, Ky., 884 S.W.2d 668, 671 (1994),

> A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. The test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.

The legal concept which troubled a prospective juror in Mabe was the mitigation of punishment when a defendant is under the influence of drugs or alcohol. Here, the defendant's right to silence bothered Juror No. 129.

Second, when a juror is confused about a legal concept, the trial court may explain the misunderstood concept to the affected juror. At that time, the trial court is seeking the juror's willingness to follow the law. If the juror's response

to the court's comments indicates that the juror feels the same way that he had stated previously, the juror has emphasized his inability to sit impartially and follow the court's instructions and should be stricken for cause. Humble v. Commonwealth, Ky. App., 887 S.W.2d 567 (1994). In Humble, a prospective juror also indicated that the defendant's failure to testify "would affect [his] judgment." After the trial court in that case asked him whether it would bother him even if he thought the prosecution had not proved its case, the juror still thought "it would be tough" to ignore the defendant's failure to testify. Id. at 569. This Court held that the juror's response showed that it was reversible error to have denied the challenge for cause.

This case differs from Humble in two respects. First, rather than posing a series of so-called "magic" questions (as in Humble) which sought to rehabilitate the juror, the trial court here instructed the jurors about the applicable law regarding the defendant's right not to testify. Second, after the court's instructions, it asked the jurors whether in light of those instructions they could follow the law. No juror gave a negative response, which strongly suggests their agreement that they could and would follow the court's instructions. Certainly, if any juror had replied in a negative way to the prospect of following the law as the court instructed, trial or appellate counsel would have cited that as a further basis for a challenge for cause. The challenge to Juror No. 129 did not include such a claim. The trial court addressed directly the concerns raised by Juror No. 129 and another juror, explaining the relevant law and the need

for them to comply with it. While it might have been preferable for the court to specifically address each juror who had raised the issue of the defendant's right to silence, we believe that the method used by the trial court here was sufficient. The trial court instructed all of the jurors on the defendant's right not to testify and asked if they could "follow that law." No one objected. We believe that the trial court's denial of the motion to strike Juror No. 129 was not an abuse of its discretion. See Mabe v. Commonwealth, supra.

The next issue raised by Moore relates to the jury instructions. The trial court instructed the jury on the offenses of burglary in the third degree and criminal trespass in the second degree. Moore asserts that the trial court committed reversible error when it denied his request that the jury also be instructed on criminal trespass in the third degree, which is a violation. One way in which a person commits second-degree criminal trespass is to knowingly enter or remain unlawfully in a building. A person commits third-degree criminal trespass by entering or remaining unlawfully in or upon premises. The difficulty in distinguishing between these two degrees of criminal trespass relates to the definition of "premises," which under KRS 511.010(3) includes the definition of a building and any real property. On the face of the statutes, then, both second-degree and third-degree trespass are committed whenever a person knowingly enters or remains unlawfully in a building.

The commentary to the Penal Code may be used as an aid in construing the Code's provisions. KRS 500.100. See, e.g.,

Williams v. Commonwealth, Ky. App., 639 S.W.2d 788 (1982). The commentary to KRS 511.060 states that criminal trespass in the third degree is exclusively for trespasses on land, not in buildings.

> The offense that is created by KRS 511.080, criminal trespass in the third degree, has the very same elements as the two higher degrees of trespass except for the area into which unlawful intrusion is proscribed. The protected area is described as "premises," which is defined in KRS 511.060 to include "dwellings," "other buildings," and "any real property." Defined in this way, it should be apparent that the lowest degree of trespass is included in each of the two higher degrees. Its exclusive coverage is only for unlawful intrusions onto land.

The commentary aids in resolving the scope of second-degree trespass and third-degree trespass: third-degree criminal trespass is limited to land, and second-degree criminal trespass occurs in a building. In this case it is undisputed that the law office which was the object of the burglary or trespass was a building, defined by KRS 511.010(1) to include any structure where people meet for business purposes. In order to give a jury instruction for a lesser included offense, there must be some supporting evidence. Without a basis upon which the trial court could determine that Moore knowingly entered or remained unlawfully on "land," the trial court properly refused to instruct the jury on third-degree criminal trespass.

Moore next contends that the trial court arraigned him on a separate PFO indictment (Indictment No. 96-CR-1105) after his trial for burglary (based upon Indictment No. 96-CR-0634) had begun, and then erroneously consolidated the PFO charge with the

burglary charge for trial. The prosecutor sought authority for the PFO indictment on May 2, 1996. The grand jury returned the PFO indictment on May 14, 1996, and the indictment was filed in open court the next day. On that same day, the Commonwealth's Attorney sent a letter to Moore at his home informing him about the indictment and a scheduled arraignment for May 20, 1996, but Moore was incarcerated at the time and did not receive the letter. On May 20, the arraignment was continued until the next day, which coincided with the first day of Moore's burglary trial. The court arraigned Moore on the PFO charge after the completion of the burglary voir dire but before opening statements or testimony had been heard.

Moore argues that the lateness of the arraignment on the PFO charge and the belated consolidation of the PFO charge with the burglary charge deprived him of due process because he had no or inadequate notice about the PFO charge. The Commonwealth claims that defense counsel knew about Moore's prior record, and that during plea negotiations Moore was told that the Commonwealth would seek a PFO indictment in another case against Moore. Further, the Commonwealth suggests that Moore suffered no undue prejudice because a PFO charge relates only to sentencing. Moreover, Moore had two days following the PFO arraignment to prepare for the penalty phase of the trial.

In Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the United States Supreme Court held that federal constitutional

due process does not require advance notice that

> the trial on the substantive offense will be followed by an habitual criminal proceeding. Nevertheless, a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense.

368 U.S. at 452, 82 S. Ct. at 504, 7 L. Ed. 2d at 450. The Kentucky Supreme Court cited Oyler with approval in Price v. Commonwealth, Ky., 666 S.W.2d 749 (1984), in which the court discussed the amount of notice required for an enhancement charge. "[I]f the Commonwealth seeks enhancement by proof of PFO status, the defendant is entitled to notice of this before the trial of the underlying substantive offense." Id. at 750.

In this case, it is unfortunate that the Commonwealth failed to give earlier notice about the PFO charge to Moore and his counsel. The pretrial notice in this case was substantially shorter than the month's notice upheld in Price. Again, Moore received official notice about the PFO charge after voir dire but before opening statements or the first witness testified on the burglary count. However, there is no record of Moore's request for a continuance to enable him to prepare a defense to the PFO charge. See Price, 666 S.W.2d at 750. Indeed, during the penalty phase he was able to introduce evidence about whether he was the person convicted in 1982 of the felony which formed the basis for the PFO charge. In addition, Moore has failed to identify the manner in which he was prejudiced by the tardy addition of the PFO charge, i.e., he has not related how the late addition of the PFO charge impaired his ability to challenge it more effectively. We find no due process violation concerning

the addition of the PFO charge.

Moore's related argument is that Indictment No. 96-CR-1105 was returned in violation of RCr 5.02, which states that the circuit court shall charge the grand jury "to inquire into every offense for which any person has been held to answer and for which an indictment. . . .has not been filed, or other offenses which come to their attention or of which any of them has knowledge." Moore submits that RCr 5.02 does not permit a PFO charge to be the only allegation of an indictment because the PFO status is not an "offense" for which Moore "has been held to answer." The Kentucky Supreme Court recently rejected this contention in Butts v. Commonwealth, Ky., 953 S.W.2d 943, 946 (1997), when it authorized a lone PFO charge in an indictment as long as the PFO status offense was based upon pending substantive charges.

Moore also asserts that he was denied equal protection of the laws because as a PFO II he was not eligible for probation, shock probation or conditional discharge pursuant to KRS 532.080(5). A defendant found guilty of being a first-degree persistent felony offender (PFO I) is eligible for probation if the underlying current offense is a Class D felony such as the second-degree criminal trespass conviction at issue here. See KRS 532.080(7).

While this constitutional issue merits consideration, it cannot be considered on this appeal because the Attorney General was not notified of the constitutional challenge at the trial level in accordance with KRS 418.075(1). In Jacobs v.

Commonwealth, Ky. App., 947 S.W.2d 416, 418-19 (1997), this Court held that such notification was a prerequisite to consideration of constitutional challenges even in a criminal case. The Jacobs court noted that, despite the Commonwealth's representation by local prosecutors, in the absence of a unified prosecutorial system in Kentucky the Attorney General is the appropriate law enforcement official for defending Kentucky statutes.

> Since the Attorney General is elected by registered voters from throughout the Commonwealth, he is in a unique position to defend the constitutionality of an act of the General Assembly. The Attorney General must be given this opportunity at the trial level because a declaration regarding the constitutionality of a statute affects all the citizens of the Commonwealth, not just the citizens represented by the local prosecuting official.

947 S.W.2d at 419. In addition, while the equal protection argument was raised obliquely by Moore's trial counsel at sentencing, the issue was never really addressed by the Commonwealth and ruled on by the trial court. This Court has no authority to decide issues which were never presented to and ruled on by the trial court. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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