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Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-002999-MR

GORDON WADDELL — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CR-000251

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Gordon Waddell appeals from the judgment of the Warren Circuit Court convicting him of the offenses of first-degree criminal trespass, a Class A misdemeanor, first-degree criminal mischief and second-degree burglary. Appellant was sentenced to five (5) years.

In May 1996, a Warren County grand jury indicted appellant for the offenses of second-degree burglary and first-degree criminal mischief for acts alleged to have been committed

on January 23, 1996, and first-degree burglary for acts alleged to have been committed on April 10, 1996. At trial, appellant was convicted of the lesser degree offense of first-degree burglary in conjunction with the incident of January 23, 1996, and first-degree criminal mischief with respect to that same incident, and second-degree burglary with respect to the incident alleged to have been committed on April 10, 1996.

Appellant presents two issues to be considered in this appeal: (1) whether the trial court erred in denying his motion for a directed verdict; and, (2) whether the trial court erred by allowing the jury to be influenced by improper factors.

Appellant and Hope Davis (Davis) resided together for several years prior to the events which gave rise to this case. By January 1996, however, appellant had moved out of Davis's residence, although he and Davis still maintained a dating relationship. On January 22, 1996, appellant, apparently motivated by feelings of jealousy, telephoned Davis, and in a conversation recorded on Davis's answering machine, threatened to physically abuse her. On January 23, 1996, when Davis returned to her house, she discovered that it had been ransacked and several items of furniture destroyed. At trial, Davis placed a value of $1,800.00 on the furniture which had been destroyed. Appellant subsequently replaced some of the items, and testified he did so at a cost of less than $1,000.00. Davis testified at trial that some of the damaged items were not replaced.

After those events, Davis obtained a domestic violence order (DVO) against appellant, which was issued on February 1, 1996, and which, by its terms, was to remain in effect until February 1, 1997. The DVO required appellant to remain at least 1,000 feet away from Davis and her household.

On April 10, 1996, appellant came by Davis's house. At trial, Davis testified that appellant entered the house through the front door without knocking. However, appellant testified that Davis permitted his entry into the house. Davis testified that appellant had called earlier seeking to come by the house, but she refused to permit him to do so. In any event, once inside the house, appellant sought to use the phone. Davis agreed that appellant could use the phone. The phone conversation appears to have given rise to some contention between appellant and Davis.[1] According to Davis, appellant struck her in the face and threw her onto the floor. She attempted to flee into the bathroom, but appellant caught and choked her. She was able to get away to a neighbor's home. She then went to the hospital for treatment for head, neck, face, and back injuries. However, appellant testified that it was Davis who attacked him during the phone conversation, and he was simply trying to restrain her.

Appellant first argues the trial court erred in denying his motion for directed verdict on the first-degree criminal

[1]Possibly because appellant was attempting to call a female friend.

mischief charge related to the January 23rd incident. He argues that, because he replaced the furniture he damaged at a cost of less than $1,000.00, he cannot be convicted under KRS 512.020, which requires, for conviction, that the property destroyed or damaged maintain a value of $1,000.00 or more.[2]

Here, the jury heard testimony that, while in Davis's home, he damaged a kitchen table, end tables, glass table tops, a dresser mirror, two (2) chests of drawers, and various electronic items. Davis testified that she obtained estimates of the value of the damaged goods in the amount of $1,800.00. While appellant testified that he replaced the items that he damaged at a cost of less than $1,000.00, Davis offered testimony that certain items which appellant damaged or destroyed were not replaced.

"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). While it is laudable for appellant to have replaced some of the furniture items he damaged, we do not believe this fact exonerates appellant from conviction. In any event, the jury heard appellant's testimony that he replaced the furniture, but chose not to consider that

[2]KRS 512.020 reads: "A person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of $1,000 or more."

testimony as a mitigating factor against conviction. Considering the Benham standard, and because the jury heard evidence that the value of all of the furniture that appellant destroyed exceeded $1,000.00, we conclude the trial court did not err in denying appellant's motion for directed verdict on the first-degree criminal mischief charge.

Appellant next argues that the trial court erred in denying his motion for directed verdict on the first-degree burglary charge arising from the April 10th incident. Appellant argues that the only evidence of his intent to commit a crime was his violation of the DVO Davis had obtained, and under Hedges v. Commonwealth, Ky., 937 S.W.2d 703 (1996), the violation of a DVO is not sufficient to establish an intent to commit a crime, a necessary element of first-degree burglary.[3]

In Hedges v. Commonwealth, Hedges, who was under a DVO,[4] sought entry into his estranged wife's apartment to use the phone. While there, he discovered another man in the apartment, and, becoming enraged, destroyed some furniture items. In answer to the argument that the violation of a DVO is sufficient to show

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[3]The element of intent to commit a crime is also required in second-degree burglary, of which appellant was convicted. KRS 511.030(1) defines second-degree burglary as follows: "(1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling."

[4]Hedges was prohibited by the DVO from committing acts of violence against his estranged wife or disposing of or damaging the couple's property. The DVO did not contain a "no contact" provision.

the requisite intent to commit a crime, an element required by KRS 511.030(1), our highest Court recognized that the requisite intent to commit the offense of burglary must exist at the time of the entry. Hedges, 937 S.W.2d at 706. In ruling that violation of a DVO, standing alone, was not sufficient to provide the requisite intent, the Court said:

> Violation of a DVO, without other evidence sufficient to show intent to commit a crime, may not be used to satisfy the elements of burglary. If it were otherwise, every indoor crime (or intended crime) would constitute burglary. Thus, while violation of a DVO can constitute criminal conduct, the evidence in this case indicates that appellant did not go to Dana's apartment with the intent to violate the DVO.

Id.

In support of its argument that the trial court in this case did not err in denying appellant's motion for directed verdict, the Commonwealth relies upon a case from our highest Court, McCarthy v. Commonwealth, Ky., 867 S.W.2d 469 (1993), which precedes in time the Hedges case. McCarthy, who was under an emergency protective order (EPO) which prohibited him from coming about his wife or onto her premises, went to the home of his estranged wife, and upon being denied entry, kicked in the door and entered. McCarthy's estranged wife sustained injuries in an ensuing fight between the two of them. In affirming McCarthy's conviction of the offense of second-degree burglary, our highest Court said:

> It is quite evident that the EPOs, issued at the behest of the victim, ordering appellant

> to stay away from her house, in the time framework of this case, are relevant as evidence of motive or state of mind, and also as part of the immediate circumstances bearing on the crimes charged. While the prosecution is not privileged to show unconnected and isolated unlawful conduct that had no bearing whatsoever upon the crime under scrutiny, yet all the circumstances may be shown which have a relation to the particular violation of the law imputed, even if, in so doing, other offenses may be brought to light.

Id. at 470 (citations omitted).

Later in its opinion, the McCarthy Court said:

> While appellant contends he went to the house to confer with his wife and not with the intent to commit an assault, he may be convicted of the crime of burglary providing the jury finds that he knowingly entered the building with intent to commit a crime or that he remained unlawfully in the building with intent to commit a crime. Therefore, even if one believes that appellant did not have the requisite intent as he entered the house, one could surely believe he subsequently formed the intent necessary to be guilty of the crime of burglary.

Id. at 471.

We believe that between the distinctions discussed in the Hedges and McCarthy cases, the issue of whether the trial court erred in denying appellant's motion for directed verdict in this case is resolved. The Court, in Hedges, noted that the EPO which McCarthy was under prohibited him from coming about his estranged wife or her premises, while Hedges's DVO contained no such provision. Further, the Court noted that McCarthy forced entry into his estranged wife's apartment, while Hedges's estranged wife permitted his entry into her apartment.

Here, the record reflects that appellant knew he was prohibited by the DVO from going about Davis or her premises.[5] Further, while appellant claimed that Davis permitted his entry into her home, Davis testified that appellant entered without her knowledge and without knocking. It is not disputed by either appellant or Davis that Davis gave appellant permission to use the telephone. However, Davis testified that, once appellant began assaulting her, she demanded that appellant leave the house.

Hedges unquestionably holds that a DVO, without more, cannot provide the element of intent to commit a crime, as required by KRS 511.030. However, we believe evidence of the requisite "more" is present in this case. In view of the DVO, in conjunction with Davis's testimony, the jury could have believed that appellant's entry into her home was without permission and therefore unlawful. In addition, even if the jury believed appellant's entry into Davis's home was with permission, the jury, based upon Davis's testimony, could have found appellant remained unlawfully in Davis's house with the intent to commit a crime [assault] after Davis ordered him to leave the house. Under these circumstances, we believe sufficient other evidence, in addition to the DVO, existed to support the trial court's

[5]While appellant maintained that he had frequent, even daily, contact with Davis after the entry of the DVO, Davis disputed that.

decision to deny appellant's motion for a directed verdict on the charge of first-degree burglary.

Appellant also raises an issue that the trial court allowed the jury to be influenced by improper factors. However, this argument was not preserved nor developed, and, we therefore do not consider it.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth A. Shaw
Richmond, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Vickie L. Wise
Assistant Attorney General
Frankfort, Kentucky