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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000370-MR

MARK CROSSLAND

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 06-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; ROSENBLUM,
SPECIAL JUDGE.

THOMPSON, JUDGE: Mark Lee Crossland appeals from a judgment of
conviction in the McCracken Circuit Court. For the reasons stated herein, we
affirm.

On November 30, 2005, Iris Kelly informed Crossland that she was going to file for divorce the following day. According to Kelly's trial testimony, she observed Crossland's tone change and became concerned for her safety. As a consequence of her concern, she checked her nightstand later and confirmed that her .357 revolver was in place. While at work the next morning, Kelly was notified that her house was on fire. After the fire, Kelly and an arson investigator inspected the remains of her home, and she discovered that her .357 revolver was missing. An investigation later revealed that the fire was the result of arson.

Kelly also informed police that in the weeks preceding the fire, she discovered that a .380 pistol was missing from her residence. She informed the police that she confronted Crossland about the missing pistol and he informed her that he pawned it. After receiving this information, police located the .380 pistol at Herzog's Pawn Shop along with a receipt bearing Crossland's name. Kelly identified the handgun as the one missing from her residence.

A search warrant was issued and executed on the residence of Mary Capelton where Crossland was residing following his move from Kelly's residence. As a result of the search, police found the missing .357 revolver, a camcorder identified as Kelly's, and several other items missing from Kelly's residence.

On January 27, 2006, Crossland was indicted for second-degree arson; first-degree burglary; theft by unlawful taking over \$300; two counts of theft by unlawful taking of a firearm; two counts of possession of a firearm by a convicted

felon; second-degree cruelty to an animal; and two counts of being a second-degree persistent felony offender (PFO). After his felony handgun possession and PFO charges were severed from the other charges, a jury found Crossland guilty on all four counts. He was sentenced to fifteen-years' imprisonment pursuant to the PFO statute. This appeal followed.

Crossland first contends that the trial court erred when it failed to conduct a *Faretta*¹ hearing; thus, he was denied hybrid representation. Specifically, Crossland contends that his *pro-se* pre-trial hearing motion to suppress the evidence obtained from the search of Capelton's residence was a sufficient ground to invoke the trial court's *Faretta* duties. We disagree.

When a defendant desires to make a limited or complete waiver of his Sixth Amendment right to counsel, a trial court must conduct a *Faretta* hearing which requires the completion of three steps. *Hill v. Commonwealth*, 125 S.W.3d 221, 226 (Ky. 2004). "First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent." *Id.* "Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel." *Id.* Third, the trial court must make a finding on the record that the waiver was made knowingly, intelligently, and voluntarily." *Id.*

Notwithstanding these affirmative responsibilities, a trial court's *Faretta* duties are not invoked unless the defendant unequivocally requests to

¹ *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

proceed *pro se* or with his counsel's role limited in some fashion. *Moore v. Commonwealth*, 634 S.W.2d 426, 430-431 (Ky. 1982). Moreover, even when a defendant files *pro se* motions, such actions do not constitute a waiver of a defendant's right to counsel to a degree meriting a *Faretta* hearing. *Matthews v. Commonwealth*, 168 S.W.3d 14, 23 (Ky. 2005) (no *Faretta* hearing is required when the defendant did not actively participate at trial in front of the jury but merely filed pre-trial motions and conferred with counsel).

Under the facts of this case, Crossland's *pro se* motion to suppress the evidence obtained as a consequence of the search of Capelton's residence did not rise to a waiver of his right to counsel. During the hearing, Crossland and his counsel disagreed regarding the merit of the suppression motion, and the trial court denied the motion on the basis that Crossland had not been appointed co-counsel. Crossland never requested to be appointed co-counsel nor requested that his counsel's role be limited in any manner. Therefore, Crossland did not make an unequivocal request to waive his right to counsel or to limit his counsel's role which would necessitate a *Faretta* hearing.

Crossland next contends that the trial court erred when it admitted evidence of other crimes and bad acts against him in violation of Kentucky Rules of Evidence (KRE) 404(b) and (c). He contends the prosecution during opening statement improperly informed the jury that Kelly became concerned about Crossland's angry tone after he was informed that she intended to seek a divorce.

Thus, he contends that the prosecution improperly implied to the jury that Crossland had threatened harm to Kelly. We disagree.

KRE 404(b) and (c) generally prevent the prosecution from introducing any evidence of crimes and bad acts other than the crimes charged in the indictment against the defendant. *O'Bryan v. Commonwealth*, 634 S.W.2d 153, 156 (Ky. 1982). After a trial court makes an evidentiary ruling, an appellate court will only reverse the ruling if the trial court abused its discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The prosecution’s statement that Kelly became concerned about Crossland’s angry tone was made to explain why Kelly checked for her gun the day before it was discovered missing. While Crossland can contend that this evidence was prejudicial, the prosecution is allowed to develop its case by competent evidence of its own choosing. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Therefore, unlike inadmissible evidence of uncharged crimes and bad acts, the prosecution’s statement was introduced to prove the necessary facts of its case.

Crossland next contends that the prosecution during opening statement improperly informed the jury that Kelly’s house was deliberately set on

fire. He further contends that the arson investigator's testimony that Kelly's house had "obviously been set on fire" was improperly admitted. We agree.

The evidence indicating that Kelly's house was deliberately set on fire should have been excluded. While we recognize that the trial court had broad discretion, there was no reason for the admission of this evidence. The jury was made aware that the gun disappeared between the night of November 30, 2005, and the following morning. The logical conclusion is that Crossland removed the gun from the residence during this period. Thus, the admission that the house was deliberately set ablaze during this same period permitted an inference that Crossland was also responsible for the fire. The trial court should have precluded the possibility of this inference by preventing any reference to arson from entering into evidence.

Despite our conclusion regarding the arson evidence, we nevertheless conclude that the admission was harmless. Under our harmless error analysis, an appellate court must disregard the admission of erroneous evidence if there is no reasonable possibility that the evidence complained of contributed to the defendant's conviction. *Ernst v. Commonwealth*, 160 S.W.3d 744, 756 (Ky. 2005). Crossland's possession of the .380 handgun was supported by sufficient evidence including Kelly's testimony and the receipt from the pawn shop bearing Crossland's name. Kelly's missing .357 revolver was found in the residence where Crossland resided and his co-occupant testified that she had no knowledge of the

gun. Based on these facts, the evidence regarding the cause of the fire was harmless.

Crossland next contends that the prosecution should not have been permitted to inform the jury that other missing items from Kelly's residence were found during the search of Capelton's residence. He contends that this was a direct inference that he was a thief. We disagree.

During trial, Crossland's legal strategy was that he was unaware of how the gun was transferred from Kelly's residence to Capelton's residence, and he intimated that one of Capelton's houseguests could have been responsible. Based on the defense's strategy, the prosecution was free to assert that only Crossland would have possessed the handgun and other items of Kelly's. This evidence made it more likely that he was in possession of the handgun rather than someone else. Therefore, the items found with the handgun at Capelton's residence were necessarily part of proving that Crossland was responsible for bringing the handgun into Capelton's residence. *Halvorsen v. Commonwealth*, 730 S.W.2d 921, 926 (Ky. 1986) (evidence that is necessarily part of proving the prosecution's case is admissible).

Crossland next contends that the trial court erred when it denied his motion for a directed verdict of acquittal on the felony possession of the .357 revolver. Specifically, Crossland contends that police searched Capelton's residence one month after his arrest and incarceration. Although the .357 revolver was found in the residence, Crossland contends that he was not present when it was

discovered and that any one of Capelton's many house guests could have brought the gun into the residence following his incarceration. Therefore, Crossland argues that the jury could not have reasonably found him guilty of actual or constructive possession of the .357 revolver. We disagree.

Our review of a denial of a motion for directed verdict of acquittal is governed by the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

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.

Id. at 187.

Appellate courts provide juries with great latitude to determine the credibility and weight of the evidence. *Reynolds v. Commonwealth*, 113 S.W.3d 647, 650 (Ky.App. 2003). "The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence." *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

Finally, it is the jury's responsibility to assign the credibility and weight to a witness' testimony even if the witness may have a motive to give false testimony.

Darnell v. Commonwealth, 558 S.W.2d 590, 595 (Ky. 1977).

KRS² 527.040(1) provides that “[a] person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted.” Felony possession of a firearm may be proven through either actual possession or constructive possession. *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2002). Constructive possession exists when a defendant does not actually possess a firearm but instead knowingly has the power and intention at a given time to exercise dominion and control of the firearm, either directly or through others. *Id.*

The Commonwealth presented evidence that Kelly observed her .357 revolver immediately after informing Crossland that she wanted a divorce. The next day, the handgun was missing and eventually found at Capelton's residence. According to Capelton's testimony, she permitted Crossland to reside at her residence until his arrest and she was unaware of the gun's presence in her residence. Finally, it was uncontroverted at trial that Crossland was a convicted felon at the time of possession.

While Crossland contends that Capelton's testimony was not credible because she was a convicted felon facing drug charges, the jury was free to believe

² Kentucky Revised Statutes.

that Crossland brought the handgun into the residence without Capelton's knowledge. Furthermore, Crossland's absence from the residence when the handgun was discovered and the possibility that one of Capelton's houseguests possessed the handgun did not prevent the jury from reasonably believing that Crossland had actual or constructive possession of the .357 revolver. *Id.* at 42-43.

For the foregoing reasons, the McCracken Circuit Court's judgment of conviction is affirmed.

ALL CONCUR.

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