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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000104-MR

HARLIE LEWIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 06-CR-00424

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Harlie Lewis appeals from the judgment of the Jefferson Circuit Court convicting him of burglary in the first degree.[1] On appeal, Lewis argues several errors occurred during his trial that require either reversal of his conviction or a new trial. After review, we affirm.

[1] Kentucky Revised Statutes (KRS) 511.020, a Class B felony.

On January 3, 2006, Lewis entered a 24-hour Walgreen Pharmacy in Louisville, Kentucky, and demanded OxyContin[2] and another drug.[3] Lewis was wearing a hooded sweatshirt pulled up around his face. This same store had been robbed a few weeks prior by a man armed with a gun and wearing a hooded sweatshirt.[4] According to the pharmacist on duty, Beth Quisno, Lewis claimed that even though he did not have a prescription, he did have a gun. After hearing Lewis's claim to be armed, and mindful of the previous robbery at this store, Quisno went to retrieve the drugs Lewis demanded. By the time she returned with the drugs, the police had arrived and subsequently arrested Lewis. Prior to his arrest, the police stated that Lewis had his hand in his sweater pocket, which was later found to contain a knife with an open blade.

After his arrest, Lewis was indicted on seven criminal charges including robbery in the first degree,[5] burglary in the first degree, assault in the

[2] OxyContin is the brand name of a formula of the potent painkiller oxycodone which is produced by the pharmaceutical company Purdue Pharma, L.P.

[3] The record indicates Lewis was mumbling and the name of the second drug was unintelligble.

[4] It is not alleged on appeal that Lewis was the perpetrator of the earlier robbery.

[5] KRS 515.020, a Class B felony.

third degree,[6] carrying a concealed deadly weapon,[7] resisting arrest,[8] disorderly conduct,[9] and alcohol intoxication in a public place.[10] Prior to trial, the Commonwealth dismissed all of the charges except the robbery and burglary counts. Following a trial by jury, Lewis was acquitted of robbery but was found guilty of burglary in the first degree for which he was sentenced to thirteen years' imprisonment. This appeal followed.

Lewis first argues that the trial court erred by not granting his motion for a directed verdict of acquittal on the first-degree burglary charge because there was no evidence presented at trial that he entered or remained unlawfully in the premises of the 24-hour Walgreen Pharmacy. When presented with a motion for a directed verdict, the trial court "must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth." *Williams v. Commonwealth*, 178 S.W.3d 491, 493 (Ky. 2005). *See also Bray v. Commonwealth*, 177 S.W.3d 741 746 (Ky. 2005) ("all fair and reasonable inferences are drawn in the Commonwealth's favor"). "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*, 816 S.W.2d 186, 187 (Ky. 1991) (citing

[6] KRS 508.025, a Class D felony.

[7] KRS 527.020, a Class A misdemeanor.

[8] KRS 520.090, a Class A misdemeanor.

[9] KRS 525.060, a Class B misdemeanor.

[10] KRS 222.202(1), a violation.

Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983)). However, 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." *Id*.

KRS 511.020 states in pertinent part:

> (1) A person is guilty of the offense of first degree burglary when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in 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; or
> >
> > (b) Causes physical injury to any person who is not a participant in the crime; or
> >
> > (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Thus, the burglary statute contains elements of both unlawful presence and intent to commit a crime.

At trial, citing the plain language of KRS 511.090(2), Lewis argued he could not be convicted of burglary because his actions were perpetrated in a public place which he was never ordered to leave. We disagree.

KRS 511.090(1) states that "[a] person 'enters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so." Concerning privilege and license in the context of premises open to the public, KRS 511.090(2) states:

> A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license or privilege unless he defies a lawful order not to enter or remain personally communicated to him by the owner of such premises or other authorized person.

The official commentary to the statute states this second subsection "eliminates the possibility of prosecuting an individual for burglary when he enters a building that is open to the public, despite his intention to commit a crime."

Thus, pursuant to the foregoing statutory provisions, Lewis argued that a defendant cannot be convicted of burglary in a public place unless that individual is personally ordered to leave or remain outside of that public place prior to his arrest, or unless he kills the person capable of granting the defendant license to enter or remain on the premises, as was the case in *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997). As a result, Lewis now argues the trial court erred when it denied his motion for a directed verdict of acquittal because there was no proof he was ever ordered to leave the pharmacy.

However, the Supreme Court of Kentucky has specifically held that "implicit in this statute is the concept that license or privilege expires once the person commits an act inconsistent with the purposes of the business. A license to be on the premises terminates when one commits criminal acts." *Id*. at 307. *See also Fugate v. Commonwealth*, 993 S.W.2d 931, 940 (Ky. 1999). Thus, regarding the element of an unlawful presence under the statutory definition of burglary, a

license or privilege to enter or remain upon a premises ends when one's perpetration of a crime begins.

While Lewis may be free to argue that our Supreme Court's ruling in *Bowling* and its progeny contradict the plain language and purpose of the statute, failure of the legislature to amend a judicially interpreted statute strongly implies legislative agreement with the interpretation. *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996). Moreover, we are compelled to follow precedent established by the decisions of our Supreme Court. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986); *Commonwealth v. Basnight*, 770 S.W.2d 231, 238 (Ky. App. 1989); and SCR[11] 1.030(8)(a).

With this proposition in mind, we must conclude Lewis's license or privilege to enter and remain in the 24-hour Walgreen Pharmacy ended when he approached the pharmacist on duty demanding narcotic painkillers with no prescription and armed with an opened knife. We reject Lewis's invitation to graft onto the criminal statute a requirement that a victim of a crime pause during its commission to demand that a perpetrator vacate the premises before one may conclude the perpetrator's license or privilege to remain on the premises was withdrawn. Pursuant to our Supreme Court's holding in *Bowling*, and based on the whole evidence taken in a light most favorable to the Commonwealth, there was sufficient proof to induce a reasonable juror to believe beyond a reasonable doubt that Lewis was guilty of the offense of first-degree burglary. Thus, the trial court

[11] Supreme Court Rules.

committed no error in denying Lewis's motion for a directed verdict of acquittal because it was not "clearly unreasonable" for jurors to find Lewis guilty. *Benham*.

Our decision in the present case is based upon application of the analysis announced in *Bowling*, primarily because its facts similarly relate to a charge of burglary arising from one committing criminal acts while present in a business which is open to the public. We are nonetheless mindful of other precedent, dealing primarily with one's license or privilege to enter or remain in private places, such as residences, under the holdings of which it might reasonably be argued that Lewis's license or privilege to enter and remain in the 24-hour Walgreen Pharmacy premises was *not* terminated by his engaging in a criminal act, even if he had entered the store for that express purpose. *See Robey v. Commonwealth*, 943 S.W.2d 616 (Ky. 1997); *Fletcher v. Commonwealth*, 59 S.W.3d 920 (Ky. App. 2001).

Admittedly, our review of relevant Kentucky law leads us to agree with the Supreme Court's own acknowledgment, stated in *Commonwealth v. Partee*, 122 S.W.3d 572, 575 (Ky. 2003), that "there has been an ebb and flow of our views with respect to the breadth of the crime of burglary." There is an apparent dichotomy of opinion within the Commonwealth on this issue, and we can determine no clear demarcation in the reasoning underlying when the license or privilege to enter or remain upon a premises is terminated by one's otherwise distinct criminal act. For example, *Partee* held "[w]e have required some evidence of intent to commit a crime prior to unlawful entry or prior to remaining

unlawfully, and the mere fact of the crime is not sufficient. Evidence of criminal intent is the key to proper application of the burglary statutes." Likewise, the holding in *Hedges v. Commonwealth*, 937 S.W.2d 703 (Ky. 1996), would indicate that Lewis's obvious intent to commit a crime prior to his entry into the store—as evidenced by his attire, being armed with an opened knife, demanding drugs while having no prescription, and claiming to possess a gun—would mandate a finding of unlawful entry upon the premises. Yet, *Robey* and *Fletcher* indicate intent upon entry has no bearing so long as the entry is effectuated by a lawful means. Moreover, without some further clarification from our Supreme Court, the reasoning of *Bowling*, taken to its logical end, would effectively turn any would-be shoplifter into a burglar. Innumerable like examples can be imagined. Based on the foregoing, the courts of the Commonwealth may continue to encounter difficulties in interpreting and applying the burglary statutes until additional guidance is provided by the Supreme Court.

Lewis's next two arguments concern alleged errors committed while instructing the jury. We review alleged errors in jury instructions *de novo* because they are questions of law. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Id*. (quoting *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981)). If an erroneous instruction is given, the error is presumed to be prejudicial but can be rebutted by showing there

was no effect on the verdict or judgment. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008).

The first instruction issue is whether the trial court correctly defined the term "deadly weapon." Lewis was tried for and convicted of burglary in the first degree which required the Commonwealth to prove several criminal elements beyond a reasonable doubt. One of those elements was that Lewis used a "deadly weapon" during the commission of the crime in question. KRS 511.020(1)(a). Over Lewis's objection, the trial court defined "deadly weapon," in part, as "any object or statement that is intended by its user to convince the victim that the object referred to is a deadly weapon and which does so convince the victim . . . ." This definition originated in *Merritt v. Commonwealth,* 386 S.W.2d 727, 729 (Ky. 1965), and was recently endorsed in *Thacker v. Commonwealth*, 194 S.W.3d 287, 291 (Ky. 2006).

In opposition, Lewis argues that this instruction was incorrect because the trial court was required to use the definition of a "deadly weapon" expressed in KRS 500.080(4)(b). Lewis cites no binding authority requiring a court to use a statutory definition or declaring the *Merritt* definition to be unsound. Even if we were to agree with Lewis, this Court is not permitted to reverse in this instance as we are bound by the decisions of our Supreme Court. *Francis*; SCR 1.030(8). We are aware that *Merritt* has been called into question by three unpublished opinions of recent vintage, and that a similar issue as presented in the instant case is

currently before the Supreme Court of Kentucky on discretionary review.[12] Nevertheless, *Merritt* has not been overruled and still represents the law in this Commonwealth which we are bound to follow. Therefore, we hold that the trial court's "deadly weapon" definition was legally sufficient and does not amount to reversible error.

The second instruction issue raised in this appeal is whether the trial court properly instructed jurors on the presumption of innocence and the burden of proof. According to Lewis, the trial court was required to instruct jurors that "you will find the defendant *not guilty, unless*" as opposed to "you will find the defendant . . . *guilty* . . . *if*," which was the phrasing used by the trial court in the individual instructions. He contends the trial court erred in denying his request to modify the instructions and reversal is thereby mandated. We disagree.

Our Supreme Court has twice held the description of the presumption of innocence provided in RCr 9.56(1), which was used in this case, to be legally sufficient. *Mills v. Commonwealth,* 996 S.W.2d 473, 491 (Ky. 1999); *Sanders v. Commonwealth*, 801 S.W.2d 665 (Ky. 1990). Further, the Supreme Court, has recently found use of the phrase "*guilty if*" sufficiently allocates the burden of proof. *Rodgers v. Commonwealth*, 285 S.W.3d 740, 759-60 (Ky. 2009). The "*guilty if*" language, as used throughout 1 W. Cooper, *Kentucky Instructions to Juries (Criminal),* §§ 5.07, 5.09, 6.14, 6.17 (1999), does not deprive a defendant of

[12] *See Gamble v. Commonwealth*, 2008 WL 3551174, Case No. 2007-CA-001869-MR (rendered August 15, 2008, discretionary review granted May 13, 2009).

his right to be presumed innocent nor does the language shift the burden of proof. Therefore, we hold the trial court properly instructed the jury.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bruce P. Hackett
Chief Appellate Defender
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, Kentucky