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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000038-MR

RANDY L. BYRD APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CR-00266-001

COMMONWEALTH OF KENTUCKY APPELLEE

AND

NO. 2013-CA-000039-MR

JANINA R. BYRD APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CR-00266-002

COMMONWEALTH OF KENTUCKY APPELLEE

AND

NO. 2013-CA-000073-MR

WILLIAM B. GODSEY APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CR-00266-003

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

DIXON, JUDGE: Randy L. Byrd, Janina R. Byrd, and William B. Godsey appeal their criminal convictions following a joint jury trial in Kenton Circuit Court. Although Randy, Janina, and Godsey filed separate appeals, this Court will hear their appeals together, as they arise from the same criminal case.

The Appellants, along with fourteen co-defendants, were indicted following an extensive police investigation into stolen property that was being sold at two "Cash-In" stores in Northern Kentucky. The Appellants co-owned the Cash-In store in Erlanger, while their co-defendant, Charlie Wilson, owned the

Cash-In store in Covington. Several co-defendants entered guilty pleas to amended charges and agreed to testify for the Commonwealth. In October 2012, the case proceeded to trial against Appellants and two remaining co-defendants. According to the testimony, members of the alleged criminal syndicate shoplifted items such as sporting goods, name brand apparel, tools, and electronics. The individuals would then sell the goods to Cash-In for a fraction of the retail price; thereafter, the merchandise was sold in the Cash-In stores and on Ebay. The testimony also indicated Cash-In purchased gift cards that were obtained by individuals who returned (stolen) items to a particular store and received a "gift card" with store credit for the value of the returned merchandise. The jury found Appellants guilty of engaging in organized crime and recommended a fourteen-year sentence for Randy and ten-year sentences for Janina and Godsey. The trial court imposed the recommended prison sentences on Randy and Godsey, along with a fine of $10,000. The court sentenced Janina to a ten-year sentence, probated for five years, and a $5,000 fine. These appeals followed.

Randy and Janina assert identical arguments on appeal. They contend the court erred by 1) denying their motion to suppress the evidence seized from their business and home; 2) failing to grant a directed verdict of acquittal; 3) admitting non-probative evidence; 4) issuing an improper jury instruction; and 5) imposing a fine at sentencing. Appellant Godsey's arguments relate only to the latter two issues regarding jury instructions and imposing a fine.

I. Motion to Suppress Evidence

Randy and Janina assert the court erred by denying their joint motion to suppress all of the evidence seized from their home and the Erlanger Cash-In, arguing the items seized were not specifically delineated in the search warrant. Following a hearing, the court denied the motion to suppress, concluding the description of the evidence was sufficient in light of the circumstances of the investigation. In its order, the trial court set forth the following facts:

> In April 2011, Detective Fern of the Erlanger Police Department applied for a search warrant of the home of the Byrds. On April 18, 2011, the Boone District Court issued a search warrant authorizing the search of the Byrd residence at 1429 RJ Lane, Union, Kentucky. The warrant set forth the following property: U.S. currency; ledgers, receipts and other similar business records from 'Cash In'; stolen property associated with Cash In; and, computers, cell phones and/or other electronic devices containing evidence of sales of stolen property.
>
> Prior to applying for the search warrant, Detective Fern had consulted with Detective Kane of the Covington Police Department. In January of 2011, Detective Kane had obtained a warrant and had searched the Covington Cash In store, as well as the home of Charles and Donna Wilson. As a result of that search, Detective Kane discovered what he believed to be stolen items as part of the criminal operation.
>
> On April 19, 2011, Detective Miles of the Erlanger Police Department executed the search warrant on the Byrd residence. As a result of that search, numerous items were seized from the Byrd residence. Many of these items were not specifically listed in the search warrant, but were seized as being stolen property believed to be associated with the Cash In store operation. The police testified that the items seized in the Byrd home were consistent with the items taken by Detective Kane from the Covington Cash In location. Thus, the Erlanger Police believe that items not

specifically set forth in the search warrant were products of criminal activity and subject to seizure.

When this Court reviews a determination on a motion to suppress evidence, we are bound by the factual findings of the trial court if they are supported by substantial evidence. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). We then review *de novo* the application of the law to the facts. *Id*.

"Items to be seized under a legally executed search warrant must be described 'particularly' or 'as nearly as may be' under the respective provisions of the Fourth Amendment to the U.S. Constitution and § 10 of the Kentucky Constitution." *Wilson v. Commonwealth*, 621 S.W.2d 894, 895 (Ky. 1981). "However, the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought. 'Thus a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit.'" *U.S. v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988), *quoting U.S. v. Blum*, 753 F.2d 999, 1001 (11th Cir. 1985). In the case at bar, the trial court noted that the police "were investigating what they believed to be a stolen property scheme involving a large and varied number of items taken from various merchants." The testimony at the hearing indicated the police had learned of a wide array of merchandise that Cash-In was purchasing from thieves, including electronics, power tools, white strips, North Face apparel, Under Armor apparel, batteries, hunting accessories, and gift cards. In light of the scope and nature of the suspected criminal enterprise, we agree with the trial court that the descriptions

contained in the warrant were valid. The trial court did not err by denying the Byrds' motion to suppress the evidence seized from their home and the Erlanger Cash-In.

II. Directed Verdict

Randy and Janina contend they were each entitled to a directed verdict because the evidence was insufficient to support a conviction for engaging in organized crime.

KRS 506.120 provides, in relevant part, as follows:

> (1) A person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall not do any of the following:
>
> (a) Organize or participate in organizing a criminal syndicate or any of its activities;
>
> (b) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;
>
> (c) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;
>
> . . .
>
> (3) As used in this section 'criminal syndicate' means five (5) or more persons . . . collaborating to promote or engage in any of the following on a continuing basis:
>
> . . .
>
> (c) Any theft offense as defined in KRS Chapter 514[.]

When a defendant moves for a directed verdict, the trial court must construe the evidence in a light most favorable to the Commonwealth and deny the motion "[i]f the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty." *Commonwealth v.*

Benham, 816 S.W.2d 186, 187 (Ky. 1991). The appellate standard of review regarding the denial of a directed verdict motion 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*.

To support their argument, the Byrds primarily rely on Randy's testimony at trial, as he generally denied any wrongdoing and attempted to disassociate the Erlanger Cash-In from the activities of the Covington Cash-In. A review of the record shows that, over the course of the ten-day trial, the jury heard testimony from numerous witnesses for the Commonwealth. The Commonwealth presented the testimony of the co-defendants in this case who regularly stole various types of merchandise and sold the items to Cash-In on a daily basis. Hundreds of exhibits were introduced showing property and merchandise that had been seized. Further, financial records from the PayPal and Ebay accounts associated with Cash-In showed more than $500,000 in sales. Blake Wilson, the daughter of Charlie Wilson, also testified for the Commonwealth. She asserted that her father and the Appellants shared money between the two stores and that the PayPal account used for Ebay transactions was in Janina's name.

Considering the evidence in a light most favorable to the Commonwealth, the trial court properly allowed the jury, as the finder of fact, to weigh the evidence and assess the credibility of witnesses. *Id*. There was ample evidence from which the jury could conclude that Randy, Janina, and at least three of their co-defendants collaborated to engage in a scheme of receiving stolen

merchandise on a continuing basis for the purpose of selling the merchandise or keeping it for themselves. We conclude it was not unreasonable for the jury to find that Randy and Janina were engaging in organized crime; consequently, the court properly denied their motion for directed verdict.

III. Admission of Evidence

In order to preserve a claim for appellate review, the movant must raise the issue below and secure a ruling from the trial court. *Buster v. Commonwealth*, 364 S.W.3d 157, 161 (Ky. 2012). Although it is acceptable for litigants to refine and clarify arguments on appeal, the issues raised in the appellate court must have been presented to the court below. *Id*. at 162. Where the issues raised on appeal were not expressly raised in the trial court, this Court will not consider them on appeal. *Dickerson v. Commonwealth*, 278 S.W.3d 145, 149 (Ky. 2009).

Here, Randy and Janina assert the trial court erred by admitting non-probative evidence. In their appellate briefs, they contend that nearly all of the Commonwealth's evidence was "non-probative."[1] However, it is not clear that specific objections were raised at trial regarding all of the evidence cited on appeal. Based on our review of the record, it appears trial counsel only raised a specific objection to testimony regarding the items seized from Charlie Wilson's home. Counsel contended the testimony was non-probative because the Byrds were never

[1] In their statement of preservation, the Byrds provide a general reference to the date and time of the suppression hearing.

alleged to have been at the Wilson residence. As this was the only argument preserved for appeal, it is the only one we will address.

Our standard of review of a trial court's evidentiary decision is abuse of discretion. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Accordingly, we will not disturb the court's ruling unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

KRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury . . . ."

Charlie Wilson was one of the Byrds' co-defendants. The evidence seized from his home was consistent with the evidence seized from the Byrds' home. This evidence was directly related to the Commonwealth's theory that the Byrds and their co-defendants were collaborating to engage in a scheme of receiving stolen merchandise on a continuing basis for the purpose of selling the merchandise or keeping it for themselves. We are not persuaded that the evidence was prejudicial or that the jury was confused by its introduction. The court did not abuse its discretion by admitting the evidence.

IV. Jury Instruction

Randy, Janina, and Godsey argue that the court erred in instructing the jury on the statutory elements of engaging in organized crime. The Appellants concede this issue was not preserved and request palpable error review.

RCr 10.26 provides: "A palpable error which affects the substantial rights of a party may be considered . . . even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." The Kentucky Supreme Court has noted "that the required showing [for palpable error] is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

The trial court instructed the jury pursuant to two theories of guilt under the organized crime statute. Instruction number five related to a criminal syndicate of five or more persons engaging in theft by unlawful taking or receiving stolen property. Instruction number six related to a criminal syndicate of two or more persons engaged in theft of retail merchandise. KRS 506.120(2) provides that a conviction under the former theory is a Class B felony, while a conviction under the latter theory is a Class C felony. The jury found each of the Appellants guilty under instruction number five.

Appellants contend instruction number five was erroneous because it failed to require a finding that at least five people (as opposed to two people for instruction number six) were involved in the syndicate. We disagree. A review of the record indicates that instruction number five followed the statutory language and referred to a group of five people. The preceding instruction also provided the statutory definition of "criminal syndicate." KRS 506.120(3). "Jury instructions in criminal cases should conform to the language of the applicable statute and,

generally, it is left to the lawyers to flesh out the bare bones in closing argument." *Noakes v. Commonwealth*, 354 S.W.3d 116, 120 (Ky. 2011). After careful review, we are not persuaded the instructions given by the trial court were erroneous.

V. Imposition of Fines

Appellants contend the court's imposition of fines at sentencing was erroneous because they are indigent. Although this issue was not preserved, Appellants correctly point out this Court has jurisdiction to review an alleged sentencing error raised for the first time on appeal. *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010).

KRS 534.030(4) prohibits a trial court from imposing a fine "upon any person determined by the court to be indigent pursuant to KRS Chapter 31." KRS 31.120(1)(b) states, in relevant part, "nothing shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon declaration by the person that he or she is needy under the terms of this chapter." In the case at bar, Appellants were represented by private attorneys for the entire duration of the circuit court proceedings. Randy, Janina, and Godsey each appeared at sentencing with private counsel. There was no indication Appellants were indigent when the fines were imposed upon them at sentencing. *See* 23A.205(3) (addressing payment of costs, fees, and fines at the time of sentencing) and *Travis*, 327 S.W.3d at 459 (error to impose a fine where, at time of trial, defendants were represented by appointed counsel). It was not until after Appellants were sentenced that they requested and were granted *in forma pauperis*

status for the purpose of filing their appeals. Under the circumstances presented here, we conclude the court legally imposed fines upon the Appellants, as they failed to establish that they were indigent at the time the fines were imposed.

For the reasons stated herein, we affirm the judgment of the Kenton Circuit Court in 2013-CA-000038, 2013-CA-000039, and 2013-CA-000073.

ALL CONCUR.

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