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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001546-MR

ALFRED D. ARNOLD — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A STINE, V, JUDGE
ACTION NO. 13-CR-00071

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

COMBS, JUDGE: Alfred D. Arnold was convicted of (1) burglary in the third degree; (2) theft by unlawful taking under $500; and (3) being a persistent felony offender (PFO) in the first degree. He was sentenced to four-years' imprisonment for the burglary charge, which was enhanced to a total of seventeen-years'

imprisonment by virtue of his status as a persistent felony offender.[1] Finding no errors requiring reversal, this Court affirms his convictions and sentence.

RELEVANT FACTS

On November 30, 2012, two loss prevention officers, Scott Barger and Joanna Najimian, observed Arnold walk into a Kroger supermarket with three reusable shopping bags. Believing Arnold to be suspicious, the officers divided up so they could watch him from different angles. The officers observed Arnold proceed to the aisle dedicated to baby products. Arnold placed various items in his cart, including formula, OxiClean, and baby wash. Arnold then walked to another aisle, where he placed three cases of soda into the cart. Barger observed Arnold pull the reusable bags out of his jacket and begin filling the bags with the items from his cart. Thereafter, Barger went outside and called the police to report the incident because he believed Arnold was about to leave the store without paying for the items.

As Barger was standing outside on the phone with the police, he saw Arnold exit through the entrance door next to the produce section of the store. Najimian, who had followed Arnold, stopped him, identified herself, grabbed the cart, and asked Arnold to return inside. Arnold responded to Najimian by claiming that he was only looking at the furniture on display in the foyer, implying

[1] Arnold was sentenced to twelve-months' imprisonment for theft by unlawful taking under $500. That sentence was ordered to run concurrently with his enhanced seventeen-year sentence for third-degree burglary.

that he had planned to return to the inside of the store to pay for the items in his bags.

In the meantime, Barger arrived in the foyer area, identified himself to Arnold, and asked him to return to the store. Instead of complying with Barger's request, Arnold ran toward Barger, struck him in the face, and tried to pull him outside. Barger managed to free himself. He shoved Arnold, causing him to fall back into the door. [2]

Shortly later, the police arrived and Arnold was taken into custody. An inventory of Arnold's cart revealed that it contained eight bottles of Similac baby formula, two baby washes, two cans of Lysol cleaner, a "Baby Basic," and three cases of Dr. Pepper soda. The total value of the items was $128.44.

On January 24, 2013, a Campbell County grand jury indicted Arnold on the charges of robbery in the second degree and burglary in the third degree. Prior to trial, the Commonwealth moved to amend the robbery count to theft by unlawful taking, property value less than $500. On August 1, 2013, the Campbell County grand jury charged Arnold with being a persistent felony offender in the first degree. After a trial by jury, Arnold was convicted on all charges. He now appeals as a matter of right. Kentucky Constitution § 110(2) (b).

Arnold makes four arguments on appeal. First, he argues that the jury was impermissibly allowed to hear evidence of an uncharged crime. Second, he asserts that the persistent felony offender instruction violated the unanimity

[2] A video of the incident inside the foyer was played for the jury at trial.

requirement. Third, he claims that the court improperly allowed a police officer to comment on Arnold's silence. And fourth, he contends that his sentence amounts to cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution. We will address each of these arguments.

I. Other Crimes Evidence

Prior to trial, the Commonwealth provided notice to Arnold that it intended to introduce evidence that Arnold had twice been banned from all Kroger supermarkets for life—once in Ohio and once in Kentucky. Arnold argues that the trial court erred in allowing the "actual banning documents" to be admitted at trial in violation of Kentucky Rule[s] of Evidence (KRE) 404(b). The Commonwealth, however, argued that KRE 404(b) did not apply because this evidence was being offered as direct evidence of an element of third-degree burglary. Arnold responded that admission of the evidence would be minimally probative but highly prejudicial and should thus be excluded.

Before trial, the court held a hearing on the matter and ruled that the evidence could be admitted at trial because it was an element of an offense that the Commonwealth was required to prove. Arnold then argued to the court that the documentary evidence of his being banned from Kroger should be excluded. In an effort to prevent the jury from seeing the documents, he contended that this evidence should only be admitted through witness testimony. Additionally, Arnold offered to stipulate to the fact that he had been banned from Kroger for life.

In the alternative, if the court were going to admit the documentary evidence, Arnold requested that the documents be redacted. Specifically, on the Ohio document, Arnold wanted references to "Kroger security," "arrestee," and "cuffed" excised. On the Kentucky document Arnold wanted the portion of the form entitled "shoplifting" to be excised. The trial court eventually held that the documents could be admitted into evidence. With respect to redaction, the court granted Arnold's motion as to the Kentucky document but overruled his motion as to the Ohio document. The trial court agreed to admonish the jury to not speculate as to the reason Arnold was banned. Arnold now contends that it was reversible error for the trial court to admit documentary evidence that he had been banned from Kroger for life.

Determinations as to the relevance and admissibility of evidence are left to the sound discretion of the trial court. *Simpson v. Commonwealth,* 889 S.W.2d 781, 783 (Ky. 1994). We may reverse a judge's decision to admit certain evidence only if the decision amounted to an abuse of discretion. *Love v. Commonwealth,* 55 S.W.3d 816, 822 (Ky. 2001). "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) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)).

KRE 404 provides, in part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the

> character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
> >
> > (2) if so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without serious adverse effect on the offering party.

We believe that it is clear the evidence regarding Arnold being banned from Kroger for life was properly admitted under KRE 404 because it was relevant to prove an element of the charged crime of burglary in the third degree.

Kentucky Revised Statute[s] (KRS) 511.040 provides, in relevant part, that "[a] person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." Kroger is a supermarket that was open to the public on the date and time that Arnold entered the building and remained on the property. KRS 511.090 (2) sets forth as follows:

> A person who, regardless of 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.

In order to prove that Arnold knowingly entered and remained in Kroger unlawfully, the Commonwealth needed to show that Arnold had notice of -- and defied - a lawful order not to be on the property. The documents submitted

by the Commonwealth, one signed by Arnold, reveal that Arnold was given proper notice that he was prohibited for life from entering onto any property owned by Kroger and that violation of the order could result in his being arrested for criminal trespass.[3] Therefore, the documents were relevant to prove a material fact in issue - not to prove bad character or propensity.

Moreover, we do not believe that the inclusion of the words *security, arrestee*, and *cuffed* made it more likely that the jury would speculate that Arnold may have shoplifted in the past than if the words had not been included. The fact that Arnold was banned from Kroger for life naturally suggests that Arnold did something against Kroger's interests or inconsistent with the purposes of the business. However, we reiterate, the fact that Arnold was banned was necessary to prove an element of the Commonwealth's case. And the Commonwealth is "permitted to prove its case by competent evidence of its own choosing[.]" *Barnett v. Commonwealth,* 979 S.W.2d. 98 (Ky.1998). We are satisfied that the trial court cured any possible prejudice resulting from admission of the documents when it admonished the jury to not speculate as to the reasons for Arnold being banned from Kroger property. A jury is presumed to follow the trial court's admonition. *Burton v. Commonwealth,* 300 S.W.3d 126, 143 (Ky. 2009). And in light of that admonition, the probative value of the documents banning Arnold from Kroger far outweighed any undue prejudice with respect to his character. We

[3] First-degree trespass, KRS 511.060, differs from third-degree burglary only to the extent that the burglary statute requires "with intent to commit a crime."

conclude that the trial court did not err by admitting the "banning documents" into evidence.

II. Jury Instructions

Arnold next argues that the jury instructions regarding his status as a first-degree persistent felony offender violated the unanimity requirement. He objects to the trial court's failure to merge four prior convictions from Cuyahoga County, Ohio, that were entered on the same day before the same judge. Additionally, he objects to the trial court's failure to merge two sentences—one from Kenton County, and one from Boone County—that were ordered to run concurrently with one another. The issue is partially preserved in that Arnold objected that the instructions should not list eight prior convictions when some should have been merged, but he did not specifically argue that the Boone and Kenton County convictions should have been merged. Arnold requests palpable error review with respect to the Boone and Kenton County convictions. However, we need not undertake palpable error review. We are persuaded that although the trial court erred in failing to merge the felony convictions, the error was harmless.

In order to be deemed a first-degree PFO, a person must have been convicted of two prior felonies. KRS 532.080(3). KRS 532.080(4) outlines the methodology used to evaluate whether an individual has been convicted of two previous felonies:

> For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served

> concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

We agree that the trial court erred in allowing the jury to consider Arnold's eight prior felonies in determining whether he was a persistent felony offender.

After having previously pled guilty to charges under four separate indictments in Cuyahoga County, Ohio, Arnold was sentenced on March 14, 1985, to three - to - fifteen-years' imprisonment for robbery; one and one-half years for two counts of passing bad checks; one and one-half years for four counts of passing bad checks; and another one and one-half years for four counts of passing bad checks. Arnold argues that all of these convictions should have been deemed as one conviction for purposes of making the PFO determination.

In *Adkins v. Commonwealth*, 647 S.W.2d 502 (Ky. App. 1982), this Court held that "[t]he concurrent/consecutive sentence break applies only to those who may have committed more than one crime but who have received their sentences for all of the crimes committed before serving any time in prison". *Id*. at 506. *See also Blades v. Commonwealth*, 339 S.W.3d 450, 456 (Ky. 2011). In this case, Arnold received his sentence for all of his crimes under the four separate Cuyahoga County, Ohio, indictments before he served any time in prison on any of the charges. Therefore, the four convictions for which Arnold was sentenced on March 14, 1985, should have been treated as one conviction for the purposes of being a persistent felony offender.

Additionally, Arnold's convictions from Boone and Kenton County should have been treated as one conviction for the purposes of determining if Arnold was a persistent felony offender. Arnold was convicted on April 16, 2004, in Kenton County of third-degree burglary, receiving stolen property over $300, and two counts of unlawful transaction with a minor, third degree. He was sentenced to six-years' imprisonment, probated for five years. On April 24, 2004, he was sentenced in Boone County for theft of services over $300, for which he received a sentence of five years: 210 days to serve, the remainder probated for five years. The order stated that the entire sentence was to run concurrently with Arnold's sentence in Kenton County. Thus, under KRS 532.080(4), the Kenton County conviction and Boone County conviction count as a single felony because Arnold served his time concurrently. *See Boyd v. Commonwealth*, 439 S.W.3d 126, 135 (Ky. 2014).

The Supreme Court of Kentucky has held that "[a]ny error in jury instructions is presumed to be prejudicial. Nonetheless, this presumption can be successfully rebutted upon a showing that the error was harmless." *Commonwealth. v. McCombs,* 304 S.W.3d 676, 680 (Ky. 2009) (*citing Harp v. Commonwealth,* 266 S.W.3d 813, 818 (Ky. 2008)). An error is harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. (*citing Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct 1827, 144 L.Ed.2d 35 (1999); *quoting Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)).

In *Sanders v. Commonwealth*, 301 S.W.3d 497 (Ky. 2010), the Supreme Court of Kentucky considered a defendant who had three prior felony offenses that could have been listed in the jury instructions. The actual jury instructions listed two offenses, one of which by statute could not be used as a prior felony conviction for persistent felony offender purposes. The Supreme Court found reversible error. Similarly, in *Carver v. Commonwealth*, 303 S.W.3d 110 (Ky. 2010), the defendant had three prior felony convictions that could have been listed in the instructions to establish his status as a persistent felony offender, but one of the two prior convictions used in the instructions was a misdemeanor. The Court reversed in *Carver*. In *Commonwealth v. McCombs*, 304 S.W.3d at 682, the Court explained that "reversal was necessary because the juries in those cases effectively found the defendant guilty under a jury instruction that on its face, constituted no crime."

Here, the jury instructions were not of the type in which a guilty verdict under the instructions constituted no crime. The instructions read: "You will find the Defendant, Alfred Duane Arnold, guilty of being a Persistent Felony Offender in the First Degree under this Instruction; if and only if, you believe from the evidence beyond a reasonable doubt... that...Arnold was convicted of at least two of the following...." The instructions went on to list Arnold's eight felony convictions as well as the other elements necessary to find Arnold a persistent felony offender under KRS 532.080. Arnold does not claim that any of the offenses was not a felony or that any was precluded from being used as a felony

for persistent felony offender purposes. He admits that all of the felonies are individually valid for consideration under the persistent felony offender statute. Thus, a guilty verdict under the instructions as given constituted the crime of being a persistent felony offender. While failure to merge the charges was indeed error, it was harmless.

Arnold nevertheless argues that he was deprived of a unanimous verdict because it is impossible to tell if the jurors relied on one of the merged convictions to find guilt. We disagree.

In *Payne v. Commonwealth*, 656 S.W.2d 719 (1983), the trial court instructed the jury on the persistent felony offender statute in the first degree -- but not on a persistent felony offender in the second degree. The appellant argued that failure to give the second-degree instruction was reversible error because the jury may have believed that he did not commit one of the felonies necessary to find him a first-degree persistent felony offender. However, the appellant did not challenge the basis of either of the convictions. In holding that there was no evidentiary basis for instructing on both convictions stated, "we believe it does not follow that the jury has the right to be capricious and ignore one conviction and believe the other where the convictions are not denied." *Id.* at 721.

In the case before us, Arnold claimed that some of the offenses should have been merged in the instructions. However, the evidence of the convictions was not challenged in any way. In fact, during cross-examination in the penalty phase, Arnold freely admitted that he had been convicted of all the charges, that he

had been eighteen at the time of commission of each of the offenses, that he had been twenty-one years of age or older at the time of each of the convictions, and that he had served a sentence of imprisonment of at least one year on each of the offenses. In order for Arnold's verdict not to be unanimous, the jury would have had to disbelieve some of the convictions, "which according to *Payne*, is impermissible absent evidence calling that proof into question." *Springfield v. Commonwealth*, 410 S.W.3d 589 (Ky. 2013). Here, as in *Payne*, there was no evidentiary basis for disregarding any of the prior convictions. Thus, we find that the jury's decision was based on all eight of Arnold's prior convictions. Arnold was not denied a unanimous verdict.

III. Comment on Silence

Arnold next argues that the trial court improperly permitted a police officer to comment on his silence in violation of his Fifth Amendment right to remain silent. Arnold points to two instances in which the Commonwealth's Attorney elicited statements regarding the fact that Arnold remained silent during questioning. Both occurred during the direct examination of Officer Adam Moeves, the arresting officer in this case.

The first instance occurred when Officer Moeves testified about what he observed upon arriving at the scene of the incident. Moeves testified that shortly after he arrived, he detained Arnold. The Commonwealth's Attorney asked Officer Moeves if he would characterize Arnold as being cooperative or uncooperative. Officer Moeves responded, "very uncooperative." Arnold objected

to the testimony on the grounds that the response was a comment on Arnold's silence, but the trial court overruled the objection. However, the court stated that the Commonwealth should elicit from Officer Moeves what he meant by "uncooperative." When questioning resumed, the Commonwealth asked Officer Moeves to explain how Arnold was being uncooperative. Officer Moeves stated that prior to waiving his *Miranda* rights, Arnold would not answer the questions of the loss prevention officers. After waiving his *Miranda* rights, he did not answer the questions that were specifically asked by Officer Moeves. Arnold again objected, but he was summarily overruled.

The next instance of which Arnold complains occurred a short time later. Officer Moeves testified that Arnold told him that he lived in Scottsville, Kentucky, and that it was about two hundred or so miles away. The Commonwealth asked if Arnold explained why he was two hundred miles away from home. Officer Moeves responded, "No. He did not." Arnold objected on the ground that he had not been provided this "non-statement" in discovery. The court sustained Arnold's objection because the Commonwealth admitted that it did not even know if Arnold had been asked the question. Arnold moved for a mistrial but was denied. Arnold did not ask the court to issue a curative admonition, and nothing further was said along these lines.

The Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant's silence once that defendant has been

informed of his rights and taken into custody. *See, e.g., Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91(1976); *Romans v. Commonwealth,* 547 S.W.2d 128, 130 (Ky. 1977). In *Romans,* our Supreme Court held that it was error to permit the Commonwealth to elicit from a police detective that at the time of arrest and interrogation, and after receiving *Miranda* warnings, the defendant "did not come forth with the explanation ... upon which he ultimately relied for his defense." 547 S.W.2d at130; *see also Miranda v. Arizona,* 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). Because *Miranda* warnings implicitly assure their recipient that his silence will not be used against him, it would be fundamentally unfair to allow a defendant's post-*Miranda* silence to be used for impeachment. But:

> Doyle and subsequent cases make it clear that not every isolated instance referring to post-arrest silence will be reversible error. It is only reversible error where post-arrest silence is deliberately used to impeach an explanation subsequently offered at trial or where there is a similar reason to believe the defendant has been prejudiced by reference to the exercise of his constitutional right. The usual situation where reversal
>
> occurs is where the prosecutor has repeated and emphasized post-arrest silence as a prosecutorial tool.

Wallen v. Commonwealth, 657 S.W.2d 232, 233 (Ky. 1983).

Wallen involved a defendant's post-arrest silence as commented upon by a police officer during the course of an extended narrative describing his investigation. The narrative was somewhat gratuitous in that it was not made in response to a direct question by the prosecutor. It was not mentioned by the

prosecutor or any witness again. The *Wallen* court held that the comment was harmless because the prosecutor did not focus upon the defendant's silence and the officer's comments were not linked to the defendant's story.

In this case, the Commonwealth did elicit the reference to Arnold's exercising his right to remain silent. However, the reference was isolated and brief. The Commonwealth's Attorney did not focus on Arnold's silence -- nor did he use it as a prosecutorial tool. Additionally, Arnold's silence was not used to impeach him or to prejudice him in any way. Although allowing Officer Moeves to make reference to Arnold's being uncooperative and not answering questions was error, the error was harmless. There is no reasonable possibility that Officer Moeves's isolated comment affected the ultimate outcome of the case. *See Talbott v. Commonwealth*, 968 S.W.2d 76, 84 (Ky. 1998).

We next consider the alleged error concerning the Commonwealth's failure to furnish Arnold his "non-statement" in discovery. We agree with the Commonwealth that his alleged error cannot be considered on appeal because the ground raised at trial differs from the one raised on appeal. *See Commonwealth v. Duke*, 750 S.W.2d 432 (Ky. 1998). It is well established that failure to raise an argument below renders it unpreserved -- even if an objection to the same matter is offered on other grounds. See *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976) (citations omitted) (*overruled on other grounds by Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010)). Arnold asks this Court to review whether Officer Moeves's statement was an improper comment on Arnold's right

to remain silent. However, his objection at trial was based on a discovery violation. Arnold is not permitted to argue one theory to the trial judge and another to the appellate court. *Id.* Therefore, Arnold's claim concerning this testimony was not properly preserved, and we may not consider it.

Arnold further claims that the trial court improperly permitted the Commonwealth to use his silence regarding his being two hundred miles from home in its closing argument as the basis for an improper argument to "send a message to the community." We disagree.

In its closing arguments during the penalty phase, the Commonwealth commented to the jury that Arnold showed how little he thinks of Campbell County because when out on bond, he went to Pennsylvania and committed a theft. Arnold objected to the Commonwealth's violating the prohibition against "sending the message." His objection was overruled. Arnold contends that the Commonwealth's argument regarding how little Arnold thinks of Campbell County was somehow related to the Commonwealth's question about why he was two hundred miles from home. The logical nexus – if indeed any – cannot be found in this line of reasoning.

After viewing the Commonwealth's closing argument, we are satisfied that the Commonwealth made no comment as to Arnold's silence. Nor was the argument in any way related to Arnold's not explaining his being two hundred miles from home. Arnold's claim that the trial court improperly permitted

the Commonwealth to use his silence in its closing argument is without merit. We find no error on this issue.

IV. Cruel and Unusual Punishment

Finally, Arnold argues that the sentence of seventeen-years' imprisonment was so disproportionate to the nature of his crimes that it violates the Eight Amendment prohibition against cruel and unusual punishment. We are compelled to disagree.

In *Turpin v. Commonwealth*, 350 S.W.3d 444, 447 (Ky. 2011), the Supreme Court of Kentucky recognized that the Eighth Amendment "prohibits not only barbaric punishments such as torture, but also punishments disproportionate to the crime." *Id*. (citing *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2021 (2010)). The Court explained that "strict proportionality" between the crime and the sentence is not required. However "extreme sentences" that are "grossly disproportionate to the crime" are forbidden. *Id*. The Court noted that if the punishment given for the crime is within the maximum prescribed by statute, a reviewing court generally will not disturb the sentence. *Id.* at 448. See also *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) ("proportionality review has never (or hardly ever) been used to strike down a mere prison sentence.").

In *Solem v. Helm*, 463 U.S. 277, 103 S.Ct 3001, 77 L.Ed.2d 637 (1983), the United States Supreme Court established three factors that must be considered when analyzing a claim of cruel and unusual punishment: (1) the

gravity of the offense and harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Id*., 463 U.S. at 290-92, 103 S.Ct. at 3010-11.

> [a] court must begin by comparing the gravity of the offense and the severity of the sentence.... "[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.... If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Turpin, 350 S.W.3d at 447-448 (*quoting Graham v. Florida*, 560 U.S. at 60, 130 S.Ct. at 2022.)

KRS 511.040(2) categorizes burglary in the third degree as a Class D felony. A Class D felony carries a sentencing range of at least one -- but not more than -- five years. KRS 532.020(1). Arnold was sentenced to four years as a result of being found guilty of burglary in the third degree.

Arnold does not dispute that he has been convicted of eight prior felonies and that he qualifies as a first-degree persistent felony offender under KRS 532.080. KRS 532.080 (6) provides in pertinent part:

> A person who is found to be a persistent felony offender in the first degree shall be sentenced to imprisonment as follows:
> ....

> (b) If the offense for which he presently stands convicted is a Class C or D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.

Although the crime for which Arnold received his seventeen-year sentence is admittedly relatively minor in terms of gravity, he was not convicted of burglary in the third degree alone. He was also found to be a persistent felony offender. Arnold's prior crimes included robbery, several thefts, and breaking and entering among other crimes for which he was convicted. "[A] State is justified in punishing a recidivist more severely than it punishes a first offender." *Riley v. Commonwealth*, 120 S.W.3d. 622, 634 (Ky. 2003) (*quoting Solem, supra,* at 296, 103 S.Ct. at 3013). Our legislature has determined that defendants who have committed several crimes serious enough to be deemed felonies and who have been incarcerated several times for those offenses should be punished more severely in order to deter that defendant from the commission of more crimes. *See Commentary* to KRS 532.080. Arnold has been incarcerated on several past occasions, a fact that establishes his status as a persistent felony offender. Considering that Arnold was sentenced within the statutory range set out by our legislature, we cannot say that the court erred as a matter of law in imposing a sentence approaching the maximum of the statutory range.

To reiterate, Arnold was sentenced to seventeen-years' imprisonment, which is within the statutory range set out by our legislature for a first-degree

persistent felony offender convicted of a Class D felony. KRS 532.080(6). He will be eligible for parole after serving twenty percent of his sentence -- or approximately three and one-half years in prison. KRS 532.080(7); KRS 439.340; 501 Kentucky Administrative Regulations 1:030(3)(a). Arnold's sentence of seventeen years is not constitutionally prohibited.

We affirm the judgment and sentence of the Campbell Circuit Court.

ALL CONCUR.

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