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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000093-MR

ROBERT D. COX — APPELLANT

v. — APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NO. 17-CR-00184

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Robert D. Cox appeals from his judgment and sentence pursuant to a jury trial, arguing the Bell Circuit Court erred in failing to grant him a mistrial, in failing to instruct on a lesser included offense, and in imposing a fine because he is indigent.

On March 22, 2017, Cox was indicted for burglary in the second degree, possession of a controlled substance in the first degree, first offense (methamphetamine), drug paraphernalia buy/possess, and being a persistent felony offender in the second degree (PFO-2). Following a jury trial, Cox was convicted on all counts, with the jury recommending ten years on burglary in the second degree, enhanced to fourteen years for being a PFO-2, to be served consecutively to a sentence of three years on the methamphetamine possession charge, with six months and a $250 fine for the drug paraphernalia conviction to be served concurrently for a total of seventeen years of incarceration. The trial court sentenced Cox consistently with this recommendation.

At trial, Stephanie Minor and her father, Tommy Johnson, testified about what occurred on the morning of February 4, 2017. Minor heard noises and suspected someone was inside her house. She called Johnson, who lived next door. Johnson called the police and met her outside; he was carrying his gun and she was carrying a knife. Johnson saw a bicycle laying on the bank next to the road. Johnson and Minor split up to look around.

Johnson walked to the back of Minor's house. He did not see anyone and observed that her backdoor was locked and closed. He shouted, "You better come out or I'm going to start shooting."

Minor saw a man, later identified as Cox, poke his head out of a window which had been previously broken and was covered by a piece of plastic. She yelled for her father to come to her side of the house. Johnson grabbed Cox through the window and pulled him outside to the ground.

Minor stated that Cox told her that he did not want any trouble and was just looking for a warm place to stay. Johnson told Cox that the police were on their way and Minor asked Cox to sit and wait, but he fled on his bicycle. Johnson fired a warning shot in Cox's direction.

Minor testified that nothing was missing from her house, but she did find some of her late mother's possessions moved from the box where they were normally kept. Her mother's Rusty Wallace memorabilia was laying on a pile on the floor next to the door. She stated that part of her house was blocked off because she was remodeling it and she used a bedroom near the front of the house during the renovation.

Officer Jeremiah Johnson testified about what occurred when he pursued Cox with his police car. Cox looked back, pedaled faster, turned into a driveway, threw his bicycle down, and ducked behind a vehicle. Officer Johnson approached Cox and told him about the dispatch call. Cox denied knowing anything about the call and claimed to be coming from the opposite direction from which Officer Johnson saw him flee. Cox denied entering the house, stating that

he was urinating outside the house. Cox also stated that since he did not have a gun he could not be charged with burglary.[1] Officer Johnson arrested Cox and in a search incident to arrest found a syringe and a bag with a rock-like substance later determined to be methamphetamine.

Cox testified to a different version of these events. Cox claimed his friend Jerry fell on hard times because he was on house arrest and did not have heat in his home. Cox agreed to help gather wood for Jerry to use in his wood stove. He used GPS on his cell phone to find Jerry's house. He testified he was following the directions on a borrowed bicycle and the directions led to Minor's house.

Cox explained he knocked on the front door. When no one answered he walked to the back door and knocked again. As he began walking back towards the front of the house, Johnson appeared, grabbed Cox by the arm and asked what he was doing. With his other hand, Johnson pointed a pistol at Cox.

Cox stated Minor was outside standing next to a window with a plastic covering and she asked Cox if he had been trying to go into the window. He denied doing so, explained that he was trying to find Jerry's house, and

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[1] Burglary in the first degree can be committed when "[a] person . . . with the intent to commit a crime . . . 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: . . . Is armed with explosives or a deadly weapon[.]" Kentucky Revised Statutes (KRS) 511.020(1)(a).

apologized if he was at the wrong house. Cox explained he tried to show Minor and Johnson text messages to back up his story. According to Cox, Johnson told Cox that Jerry lived three houses down the road.

Cox testified he felt scared because Johnson continued to point his gun at him and Minor was wielding a large butcher knife. He said he did not want to trespass, so he picked up his bike and began moving down the road. When Johnson fired at him, he jumped on his bike and began pedaling. Johnson fired again, and Cox eventually dumped his bike and hid behind a parked car.

Cox testified that the police appeared and searched him. He denied ever being asked by the police about his side of the story. He denied making any statements to Officer Johnson, denied ever entering Minor's home, and denied telling Minor that he was looking for somewhere warm to stay.

Cox admitted to possessing the methamphetamine found in his pocket as he was an addict and a user. He stated that Officer Johnson's account was untrue and Minor omitted large parts of the story.

During the Commonwealth's cross-examination of Cox's testimony, the following exchange took place. The Commonwealth asked Cox about Jerry's last name, which Cox provided. The Commonwealth then asked whether Cox brought his cell phone as evidence to show the GPS map to Jerry's house. Cox responded: "No, I'm presently incarcerated, I can't get to my personal property

because I'm in jail because of this. I can't get to my phone." The Commonwealth then asked whether Jerry was going to testify because Cox could not produce the evidence on his phone. Cox again stated he was in jail and because he was incarcerated he could not access his phone to call Jerry to come testify.

After Cox's second response referencing his ongoing incarceration, defense counsel objected and requested a mistrial. The Commonwealth argued this remedy was not warranted because Cox brought up the fact of his being in custody on his own and no questions had been asked which were designed to elicit such responses. The trial court denied the motion for a mistrial. Defense counsel did not request an admonition, and none was given.

Cox argues that the trial court erred in failing to grant a mistrial because it was both irrelevant and unduly prejudicial for the jury to know that Cox was in continued custody. He argues that the Commonwealth improperly cross-examined Cox by asking him its second question knowing what the first question had elicited. He argues this was not harmless as it negatively impacted Cox's credibility and credibility was key in the trial.

The Commonwealth argues that to the extent Cox is arguing that its questions were designed to "trip him up" this ground is unpreserved because defense counsel never objected to the Commonwealth's questions, but rather to Cox's answers. In Cox's reply, he argues that "[t]he spirit and intent of the

objection was presented and denied, even if it was not fully articulated," but he requests palpable error review if the objection was not properly preserved.

The trial court has broad discretion in determining when there is a necessity to grant a mistrial. *Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005). We review the trial court's decision to refuse to grant a mistrial for abuse of discretion. *Baumia v. Commonwealth*, 402 S.W.3d 530, 541 (Ky. 2013).

We agree with Cox that testimony or other evidence that a defendant is currently incarcerated is generally inadmissible even though our rules do not directly address these exact circumstances.[2] The right to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments, requires the omission of evidence that a defendant is currently incarcerated because that could prevent a jury from independently evaluating guilt or innocence.

> Central to the right to a fair trial . . . is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official

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[2] Kentucky Rules of Evidence (KRE) 404(b) and Kentucky Rules of Criminal Procedure (RCr) 8.28(5) do not directly address this issue. KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The fact that a defendant has been in jail awaiting trial is not evidence of another crime. *See Reed v. Commonwealth*, No. 2008-SC-000117-MR, 2009 WL 735884, at *5 (Ky. Mar. 19, 2009) (unpublished). RCr 8.28(5) prohibits a defendant being required to wear prison garb during court appearances before a jury. Obviously, there is a distinction between a defendant being dressed in prison garb and a witness testifying that the defendant is currently incarcerated. However, in examining the purposes behind these rules, defendants have argued that a reference to a pretrial incarceration has a similar effect to a defendant being forced to wear prison garb. *Mason v. Commonwealth*, No. 2018-SC-000044-MR, 2020 WL 1290429, at *4 (Ky. Feb. 20, 2020) (unpublished); *Bledsoe v. Commonwealth*, No. 2002-CA-002132-MR, 2004 WL 1047262, at *2 (Ky.App. May 7, 2004) (unpublished).

> suspicion, indictment, *continued custody*, or other circumstances not adduced as proof at trial."

Holbrook v. Flynn, 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978) (emphasis added)). "To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process [and] . . . must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976) (citation omitted).

In any proper cross-examination, "a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997). The prosecutor should not deliberately elicit improper evidence. *Phillips v. Commonwealth*, 679 S.W.2d 235, 237 (Ky. 1984).

The Commonwealth was entitled to delve into Cox's testimony on direct examination and specifically ask questions about Cox's defense, which involved the GPS on his phone leading him to the wrong house and Jerry being able to corroborate Cox's story that Cox had agreed to come to his house to help him collect firewood.

There was nothing contained in the Commonwealth's questions which called for Cox to respond that he was incarcerated. The Commonwealth's question about whether Cox brought his cell phone as evidence to show the GPS map could have been answered with a simple "no." Instead, Cox invited the error by using his incarceration as a defense to not produce his phone and defense counsel did not object to either the question or Cox's answer.

The Commonwealth's question about whether Jerry was going to testify could also have been answered without an extraneous explanation. Cox had already named Jerry's last name and testified that Jerry lived near Minor, so potentially Cox could have found Jerry without using the phone. Instead Cox decided again to use the fact of his present incarceration to excuse his failure to locate and call Jerry.

The Commonwealth is not responsible for Cox's decision to answer in a manner which would alert the jury to the fact that Cox was presently incarcerated. The Commonwealth responded appropriately by not asking follow-up questions on these matters. Cox's argument on appeal that the Commonwealth's questions were improper is clearly refuted by the record.

Additionally, we note that even had the improper testimony been solicited rather than volunteered by Cox, a mistrial would not have been warranted.

"We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition." *Matthews*, 163 S.W.3d at 17 (footnotes omitted). Admonitions are an appropriate remedy for addressing improper testimony about a defendant's prior incarceration. *Hilton v. Commonwealth*, 539 S.W.3d 1, 16 (Ky. 2018).

> A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial.

Matthews, 163 S.W.3d at 17 (footnotes omitted).

> There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003) (citations omitted). "This standard is the same where the movant waives the protections of an admonition due to oversight or as a matter of trial strategy." *Sherroan v. Commonwealth*, 142 S.W.3d 7, 17 (Ky. 2004). A trial court need not grant a defendant the extraordinary relief of a mistrial "simply because he refused the offer of another legally sufficient remedy." *Matthews*, 163 S.W.3d at 18.

While it would have been appropriate for Cox's counsel to ask for an admonition, counsel declined to request an admonition and we cannot say that an admonition would have been insufficient under the circumstances. While Cox's personal calculus that discussing his present incarceration was preferable to having no explanation for why he did not have his phone or Jerry as a witness, evidently his counsel did not agree with this approach but as a matter of trial strategy tried to pursue a mistrial rather than bring further attention to Cox's pre-trial incarceration. Cox's testimony was not devastating to the defense and was not deliberately solicited. The trial court acted appropriately in declining to grant a mistrial under these circumstances.

Cox argues that the trial court erred by failing to instruct the jury on second-degree criminal trespass as a lesser included offense for second-degree burglary. Cox requested instructions for both first and second-degree criminal trespass. The trial court granted his request as to first-degree criminal trespass and denied it as to second-degree criminal trespass.

"A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when: . . . It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" KRS 505.020(2)(a). "It is axiomatic that a trial court must instruct the jury on all lesser included offenses which are justified

by the evidence." *Cannon v. Commonwealth*, 777 S.W.2d 591, 596 (Ky. 1989) (citations omitted). "An instruction on a lesser included offense is required *only if*, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Miller v. Commonwealth*, 283 S.W.3d 690, 699 (Ky. 2009) (quoting *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998)). We review a trial court's ruling on jury instructions for abuse of discretion. *Sasser v. Commonwealth*, 485 S.W.3d 290, 297 (Ky. 2016).

We compare burglary and trespass charges to explore whether the trial court appropriately acted within its discretion in instructing the jury on second-degree burglary and first-degree criminal trespass and denying Cox's request for an instruction on second-degree criminal trespass. A person is guilty of burglary in the second degree, a Class C felony, "when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a *dwelling*" while the crime of third-degree burglary, a Class D felony, is committed "when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a *building*." KRS 511.030 and KRS 511.040 (emphasis added).

Similarly, a person is guilty of criminal trespass in the first degree, a Class A misdemeanor, "when he knowingly enters or remains unlawfully in a *dwelling*" while criminal trespass in the second degree, a Class B misdemeanor, is

satisfied "when he knowingly enters or remains unlawfully in a *building* or upon premises as to which notice against trespass is given by fencing or other enclosure." KRS 511.060 and KRS 511.070 (emphasis added).

KRS 511.010 provides relevant definitions for burglary and trespass:

> (1) "Building," in addition to its ordinary meaning, means any structure . . . :
>
> (a) Where any person lives . . . .
>
> Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate building.
>
> (2) "Dwelling" means a building which is usually occupied by a person lodging therein.

"Under this definition, a building does not have to be occupied at the time of the crime charged to constitute a 'dwelling.'" *Cochran v. Commonwealth*, 114 S.W.3d 837, 838 (Ky. 2003) (citations omitted). The Kentucky Supreme Court has adopted the interpretation from other jurisdictions that "a building does not lose 'dwelling' status when the building (1) has been used as a residence in the 'immediate past,' (2) is capable of occupancy at the time of unlawful entry, and (3) has not been abandoned." *Id.* at 839 (citations omitted). Even a part of a residence that cannot be reached without going outside of a house and entered by a separate, locked door is still part of a residence. *Stewart v. Commonwealth*, 793 S.W.2d 859, 861 (Ky.App. 1990).

A house that is not occupied as frequently, but is not abandoned or totally empty, remains a dwelling. *Haynes v. Commonwealth*, 657 S.W.2d 948, 952 (Ky. 1983). In contrast, a home that is irreparably damaged, is uninhabitable, is scheduled for demolition, and that even the owner is prohibited from entering at night does not qualify as a dwelling. *Shackelford v. Commonwealth*, 757 S.W.2d 193, 194 (Ky.App. 1988).

Minor's unrefuted testimony was that she lived in her home. Her testimony that part of her home was blocked off due to remodeling could not disqualify this portion of her home from being part of her dwelling. The remodeling did not make this other portion a separate abandoned unit; instead, as a matter of law Minor's home in its entirety constituted a dwelling. Because there was no doubt that Minor's home was a dwelling, the evidence did not support any instruction on burglary or trespass to a building.[3] Additionally, as the jury convicted Cox of the second-degree burglary charge, the jury concluded that Cox intended to commit a crime in the home. Therefore, even had it been offered, the additional trespass instruction would have no effect. The trial court did not err in refusing this additional instruction.

[3] We note that had there been evidence that this portion of Minor's home was not a dwelling, logically Cox would have sought an instruction on third-degree burglary as well as both trespassing instructions.

Cox argues that the $250 fine on his drug paraphernalia misdemeanor must be vacated because during the sentencing hearing the trial court agreed to waive the fines, but the written judgment contained the fine. Cox argues he is indigent and imposing a fine violated KRS 534.040(4). The Commonwealth admits that Cox may be entitled to relief as it appears that the sentencing hearing supports his claim and, thus, either there was a scrivener's error or a misunderstanding and states that a partial remand may be appropriate for clarification.

As provided in KRS 534.040(4), "[f]ines required by this section [fines for misdemeanors and violations] shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." This "is a true 'sentencing issue' which cannot be waived by failure to object [below]. *Roberts v. Commonwealth*, 410 S.W.3d 606, 611 (Ky. 2013) (citations omitted) . We review this type of issue for clear error. *Id.*

When the trial court provides a defendant with court-appointed counsel, we are entitled to assume that the trial court improperly imposed a fine in violation of KRS 534.040(4) and vacate the judgment as to the fine. *Hall v. Commonwealth*, 551 S.W.3d 7, 21 (Ky. 2018); *Roberts*, 410 S.W.3d at 611.

Because Cox was appointed counsel, we conclude he is indigent and the trial court erred by imposing a fine on him. Therefore, he is entitled to have this fine vacated.

Accordingly, we affirm the judgment and sentence of the Bell Circuit Court, except for the portion thereof imposing a fine for Cox's misdemeanor conviction, which is vacated and remanded to the trial court for entry of a new judgment.

ALL CONCUR.

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