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RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2004-SC-0402-TG

DATE 6-9-05 Ella Gravitt, D.C.

RAYMOND L. SMITH — APPELLANT

TRANSFER FROM COURT OF APPEALS NO. 2004-CA-439
APPEAL FROM MEADE CIRCUIT COURT
V. — HONORABLE ROBERT A. MILLER, JUDGE
2003-CR-040

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, VACATING IN PART AND REMANDING

This appeal is from a judgment based on a jury verdict that convicted Smith of four counts of second-degree burglary, three counts of receiving stolen property over $300, one count of receiving stolen property under $300, possession of drug paraphernalia, possession of marijuana and being a first-degree persistent felony offender. He was sentenced to a total of 70 years in prison.

The questions presented are whether the trial judge erred by running the sentences consecutively so that the aggregate exceeded 20 years; whether Smith was entitled to a directed verdict on the burglary charges; whether a pawn shop receipt was erroneously admitted into evidence; whether the prosecution failed to establish the value of the property on the receiving stolen property charges; and whether the prosecution's alleged comment on the defendant's silence denied him a fair trial.

A series of four house burglaries occurred in Meade County from February 20, 2003, through and including February 27, 2003. A variety of personal items were taken as a result of the burglaries. At least one member of each of the households testified about the break-ins at their homes. Even though there was more than one victim in each instance, for the purposes of this opinion, we will identify each household as one victim and do so in the order of the date of the crime.

Some of the stolen items were located at the home of Mary House, who resided there with her boyfriend, Smith. She advised police that Smith had brought the items to her residence. House and Smith were arrested and tried together. House cooperated with the police and produced some of the other stolen property. She testified against Smith at their joint trial. Smith testified in his own defense and denied being the burglar, claiming he was in jail in Missouri during the relevant time. He admitted he had pawned a knife and two rings in Missouri, but said he did not know that the items were stolen and that he had been asked to sell them by the boyfriend of House's daughter.

The jury convicted Smith on all counts. He was sentenced to 15 years for each of the three felony offenses of receiving stolen property over $300, 15 years for each of the four counts of second-degree burglary and twelve months for each of the three misdemeanor offenses. The jury recommended that the sentences be served consecutively for a total of 108 years. The trial judge reduced the sentences to 70 years based on his interpretation of KRS 532.110. Upon transfer from the Court of Appeals, this appeal followed.

I. Sentence

Smith argues that the trial judge erred by running his sentences consecutively so that the aggregate exceeded the highest sentence that could be imposed by statute for

a Class C felony. He claims that KRS 532.110 limits the sentence the trial judge could impose to 20 years pursuant to KRS 532.080(6)(b).

KRS 532.110(1)(c) states:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

KRS 532.080 reads in pertinent part as follows:

> (6) 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 Class 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.

Second-degree burglary, a Class C felony, was the highest class of crime of which Smith was convicted. Thus, the maximum sentence that could be imposed here was twenty years. Cf. Devore v. Commonwealth, 662 S.W.2d 829 (Ky. 1984). There is nothing in the pre-sentence investigation report to indicate that this defendant was on probation or parole at the time of these offenses. The sentence imposed by the trial judge is vacated and the matter of sentencing is remanded to the circuit court for the imposition of a sentence not to exceed 20 years.

II. Directed Verdict

Smith contends that the trial judge erred by refusing to direct a verdict on the second-degree burglary charges. He denies the possession of the stolen items and claims there was no other evidence linking him to the offenses. We disagree.

On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). 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. The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

It is well settled that where there is evidence of a breaking and entering of a dwelling and property is taken from there, and the property is found in the possession of the accused, such showing makes for a jury case. Wahl v. Commonwealth, 490 S.W.2d 769 (Ky. 1972). It is also fundamental in criminal law doctrine that possession of stolen goods makes at least a prima facie case of the guilt of the one in possession, and casts the burden upon him to explain his possession consistent with his innocence. Owen v. Commonwealth, 181 Ky. 257, 204 S.W. 162 (1918). See also KRS 514.110(2).

Here, there is sufficient evidence linking Smith to the possession of the items taken in the burglaries and sufficient other evidence connecting him with the commission of the crimes. Smith lived in a residence with codefendant House, which was across the street from one of the burglarized homes and within a short distance of the others. He was also present at the House residence on March 6, 2003, when the state police conducted their investigation. House testified that it was Smith who brought the assorted stolen items from the various burglaries to her home.

House also stated that she maintained another residence in Mountain View, Missouri, and that Smith went to a pawn shop there. A police officer testified that certain items stolen in one of the burglaries were recovered from that pawn shop. Additionally, the first victim testified that a container of change and her son's wallet were taken from her home. House admitted that she was the person who cashed in about $60 in coins that were given to her by Smith. Except for this victim, all of the other victims recovered some of their property either from the residence shared by House and Smith, from Smith herself or from the pawn shop. Accordingly, there was sufficient evidence presented to the jury and it was not unreasonable for it to return a finding of guilt against Smith.

III. Pawn Shop Receipt

Smith claims that the prosecution should not have been allowed to introduce the pawn shop receipt from Missouri. A police witness testified that he received the receipt from the pawn shop and that the fourth victim identified the two rings and a knife as having been taken from his home. At an in-chambers hearing held prior to the testimony, defense counsel for Smith argued that the document was hearsay unless properly authenticated and must be introduced by a person of knowledge. The Commonwealth responded that the receipt was admissible under KRE 803(6) as a business record, and also under KRE 803(15) concerning statements and documents affecting an interest in property. Although he did not specify the reasons, the trial judge agreed with the Commonwealth and allowed the evidence to be admitted.

The pawn shop receipt was admissible under KRE 803(6) and possibly KRE 803(15) so long as it was properly authenticated. That was not done here. The document was not certified by a custodian, KRE 902(11), nor was the police officer

shown to be a witness with knowledge of its authenticity, KRE 901(b)(1). Although the receipt was not properly authenticated, the error in its introduction was harmless. There was other sufficient evidence introduced linking Smith to the pawn shop. House testified that Smith went to a pawn shop in Mountain View, Missouri, where she maintained another residence. A police officer testified that he recovered several items from the pawn shop that were identified as being stolen in one of the burglaries. Considering this evidence and the entire record, there is no reasonable possibility that the result of this trial would have been any different absent the pawn shop receipt. RCr 9.24

IV. Value of Property

Smith complains that there was insufficient or inappropriate testimony given to establish the valuation of items that were taken in the burglaries. He concedes that no objection was raised during the trial, but seeks review because of palpable error pursuant to RCr 10.26. He asserts that a new trial should be given because the Commonwealth did not elicit specific details about the property recovered and did not limit the valuation testimony to those items recovered from the home and the pawn shop.

The Commonwealth must prove the market value of the stolen items at the time and place of the theft. Perkins v. Commonwealth, 409 S.W.2d 294 (Ky. 1966). Testimony of an owner of the stolen property is competent evidence as to value. Poteet v. Commonwealth, 556 S.W.2d 893 (Ky. 1977). Except for the first victim, all of the victims here testified that the total value of the property stolen was well over three hundred dollars. Smith was only convicted of a misdemeanor in relation to the theft of

the first victim. The testimony of the victims was sufficient to allow the jury to make a determination of the value of the stolen property.

Reliance by Smith on Commonwealth v. Reed, 57 S.W.3d 269 (Ky. 2001), is misplaced. In Reed, supra, the victim testified that he discovered tools and a tool chest missing from his garage and valued their worth at over $300. Based on evidence that Reed had possessed some of those stolen tools, he was charged with receiving stolen goods over $300. The only evidence at trial, however, showed that the value of the items possessed by Reed was $30. This Court held that in order to sustain a conviction for receiving property in excess of $300, the Commonwealth must show that the stolen items found in the defendant's possession totaled more than $300.

Reed is clearly distinguishable because the defendant in that case was never connected to the theft of the items; he was only shown to possess them. Here, sufficient evidence was introduced that Smith broke into the homes and took the various items. Even though the total value of the items recovered from his possession was indeterminable or less than $300, he did at one time possess the items which were valued at over $300. There was no error and certainly no palpable error under these circumstances.

V. Prosecutor's Comments

Smith maintains that the prosecutor erred by commenting on his post-arrest silence. He concedes that this issue is not preserved for appellate review, but claims that it is palpable error under RCr 10.26.

A police officer was asked by the prosecutor if Smith was given an opportunity to make a statement. He responded affirmatively. The police officer was next asked Smith's reaction and he answered, "He did not want to speak to me." Later, defense

counsel asked another police officer if he had talked to Smith and that officer stated, "Yes, well, when I brought him down to the jail, he was Mirandized and didn't want to say anything."

During cross-examination of Smith, the prosecutor questioned him on why he did not inform police officers that he was in jail in Missouri when the crimes were committed and was now stating that at trial when it could not be verified. Smith responded that he was standing up for his Miranda rights. The prosecutor followed up on that answer by asking Smith if it was to be accepted that he didn't tell the one officer what he knew because he had the right to remain silent. Smith responded in the affirmative. The prosecutor next asked if Smith misstated the truth to another officer because of his right to remain silent. When Smith did not comprehend the question, she then asked him, "You told [the police officer] you didn't know anything about the burglaries, you just got here from Missouri, that wasn't true was it?" Smith replied that he did not know anything about the burglaries until he got arrested for them.

There were no objections to any of the questions or the statements complained of by Smith. One of those statements was introduced during defense counsel's cross-examination of a witness. Even if these isolated occurrences were deemed improper comments on silence, they certainly do not rise to the level of palpable error. RCr 10.26

Smith received a fundamentally fair trial and he was not deprived of any due process under either the federal or state constitutions.

The judgment of conviction is affirmed, but the matter is remanded to the circuit court for sentencing in accordance with this opinion.

All concur.

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