IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-13-05 [illegible]

2004-SC-000890-MR

HENRY THOMAS SMITH — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS
KENTON CIRCUIT COURT NO. 04-CR-00358

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

Appellant Henry Thomas Smith was convicted in the Kenton County Circuit Court on October 7, 2004 for the offense of First Degree Burglary. He was sentenced to 20 years imprisonment and now appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting three claims of error: (1) the evidence was insufficient to sustain a burglary conviction; (2) Appellant's presumption of innocence was denied; and (3) the trial court erred by admitting evidence of Appellant's other crimes or bad character. Finding no error, we affirm the judgment.

II. Factual Background

During the early morning hours of June 3, 2003, the victim, William Guilfoyle, was awakened by knocking on the front door of his apartment. He finally got up and looked through the door's peep hole and saw two people, a male and a female, walking away from his apartment. Not recognizing the man or woman, he made sure the deadbolt was locked and went back to bed. Ten minutes later, he heard his door open and shut.

He jumped out of bed, went into his living room and found a man and woman inside his apartment.

Mr. Guilfoyle testified that he was no more than two and a half to three feet from the intruders and that there was sufficient light in the apartment to see the intruders' faces and general characteristics. When he asked, "What the hell are you doing here?," the female, followed by the male, turned back toward the front door with Mr. Guilfoyle following. As the female intruder opened the door, the male turned and stabbed Mr. Guilfoyle in the chest.

Yet, Mr. Guilfoyle followed as they fled, and he observed the female entering an apartment on the first floor. He then returned to his apartment and called 911, giving the police a description of the crime and the intruders.

Upon arrival of the police, Mr. Guilfoyle was sent to the hospital for the stab wound. The police, however, remained at the apartment where they found a cell phone next to the stairs on the second floor. By calling numbers programmed into the cell phone, the police were able to determine the phone belonged to Angel Chandler.

After Mr. Guilfoyle's release from the hospital, the police showed him a photo lineup of six women, where he positively identified Ms. Chandler as the woman in the apartment. He was also shown a photo lineup of six men, including Appellant, but could not identify him as the man in his apartment. He wasn't able to identify Appellant at trial either. Ms. Chandler, however, agreed to cooperate and voluntarily gave a statement indicating she was present in Mr. Guilfoyle's apartment and that Appellant was the male with her.

The Appellant was then indicted by the Kenton County Grand Jury and tried before a jury on August 26, 2004.

The evidence against the Appellant included a cell phone recovered inside the victim's apartment (determined to belong to Angel Chandler), a positive photo identification of Angel Chandler, description of a male suspect matching the Appellant, a taped statement by Angel Chandler, Angel Chandler's own trial testimony, and evidence of a letter written by the Appellant to Angel Chandler attempting to influence Chandler's testimony.

The jury convicted the Appellant of First-Degree Burglary and recommended a sentence of 20 years. Having reviewed the record, we affirm.

III. ANALYSIS

A. INSUFFICIENT EVIDENCE

Appellant's primary allegation of error is that the evidence presented at trial is constitutionally insufficient to support a conviction for First Degree Burglary. Specifically, Appellant argues that the only evidence tending to incriminate him in the crime was the "inconsistent, inherently suspect testimony," elicited from Ms. Chandler.

Appellant relies on Davis v. Commonwealth, 290 Ky. 745,162 S.W.2d 778, 779-780 (Ky. 1942), for the proposition of reversing a conviction on the basis of the incredibility of witnesses. Appellant argues that, in a case where the prosecution's evidence lacks the "atmosphere of verisimilitude" and "fitness to produce conviction," a directed verdict of acquittal should be granted." Kentucky Power Co. v. Dillon, 345 S.W.2d 486, 489 (Ky. 1961). It is well settled, however, that "it is within the sole province of the jury to determine the weight and credibility of conflicting evidence."

Clark v. Commonwealth, 996 S.W.2d 39, 42 (Ky. App. 1998) (citing Brown v. Commonwealth, 558 S.W.2d 599 (Ky. 1977).

Pursuant to KRS 511.020(1):

> A person is guilty of burglary in the first degree 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.

In Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991), we held that:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions of credibility and weight to be given to such testimony.

Further, in Benham, we held that, "[o]n 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. Id. Appellant cites Winship[1] and Patterson[2] for the propositions that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which

[1] In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)
[2] Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)

he is charged," and, thus, the prosecution must prove every element involved in the definition of the offense beyond a reasonable doubt.

In this case, however, the Commonwealth established that Appellant knowingly entered and/or remained in the dwelling of William Guilfoyle and that Appellant caused physical injury to Mr. Guilfoyle by stabbing him in the chest during the commission of the crime. Detective Ted Edgington testified that he traced a cell phone recovered from the scene to Angel Chandler. He then prepared a photo lineup with Ms. Chandler's photo and showed it to Mr. Guilfoyle. Mr. Guilfoyle positively identified Ms. Chandler as the woman he had seen in his apartment. The detective then set up a meeting with Ms. Chandler through her federal probation officer. Ms. Chandler cooperated with the detective and voluntarily gave a taped statement in which she admitted being inside Mr. Guilfoyle's apartment and identified Appellant as the male who was also inside the apartment. Although Mr. Guilfoyle could not positively pick Appellant's photo from a photo lineup, Appellant's general features matched the description given by Mr. Guilfoyle shortly after he was stabbed.

While on the stand, Ms. Chandler again identified Appellant as the person she was with inside Mr. Guilfoyle's apartment. She further explained that she observed Appellant push or otherwise confront Mr. Guilfoyle. In addition, after her arrest, Ms. Chandler received a letter from Appellant in which he blatantly attempted to influence her testimony. During her testimony, Ms. Chandler read Appellant's letter to the jury. In relevant part, the letter read, "...if you just ride with me on this it is beat. All you have to do is say you had a lack of memory and you were drinking and don't remember clearly.

Worse comes to worse, you can get drug court with probation. I don't know nothing. I wasn't there. Do you feel me?"

Viewing Ms. Chandler's testimony, the incriminating letter authored by Appellant, and the fact Appellant's general appearance matches the description given by Mr. Guilfoyle, in a light most favorable to the Commonwealth, the trial court did not err in overruling Appellant's motion for directed verdict. The above mentioned evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Appellant knowingly entered and/or remained in the dwelling of William Guilfoyle and that, while present in the dwelling, Appellant caused physical injury to Mr. Guilfoyle by stabbing him in the chest. Thus, the jury was properly given the opportunity to consider the evidence and render its unanimous verdict finding Appellant guilty of First Degree Burglary.

B. PRESUMPTION OF INNOCENCE

Appellant contends that the prosecution stripped him of his presumption of innocence by its introduction of evidence of court procedures suggestive of prior determinations of guilt, i.e. having a witness testify about the issuing of a warrant, the arrest of Appellant, the crime Appellant was charged with, as well as general court proceedings, in particular, preliminary hearings. Appellant, however, admits that no objection was made during the questioning. Thus, Appellant waived this claim of error.

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126 (1976). The U.S. Supreme Court "has declared 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 suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485, 98 S. Ct. 1930, 1935, 56 L. Ed. 2d 468 (1978). "[T]he Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.'" Taylor, supra, at 486 (quoting Estelle, supra, at 503).

Pursuant to RCr 10.26, we may address an alleged error not properly preserved for review only if the alleged error is "palpable" and affects the "substantial rights" of the defendant. Further, relief may be granted only upon a determination that the alleged error has resulted in "manifest injustice." Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997). Such a showing requires that "the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings." Id. at 28; United States v. Olano, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993). Stated differently, "[e]rror rises to this level only when it is so shocking that it seriously affected the fundamental fairness and basic integrity of the proceedings conducted below." United States v. Tutiven, 40 F.3d 1, 7-8 (1st Cir. 1994).

In this case, Appellant has failed to specify how the witness's testimony impacted the trial's outcome or resulted in a "manifest injustice." Essentially, the detective, informed the jury that he asked for a warrant to be issued for Appellant's arrest and that, prior to the Grand Jury returning an indictment against Appellant, the District Court had held a probable cause hearing.

The detective did not explain how the warrant process works nor did he attempt to define probable cause. At no point during his testimony did he offer an opinion as to the Appellant's guilt; nor did he attempt to inform the jury that Appellant's guilt had already been determined.

Moreover, the trial court properly instructed the jury as to Appellant's presumption of innocence. Accordingly, we find the trial court did not deny Appellant his presumption of innocence.

C. IMPROPER INTRODUCTION OF CHARACTER EVIDENCE

Lastly, Appellant argues the trial court improperly admitted statements of Appellant's unindicted accomplice, Angel Chandler, pursuant to KRE 404(b). During questioning by Appellant, she informed the jury that Mr. Smith served a lengthy stint in the Ohio prison system by saying, "we corresponded while he was in Ohio prison for a long time." On cross, she said "Tommy [Appellant's middle name] and my mom was friends before me and Tommy was together. They have their problems and, you know, whatever. He has stole my parents' truck and everything . . . ." Again, Appellant failed to preserve this alleged error, so it is subject only to an RCr 10.26 analysis.

The essence of KRE 404(b) is that "evidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or criminal disposition, and only if its probative value on that issues outweighs the unfair prejudice with respect to character." Billings v. Commonwealth, 843 S.W.2d 890, 892 (Ky. 1992). The burden is on the prosecution to establish a proper basis before admitting evidence of the defendant's bad character, "including the need for such evidence, and that its probative value outweighs its inflammatory effect." Daniel v.

Commonwealth, 905 S.W.2d 76, 78 (Ky. 1995). The trial court must undertake three inquiries, which together provide the framework for determining the admissibility of character evidence – relevance, probative value, and prejudice. Bell v. Commonwealth, 875 S.W.2d 882, 889-890 (Ky. 1994).

KRE 404(b) states that an exception exists to the prohibition against other crimes/ bad acts evidence where it is relevant and probative of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Appellant argues that the statements by Ms. Chandler regarding his time spent in an Ohio prison does not fall into the recognized exceptions and was used to establish Mr. Smith's criminal propensities and bad character in hopes of obtaining a conviction and maximum sentence.

Because Appellant failed to preserve this error, however, the admission of Ms. Chandler's statement "must seriously affect the fairness, integrity, or public reputation of judicial proceedings." Id. at 28; Olano, supra, 507 U.S. at 732. Stated differently, "[e]rror rises to this level only when it is so shocking that it seriously affected the fundamental fairness and basic integrity of the proceedings conducted below." Tutiven, supra, 40 F.3d at 7-8 (1st Cir. 1994).

In the present case, Appellant has failed to establish that Ms. Chandler's statements regarding his past seriously affected the fairness or integrity of the judicial proceeding. Further, Appellant has failed to articulate how the admission of her statements indicating Appellant had served time in an Ohio prison and that Appellant once stole her parents' truck resulted in actual prejudice. The first statement was a somewhat non-responsive answer to the Commonwealth's inquiry into how she became

familiar with the Appellant's handwriting; while the second statement, indicating that the Appellant had once stolen her parents' truck, came in response to defense counsel's cross-examination.

The comments were brief statements that no one, including the Commonwealth, drew attention to or otherwise used against Appellant. We find, therefore, that any possible prejudice that resulted from Ms. Chandler's statement did not constitute palpable error that affected the substantial rights of Appellant, resulting in manifest injustice to Appellant.

Accordingly, pursuant to RCr 10.26, we will not review this unpreserved issue.

For the aforementioned reasons, we find the evidence presented at trial was sufficient for a reasonable juror to find beyond a reasonable doubt that Appellant was guilty of Burglary in the First Degree. Therefore, we affirm.

All concur.

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