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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2003-SC-1059-MR DATE 10-13-05 ELA Grant DC

RICHARD EWING — APPELLANT

V.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS WALLER, JUDGE
99-CR-75

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Richard Ewing, was convicted by a Bullitt Circuit Court jury of thirteen counts of burglary in the third degree, twelve counts of theft by unlawful taking of property having a value of $300 or more, and one count of theft by unlawful taking of property having a value of less than $300.[1] He was sentenced to an aggregate term of twenty years in prison and appeals to this court as a matter of right. Ky. Const. § 110(2)(b). Appellant asserts that he was prejudiced by amendments to the indictment and that the trial court abused its discretion by denying his motion for a mistrial. Finding no abuse of discretion, we affirm.

All of the charges pertained to Appellant's suspected culpability for multiple burglaries and thefts from individual storage units rented from 2-M Tractor Storage, a

[1] Appellant was also indicted for, and convicted of, one count each of possession of marijuana, cocaine, and drug paraphernalia, none of which are at issue on appeal.

Shepherdsville business engaged in renting small storage units primarily to individuals. Howard Nelson, a 2-M lessee, noticed that some items that had been stolen from his 2-M rental unit were being offered for sale at a roadside stand by an unnamed vendor. Nelson contacted the police, and a detective determined that the vendor had purchased Nelson's property from a nearby auction house. The owner of the auction house advised that he had acquired Nelson's stolen property from Appellant. A search warrant was obtained for Appellant's property, and the resulting search yielded five truckloads of goods and equipment seizable under the warrant. Notice was published, and theft victims, mostly present or former customers of 2-M, appeared and identified items of personal property that had been stolen from their respective rental units.

The original indictment charged Appellant with burglaries of and thefts from twenty-two different storage units at 2-M's Shepherdsville facility, along with one theft from another nearby storage facility and still another theft from a truck belonging to Appellant's neighbor. The dates of forty-two of the offenses charged in the original indictment ranged from December 1997 to March 1999, with two counts allegedly committed in 1994 and two others in 1996. The indictment alleged the date of commission of thirty-two of the offenses (roughly seventy-five percent) to have been "on or about" a specific date, and another twelve as having occurred "during" a specified month.

During the Commonwealth's case-in-chief, most of the victims were unable to pinpoint the exact dates when the burglaries and thefts occurred but only the dates when they discovered the crimes, i.e., when they visited their storage units and discovered that locks had been broken and/or that property was missing from the units. Pursuant to Kentucky Rule of Criminal Procedure (RCr) 6.16, the Commonwealth

moved during its case-in-chief to amend the dates of many counts of the indictment. As amended, these counts alleged that the offenses occurred "during the time period beginning the year of 1998 through and including the first three months of 1999." The Commonwealth explained that the amendments were necessary because, unlike most reported property crimes, burglaries of and thefts from rental storage units often remain undiscovered for days or weeks after they occur. The trial court granted the motion to amend the indictment.

After acknowledging the trial court's authority to grant the Commonwealth's motion to amend the indictment, Appellant moved for a mistrial, asserting that his defense, as prepared, had been substantially prejudiced by the change in dates. His motion for a mistrial was denied.

The jury convicted Appellant of twenty-four offenses that occurred in a twelve-month period between February 1998 and February 1999, and of one count of burglary in the third degree that occurred "on or about" November 1996.[2] He received twenty-five one-year sentences to be served consecutively, reduced to a maximum aggregate sentence of twenty years. KRS 532.110(1)(c).

I. AMENDMENT OF INDICTMENT.

Under RCr 6.16, "[t]he court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." (Emphasis added.) See Schambon v. Commonwealth, 821 S.W.2d 804, 810 (Ky. 1991) (describing RCr 6.16 as "lenient"). Whether to permit the Commonwealth to amend an indictment under RCr 6.16 is within the sound discretion of the trial court. Baker v. Commonwealth, 103

[2] The original indictment was not amended with respect to this count.

S.W.3d 90, 94 (Ky. 2003). Appellant admitted at trial that the trial court could permit the Commonwealth to amend the indictment to conform to the evidence, but claims on appeal that the trial court abused its discretion by denying his motion for a mistrial. "When a party moves for a mistrial, the trial court must determine whether there is a 'manifest necessity' for a new trial." Shabazz v. Commonwealth, 153 S.W.3d 806, 810 (Ky. 2005) (quoting Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996)). A mistrial is an extraordinary measure appropriate only where there has been an error of such magnitude that no other remedy is adequate to correct prejudice to the defendant. Id. at 811.

Appellant claims his defense was "gutted" when his alibi for two of the original forty-nine counts of the indictment was nullified. Specifically, he claims that he previously had an absolute defense to two of the charges in the original indictment because he was incarcerated in the Bullitt County Jail during the month when those offenses were alleged to have occurred. Although both of those counts were ultimately dismissed when the victim failed to appear at trial, Appellant argues that the amendment vitiated his anticipated argument that because he had an air-tight alibi for two counts, reasonable doubt must exist with regard to all of the remaining counts – even though Appellant had no alibi for the offenses of which he was convicted, either as they appeared in the original indictment or as amended. His defense to these counts was that he had innocently purchased the stolen goods at various auctions.

Generally, an amendment must change some substantive element of the indictment in order to prejudice a defendant's substantial rights. Wolbrecht v. Commonwealth, 955 S.W.2d 533, 538 (Ky. 1997); Yarnell v. Commonwealth, 833 S.W.2d 834, 837 (Ky. 1992). We have consistently held that amendments to the dates

of offenses in an indictment do not prejudice the defendant's substantial rights when the defense is a mere denial of having committed the offenses at all. See, e.g., Anderson v. Commonwealth, 63 S.W.3d 135, 140-41 (Ky. 2001) (holding defendant was not prejudiced by amendment that changed the dates of alleged rape from 1994 to 1992); Gilbert v. Commonwealth, 838 S.W.2d 376, 378 (Ky. 1991); Stephens v. Commonwealth, 397 S.W.2d 157, 158 (Ky. 1965). Other jurisdictions have agreed with this reasoning. See, e.g., United States v. Goldstein, 502 F.2d 526, 528 (3d Cir. 1974) ("Ordinarily, a mere change in dates is not considered a substantial variation in an indictment . . . ."); State v. Bruce, 610 P.2d 55, 57 (Ariz. 1980) (amendment held not prejudicial even though it prevented defendant from pointing out conflicts in testimony); State v. McCoy, 337 So.2d 192, 195 (La. 1976) (same); Baine v. State, 604 So.2d 258, 261 (Miss. 1992) ("Unless time is an essential element or factor in the crime, . . . an amendment to change the date on which the offense occurred is one of form only."); McLean v. Maxwell, 208 N.E.2d 139, 140 (Ohio 1965) (amended indictment that changed date of alleged offense by six months did not prejudice defendant despite destroying defendant's alibi that he was imprisoned at time alleged in original indictment).

Appellant's assertion that depriving him of an alibi for two offenses of which he was not convicted precluded him from claiming that there was a reasonable doubt with respect to the other forty-seven charges is, at best, anemic. Any possible prejudice from changing the dates of the "alibi" offenses was eliminated when those charges were dismissed because of insufficiency of the evidence. It was the dismissal of those charges, not the amendment of the dates, that precluded Appellant from arguing to the jury that his alibi as to some offenses created a reasonable doubt as to all.

We have previously rejected an argument that amendment of dates in an indictment prejudices the defense by rendering an alibi worthless. Gilbert, 838 S.W.2d at 378. Unlike the case sub judice, Gilbert was an appeal from a conviction of the offense to which the alibi corresponded. Here, Appellant was not convicted of the offenses to which the alibi pertained. As such, Appellant was not prejudiced by the amendment of the indictment. Absent prejudice, there was no manifest necessity for a mistrial.

Accordingly, the judgment of convictions and sentences imposed by the Bullitt Circuit Court are AFFIRMED.

All concur.

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