

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2004-SC-651-MR

DATE 12-14-05 ELLA Gammon

THOMAS W. LEGLER

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
2003-CR-3255 & 2004-CR-1411

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Thomas W. Legler, was convicted by a Jefferson County Circuit Court jury of first-degree robbery, first-degree burglary, and of being a first-degree persistent felony offender (PFO). He was sentenced to thirty-one years' imprisonment. He now appeals to this Court as a matter of right, alleging two trial errors. For the reasons set forth herein, we affirm.

On October 15, 2003, Appellant and Phillip Taylor had been drinking in a Louisville park when Appellant suggested that they go to the residence of Mr. Shirley Gammon, an elderly gentleman for whom Appellant had previously performed odd jobs. While en route to Mr. Gammon's home, Appellant announced his intention to rob Mr. Gammon, noting that he had both a car and a lot of money.

Upon arrival at the home, Appellant and Taylor asked Mr. Gammon if he had any work available. They then forced their way into the home; Mr. Gammon struggled to prevent their entry. Appellant pulled Mr. Gammon's arms behind his back to restrain

him. In doing so, Appellant mashed Mr. Gammon's hands, causing them to sustain severe bruising. Eventually, Mr. Gammon complied with their demand for his car keys and the pair left, also taking about sixty or seventy dollars from Mr. Gammon's person.

As they fled, Mr. Gammon also went outside. Appellant got Mr. Gammon on the ground and was about to hit him, but Taylor intervened. Mr. Gammon took the opportunity to escape and was able to flag down a passing public bus. The driver contacted law enforcement. Appellant and Taylor drove away in Mr. Gammon's vehicle, heading for Appellant's hometown in Mississippi. The pair eventually returned to Louisville and abandoned the vehicle at a shopping center. They were later apprehended.

A Jefferson Circuit Grand Jury returned an indictment charging Appellant with one count of first-degree burglary and one count of first-degree robbery. Taylor received similar charges, but entered into a plea agreement in return for his testimony at Appellant's trial. Appellant was tried before a jury and found guilty of first-degree robbery, first-degree burglary, and of being a first-degree persistent felony offender (PFO). He appeals the convictions, raising two issues for review.

Appellant first contends that the evidence of physical injury was insufficient to sustain a conviction for first-degree burglary or first-degree robbery. The issue is unpreserved and Appellant seeks relief pursuant to RCr 10.26, alleging palpable error.

KRS 515.020 (robbery in the first degree) and KRS 511.020 (burglary in the first degree) both contain as an element of each offense that the defendant "causes physical injury to any person who is not a participant in the crime." At trial, the Commonwealth presented photographic evidence of Mr. Gammon's hands after the incident which revealed severe bruising. Detective Donnie Tinnell testified that the

photograph was an accurate depiction of Mr. Gammon's hands after the incident, adding that "it was significant bruising." Appellant now argues that the bruising to Mr. Gammon's hands is not "physical injury" within the meaning of KRS 515.020 and KRS 511.020.

KRS 500.080(13) defines "physical injury" as "substantial physical pain or any impairment of physical condition." Our case law makes clear that any injury will satisfy the requirement of physical injury: "The requirements of the statute under these circumstances are met when any injury results, as the words 'impairment of physical condition' used in the KRS 500.080(13) definition, simply mean 'injury.'" Commonwealth v. Potts, 884 S.W.2d 654, 656 (Ky. 1994). See also Meredith v. Commonwealth, 628 S.W.2d 887 (Ky. App. 1982) (superficial wound on victim's hand from perpetrator's knife constituted physical injury, even though there was no evidence that victim suffered substantial pain); Key v. Commonwealth, 840 S.W.2d 827 (Ky. App. 1992) (strike to victim's back with a baseball bat that resulted in bruising to victim's ribs constituted a physical injury); Hubbard v. Commonwealth, 932 S.W.2d 381 (Ky. App. 1996) (victim's pain in her left hip following assault constituted physical injury even though the hip was not fractured and victim did not seek further medical attention for the injury). The significant bruising to Mr. Gammon's hands satisfies the requirement of physical injury for purposes of first-degree burglary and first-degree robbery. There was no error.

Appellant also argues that insufficient notice was given that the Commonwealth would pursue a PFO indictment, which severely prejudiced his ability to prepare a defense. A brief review of the procedural history of this charge is necessary. On January 5, 2004, a pretrial hearing was held at which the Commonwealth informed the

trial court and defense counsel that it would seek a first-degree PFO indictment in addition to the indictment already returned. On January 6, 2004, the Commonwealth filed its "Response to Court's Order of Discovery" which states that "Defendant Legler is a first degree persistent felony offender and will be so charged prior to trial." In its "Supplemental Response to the Court's Pretrial Order for Discovery and Notice Pursuant to KRE 404(C)," filed February 11, 2004, the Commonwealth attached a copy of a 1997 Jefferson County indictment, which levied a first-degree PFO charge against Appellant. (That indictment resulted in Appellant entering a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to one count of first-degree robbery, one count of first-degree burglary, one count of second-degree burglary and one count of giving a peace officer a false name. The PFO charge was dismissed pursuant to the agreement.) According to Appellant, no other mention of the PFO charge was made until his trial commenced on May 11, 2004, when jury selection began. When the Commonwealth thereafter announced it was ready for trial, it also stated that it would proceed with the PFO indictment against Appellant. The following day, the trial court arraigned Appellant on the PFO indictment. Defense counsel objected, arguing that the Commonwealth had provided insufficient notice that it would be trying the PFO indictment. The objection was overruled, and trial on the PFO indictment began. Appellant was found guilty of being a first-degree persistent felony offender.

Appellant concedes that he had notice that the Commonwealth originally contemplated a PFO charge. However, because the Commonwealth never obtained the indictment until the date of trial, Appellant argues that he had insufficient time to prepare any defense to the charge. Appellant points mainly to the Commonwealth's

use of a prior Missouri conviction and a federal conviction, stating that defense counsel was denied the opportunity to investigate the convictions further.

The trial court entertained several objections concerning this matter, ultimately concluding that defense counsel was aware that a PFO charge was forthcoming based on the Commonwealth's discovery documents. Furthermore, the trial court noted the numerous plea discussions between Appellant and the Commonwealth, during which the PFO issue had been discussed. While defense counsel did seek dismissal of the indictment, it is of note that defense counsel never requested a continuance. The trial court refused to dismiss the charge.

"[I]f the Commonwealth seeks enhancement by proof of PFO status, the defendant is entitled to notice of this before the trial of the underlying substantive offense." Price v. Commonwealth, 666 S.W.2d 749, 750 (Ky. 1984). Here, there is no doubt that Appellant was on notice that a PFO charge was impending. The Commonwealth had revealed as much not only in its discovery documents, but also in its statements to both the trial court and defense counsel during pretrial hearings and plea negotiations. The question, then, is whether Appellant was denied an opportunity to prepare a defense by the Commonwealth's decision to seek an indictment on the PFO charge at the trial of the underlying offenses. The U.S. Supreme Court noted, in Oyler v. Boles, that "due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding. Nevertheless, a defendant must receive reasonable notice and an opportunity to be heard" 368 U.S. 448, 452, 82 S. Ct. 501, 503, 7 L. Ed. 2d 446, 447 (1962).

We are convinced that Appellant had reasonable notice that a PFO charge was forthcoming, and he was certainly afforded an opportunity to be heard; his due process

rights were satisfied. If Appellant needed more time to prepare a defense to the PFO charge, a request for continuance should have been made. A party may not decline to avail himself of a certain remedy, and then argue on appeal that he was prejudiced. Weaver v. Commonwealth, 955 S.W.2d 722, 726 (Ky. 1977). By failing to request a continuance, we can only conclude that defense counsel did not believe additional time was necessary or required. See Price, 666 S.W.2d at 750.

We further note that Appellant was not prejudiced by the peculiar circumstances of this case. An alleged error is harmless or non-prejudicial if there is no substantial possibility that the result of the trial would have been different if the alleged error had not occurred. Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969). Though Appellant argues on appeal that defense counsel was unaware that the Commonwealth would admit evidence of his prior Missouri and federal convictions, he was most certainly on notice of the prior Jefferson County felony convictions. Copies of these convictions were attached to the Commonwealth's "Supplemental Response to the Court's Pretrial Order for Discovery and Notice Pursuant to KRE 404(C)," filed three months prior to trial. These convictions alone would have been sufficient to convict Appellant as a first-degree PFO. Reversal on this issue is not required.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

All concur.

COUNSEL FOR APPELLANT:

J. David Niehaus
Deputy Appellate Defender
Office of the Louisville Metro Public Defender
200 Advocacy Plaza
719 West Jefferson Street
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Clint Evans Watson
Assistant Attorney General
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204