

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 23, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0776-MR

DATE 3/6/06 EJA/GWH/PC

DWIGHT ALLEN

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
2003-CR-0555

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict that convicted Allen of third-degree burglary and being a first-degree persistent felony offender. He was sentenced to an enhanced term of twenty years in prison.

The questions presented are whether Allen was entitled to a directed verdict of acquittal on the burglary charge and whether the trial judge abused his discretion in denying a motion to remove a juror for cause.

Allen admitted at trial that he stole a wallet from a woman's purse. The crime occurred during the afternoon in the offices of University Cardiothoracic Surgical Associates (UCSA), which is on the 12th floor of the Rudd Heart and Lung Center building of the Jewish Hospital complex in Louisville. The principal contention by Allen was that he was not properly charged with third-degree burglary.

As it was explained at trial, someone exiting the elevator on the 12th floor of the aforementioned hospital building would enter a large waiting area for UCSA patients. Physicians from this group usually see patients in the morning between 7-9 a.m. Allen notes in his brief that anyone exiting the elevator on the 12th floor during the afternoon hours would simply enter a vacant waiting area.

There are two doors in the waiting room, one to the left of the elevators and one to the right. The door on the left is a wooden door with a keypad which requires a code to gain entry. This door leads to a hallway with offices for physicians and secretaries. It is considered the academic area.

The door on the right is a glass door, with a regular key lock. According to the employee who had her wallet stolen, the door is always closed, but is often unlocked. The glass door leads to the patient examination rooms. If someone enters through this door, the hallway loops around, so one would end up on the other side of the secured wooden door. Apparently no signs are posted indicating that the glass door leads to a restricted or secure area.

A receptionist is on duty during the morning hours when patients are being seen. She is seated behind a glass window next to the glass door. When a patient is ready to be seen, a nurse appears at the glass door and calls the patient who is then escorted to the examination rooms. Patients are not brought into the academic area.

An administrative assistant working in the offices of UCSA indicated that Allen made the loop from the patient exam rooms to the academic offices. When he walked past her desk, she asked him what he was doing and he responded that he was looking for a patient. Allen continued walking, and the administrative assistant observed him bend down by the desk of another employee. The administrative assistant followed

Allen down the hall and asked him if she could help him. He responded no and said he was leaving. Allen exited the hallway through the wooden door that leads to the waiting room.

It was quickly discovered that Allen had taken a wallet from the purse of one of the employees. He was confronted outside the elevators by several individuals and initially denied taking the wallet. When further demands were made, he turned the wallet over to the employee.

The jury convicted Allen of the burglary charge as well as being a first-degree persistent felony offender. The latter offense was based on ten prior felony convictions -- some multi-count -- for theft, burglary, forgery, possession of a forged instrument, receiving stolen property and trafficking in a controlled substance. Allen was sentenced to five years on the burglary charge, which was enhanced to twenty years for being a persistent felony offender. This appeal followed.

I. Directed Verdict

Allen argues that the trial judge erred in refusing to grant a directed verdict of acquittal as to the charge of third-degree burglary because the Commonwealth allegedly failed to prove all the elements of the crime beyond a reasonable doubt. He contends that he cannot be convicted of burglary because the 12th floor of the hospital was open to the public; there were no signs indicating restricted entry; and no one ordered him to leave. Allen claims that there simply is no evidence that he entered or remained unlawfully in the offices of UCSA with the intent to commit a crime. We disagree.

Our standard of review of a denial of a directed verdict of acquittal is well-settled and is stated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991) as follows: "On

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, only then the defendant is entitled to a directed verdict of acquittal." Id. at 187.

A person is guilty of third-degree burglary when he knowingly enters or remains unlawfully in a building with the intent to commit a crime. KRS 511.040. A person "enters or remains unlawfully" in or upon a premises when he is not privileged or licensed to do so. KRS 511.090(1). A license or privilege to enter or remain in or upon premises which are only partly open to the public is not a license or privilege to enter or remain in or upon a part of the premises which are not open to the public. KRS 511.090(3).

The fallacy of the argument offered by Allen is his contention that he had a license of privilege to be in that part of the premises where he stole the wallet. He did not. The academic area is not open to the public. Just because certain areas of the hospital may be open to the public, it does not give a person a license or privilege to be in other areas that are not. In this case, it was even more apparent from the time of day and the absence of people from the reception area as well as the patient rooms that this part of the hospital was not open to the public. The trial judge properly denied the motion for a directed verdict.

Even if we accepted the claim by Allen that the area was open to the public, he was still properly convicted of third-degree burglary. Allen terminated his license to be on the premises when he committed the criminal act. See Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997).

II. Juror

The trial judge did not abuse his discretion in denying the motion by Allen to remove juror #35496 for cause. This juror was challenged because he stated that he did not like “thieves, cheats and liars.” Allen exercised all of his peremptory challenges, but did not strike Juror #35496. The juror sat on the petit jury. Allen explains that his trial counsel attempted to use one of his peremptory challenges on this juror, but was confused about the juror’s number and removed the wrong person.

The trial judge has broad discretion in determining whether to excuse a juror for cause. Mills v. Commonwealth, 95 S.W.3d 838 (Ky. 2003). That determination will not be reversed on appeal absent a clear abuse of discretion. Id. As the trial judge indicated, if persons were honest, no one would particularly like thieves, cheats and liars. It just happened that this juror expressed himself more than the other jurors. When defense counsel asked if any potential juror could not be fair and impartial, no one indicated that they could not. After reviewing the record, we find no abuse of discretion by the trial judge in denying the challenge for cause.

Allen received a fundamentally fair trial. He was not denied any of his due process rights under the state or federal constitutions.

The judgment of conviction is affirmed.

All concur except Roach, J., who concurs in result only.

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