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NOT TO BE PUBLISHED OPINION

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RENDERED: MAY 18, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2005-SC-000212-MR

DATE 6-8-06 Ella Grayson D.C.

MARK MARSHALL APPELLANT

V.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN BATES, JUDGE
2004-CR-00094

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellant, Mark Marshall, was convicted in the Carroll County Circuit Court on February 3, 2005, for five counts of receiving stolen property over $300, three counts of second-degree burglary, two counts of first-degree burglary, one count of receiving stolen property (firearm), one count of receiving stolen property of $300 or more (firearm), and for being a first-degree persistent felony offender. Appellant was subsequently sentenced to forty years imprisonment.

Appellant now appeals his conviction and sentence pursuant to Ky. Const. § 110(2)(b), alleging the trial court committed several errors, *viz.*: (1) that the trial court erroneously denied Appellant's motion for directed verdict with regard to all counts; (2) that the trial court erroneously denied Appellant's motion for a separate trial from his co-defendant, David Gordon; (3) that the trial court erroneously denied Appellant's motion for a separate trial with regard to the five

counts for burglary from the seven counts for receiving stolen property; (4) that the trial court erroneously denied Appellant's motion to suppress evidence seized from his room, which was in his sister's apartment, arguing that she had no authority to consent to a search of his room; (5) that the trial court erred in refusing to admonish the jury concerning officer testimony regarding alleged burglar's tools found in the co-defendant's vehicle upon their arrest; (6) that the trial court erred when it allowed the prosecution to reopen its case after it had closed; (7) that the instructions given to the jury at the persistent felony offender/truth in sentencing phase of the trial were erroneous in that they did not permit consideration of the appropriate penalty for each individual crime; and, (8) that the instructions given to the jury during the guilt phase of the trial were erroneous in that the instructions did not define "reasonable doubt," did not thoroughly instruct on the presumption of innocence, and did not adequately instruct that the Commonwealth had the burden of proof. For the reasons set forth herein, we affirm Appellant's conviction and sentence on all counts.

II. FACTS

Appellant, Mark Marshall, and the co-defendant, David Gordon, were described as "good buddies" and had known one another for quite a few years. Both reportedly made a living from illegal work. Both have extensive criminal histories. Appellant was released from prison on September 7, 2004, after spending ten years for a 1994 conviction for second-degree robbery and first-degree persistent felony offender. Appellant allegedly made a living by selling drugs and various forms of other illegal activity.

From October 6, 2004, to November 1, 2004, a rash of burglaries were reported in Carroll, Henry, and Owen counties. The first was reported on October 6, 2004, by Tony and Karen Osborne, who returned home from work to find the back door of their home had been forced open and the contents of their dresser drawers spilled out in their bedroom. The Osborne's discovered many pieces of jewelry missing, as well as $90 in cash and a large jar full of change. Interestingly, Mr. Osborne also reported missing a gold crown he had worn on two of his teeth for seventeen years. No fingerprints were found.

On October 9, 2004, Gerald Morgan and his wife returned home to find the back door of their house "busted open" and their bedrooms "ransacked." The burglars took firearms (two handguns) and jewelry, but curiously left several rifles and shotguns. Again, attempts to procure fingerprints were unsuccessful.

On October 11, 2004, Joe Verme returned home to sight in a muzzle loader for the upcoming season only to find the back door of his home had been pried open, his hammer lying on the floor of the house. The burglars took handguns and a camcorder, as well as other items, including jewelry. Mr. Verme immediately contacted Sheriff Maiden, who was unable to find any fingerprints. He did, however, find smear marks that appeared to have been made by a glove.

On October 18, 2004, James Sapp returned home around 4:30 p.m. and found his house had been burglarized. He immediately phoned the Carroll County sheriff. It appeared the burglars in this case gained entry through an unlocked front door. The burglars made off with jewelry, old coins, cash (approximately $65), a vintage pocket watch, and a five-gallon jug which was

three-fourths full of change. Again, no fingerprints were found. It was determined the burglars had used gloves.

On the same day as Mr. Sapp's reported break-in, Paul and Misty Kinman reported a burglary at their residence in Owen County. The burglars in this case entered through a side door, and stole jewelry and two leather jackets. The burglars also took a glass jar and a cup with "Las Vegas" inscribed on it, both full of change.

This same day, Appellant and Gordon were videotaped using a Coin Star change machine at a local Kroger grocery store. From the video, Appellant and Gordon could be seen carrying both the Las Vegas cup and glass jar taken from the Kinman residence. After receiving their cash, Appellant and Gordon left. Interestingly enough, Mr. Kinman, realizing the burglars made off with a significant amount of money in change, called the local Kroger to see if they had a coin machine, which was confirmed by a store clerk. The next day, Mr. Kinman met with the store manager, and she agreed to let Mr. Kinman view the videotape from the previous day. Upon viewing the videotape, Mr. Kinman immediately recognized both the Las Vegas cup and his glass jar, and he then contacted Deputy Kinman[1] about the videotape at Kroger. Deputy Kinman and Sheriff Maiden later viewed the same tape, and Maiden requested that Kroger employees call him if Appellant and Gordon returned.

Then, on October 26, 2004, the home of Hazel and David Wilhoite was burglarized. Mr. Wilhoite returned home around noon to find the front door unlocked, which was strange, as they did not use that door. The Wilhoites found

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[1] Deputy Kinman and the victim, Mr. Paul Kinman are not related.

jewelry missing, as well as $800 in cash (seven $100 bills and two $50 bills). The burglars also took a glass, which was full of quarters. Again, no fingerprints were found, as it was surmised the burglars used gloves.

Finally, on November 1, 2004, Gala McIntosh returned home to find her home burglarized. The front door had been "busted open," and it appeared the burglars attempted entry through the back door. Mrs. McIntosh reported missing several items of jewelry, as well as a bag of coins, $36 worth of Kennedy half dollars, and a wicker basket also full of coins. The burglars also took all the quarters from a mason jar and a green mug with a black handle.

On this same day, Appellant and Gordon returned to the same Kroger where they had initially cashed in the coins. They were carrying the basket of coins taken from the McIntosh home. While Appellant and Gordon were busy filling the coin machine, a Kroger supervisor contacted Sheriff Maiden. After receiving cash for the coins, Appellant and Gordon left the store. As they exited the Kroger, Sheriff Maiden observed them from the end of the parking lot. He recognized them from the previous videotape and noticed them splitting up the cash. He then pulled behind their car to prevent their escape.

Upon approaching the car, Gordon exited, and Appellant was told to remain in the vehicle. After taking their identification, the sheriff questioned the men, to which they responded they had given a friend a ride from Louisville and let him off at the exit. Although they admitted to dumping change at the Kroger, Gordon contended the money belonged to him and both denied being at that Kroger prior to that day. In plain view in Gordon's car, the sheriff observed

several items of jewelry and two pairs of brown Jersey gloves. An arrest warrant and search warrant were obtained.

A search of Gordon's car revealed a lug wrench, which Sheriff Maiden described as being modified in that it had a hook on the end which would make it easy to carry on one's belt. Sheriff Maiden also testified that the end of the wrench was "chipped up pretty good," although he did not return to any of the homes to determine whether or not this particular tool had been used to effectuate entry. A screwdriver and a brake spoon were also found in Gordon's car, as were seven "finger condoms." Among the items reported stolen, the sheriff found in the vehicle the gold crown stolen from Mr. Osborne on October 6, a green plastic mug with a black handle, two necklaces and four rings belonging to Mrs. McIntosh, and numerous other earrings and necklaces scattered on the floorboard of the car.

Using the address on Gordon's driver's license and the address given to the sheriff by Appellant, sheriff's deputies were dispatched to obtain consent to search the premises. At Gordon's residence, the deputies found Mr. Morgan's handgun and holster, Mr. Verme's pillow case, handgun, and bullets, Mr. Sapp's Hamilton pocket watch, Mrs. Kinman's black leather jacket and various jewelry, and Mrs. Wilhoite's gold diamond bracelet.

Deputies also arrived at Appellant's residence. From the record, it appears Appellant lived with his sister in an apartment she rented with her husband. Although Appellant argues his room was exclusively his, there was evidence that his sister, Darlene Hickey, often went into the room and even had personal items in the closet in Appellant's room. Furthermore, the door to

Appellant's room was open when Mrs. Hickey consented, verbally and in writing, to the warrantless search by the deputies. Upon searching the room, the deputies found Mr. Sapp's jewelry, as well as other watches and jewelry and assorted denominations of change. Inside a closet, they found a bag of marijuana and seven $100 bills and two $50 bills.

A grand jury separately indicted Appellant and Gordon for the counts previously mentioned. Appellant then filed a motion for a separate trial from Gordon, but that motion was denied. He also filed a motion to sever the counts, which was also denied, and a motion to suppress the evidence seized in the search of his bedroom at his sister's apartment, which was similarly denied. Appellant was subsequently convicted by a jury on all counts and was sentenced to forty years imprisonment. He now appeals.

III. ANALYSIS

A. Appellant's motion for directed verdict was properly denied as to all counts.

In his first assignment of error, Appellant argues that the trial court erred by denying his motions for directed verdict with respect to all of the counts for which he was indicted. At the close of the Commonwealth's case, counsel for Gordon, with Appellant joining, moved for a directed verdict on the first-degree burglary charge regarding the Gerald Morgan burglary; on the first-degree burglary charge regarding the Joe Verme burglary; on the second-degree burglary charge regarding the Tony Osborne burglary; on the second-degree burglary charge regarding the Hazel Wilhoite burglary; and, on the second-degree burglary charge regarding the James Sapp burglary. Counsel also

argued that the charges for receiving stolen property had not been proven since it was not proven that the property had been received in Carroll County.

However, no motion was made for a directed verdict on the receiving stolen property charges. Thus, the latter issue is unpreserved, and we will not entertain arguments addressing this issue. The trial court denied the other motions, which were renewed at the close of all the evidence and were again denied. We note that Appellant has not asked this Court to review the trial court's decision for palpable error with regard to the denial of the motion for directed verdict on the receiving stolen property charges.

"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." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted). "[T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." Id. at 187-88. "A reviewing court[, however,] does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented." Id. at 187.

> 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 as to the credibility and weight to be given to such testimony.

Id.

The standard is the same whether it is direct or circumstantial evidence. "The rule is that if from the totality of the evidence the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go to the jury even though it is circumstantial." Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983). See also Trowel v. Commonwealth, 550 S.W.2d 530 (Ky. 1977).

Despite Appellant's argument that the evidence was insufficient, or at best "weak" to convict, and thus a directed verdict was necessary, a "[c]onviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt." Graves v. Commonwealth, 17 S.W.3d 858, 862 (Ky. 2000).

Appellant argues that his conviction by the jury was merely a result of the prosecution using the charges and evidence against Gordon to "piggyback" a conviction against Appellant. We decline to accept Appellant's arguments, and find the trial court properly denied the motions for directed verdict. As the prosecution argues on appeal, the mode of operation in each of the burglaries was consistent. Similar or identical methods of effectuating entry were used in almost every case, and similar items were taken, these being items that could be fenced quickly. Furthermore, videotaped evidence placed both Appellant and Gordon together cashing coins they had taken from burglaries, two of which occurred on the very day they first cashed the coins. Additionally, several items of stolen property were in the men's possession when they were arrested.

Although Gordon was in possession of the proceeds of the Morgan burglary, Appellant was likewise responsible as the circumstantial evidence

placed both of them together shortly after the commission of this burglary. Further, the Grand Jury charged Appellant for acting alone or in complicity. As has been stated in previous cases, "possession of stolen property is prima facie evidence of guilt of theft of the property." Jackson v. Commonwealth, 670 S.W.2d 828, 830 (Ky. 1984), *overruled on other grounds by* Cooley v. Commonwealth, 821 S.W.2d 90 (Ky. 1991). Given the evidence, the trial court properly submitted the issue to the jury.

With respect to the Verme burglary, we note that the method of entry was identical to that in the Morgan burglary. Again, although the proceeds of this burglary were only found at Gordon's residence, the circumstantial evidence tended to reveal their ongoing scheme of burglaries and cashing in of the bounty.

With respect to the Osborne burglary, Mr. Osborne's gold crown was recovered from Gordon's vehicle along with jewelry stolen from Mrs. McIntosh. In these instances, Appellant's possession of the stolen items provides a presumption that he also committed the burglary, and thus created a case worthy of submission to the jury.

With respect to the Wilhoite burglary, a search of Appellant's room revealed $800 (seven $100 bills and two $50 bills). Mrs. Wilhoite testified to these exact denominations. While it is not uncommon for confessed drug dealers to carry such denominations, it is enough, when considering the evidence as a whole, for the case to be submitted to the jury.

Finally, with respect to the Sapp burglary, a search of Appellant's room at his sister's apartment revealed a portion of Mr. Sapp's jewelry. Mr. Sapp's other jewelry items were recovered at Gordon's residence. Appellant's possession of

Mr. Sapp's jewelry provided enough evidence for the case to be submitted to the jury.

In short, in every instance, the evidence was of such character that reasonable minds would be justified in concluding that Appellant was guilty beyond a reasonable doubt. See Sawhill, supra. Appellant urges this Court to reconsider its holding in Jackson v. Commonwealth, 670 S.W.2d 828, 830 (Ky. 1984), wherein this Court held that "[w]here there is a breaking and entering and property taken from a dwelling and the property is found in possession of the accused, such showing makes a submissible case for the jury on a charge for burglary." We are not inclined to do so, and note that this Court revisited Jackson four years ago in Riley v. Commonwealth, 91 S.W.3d 560 (Ky. 2002), where we found the facts to be indistinguishable from Jackson and upheld its ruling with respect to this issue. Accordingly, Appellant's conviction is affirmed with regard to these issues.

B. Trial Court properly denied Appellant's motion for a separate trial.

Appellant argues that the trial court erred when it denied his motion to sever the joint trials of the defendants. The trial court determined that this was the type of case that needed to have both defendants tried together and thus denied the motion.

RCr 6.20 permits two or more defendants to be charged in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Although Appellant and co-defendant Gordon were separately indicted, we note that RCr 6.20 would have allowed them to be charged in the same indictment, as

they were alleged to have participated in the same series of acts. Furthermore, RCr 9.16 provides that separate trials are required only "if it appears that a defendant . . . will be prejudiced . . . by joinder for trial." The rule, however, requires the party seeking separate trials to support the claim of prejudice. "Severance is not automatic, and a defendant must prove that joinder is prejudicial so as to be unfair or unnecessarily or unreasonably hurtful." Dishman v. Commonwealth, 906 S.W.2d 335, 340 (Ky. 1995) (citing Commonwealth v. Rogers, 698 S.W.2d 839 (Ky. 1985)). "A party moving for separate trials has the burden of showing facts to justify the relief sought." Bush v. Commonwealth, 457 S.W.2d 495, 497 (Ky. 1970) (citation omitted).

Moreover, the trial court has broad discretion with respect to motions to sever. "We will not reverse on appeal for failure to sever 'unless we are clearly convinced that prejudice occurred and that the likelihood of prejudice was so clearly demonstrated to the trial judge as to make his failure to grant severance an abuse of discretion.'" Bratcher v. Commonwealth, 151 S.W.3d 332, 340 (Ky. 2004) (quoting Rachel v. Commonwealth, 523 S.W.2d 395, 400 (Ky. 1975)). As we have stated on many occasions, "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted).

Appellant cites Jackson, supra, in support of his argument that he was prejudiced by the joint trial. However, the moving defendant in Jackson had only one charge against him, and a joint trial with the other co-defendants would have prejudiced him because of the overwhelming evidence of a "ring of thefts" for

which the movant was not charged. Here, however, Appellant and his co-defendant Gordon were both charged for the same crimes and in all respects the evidence was admissible against both of them, although Appellant and Gordon were indicted separately.

On this issue, we note RCr 9.12, which provides that "[t]he court may order two (2) or more indictments, informations, complaints or uniform citations to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment, information, complaint or uniform citation." Further, RCr 6.18 provides that two or more offenses may be charged in the same indictment if they "are of the same or similar character or are based on the same acts or transactions connected together or constitute parts of a common scheme or plan." When coupled with RCr 6.20 and RCr 9.16, we find that Appellant and co-defendant Gordon could have been indicted in a single indictment as the evidence suggested a common scheme or plan, the offenses were similar in character, and both were alleged to have participated in the same act or same series of acts constituting the offenses with which they were charged.

Despite Appellant's argument that the trial court impermissibly shifted the burden of persuasion to him by joining both cases for trial, RCr 9.12 permits joinder in this situation. Moreover, an appropriate joinder is merely one of the many means a trial court has within its inherent powers to manage its docket. Here, Appellant failed to demonstrate that the joinder would be so prejudicial as to be unfair or unreasonably hurtful. See Romans v. Commonwealth, 547 S.W.2d 128, 131 (Ky. 1977).

Appellant points out that the prosecution did not move to try the defendants together; rather, the court "appeared to proceed from the outset on the assumption that there would be a joint trial on the separate indictments." Appellant, however, failed to adduce how he was prejudiced by the joint trial given the facts surrounding the case. All of the evidence was competent and admissible against each defendant, and each was charged with identical crimes, albeit in separate indictments. Furthermore, the evidence was inextricably intertwined such that it would require duplicative actions on the part of the prosecution in trying the defendants separately. We cannot see how Appellant was prejudiced by being tried jointly with co-defendant Gordon. Thus, we find the trial court did not abuse its discretion in this regard and properly denied the motion to sever as a joint trial was permissible in this situation.

C. Trial Court properly denied Appellant's motion for severance of the burglary charges from the receiving stolen property charges.

Appellant argues that the trial court denied him a fair trial when it tried him on the burglary and receiving stolen property charges in one trial. Appellant moved the court to sever the five burglary charges from the seven receiving stolen property charges. In denying the motion, the trial court noted that "these are the exact type of cases and charges that should be tried together." Appellant maintains his argument that there was some evidence relevant to the receiving stolen property charges but none connecting Appellant to the burglaries, and thus the prosecution had to "piggyback" the burglary charges on the receiving stolen property charges. In essence, Appellant's argument here is the same as with his previous argument concerning the denial of the motion for a separate

trial. However, as with Appellant's previous argument, we find the decision of the trial court was not an abuse of discretion.

Again, RCr 6.18 provides that joinder of two or more offenses in the same indictment is permitted "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." Joinder is precluded if a party will be unduly prejudiced, and the trial court must then order separate trials of counts or provide other relief as justice requires. RCr 9.16. As with Appellant's previous argument, the moving party has the burden of proving prejudice. See Peek v. Commonwealth, 415 S.W.2d 854, 855 (Ky. 1967). Likewise, the trial court has broad discretion with regard to the granting of separate trials, and we will not disturb the ruling unless we find "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." English, supra. We find it was not.

In this case, the burglary and receiving stolen property charges were so intertwined that a separate trial would not have been appropriate. "Offenses closely related in character, circumstances and time need not be severed." Sherley v. Commonwealth, 889 S.W.2d 794, 800 (Ky. 1994) (citing Cardine v. Commonwealth, 623 S.W.2d 895 (Ky. 1981)). Furthermore, "the primary test for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other." Roark v. Commonwealth, 90 S.W.3d 94, 98 (Ky. 2002).

Here, the evidence would have been admissible against both defendants in a separate trial. Moreover, the charges at issue here involved criminal

occurrences closely related in character, circumstance and time. The method of entry and the items stolen in each instance were nearly identical, and all the burglaries occurred within one month. See Hayes v. Commonwealth, 698 S.W.2d 827 (Ky. 1985) (holding that it was proper for the defendant to be tried for eleven counts of theft by unlawful taking over $100, four counts of first-degree burglary, one count of second-degree burglary, eleven counts of receiving stolen property over $100, one count of theft or possession of stolen motor vehicle registration plates, and three counts of being an accomplice to all of the charges, which occurred during a three-week crime spree and involved property stolen in Tennessee but brought back to Kentucky). It can hardly be said that it was an abuse of discretion for the trial judge to permit the five burglary charges to be tried with the seven receiving stolen property charges. Accordingly, Appellant's conviction with regard to this argument is affirmed.

D. Trial Court properly denied Appellant's motion to suppress.

Appellant also argues that the trial court erred when it denied his motion to suppress evidence seized from his room at his sister's apartment. In denying the motion, the trial court stated that Mrs. Hickey had "a common possessory interest in the residence at 1409 Oakwood, Louisville, Kentucky, and had authority to grant the police consent to search the entire residence, including the room in which her brother, [the Appellant,] slept." Specifically, Appellant argues that his sister could not give valid consent to allow the officers to search his room, alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution and Sections 2, 10, and 11 of the Kentucky Constitution.

On January 27, 2005, the trial court held an evidentiary hearing. Deputy Sheriff Jamie Kinman testified that he and another deputy went to the address given to him by Appellant to obtain consent to search the premises. Darlene Hickey, Appellant's sister, spoke with the deputy and informed him that she and her husband were the tenants of the apartment and that her brother, Appellant, had a room there. She consented to the search of Appellant's room, and the search revealed several items of stolen property, later identified by the lawful owners.

This Court has held that RCr 9.78 provides the standard for appellate review of a trial court's actual determinations regarding suppression motions. "If supported by substantial evidence the factual findings of the trial court shall be conclusive." RCr 9.78. See also Davis v. Commonwealth, 795 S.W.2d 942 (Ky. 1990). "When the findings of fact are supported by substantial evidence . . . the question necessarily becomes, 'whether the rule of law as applied to the established facts is or is not violated.'" Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998) (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911(1996)). Our Court of Appeals had held that "[t]he second prong involves a *de novo* review to determine whether the court's decision is correct as a matter of law." Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000) (citing Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998); Commonwealth v. Opell, 3 S.W.3d 747, 751 (Ky.App. 1999)). It should be pointed out, however, that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences

drawn from those facts by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. at 699, 116 S.Ct. at 1663.

Under this two-prong standard of review, we must first determine whether the trial court's denial of the Appellant's motion to suppress was supported by substantial evidence. We find it is.

In this case, Appellant's sister, the tenant of the apartment in which Appellant had only a room, told the officers that she rented the apartment with her husband. She also explained that Appellant lived there. Although Mrs. Hickey testified at the hearing that she and Appellant had an agreement that the one could not enter the other's room, there was also evidence that the sister frequently entered the room to place laundry on Appellant's bed. Testimony also revealed that the sister had personal items stored in a closet in the room in which Appellant slept. Furthermore, the deputies testified that when they were allowed entry into the apartment, Appellant's bedroom door was open, and Mrs. Hickey showed the officers where the room was located. Under these circumstances, we cannot say that the trial court's decision was not based on substantial evidence because Appellant's sister, as the only paying tenant besides her husband, had authority to consent to the search of the entire apartment.

Having found the trial court's denial of the motion to suppress to be based upon substantial evidence, we must now determine whether the trial court was correct as a matter of law under a *de novo* review. We find it was.

The trial court found that Mrs. Hickey had a common possessory interest in the residence and had authority to grant the police consent to search the entire residence, including the room in which her brother, Appellant, slept. It is well

settled law that consent to search may be obtained "from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). In Matlock, the defendant's apartment had been searched with the consent of his female live-in partner. The defendant argued that she could not consent as he was the sole tenant, and the two were not married. The United States Supreme Court found the joint use of the apartment supported the woman's authority to consent to the search. In a footnote, however, the Court opined:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, see Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord could not validly consent to the search of a house he had rented to another), Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (night hotel clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 172, 94 S.Ct. at 993.

This Court applied the rationale of Matlock, supra, in McQueen v. Commonwealth, 669 S.W.2d 519, 523 (Ky. 1984), wherein we held that "consent may be given by anyone who has "common authority over or other sufficient relationship to the premises . . . sought to be inspected." There, the appellant's live-in girlfriend consented to a search of the trailer in which the two cohabitated.

We found the common authority and relationship presented by those facts sufficiently met the test for consent.

Similarly, in Sarver v. Commonwealth, 425 S.W.2d 565, 566 (Ky. 1968), this Court held that the defendant's girlfriend could give valid consent to search the residence because she "'paid the rent' and professed to have dominion over it, and . . . she freely consented to the search." Sarver did not claim control of the residence, and he did not deny that his girlfriend consented to the search.

Despite Appellant's contention that his bedroom was exclusively his space, this falls short of a legal premise upon which one could effectively argue that a tenant may not give valid consent to search the entire residence. In this case, only Mrs. Hickey and her husband paid rent and had rented the residence for three years. Appellant did not pay rent and had only been there a month and a half. Furthermore, Mrs. Hickey never indicated to the officers that she did not have access or joint use of Appellant's room and even directed the officers to his room. Although Mrs. Hickey testified concerning the exclusivity of the room, the trial court apparently did not find this to be credible, which is well within the purview of the trial judge. As tenant of the residence, Mrs. Hickey had authority to consent to a search of the entire apartment, including Appellant's room.

Even if we were to find Mrs. Hickey did not have authority, we would still find the search to be valid. "The test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched." Commonwealth v. Nourse, 177 S.W.3d 691, 696 (Ky. 2005) (citing United States v. Gillis, 358 F.3d 386, 390 (6th Cir.2004) ("Even if a third party

does not possess actual common authority over the area that was searched, the Fourth Amendment is not violated if the police relied in good faith on a third party's apparent authority to consent to the search.")). We further opined in Nourse, supra, that "[t]his Court's inquiry into the reasonableness of a warrantless search 'must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?'" Nourse, 177 S.W.3d at 696 (quoting Illinois v. Rodriquez, 497 U.S. 177, 189, 110 S.Ct. 2793, 2801, 111 L.Ed.2d 148 (1990)).

In this case, the officers were greeted at the apartment door by Mrs. Hickey, who agreed verbally and in writing to the search. At no time did she indicate to the officers that she did not have dominion over the premises. In United States v. Jenkins, 92 F.3d 430, 437 (6th Cir. 1996), the Sixth Circuit stated that "a reasonable officer would usually assume that a person in the position of the consenter *does* have authority over the space. This is the general rule [when] . . . someone . . . comes to the door of a house after the police knock." Thus under these circumstances, the objective and reasonable belief of the officers that Mrs. Hickey could consent to a search of the apartment must be upheld.

Finding the search to be valid under either or both of the theories posited above, we find the trial court's denial of the motion to suppress was clearly supported by substantial evidence and correct as a matter of law.

E. Trial Court erred, though harmlessly, in admitting witness testimony, but did not abuse its discretion in refusing to admonish the jury.

In his next assignment of error, Appellant contends that the trial court committed reversible error by refusing to admonish the jury not to consider Sheriff Maiden's testimony regarding the possible use of several items seized from Gordon's car upon the arrest of Appellant and Gordon. Sheriff Maiden testified during the prosecution's case in chief and described several items, including a brake spoon, lug wrench and a screwdriver, as being "burglary tools." A limiting instruction was requested by Gordon's counsel, but this was denied.

Later in the trial, the prosecution attempted to enter into evidence as exhibits several photographs of the lug wrench and brake spoon, to which Gordon objected. Sheriff Maiden elaborated that the lug wrench had been modified in that it had a hook on it, and he speculated that this would allow someone to carry it "on their belt or britches." Gordon again objected, and the trial court overruled the objection and told counsel he could address the issue on cross examination. The sheriff also testified that the end of the lug wrench was "chipped up pretty good".

After the photographs were introduced into evidence, the sheriff further explained that the sliding glass door at Mr. Verme's residence had been pried open, and he speculated that the door had been pried open with a tire tool, as the marks on the door were too large to result from the use of the screwdriver. Again, counsel for Gordon objected, which was overruled by the trial judge who told counsel he could again address the issue on cross examination. Finally, Sheriff Maiden testified about the Jersey gloves and "finger condoms" found in the vehicle.

On cross examination, Sheriff Maiden testified that he had performed no tests to confirm his opinion about the tire tool being used as a burglary tool. He also acknowledged that he did not go to the Verme residence to confirm his speculation.

Appellant contends that the use of this testimony violated KRE 602, arguing that Sheriff Maiden lacked personal knowledge about the tools' illicit uses. Appellant further argues that admission of this testimony also violated KRE 701 and 702, arguing that Sheriff Maiden's testimony was not "rationally based on the perception of the witness" and that since technical knowledge was necessary to assist the jurors about a fact in issue, an expert should have testified concerning the nature of the tools as "burglary tools." However, Appellant failed to present these arguments to the trial court, and as such we will not give them weight on appeal. Although the lug wrench and brake spoon were proper subjects of Sheriff Maiden's testimony as these items were found in Gordon's car when he and Appellant were arrested, we nonetheless agree that Sheriff Maiden's speculation that the lug wrench and brake spoon were "burglary tools" was improper as the sheriff lacked personal knowledge of the tools' uses. However, any error in the admission of this evidence was harmless, and the trial judge did not abuse his discretion in refusing to admonish the jury.

Both Appellant and Gordon were able to successfully cross-examine Sheriff Maiden concerning the tools in that the sheriff's credibility with regard to his speculation was made obvious to the jurors. However, the sheriff's statements that it was merely his opinion that these tools were indeed used in the burglaries by these defendants, without any proper basis in fact, was error for

which no rule of evidence exists to permit their admission. In any event, the overwhelming amount of evidence against the defendants supports the contention that there was no reasonable possibility that the error might have affected the jury's decision, and thus the error was harmless. Crane v. Commonwealth, 726 S.W.2d 302, 307 (Ky. 1987) (citation omitted). Furthermore, the trial court here sustained Gordon's objection to the testimony, and thus the refusal to give an admonition was within the trial court's discretion considering the Appellant's ability to impeach Sheriff Maiden's credibility through cross examination.

F. Trial Court did not err in allowing prosecution to re-open case and recall a prior witness; Appellant failed to preserve this issue for appeal.

In his next claim of error, Appellant alleges the trial court erred when it allowed the prosecution to reopen its case and recall a prior witness, Hazel Wilhoite, after it had already announced the case was closed. However, a review of the record reveals that Gordon's counsel objected only when the prosecution called Jamie Banforth to testify and verify the testimony of Deputy Kinman. Gordon's counsel phrased the objection by stating "I don't know of any authority that would allow them to call this witness at this time." The trial court replied that this was a matter of discretion with the court and granted the prosecution's request to call Banforth. Following Banforth's testimony, the prosecution recalled Mrs. Wilhoite in order for her to elaborate on the exact denominations and amount of money stolen from her home. Appellant's counsel did not object when the prosecution elicited further testimony, and as a result, waived any argument regarding Mrs. Wilhoite's recall and additional testimony. A contemporaneous

objection was necessary in order for the court to address Appellant's concerns regarding the reopening of the case by the prosecution. See RCr 9.22; Salisbury v. Commonwealth, 556 S.W.2d 922, 926 (Ky. App. 1977) (holding that RCr 9.22 requires contemporaneous objections and gives the trial judge an opportunity to remedy any errors); Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived."). Moreover, Appellant has not asked this Court to review the trial court's decision to reopen the case for palpable error.

Were we to address this issue, we would find that the issue of reopening a case once it has been announced closed by a party is a matter of discretion with the trial court. In Marshall v. Commonwealth, 625 S.W.2d 581, 583 (Ky. 1981), this Court held that "[u]nder RCr 9.42(e), the court may 'for good reason in the furtherance of justice' permit parties to offer evidence in chief after evidence has been offered by both the prosecution and the defense." "A trial judge has wide discretion as to the order of proof and may grant permission to reopen the case by either the prosecution or defense." 9 Leslie W. Abramson, Kentucky Practice, Criminal Practice and Procedure § 26:38 (4th ed. 2003). The prosecution wanted to reopen its case in order for the jury to hear additional testimony. In particular, the prosecution wanted Mrs. Wilhoite to elaborate on the money she found missing from her home in order to tie her testimony to the money found in Appellant's bedroom at his sister's apartment. Because the court has discretion here, we would find no abuse and would not reverse and order a new trial on this basis. Appellant's conviction with regard to this argument is affirmed.

G. Jury Instructions were proper.

Appellant's final two arguments will be addressed together as his final two assignments of error deal with the jury instructions. In his first argument here, Appellant contends the instructions given to the jury at the persistent felony offender and truth in sentencing stage ("PFO/TIS") of the trial did not permit consideration of the appropriate penalty for each individual crime, and as such, he was prejudiced because of insufficient evidence. In his second argument, Appellant argues that the trial court committed reversible error when it failed to define reasonable doubt, failed to thoroughly define the presumption of innocence, failed to instruct that the Commonwealth had the burden of proof, and failed to thoroughly instruct on the Fifth Amendment right not to testify. Essentially, Appellant argues on appeal that the trial court should have tendered to the jury the instructions he prepared. Finding no error in the instructions given to the jury, we affirm Appellant's conviction.

The prosecution argues that the Appellant failed to preserve his first argument here for review. We agree, as a review of the record reveals that the Appellant merely objected to the instructions without more and did not offer the trial court an explanation as to why the penalty phase instructions were defective as he does now on appeal. As such, we find this error is not preserved for appellate review and do not address the merits of Appellant's argument with respect to any defect in the penalty phase instructions. Furthermore, the penalty phase instructions are adequate when compared to the recommended form of such instructions suggested in 1 Cooper, Instructions to Juries, Criminal §§

12:17, 12:26, 12:28 (4th ed. 2003). The same can be said for the Verdict Forms submitted to and returned by the jurors.

The gist of Appellant's last argument concerning the form of the jury instructions is that the instructions did not define reasonable doubt or thoroughly define presumption of innocence, that the instructions did not instruct that the Commonwealth had the burden of proof, and that the instructions failed to thoroughly instruct on the Appellant's Fifth Amendment right not to testify. The prosecution argues that Appellant's claims are unpreserved for appellate review as he failed to adequately make his objections to the instructions known to the trial court so that any error could be corrected.

A review of the record reveals that the Appellant failed to adequately preserve for appellate review his contentions that the instructions fell short of adequately instructing the jury, thus we will not address the merits of those arguments. RCr 9.54(2) is dispositive and provides that:

> No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

We note, however, that RCr 9.56(2) provides that instructions to the jury "should not attempt to define the term 'reasonable doubt.'" In any case, the instructions tendered by the Court to the jury in this case meet the requirements set forth in RCr 9.56(1) regarding both reasonable doubt and presumption of innocence. Furthermore, Appellant's claim that the jury was not adequately instructed on the Commonwealth's burden of proof is without merit, as we have stated in prior cases:

> [W]e have sought to avoid abstract legal principles, presumptions, comments on the weight of the evidence, and **references to the burden of proof**, which is cast by the form of instruction requiring that in order to make an affirmative finding the jury must, on the basis of the evidence, believe certain specified facts to be true. This approach minimizes the possibility of intrusion by the judge into that particular area of decisionmaking which belongs exclusively to the jury, and it minimizes the possibility of error in that respect.

Whorton v. Commonwealth, 570 S.W.2d 627, 631-32 (Ky. 1978), *reversed on other grounds by* Kentucky v. Whorton, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979) (emphasis added) (citation omitted). See also Gall v. Commonwealth, 607 S.W.2d 97, 110 (Ky. 1980) (holding that the trial judge is not required to instruct as to who has the burden of proof in a criminal case); Bills v. Commonwealth, 851 S.W.2d 466, 471 (Ky. 1993).

As for Appellant's remaining contentions that the jury was not instructed on the presumption of innocence and on Appellant's right not to testify under the Fifth Amendment, though unpreserved, we find his arguments are without merit as the jury was adequately instructed regarding these principles. Reviewing the record, we find that the presumption of innocence instruction is identical to that recommended and approved in Edwards v. Commonwealth, 573 S.W.2d 640, 642 (Ky. 1978) and Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). Further, the instruction regarding Appellant's right to remain silent complies with the United States Supreme Court's ruling in Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) and is identical to the instruction provided in 1 Cooper, Instructions to Juries, Criminal § 2.04(A) (4th ed. 2003).

Appellant also argues that the instructions given to the jurors were "barebones." We have addressed such arguments before. In Cox v. Cooper,

510 S.W.2d 530, 535 (Ky. 1974), we held that "[o]ur approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." Similarly, in McGuire v. Commonwealth, 885 S.W.2d 931, 936 (Ky. 1994), we opined that "Kentucky follows the 'bare-bones' principle in providing instructions." (Citing Rogers v. Kasdan, 612 S.W.2d 133 (Ky. 1981)). As such, we affirm Appellant's conviction with regard to these arguments.

CONCLUSION

Having thoroughly reviewed the record and having found no error upon which reversal is warranted, we affirm Appellant's convictions and sentence.

All concur.

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