

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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

2005-SC-000111-MR

DATE 9-14-06 ELLA GRAHAM, P.C.

WILLIAM KELLY CLARK

APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
NO. 04-CR-00450-001

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING IN PART AND REVERSING AND REMANDING IN PART**

Appellant, William Kelly Clark, was convicted of burglary in the first degree, four counts of theft by unlawful taking over \$300.00, and of being a persistent felony offender in the second degree. This appeal is as a matter of right.<sup>1</sup> Appellant assigns the following errors: (1) Appellant's convictions on four separate counts of theft by unlawful taking arising from the theft of multiple items at the same time, from the same residence, violates double jeopardy principles of both the state and federal constitutions, and (2) the trial court committed reversible error by sustaining the Commonwealth's motion to prevent the defense from impeaching Tammy Miller Adkins' credibility with her prior conviction of forging prescriptions.

Appellant was Tammy Miller Adkins' live-in boyfriend. Ms. Adkins is the mother of Roy Johnson, who was fourteen years of age at the time of the burglary. The

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<sup>1</sup> Ky. Const. § 110(2)(b).

burglarized home was owned by Robert Richmond, and his son is Nick Richmond. On June 8, 2004, four individuals, Appellant Clark, Ms. Adkins, her son Roy Johnson, and Adkins' younger son, drove from the Adkins' residence to the Richmond residence. Nick Richmond permitted Roy Johnson to enter the house and closed the screen door without locking it. On the back porch, Roy Johnson and Nick Richmond talked.

During this time, Appellant and Adkins entered the front door and removed several items, including guns and jewelry. Debbie Simmons, a neighbor who lived across the street from the Richmond residence, observed a man and woman carrying items in and out of the house and placing them in a car. After several minutes, Appellant went to the back porch where Johnson and Nick were still talking. When Appellant, Adkins, and Johnson left, Johnson noticed a jewelry box and some guns in the car. They drove to a store and then to a "car place," where Adkins sold the guns. After selling the guns, Adkins bought clothes for Johnson at a clothing store. Johnson stated that Adkins pawned some of the jewelry at a pawn shop. Adkins testified that she never saw the jewelry.

The next day, the homeowner, Robert Richmond noticed that some pistols were missing. Later that day, Robert Richmond telephoned the Sheriff's Department. Richmond later noticed that five knives, a .270 deer rifle, a jewelry box, and two necklaces were missing. At trial, Adkins testified that Appellant entered the Richmond residence and took the guns. Adkins denied ever seeing jewelry, but did admit that she entered the Richmond residence "one time." The defense was not permitted to cross-examine Adkins concerning her prior felony conviction for forging prescriptions to obtain drugs.

On June 30, 2004, Appellant was indicted and charged. Upon the conclusion of a jury trial on February 2, 2005, the Warren Circuit Court entered judgment against Appellant for four separate counts of theft by unlawful taking and sentenced him to imprisonment for seventy years. Appellant contends that his convictions violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution. The alleged error was unpreserved. Appellant claims however that although the issue is not preserved for appellate review, this Court may still review alleged double jeopardy violations.

With respect to preservation, the Commonwealth contends that the present case illustrates the necessity for preservation of double jeopardy claims because the record does not adequately explain why Clark was indicted for four counts of theft by unlawful taking. However, “failure to object on grounds of double jeopardy does not constitute a waiver of the right to raise the issue for the first time on appeal.”<sup>2</sup> In Baker v. Commonwealth,<sup>3</sup> this Court said that “[a] principal reason for doubting the soundness of the rule, in addition to the general reasons for requiring preservation, is the difficulty of analyzing a double jeopardy claim when there is no context from the trial court.”<sup>4</sup> Nevertheless, “failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand.”<sup>5</sup> Although the argument is

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<sup>2</sup> Baker v. Commonwealth, 922 S.W.2d 371, 374 (Ky. 1996) (citing Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977)), cert. denied, 435 U.S. 999, 98 S.Ct. 1655, 56 L.Ed.2d 89 (1978).

<sup>3</sup> 922 S.W.2d 371 (Ky. 1996).

<sup>4</sup> Id. at 374.

<sup>5</sup> Sherley, 558 S.W.2d at 618, quoting Beatty v. Commonwealth, 125 S.W.3d 196, 210 (Ky. 2004).

not preserved, this Court continues to adhere to the rule that double jeopardy questions may be reviewed on appeal despite the failure to preserve the issue in the trial court.

The issue presented is whether Appellant's convictions violate the Double Jeopardy Clause of both the state and federal constitutions. We will limit our analysis to the Kentucky Constitution. Appellant contends that our decision in Jackson v. Commonwealth<sup>6</sup> controls the outcome here. He maintains that the three guns and the other items were stolen from the Richmond residence at the same time, so only one theft occurred. In Jackson, the defendant was convicted of the theft of guns from the residence of Roger Stice and the theft of a scanner from the Stice residence.<sup>7</sup> This Court said that the defendant was entitled to have the conviction for the theft of the scanner set aside because the guns and the scanner were stolen from the same residence at the same time, and therefore constituted only one theft.<sup>8</sup> In Nichols v. Commonwealth,<sup>9</sup> appellants feloniously took and carried away fowls owned by different people, but from the same place, and "although they were no doubt taken one by one into the possession of the thieves, the taking of all constituted in law but one act."<sup>10</sup>

Here, Appellant took three guns and other items from the Richmond residence. He was charged with four separate counts of theft by unlawful taking. The three guns and the other items were stolen from the same residence at the same time, and under our decisions only one theft occurred.<sup>11</sup>

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<sup>6</sup> 670 S.W.2d 828 (Ky. 1984), rev'd on other grounds, 821 S.W.2d 90 (Ky. 1991).

<sup>7</sup> Jackson, 670 S.W.2d at 832.

<sup>8</sup> Id.

<sup>9</sup> 78 Ky. 180 (Ky. 1879).

<sup>10</sup> Nichols, 78 Ky. 180 at 2.

<sup>11</sup> See Jackson, 670 S.W.2d at 832.

Appellant also alleges trial court error because he was not permitted to impeach the credibility of Adkins, a witness for the Commonwealth, by eliciting from her that she had been convicted of a felony for fraudulently forging a prescription to obtain drugs. The prior felony conviction occurred more than ten years before this trial. KRE 609(b) provides the time limit: "Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect."<sup>12</sup> The balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved to the sound discretion of the trial court.<sup>13</sup> Prior to trial, the Commonwealth filed a motion *in limine*, seeking to prevent the defense from introducing Adkins' prior felony conviction. The trial judge granted the Commonwealth's motion, ruling that the conviction was over ten years old and did not reflect upon her credibility for truthfulness.

Under KRE 609(b), a factor in determining whether the offense is probative is the nature of the prior offense.<sup>14</sup> The trial judge found that Adkins had a drug addiction at the time of her prior offense. In his view, the addiction did not presently reflect upon her credibility. Under the circumstances of this case, we are unable to conclude that the trial court abused its discretion in refusing to allow Appellant to impeach Adkins' credibility with evidence that she had been previously convicted of a felony.

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<sup>12</sup> KRE 609(b).

<sup>13</sup> Rake v. Commonwealth, 450 S.W.2d 527, 528 (Ky. 1970).

<sup>14</sup> Id.

Upon the foregoing, Appellant's conviction for one theft is affirmed and the other three counts of theft by unlawful taking are reversed, and the sentences thereon vacated. This cause is remanded to the Warren Circuit Court for entry of judgment in conformity herewith. In all other respects, the judgment of the trial court is affirmed.

Lambert, C.J., and Graves, McAnulty, Minton, and Scott, JJ., concur.

Roach, J., concurs in result only. Wintersheimer, J., dissents for the reasons set out in his dissent in Jackson v. Commonwealth, 670 S.W.2d 828 (Ky. 1984).

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