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RENDERED: MAY 24, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 8-23-07 E.A.Gro.th,D.C.

2005-SC-000180-MR

DAVID GORDON — APPELLANT

V.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
NO. 04-CR-00095

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, David Gordon, was charged along with a co-defendant, Mark Marshall, with involvement in five criminal incidents occurring over the course of a month in Carroll and Owen Counties in Kentucky. The grand jury charged appellant with two counts of burglary in the first degree; three counts of burglary in the second degree; two counts of receiving stolen property (a firearm); and five counts of receiving stolen property, value of $300 or more; while acting alone or in complicity with another. Appellant was additionally charged with being a persistent felony offender in the first degree. Following a jury trial, appellant and his co-defendant, Marshall, were convicted on all charges.

The trial court proceeded to a combined persistent felony offender/sentencing hearing. The jury recommended the maximum sentence on all counts, and enhanced the receiving stolen property sentences from 5 years to 20 years, enhanced the

burglary in the second degree counts from 10 years to 20 years, and enhanced the burglary in the first degree counts from twenty years to forty years. Appellant thus received a total sentence of forty years to serve after the jury recommended that the sentences be run concurrently.

Appellant raises a number of arguments on appeal. First he argues that the evidence was insufficient to establish the charges in this case. He further alleges the burglary counts should have been severed from the receiving stolen property counts for trial. He contends the court should have granted his motion to suppress evidence seized from his room pursuant to his sister's consent. He alleges that a sheriff's testimony about burglary tools should have been disallowed and the jury should have been admonished that this testimony was speculative. He alleges it was error for the Commonwealth to be permitted to play a recorded conversation for impeachment purposes during the guilt phase of the trial. He alleges an abuse of discretion in the trial court's refusal to allow defense counsel to listen to the recorded statement of appellant prior to the start of trial. Appellant cites improper closing argument by the Commonwealth. He alleges the instructions given to the jury at the persistent felony offender/truth-in-sentencing phase were erroneous because they did not allow consideration of the appropriate penalty for each individual crime. He alleges the trial court erred in failing to instruct as to the burden of proof, presumption of innocence and reasonable doubt. Finally, he alleges it was error to allow the prosecutor to call a witness after the Commonwealth had announced its case was closed. Having reviewed all of these claims of error, we affirm appellant's conviction.

The case involved a series of burglaries reported in Carroll, Henry and Owen counties from October 6, 2004, to November 1, 2004. The first was reported in

Carrollton on October 6, 2004, by Tony and Karen Osborne. They returned home from work to find the back door of their home had been forced open and the contents of their dresser drawers spilled in their bedroom. The Osbornes discovered many pieces of jewelry missing, as well as $90 in cash and a large jar full of change. Mr. Osborne also reported missing a gold crown he had worn on two of his teeth. No fingerprints were found.

On October 9, 2004, Gerald Morgan and his wife returned to their home in Carrollton to find the back door of their house "busted open" and their bedrooms ransacked. Two handguns and jewelry were taken, but several rifles and shotguns were left. Attempts to procure fingerprints were unsuccessful.

On October 11, 2004, Joe Verme returned to his home in Worthville to find the back door of his home had been pried open and his hammer lying on the floor of the house. Handguns and a camcorder, jewelry and other items were taken, but rifles and shotguns were left. The sheriff was unable to find fingerprints, but found smear marks that appeared to be made by a glove.

On October 18, 2004, James Sapp returned to his home in Carrollton around 4:30 p.m. to find his house had been burglarized. It appeared entry was gained through an unlocked front door. Jewelry, old coins, approximately $65 in cash, a vintage pocket watch, and a five-gallon jug about three-fourths full of change were taken. A cabinet containing shotguns and rifles was not disturbed. Again, no fingerprints were found, but there were smudges which indicated gloves had been used.

On the same day as the break-in at Mr. Sapp's residence, Paul and Misty Kinman reported a burglary at their residence in Owen County. Entry was made

through a side door. Jewelry and two leather jackets were taken, as well as a glass jar and a cup with "Las Vegas" inscribed on it, both full of change.

That same day, appellant and Marshall were videotaped using a Coin Star change machine at a Kroger grocery store in Carrollton. On the video, appellant and Marshall could be seen carrying both the "Las Vegas" cup and glass jar taken from the Kinman residence. Appellant and Marshall left after receiving the cash. Mr. Kinman, realizing that a significant amount of change had been taken, called the local Kroger to see if it had a change machine. A store clerk confirmed that it did. The next day, Mr. Kinman met with a store manager who agreed to let Mr. Kinman view a surveillance videotape from the previous day. Mr. Kinman immediately recognized both the "Las Vegas" cup and his glass jar, and contacted Deputy Kinman[1] of the Carroll County Sheriff's Department about the videotape. Deputy Kinman, Sheriff Maiden and other deputies later viewed the same tape, and Sheriff Maiden requested that Kroger employees call him if appellant and Marshall returned.

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 unusual as they did not use that door. Jewelry, $800 in cash (seven $100 bills and two $50 bills) and a glass full of quarters were missing. Again no fingerprints were found.

On November 1, 2004, Gala McIntosh returned home to find that her home in Henry County had been burglarized. The front door had been "busted open," and it appeared that entry had also been attempted through the back door. Mrs. McIntosh reported missing several items of jewelry, a bag of coins, $36 worth of Kennedy half-dollars, and a wicker basket full of coins, as well as quarters from a mason jar and a

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

green mug with a black handle.

On that same day, appellant and Marshall returned to the Carrollton Kroger where they had previously cashed in coins. They were carrying the basket of coins from the McIntosh home. While appellant and Marshall were filling the coin machine, a Kroger supervisor contacted Sheriff Maiden. After receiving cash for the coins, appellant and Marshall left the store. As they exited the store, Sheriff Maiden observed them from the end of the parking lot. He recognized them from the videotape and observed appellant hand Marshall some cash. After appellant and Marshall got in their car, Sheriff Maiden pulled behind the car to prevent them from leaving.

As Sheriff Maiden approached the vehicle, both men started to exit. Sheriff Maiden told them to remain where they were, and obtained their identification. When he determined that neither was from Carroll County, he asked what they were doing there. Appellant responded that they had given a buddy a ride from Louisville and let him out at the exit. They admitted that they went to Kroger to dump change, but appellant said the money belonged to him. When asked why he was seen splitting it with Marshall, appellant responded that he did not know. They denied having been in the Kroger prior to that day. Sheriff Maiden observed in the car in plain view pieces of jewelry and two pairs of brown gloves. An arrest warrant and search warrant were obtained.

A search of Gordon's car revealed a lug wrench, a screwdriver and brake spoon and what Sheriff Maiden described as seven "finger condoms." The sheriff found the gold crown taken from the Osborne residence in the vehicle, four rings belonging to Mrs. McIntosh, and numerous earrings and necklaces scattered on the floorboard of the car.

Sheriff's deputies were dispatched to the address on the driver's license appellant had shown to Sheriff Maiden. They obtained consent to search the premises, and found the handgun and holster belonging to Mr. Morgan, a pillow case, handgun and bullets belonging to Mr. Verme, a black leather jacket and various jewelry belonging to Mrs. Kinman, and Mrs. Wilhoite's gold diamond bracelet.

Deputies also went to search Marshall's residence. From the record, it appears Marshall lived with his sister in an apartment she rented with her husband. His sister consented verbally and in writing to the warrantless search by deputies. Upon searching Marshall's room, deputies found Mr. Sapp's jewelry, 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.

Prior to trial, appellant moved to have the burglary charges severed from the receiving stolen property charges. A party moving for separate trials has the burden of showing facts that justify the relief sought. Bush v. Commonwealth, 457 S.W.2d 495, 497 (Ky. 1970). Appellant argued that since there was nothing to tie him to the multiple burglaries other than the property, allowing the Commonwealth to proceed on all charges made it more likely that the jury would "piggyback" the burglary charges based on the evidence of receiving stolen property. The Commonwealth countered that the cases should be tried together because they involved the same or similar evidence, were related in circumstances and time, and the evidence would be admissible in separate trials even if they were not joined.

Under RCr 9.16, the court shall order separate trials of counts if it appears the defendant will be prejudiced. The trial court has broad discretion in determining the issue of proper joinder, and a reviewing court will only overturn such a decision on a

showing of clear abuse of discretion and prejudice to the defendant. Sherley v. Commonwealth, 889 S.W.2d 794 (Ky. 1994). The trial court overruled the motion for severance, after remarking that, "[M]y understanding of the law is these are the exact type of cases and charges that should be tried together."

In this case, the evidence of receiving stolen property would be admissible in a trial of the burglary counts since it constitutes prima facie evidence that the person in possession was also responsible for the theft thereof. Jackson v. Commonwealth, 670 S.W.2d 828, 830 (Ky. 1984), overruled on other grounds, Cooley v. Commonwealth, 821 S.W.2d 90 (Ky. 1991). The trial court is not required to sever the charges for trial where evidence of the other charges would have been admissible had there been separate trials, being all part of a common scheme, pattern, or design. Hayes v. Commonwealth, 698 S.W.2d 827, 829 (Ky. 1985). Moreover, where the offenses are sufficiently interwoven and the character of proof is overlapping, it is a proper exercise of discretion to join the various offenses for trial. Id. It has also been stated that offenses closely related in character, circumstances and time need not be severed. Sherley, 889 S.W.2d at 800.

In the case at bar, the evidence presented was that the criminal enterprise involving these burglaries was part of a common scheme, and the evidence was indeed overlapping at trial. Moreover, these offenses were of the same character, the burglaries had similar circumstances and they all occurred within one month of each other. We agree that appellant did not show prejudice from the joining of the counts for trial, and the trial court acted properly within its discretion.

Next, we examine whether the trial court erred in denying the motion to suppress evidence found in the apartment of appellant's sister. Appellant argues that his sister

was incapable of consenting to a search of appellant's room in the apartment she was renting. He believes the Commonwealth failed to show that the sister had the "apparent authority" to consent to a search.

The standard of review for an appeal of an order denying suppression is whether the factual findings of the trial court were "clearly erroneous." Commonwealth v. Banks, 68 S.W.3d 347, 349 (Ky. 2001). The trial court entered findings of fact and conclusions of law following an evidentiary hearing on the motion to suppress. The trial court found that the deputies visited the New Albany, Indiana, address that was listed on the identification appellant was carrying at the time of his arrest. There, appellant's brother and mother informed them that appellant was living with his sister, Sandy Gordon, and her boyfriend at an address in Louisville. The deputies went there with two Jefferson County police officers, and came into contact with Sandy Gordon and her boyfriend, Paz Rodriguez. Sandy Gordon informed the officers that she and Rodriguez rented the residence and appellant was living there. The court found that the officers explained their purpose for being at the residence, after which Sandy Gordon consented to a search of the residence both orally and in writing. Rodriguez consented orally to a search of the residence. The court found that Sandy Gordon showed the officers to a room in which appellant slept. The court found that there was no door to the room.[2] Officers proceeded to search the residence and took possession of several items which they found in appellant's room.

The trial court concluded that as tenants in the residence, Sandy Gordon and Paz Rodriguez had a "common possessory interest" and each had the authority to grant

[2] The officers testified at the suppression hearing that there was a cover or curtain over the entrance to appellant's bedroom in the residence.

the police consent to search the entire residence including the room in which appellant slept. The court further concluded that the officers did not exceed the scope of the authority granted to them.

It is axiomatic that searches conducted without a warrant are unreasonable, unless they fall within a "few specifically established and well-delineated exceptions." Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 2043, 36 L. Ed. 2d 854 (1973). One exception is a search conducted pursuant to proper consent. Id. at 219, 93 S. Ct. at 2043-2044. Consent to search can be obtained from a third party who possesses common authority over or other sufficient relationship to the premises. United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242 (1974). The state has the burden of showing that the person who gave consent had common authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). Common authority is not to be implied from the mere property interest a third party has in the property. Matlock, 415 U.S. at 172, 94 S. Ct. at 993. The authority which justifies third party consent does not rest upon the law of property; rather, it rests on mutual use of the property by persons generally having joint access and control for most purposes so that it is reasonable to recognize that co-inhabitants have the right to permit the inspection and other inhabitants have assumed the risk that another may permit the common area to be searched. Id. This Court has previously determined that third-party consent will be considered valid where a reasonable police officer faced with the prevailing facts would reasonably believe 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).

Having reviewed the record, the facts found by the trial court are supported by substantial evidence and, therefore, are conclusive. When the findings of fact are supported by substantial evidence, the question 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). We agree that the trial court was correct as to its conclusions of law. The Commonwealth showed, under Matlock, that Ms. Gordon had "common authority" over the premises sought to be inspected.

In the case at bar, we believe the sister's rights as primary tenant of the premises were at least co-extensive with appellant, as a person merely staying with her, if not superior to appellant's. In Sarver v. Commonwealth, 425 S.W.2d 565, 566 (Ky. 1968), which predates Matlock, our court held that third party consent was valid from the person who paid rent on the residence to be searched and who claimed to have dominion over it. The defendant in Sarver did not deny that the person renting had the right of control of the residence, and did not himself claim dominion and control over it.

This Court has also held that a parent as homeowner could consent to the search of the bedroom of her adult child, who did not contribute rent or have an agreement with his mother for exclusive control of his room. Colbert v. Commonwealth, 43 S.W.3d 777, 780-781 (Ky. 2001). Although the relationship of brother and sister is very different from that of parent and child, Colbert leads to a conclusion that a separate bedroom occupied by a family member, not contributing rent, is not considered to be beyond control of the head of the household.

Furthermore, even if we considered Ms. Gordon not to possess common authority over the premises, we would still consider the search to be valid. We conclude a reasonable police officer faced with this situation would reasonably believe

that the consenting party, Sandy Gordon, had common authority over the premises to be searched. Nourse, 177 S.W.3d at 696. Gordon indicated to the officers that she and Rodriguez were renting the premises. At no time did either of them indicate to the officers that they did not possess common authority over the whole of the premises, including the room occupied by appellant. Therefore, we uphold the reasonable belief of the officers that Ms. Gordon could consent to a search of the entire apartment. For all these reasons, we affirm the trial court's denial of the motion to suppress the evidence found in the search.

Next, appellant argues that there was insufficient evidence to support his convictions. As to his burglary convictions involving the homes of Gerald Morgan, James Sapp, Joe Verme, Hazel Wilhoite and Tony Osborne, appellant maintains that there was no evidence that he broke into those homes. Next, he argues that there was no evidence to charge him with receiving stolen property in Carroll County, as opposed to Jefferson County, where Mr. Morgan's gun, Mr. Sapp's watch, Joe Verme's gun and pillowcase, and Ms. Wilhoite's bracelet were found in his bedroom at his sister's residence. Finally, appellant argues on appeal that this Court should consider his argument that there simply was insufficient evidence to charge him with receiving stolen property. He asks this Court to review the issue of whether there was insufficient evidence to prove those charges under the palpable error standard pursuant to RCr 10.26.

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 is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). There 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 187-188. The standard is not different when the evidence is circumstantial. Commonwealth v. Sawhill, 660 S.W.2d 3, 4 (Ky. 1983). 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. Id.

We cannot agree with appellant that the evidence was insufficient to convict him of the charges. We agree with the Commonwealth that the facts and circumstances of the crimes charged were not required to be viewed in isolation, but could be considered as a whole. As to the receiving stolen property counts, appellant and Marshall were in possession of stolen property from the victims of these burglaries. In appellant's vehicle, the police found the gold crown taken from Mr. Osborne's home. On the videotape, appellant was seen cashing in coins from Mr. Sapp's residence. As to the burglaries in question, appellant or Marshall had items at their residences from each of the victims.

Additionally, the jury could consider that the mode of operation for every burglary was similar. The victims' homes were burglarized after they left in the morning. The methods of gaining entry were comparable for each of the burglaries. Similar items were taken, such as jewelry, coins, and handguns – items that could be fenced quickly. Videotape evidence identified appellant and Marshall cashing in money from two burglaries which had been committed on the very day the coins were exchanged. Given the commonality of the commission of the crimes, it was reasonable for the jury to conclude that appellant and Marshall committed the offenses together.

The possession of stolen property is prima facie evidence of guilt of the theft of

the property. Jackson v. Commonwealth, 670 S.W.2d at 830. Thus, the case was properly submitted to the jury on the facts that appellant, or his co-defendant, was in possession of stolen property from the burglaries. It was not unreasonable for the jury to find guilt beyond a reasonable doubt. And because the evidence is sufficient to show that the appellant committed burglaries at these residences in Carroll County, it follows, therefore, that appellant was in possession of the stolen property while in Carroll County.

Appellant urges this court to reconsider the rule in Jackson that allows for a submissible case on a charge for burglary when there has been a breaking and entering and property taken from the dwelling is found in the possession of the accused. Id. We decline to do so however. We note that this court revisited the rule four years ago in Riley v. Commonwealth, 91 S.W.3d 560 (Ky. 2002), and we upheld the Jackson ruling in that case in which we found the facts to be indistinguishable from Jackson. We agree that conclusion remains sound at this time.

Next, appellant argues that it was error for the trial court to allow "extensive" evidence from Sheriff Maiden that items found in appellant's car were burglary tools, and error for the court not to admonish the jury that the sheriff was speculating about the items. Sheriff Maiden testified about the items found in the search incident to arrest of appellant's car outside the Kroger store. Sheriff Maiden testified that in the back of appellant's car were what he believed were burglary tools. Appellant's attorney objected, and the court sustained the objection. Defense counsel's motion for a limiting instruction was denied.

The Commonwealth's attorney proceeded to question Sheriff Maiden about photographs of items found in the car. Prior to questioning about photograph number

78, defense counsel asked to approach. He reminded the court that his earlier objection to the sheriff's testimony about that item was sustained. Defense counsel argued that the Commonwealth could not prove that the items in the car were burglary tools or that they had anything to do with the burglaries. The Commonwealth asserted that it was confident it would be able to link the items in order to make the opinion testimony proper. The court ruled that the defense could more appropriately address it on cross-examination.

The sheriff testified that a lug wrench found in the vehicle had a hook on it so that it might be carried on a belt or pants. Appellant objected that this was speculation, and the trial court again ruled that could be addressed on cross-examination. The sheriff testified that the end of it was "chipped up pretty good." Sheriff Maiden testified that there was a screwdriver and a brake spoon in the car. He testified that there was a sliding door in the rear of Joe Verme's house which had been pried open. On the door there were two or three marks and there was some blue paint. Sheriff Maiden testified that he believed the blue paint came off the hammer found at the scene, but that the burglars were unable to open the door with the hammer. He testified that there was another mark on the door indicating the burglars used something else to pry the door open. He stated that he believed the tire tool was used to break the door open. Defense counsel again objected, on the basis of speculation. The court overruled the objection and stated that it was a matter for cross-examination. Lastly, defense counsel objected to a photograph of "finger condoms" on the same basis.

On cross-examination, the sheriff acknowledged that he had done no testing to confirm his opinion about the use of the tire tool. He asserted that he had measured the end of the tool but did not record the measurement. He also acknowledged that he

had not gone to Verme's house to investigate the matter.

Appellant argues that he was prejudiced because these were items found in his car, and that there was nothing to link him to the burglaries other than Sheriff Maiden's speculation. Appellant argues he was denied a fair trial, and that Sheriff Maiden's testimony violated the Rules of Evidence. First, he contends that the testimony violated KRE 602 because the sheriff demonstrated that he lacked personal knowledge of the matter about which he testified. He also argues the testimony violated KRE 701, concerning opinion testimony by lay witnesses, and 702, concerning testimony by experts. While appellant challenged Sheriff Maiden's personal knowledge below, he failed to raise any issue as to whether the sheriff had been qualified as an expert and so we do not consider this contention on appeal.

We agree with appellant that Sheriff Maiden should not have been allowed to characterize the items found in the car as burglary tools under the Rules of Evidence. He had not done any tests or investigation at the scene to establish whether his theories about the items were correct. Thus, we agree that he was providing testimony based not on his personal knowledge and that was not rationally based on his perception, and so it violated the rules for opinion testimony by lay witnesses.

However, we believe the error was harmless in that appellant was able to extensively cross-examine the sheriff on this point and expose the speculative nature of the testimony. Moreover, we do not agree that it prejudiced appellant's substantial rights under RCr 9.24. There was an overwhelming amount of evidence to tie appellant to the burglaries, given the number of items appellant and his co-defendant were found in possession of, and their cashing in coins on the same day as the related burglaries. Thus, we conclude there was no likely possibility that the verdict in this case would have

been different had the error not occurred. Greene v. Commonwealth, 197 S.W.3d 76, 84 (Ky. 2006). In addition, we do not believe it was clearly erroneous for the trial court to refuse to give an admonition after sustaining appellant's initial objection, particularly since the court allowed appellant to convincingly address the error through cross-examination.

Next, appellant complains about evidence used for impeachment at trial. His sister was impeached using a tape recording of a conversation between her and appellant at the jail. Appellant objected because the tape was not turned over to the defense prior to trial. The recording took place approximately one week before trial. The Commonwealth's Attorney stated in a conference in chambers just before trial that his office had only obtained the recording the day before trial after serving a subpoena on the jail. The Commonwealth argued that it was not required to provide the recording because it was intended to be used for impeachment only, and appellant could have obtained the same recording from the jail. Appellant argued that the recording should have been provided in discovery and moved that it be excluded.

In discovery matters, it is within the discretion of the trial judge to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing into evidence the material not disclosed, or enter such other orders as may be just under the circumstances. RCr 7.24(9); Neal v. Commonwealth, 95 S.W.3d 843, 848 (Ky. 2003). The court denied the motion in limine to exclude the evidence. The court also denied the motion for disclosure of the tapes prior to trial, holding that the defense could listen to them at such time as they became relevant.

We conclude that the Commonwealth was required to disclose the recorded

statements between appellant and his sister pursuant to RCr 7.24(1),[3] but that the failure to disclose was harmless under the circumstances. RCr 7.24(1) provides that "Upon written request by the defense, the attorney for the Commonwealth shall ... permit the defendant to inspect and copy or photograph any relevant ... written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth." Incriminating statements from the accused to any witness were required to be disclosed pursuant to RCr 7.24(1). There is no exception in that rule for evidence intended to be used to impeach or in rebuttal.

We do not regard the violation of RCr 7.24(1) as reversible error under the circumstances of this case, since the Commonwealth had just obtained the recordings the day before trial and because it informed defense counsel of the substance of the statements prior to trial. See Deskins v. Commonwealth, 512 S.W.2d 520, 525 (Ky.1974). The Commonwealth, despite the court's ruling that the recording was not required to be disclosed and denying a continuance, informed the defense that since it had the equipment available, defense counsel could sit and listen to the tapes during the trial. Furthermore, it is true that appellant himself should have had memory of what the tapes would contain given that the occurrences happened just before trial, and this was accessible by the defense. Appellant thus had information from which to determine whether to call his sister as a witness knowing of the existence of the jail tapes. What is more, we believe that there was not a substantial chance that this discovery error affected the outcome of the case. There was significant substantial

[3] On the other hand, the Commonwealth did not violate RCr 7.26. The failure to disclose the recording was not a violation of RCr 7.26(1) because it was not a statement from a Commonwealth's witness.

evidence of the crimes charged, and it is notable that appellant's co-defendant was convicted on the same evidence without the use of incriminating recorded statements against him.

Next, appellant argues that the Commonwealth's impeachment of his sister at trial was improper because it did not relate to the facts elicited from her on direct examination and, furthermore, it was an impeachment on collateral facts. We disagree. Ms. Gordon was asked by the Commonwealth on cross-examination if she had talked to appellant while he was in jail about what she should say on the witness stand. Ms. Gordon replied that she had not. The Commonwealth then played the tape, and asked Ms. Gordon if it consisted of appellant telling her what to tell the jury. Ms. Gordon responded, "Yeah, but I'm not going to lie for him." The Commonwealth reminded her that she had been asked whether they had discussed her testimony. She responded that she had forgotten about it.

The witness sought to be impeached must first be offered the opportunity for explanation. Moreover, this Court has affirmed that, "The credibility of a witness' relevant testimony is always at issue, and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." Sanborn v. Commonwealth, 754 S.W.2d 534, 545 (Ky. 1988). This was not an impeachment on collateral facts. The truthfulness of her testimony and whether her testimony had been influenced by her brother was relevant to the case, not a collateral issue. Furthermore, we agree with the Commonwealth that an admonition to the jury that the cross-examination should only be considered for purposes of impeachment was not required, since evidence of prior inconsistent statements may be considered at trial for substantive purposes in Kentucky. Porter v.

Commonwealth, 892 S.W.2d 594, 596 (Ky. 1995), citing Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

Next, appellant argues that the Commonwealth twice presented improper comments during closing statements. First, appellant argues that it was improper for the Commonwealth's Attorney to thank the jury for its service on behalf of the victims and the Commonwealth's staff. The statement was not objected to at trial. In Thompson v. Commonwealth, 147 S.W.3d 22, 46 (Ky. 2004), this Court agreed that the Commonwealth should not imply that it was acting on behalf of victims, since the Commonwealth's duty is to represent the Commonwealth. In Thompson, this court concluded that the Commonwealth's statement that it was representing the victim approached the "line of impropriety" but still fell within the latitude of acceptable closing argument. Id. The prosecutor's statement of appreciation was even less meaningful than the statement in Thompson that the Commonwealth acted for the victim, and so it logically falls within the bounds of permissible argument as well.

Appellant next contends that the Commonwealth argued facts not in evidence. This statement was also made without objection from the defense. Appellant testified that he had purchased the items taken in the burglaries from a man named Billy, who had told appellant that he bought them at a flea market. There was no evidence at trial about the flea market, but in closing argument the prosecutor questioned whether the flea market story could be true based on personal knowledge of the only flea market operating in Carroll County. Appellant asserts this argument including facts not in evidence damaged the heart of his defense. The Commonwealth points out that appellant testified that he did not believe Billy's flea market story, but he was not concerned with whether Billy had stolen the items.

We conclude that appellant's argument fails because of the lack of a contemporaneous objection. In order to preserve error as to argument of counsel, there must be an objection at the time of the argument. Sizemore v. Commonwealth, 844 S.W.2d 397 (Ky. 1992) overruled on other grounds, McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994). This Court has also stated that we will reverse for prosecutorial misconduct in a closing argument only if the misconduct is "flagrant" or if each of the following three conditions is satisfied: (1) proof of defendant's guilt is not overwhelming; (2) defense counsel objected; and (3) the trial court failed to cure the error with a sufficient admonishment to the jury. Barnes v. Commonwealth, 91 S.W.3d 564, 568 (Ky. 2002). Since here, defense counsel made no objection, it would be necessary for us to find that the error was "flagrant."

We agree with the Commonwealth that there was no flagrant misconduct. It was not necessary for the jury to believe that the items had been obtained from a Carroll County flea market in order to accept appellant's version of his defense. Moreover, the jury was informed that the closing statements of counsel were not evidence in the case. We find no flagrant error.

Next, appellant complains that the instructions were erroneous. Regarding the instructions in the penalty phase, he argues they failed to identify the specific offense to which the instruction applied. The first instruction listed by count number the offenses (i.e. receiving stolen property or burglary) and the degree of the offense. There followed verdict forms for each offense. The verdict forms did not identify the location of the burglary or the victims of the count in question.

The Commonwealth responds that appellant made only a general objection to the instructions in the penalty phase but did not make this specific allegation below and

so it is unpreserved. RCr 9.54(2) provides that a party may not assign as error the giving of an instruction unless the party tenders an instruction or objects before the jury is instructed, stating specifically the matter to which the party objects and the grounds of the objection. We agree that appellant's failure to question the verdict forms below leaves him unable to argue the irregularity on appeal. Moreover, we believe that the offenses in the penalty phase instructions were sufficiently identified by count number and offense, and so this is not a case of clear error.

Next, appellant argues that the trial court erred in failing to instruct the jury properly on the burden of proof, the presumption of innocence, and the definition of reasonable doubt. The Commonwealth responds that appellant failed to adequately preserve his arguments that the instructions fell short of properly instructing the jury, and therefore this Court should not address the merits of the arguments. We agree. Appellant's counsel expressed displeasure with the instructions on the presumption of innocence and one instructing as to reasonable doubt as to lesser included offenses, but the court indicated standard instructions on these concepts would be given. We do not find in the record where appellant made the additional arguments he now makes on appeal. If appellant tendered separate instructions they were not made part of the record on appeal. RCr 9.54. Thus, we find this allegation of error is not preserved. RCr 9.54(2). We further note that it is the rule in this Commonwealth that the instructions should not attempt to define reasonable doubt. RCr 9.56(2).

Finally, appellant argues that he was deprived of a fair trial when the prosecutor was allowed to reopen its case to call a witness. Appellant acknowledges that the trial court has broad discretion concerning whether to permit the introduction of additional evidence under such circumstances. Davis v. Commonwealth, 795 S.W.2d 942, 947

(Ky. 1990). Appellant argues that in contrast with the evidence in Davis, the evidence for which the court reopened the case below was previously available and was not critically important. Notwithstanding, appellant has not identified any impropriety by the trial court. Thus, we find no abuse of the trial court's discretion.

We have found no allegation of error which requires reversal in this case. Thus, we affirm appellant's conviction and sentence.

All sitting. Lambert, C.J.; McAnulty, Minton, and Scott, J.J., concur. Noble, J., dissents by separate opinion in which Cunningham, and Schroder, J.J., join.

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Supreme Court of Kentucky

2005-SC-000180-MR

DAVID GORDON — APPELLANT

V.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
NO. 04-CR-00095

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE NOBLE

Because I believe that when the appropriate harmless error analysis is applied to the facts of this case it is necessary to reverse as to the burglary charges, I dissent.

Appellant argues that the trial court erred by allowing extensive testimony from Sheriff Maiden about the items found in Appellant's car—the lug wrench, screwdriver, and brake spoon. Specifically, Appellant claims that it was error for the sheriff to describe the items as burglary tools and to discuss at length how he thought they had been used to commit the burglaries.

When first asked about the items, Sheriff Maiden testified that he believed they were burglary tools. Appellant's attorney objected and asked for a limiting instruction. The trial court sustained the objection but denied the limiting instruction. The Commonwealth's attorney then moved on to ask about other items, but a few minutes later returned to the tools found in the car by asking the sheriff about photographs of them. At that point, defense counsel asked to approach the bench, where he reminded the court that his earlier objection to the sheriff's testimony about the items in question

had been sustained. Defense counsel argued that the Commonwealth could not prove that the items in the car were burglary tools or that they had anything to do with the burglaries. The Commonwealth's attorney asserted that he was confident he would be able to link the items in order to make any opinion testimony by the sheriff proper. The trial court ruled that the defense could more appropriately address the matter on cross-examination.

The Commonwealth's attorney first asked about the lug wrench. The sheriff then testified that it had been found in Appellant's car, that a hook had been attached to it, and that the hook was "a way to carry it" on a belt or pants. Appellant's attorney objected that this was speculation, and the trial court again ruled that it could be addressed on cross-examination. The sheriff testified that the end of the lug wrench was "chipped up pretty good" and again that it could hang from a belt or pants. He also testified that the brake spoon and screwdriver had been found in Appellant's car, but he did not discuss the use of those tools at that time.

The Commonwealth's attorney then turned to the burglaries themselves. The sheriff testified that a sliding door in the rear of Joe Verme's house had been pried open. There were two or three marks and some blue paint on the door. Sheriff Maiden testified that he believed the blue paint came off a hammer found at the scene, but that the burglars had been unable to open the door with the hammer. He testified that there was another mark on the door indicating the burglars used something else to pry it open, and that he believed the brake spoon had been used to do so. Defense counsel again objected, arguing that the sheriff's testimony in this regard was "speculation" and "guesswork." The court overruled the objection and stated that it was a matter for cross-examination.

On cross-examination, the sheriff acknowledged that he had done no testing to confirm his opinion about the use of the brake spoon. He asserted that he had measured the end of the tool but had failed to record the measurement. He also acknowledged that he had not gone to the Vermes' house to investigate the matter or to measure the pry marks on the door.

1. Was the Testimony Admitted in Error?

Appellant argues that the sheriff's testimony about the nature and use of the tools found in the car was admitted erroneously for two reasons. He contends that the testimony violated KRE 602 because the sheriff demonstrated that he lacked personal knowledge of the matter about which he testified. He also argues the testimony violated KRE 701, concerning opinion testimony by lay witnesses, and KRE 702, concerning testimony by experts. He is correct.

Sheriff Maiden should not have been allowed to characterize the items found in the car as burglary tools or to testify how he thought the items were used to pry open the door. The sheriff had not done any tests or investigation at the scene to establish whether his theories about the items were correct. He specifically testified that he did not measure the pry marks at the scene, which might have allowed him to make a comparison to the brake spoon. Thus, the sheriff's testimony was speculative, was not based on any established expertise or personal knowledge, and was not rationally based on his perception. The sheriff's testimony in this regard was admitted erroneously.

2. Harmless Error Standard

The question here is whether the erroneous admission of the sheriff's testimony was harmless error. See RCr 9.24; KRE 103(a). As this Court said in Jarvis v.

Commonwealth, 960 S.W.2d 466 (Ky. 1998), "The relevant inquiry under the harmless error doctrine 'is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Id. at 471 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230-31 (1963); see also Morgan v. Commonwealth, 189 S.W.3d 99, 108 n.27 (Ky. 2006) ("'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967)."); Ernst v. Commonwealth, 160 S.W.3d 744, 756 (Ky. 2005) (citing Jarvis); Shockley v. Commonwealth, 415 S.W.2d 866, 871 (Ky. 1967) (noting that under the harmless error rule of the old Criminal Code of Practice, "the court has in some cases refused to reverse where on the whole case the real truth was so apparent that the error could have had no real effect on the result of the trial"). Properly, these cases focus on whether the erroneously admitted evidence contributed to the verdict.

That this is a difficult standard to apply is without question. Its inherent difficulty has in some cases evolved to the misstatement of the inquiry as, "Is there substantial evidence of guilt?" with the focus on whether the verdict would have been different absent the error. See Commonwealth v. Preece, 844 S.W.2d 385, 388 (Ky. 1992) (holding an error harmless because "circumstantial evidence produced at trial was more than sufficient to support the conviction of appellee"); Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983) ("[A]n appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." (emphasis added)); see also Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969), overruled in part on other grounds, Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983) ("What it really boils down to is that if upon the whole case this court does

not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.").

This erroneous standard comes down to requiring the appellate court to inquire into the defendant's factual guilt by reviewing whether there is "substantial evidence" to support a finding of guilt absent the error. This becomes a "guilt-based test," leading the appellate court to speculate on whether the jury would have convicted the defendant if they had not heard the erroneously admitted evidence. The appellate court must thus base its ruling on a trial that the jury did not actually hear. The infiltration of this diluted standard into the Court's jurisprudence has not gone entirely unnoticed. In fact, over time it has led to some internal debate within this Court as to what the proper standard is. Compare Taylor v. Commonwealth, 175 S.W.3d 68, 72 (Ky. 2005) (applying the substantial evidence test and noting that the evidence of guilt absent the error was "mountainous" and that the result would have been no different), with id. at 79 (Cooper, J., concurring in part, dissenting in part) (arguing that the proper measure of harmless error is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction).

No doubt, some will argue that there is no significant distinction between these two approaches. However, the late Chief Justice of the California Supreme Court noted, "[t]here is a striking difference between appellate review to determine whether an

whereas it is more difficult to show that a piece of evidence did not have a reasonable possibility of contributing to a guilty verdict.

However, perhaps the most compelling argument in favor of the "effect on the verdict" approach over the substantial evidence test is that propounded in Justice Scalia's majority opinion in Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993). Essentially, the United States Supreme Court determined that the effect on the verdict approach is the only viable alternative because the substantial evidence approach requires the appellate court to hypothesize a verdict that could result from the evidence absent the error, which undermines the right to a jury trial:

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See Chapman[v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)] (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." Yates v. Evatt, 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279-80, 113 S.Ct. at 2081-82; id. at 280, 113 S.Ct. at 2082 ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty."); see also Weiler v. United States, 323 U.S. 606, 611, 65 S.Ct. 548, 551 (1945) ("We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the

jury and, under our system of justice, juries alone have been entrusted with that responsibility."); Bollenbach v. United States, 326 U.S. 607, 615, 66 S.Ct. 402, 406 (1946) ("From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.").

However, the correct measure of harmless error—whether the error may have contributed to the verdict—does not pose this danger because it "does not invade the province of the jury." Roger J. Traynor, The Riddle of Harmless Error 13 (1970).

> If the court is convinced upon review of the evidence that the error did not influence the jury, and hence sustains a verdict, a fortiori there is no invasion of the province of the jury. There is likewise no invasion should it appear instead that the error did influence the jury, and hence contaminated the verdict, for the appellant did not get the jury trial to which he was entitled.

Id.

This is not to say that an appellate court must entirely ignore the outcome or that it cannot consider the weight of the evidence at all when properly evaluating harmless error. See Kotteakos v. United States, 328 U.S. 750, 764, 66 S.Ct. 1239, 1247 (1946) (noting in the context of an effect on the verdict harmless error analysis: "[T]his does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum."). Such considerations are

inescapable. The danger, however, arises when "the weight of the evidence against a defendant is not just one factor playing into the harmless error analysis, but rather the sole criterion by which harmlessness is gauged." Harry T. Edwards, To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. Rev. 1167, 1187 (1995).

Some members of the majority believe that the above analysis does not pertain to state court decisions since the states are entitled to establish their own approach to the harmless error rule. That view, however, cannot be sustained because no state is free to interfere with a defendant's superceding United States Constitutional guarantee to a trial by jury.

Even worse, it is likely that the natural tendency is to shift from an effect on the verdict approach to a substantial evidence test, because the latter is both easier and, in some ways, appealing. As Judge Edwards has noted:

> It is one thing to state that the harmless-error analysis looks to the effect of the error on the verdict, rather than to the sufficiency of the evidence to support the verdict. It is yet another more difficult thing for us as appellate judges to adhere to that analytical framework when confronted with the concrete facts of a particular case in which the defendant's guilt seems well established. In such circumstances, it is by far the simpler and more natural course to construct a jurisprudence that cares only for punishment of the guilty, and, accordingly, to discount all errors that fail to cast doubt upon our perceptions of culpability.

Id. at 1191-92. This simply underscores the point above that the difficulty of applying the effect on the verdict standard has led to, and is evidenced by, its dilution. The best solution is conscientious adherence to the standard and vigilance in its application. See id. at 1192 ("Only through a determined adherence to principle do we look beyond the weight of the evidence to the likely impact of an error. Often, pressed by the demands

of the docket and mindful of a society wracked by crime, we simply lack the determination.").

Perhaps another tool is a simple but complete formulation of the test to be applied: An error is reversible error if the erroneously admitted evidence has a reasonable possibility of contributing to the conviction; it is harmless error if there is no reasonable possibility that it contributed to the conviction. The test can be applied by asking a single question: Is there a reasonable possibility that the error contributed to the conviction? If the answer is yes, then the error is prejudicial and reversal is required. If the answer is no, then the error is harmless.

3. Application of the Harmless Error Standard to the Sheriff's Testimony

Despite the potential difficulties with applying the effect on the verdict approach, its application in this case is relatively straightforward. As for the convictions for receiving stolen property, there is no question that the sheriff's improper testimony was harmless. Ample, separate evidence showed that Appellant possessed the stolen items. He was shown on videotape with some of the items, while others were actually found in his home and vehicle. More importantly, the erroneous portion of the sheriff's testimony related only to the discussion of the burglaries, not the subsequent possession of the stolen property, and was at best collateral to the question of whether Appellant possessed stolen property. Thus, there is little chance, much less a reasonable possibility, that the testimony contributed to the receiving stolen property verdicts.

The burglary convictions present a more difficult question. No direct evidence was discovered that could place Appellant at the scene of the burglaries. No witnesses saw the burglaries happen, and no fingerprints or other kind of identifier were collected

at the scene. Even worse is the fact that the tools in question—a lug wrench, screwdriver, and brake spoon—were the sort that could reasonably be found, as they were in this case, in the trunk of any car, yet no direct evidence showed that the seized tools were used in the burglaries. The only evidence that directly tied Appellant to the burglaries was the sheriff's improper, speculative testimony that the tools found in Appellant's car were not only burglary tools but were also the tools used to commit one of the burglaries.

The majority believes that the circumstantial evidence in this case is overwhelming as to the burglary charges as well. The relevant inquiry, however, is whether the sheriff's testimony had a reasonable possibility of contributing to the burglary verdict.

This testimony added such weight to the possible inference of guilt created by Appellant's possession of the stolen goods as to make that inference a distinct probability rather than a mere possibility. Absent the sheriff's testimony, the jury only had evidence that Appellant was in possession of the stolen goods. It was the sheriff's improper testimony connecting Appellant's brake spoon to a burglary that tipped the scales to a finding that he was also the burglar. In this light, it is clear that there is at least a reasonable possibility that the sheriff's erroneous testimony contributed to the guilty verdict on the burglary charges. Such improper testimony cannot be considered harmless error.

Consequently, Appellant's convictions for the burglaries should be reversed.

Cunningham and Schroder, JJ., join this dissenting opinion.