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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 21, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000384-MR

PEDRO HIGAREDA — APPELLANT

V.

ON APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN M. HORNE, JUDGE
NO. 07-CR-00591

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On the morning of July 28, 2007, Pedro Higareda ("Appellant") entered the mobile home of Sergio Pedraza, awakened him, and held a gun to his neck in an effort to collect money for marijuana which Sergio had agreed to sell. For that offense, Appellant was convicted of first-degree burglary and of being a second-degree persistent felony offender. Appellant received a ten-year sentence for the burglary conviction which was enhanced to twenty years by the PFO charge. He appeals to this court as a matter of right. Ky. Const. § 110(2)(b). Appellant asserts two arguments on appeal. First, Appellant argues that there was insufficient evidence to support his convictions. Second, Appellant argues that the Commonwealth's failure to amend his indictment from complicity to commit burglary to burglary in the first degree should have

resulted in a directed verdict of acquittal. For the reasons set forth herein, we affirm Appellant's conviction and sentence.

Sergio Pedraza was fifteen years-old when he first met Appellant. Shortly thereafter, Appellant recruited Sergio to sell marijuana. The police caught Sergio while in possession of the marijuana and confiscated both the marijuana and his money. When Appellant came to Sergio looking for the money from the drug sales, Sergio could not pay him. Over time Appellant's demands for the money became more frequent and more threatening, culminating with Appellant's burglary. Further facts will be developed below as necessary.

I. SUFFICIENCY OF THE EVIDENCE

Appellant first argues that the trial court erred by not granting his motion for a directed verdict of acquittal on the first-degree burglary charge. On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Williams v. Commonwealth, 178 S.W.3d 491, 493 (Ky. 2005); Bray v. Commonwealth, 177 S.W.3d 741, 746 (Ky. 2005). 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. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky.1991). On appeal we review the trial court's ruling on a directed verdict to see if a reasonable juror could find Appellant guilty in light of the evidence as a whole. Id. If a reasonable juror can find

Appellant guilty, the denial of the directed verdict was proper. A person is guilty of first-degree burglary when:

> With the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effectuating entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
> a) Is armed with explosives or a deadly weapon; or
> b) Causes physical injury to any person who is not a participant in the crime; or
> c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime

KRS 511.020

Upon review of the evidence presented, the trial court correctly denied Appellant's directed verdict motion. Pablo, the victim's nine year-old brother, testified that on the morning of the burglary, he, his brother, and his sister were in the living room of their mobile home watching cartoons. Everyone else in the home was asleep, including Sergio. Pablo testified that when Appellant knocked on the front door, he looked out of the window to see who was there while his brother answered the door. With the door open, Appellant asked for Sergio and was told by the children that Sergio was asleep in his room. Without permission from the children, Appellant entered the residence and proceeded to Sergio's bedroom. Pablo testified that he saw a gun sticking out of Appellant's pocket. Sergio testified that Appellant only visited the home once before and that he was not a frequent guest.

Appellant argues that the Commonwealth failed to prove that he entered the home unlawfully as required for a first-degree burglary conviction.

Appellant cites Fletcher v. Commonwealth, 59 S.W.3d 920, 922 (Ky. App. 2001), for the proposition that a burglary was not committed if one enters a home lawfully and subsequently commits a crime, even if he had the intent to commit the crime when he entered. The Fletcher decision, however, affords Appellant little support as it further holds:

> The evidence most favorable to the Commonwealth establishes that Fletcher knocked on the door and demanded that [the occupant] open the door, which he did. There was no evidence that [the occupant] made any kind of utterance, gesture, or movement that could reasonably constitute an invitation, either explicit or implicit, to Fletcher to enter the home . . . [I]t would be ludicrous to conclude that the mere opening of a door by an occupant of a private residence could be reasonably construed as an invitation to enter the residence. Such a result would imperil the time-honored principle that the home is a bastion of privacy and an occupant's rights therein would be seriously jeopardized.
> Since [the occupant] did not extend either an explicit or implicit invitation to Fletcher to enter the dwelling, Fletcher's entry into the dwelling by swinging his hand through the doorway for the purpose of assaulting [the occupant] was unlawful. Accordingly all the elements of burglary in the second degree were proved.

Id. at 923.

Viewing the evidence as a whole, we find that it would not be clearly unreasonable for a jury to find Appellant committed first-degree burglary. There was adequate evidence presented through Pablo and Sergio's testimony for a jury to believe beyond a reasonable doubt that Appellant entered the house unlawfully with a dangerous weapon with the intent to commit a crime. KRS 511.020. No evidence was presented at trial that Appellant was given implicit or explicit permission to enter Sergio's house. See Fletcher, 59 S.W.3d

at 923. Therefore, the trial court properly denied Appellant's motion for a directed verdict.

II. FAILURE TO AMEND THE INDICTMENT

Appellant next argues that the trial court should have sustained his motion for a directed verdict because the Commonwealth failed to prove that he was complicit in a burglary as charged in the indictment. Appellant asserts that, since the evidence pointed to Appellant as the principal offender rather than as an accomplice, the Commonwealth's failure to amend the indictment was fatal to its case. However, Appellant is simply mistaken when he argues that he was indicted for "Complicity to Commit Burglary". Although the Warrant of Arrest issued for Appellant on September 24, 2007, erroneously identified the charge as Complicity to Commit Burglary, the actual indictment filed on September 18, 2007, stated: "... [T]he above named defendant committed the offense of Burglary in the First Degree...in that he burglarized the residence of another while armed with a deadly weapon." Thus, Appellant was tried on the same charge specified in the indictment and no amendment of the indictment was necessary.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment and sentence of the Boone Circuit Court.

All sitting. All concur.

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