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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 25, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000101-MR

DATE 7/16/09 Kelly Klaber D.C.
APPELLANT

SHAWN BARNETT

V. ON APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 07-CR-00147

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Brian Harmon and Dixie Sturgeon lived together at 259 Baybrook Circle. On the morning of May 1, 2007, at approximately 5:00 a.m., Mr. Harmon entered his vehicle to go to work. In his vehicle, he noticed papers from the glove box scattered on the seat and floorboard, as well as a pair of sunglasses that did not belong to him, and the cap to a missing bottle of Ralph Lauren Romance cologne. Mr. Harmon also noticed that the garage door was open a few feet, and he shut it with his remote control and left for work.

Approximately thirty minutes later, Ms. Sturgeon heard the garage door open. Ms. Sturgeon assumed it was Mr. Harmon returning from work, but when he did not come into the house after a few minutes, she went to the garage to investigate. Ms. Sturgeon opened the door in the house leading into the garage and saw Appellant, Shawn Barnett, standing at the foot of the steps.

Appellant appeared startled and was visibly intoxicated. Appellant mumbled to Ms. Sturgeon that he erroneously believed the home to be his uncle's and asked her to open the garage door so that he could leave. Ms. Sturgeon complied with his request, and Appellant exited the garage and walked down the street. Minutes thereafter, Ms. Sturgeon called 911. Nothing appeared to be missing from the garage. An officer arrived at the home, took Ms. Sturgeon's statement, and searched the interior of her 2002 Volkswagen Beetle. Inside, the floorboard was littered with beer cans and a bottle of Victoria's Secret perfume, neither of which belonged to Ms. Sturgeon.

Approximately fifteen minutes after Ms. Sturgeon placed the call to 911, Appellant was found walking on the sidewalk one mile away from the home on Baybrook Circle. An officer approached Appellant, and from six feet away could smell alcohol emanating from him. Appellant never tried to flee or hide from the police and readily identified himself as Shawn Barnett. When asked from where he had come, Appellant initially replied that he did not know. Moments later, Appellant changed his story and said that he was coming from Elm Fork Road, approximately 5.9 miles away from his current location. Appellant then told the officer that he lived at 400 North Central Avenue and was walking home. Appellant was subsequently arrested for alcohol intoxication. After a search of Appellant's person, two pairs of sunglasses, one radar detector, and a bottle of Ralph Lauren Romance cologne were found. Appellant was taken to jail, Mirandized, and interviewed.

Appellant told the interviewing officer a different story than what he told the arresting officer. He stated that he was coming from his friend Todd's house on Shun Road, but confirmed that he had told Ms. Sturgeon that he believed her home to be his uncle's. Appellant additionally indicated that he was attempting to walk to a party that Todd had earlier mentioned.

After Appellant's arrest, there were reports of other vehicle break-ins at 119 and 207 Baybrook Circle. Both vehicles at these locations had beer cans left in the floorboard, and an empty bottle of Jim Beam whiskey was found in one car. Appellant freely admits to entering each of the vehicles, and both either had items removed from them, or items placed within them, that did not belong to the owners.

At trial, the Commonwealth sought to introduce evidence of the other vehicle break-ins, as well as evidence of a black 1992 Acura having been observed on April 30, 2007, fleeing from police and abandoned near Baybrook Circle. The Acura was owned by Appellant's girlfriend, Tera Lindsey, and Appellant had permission to drive the vehicle. However, there was some dispute as to whether or not Appellant was the driver of the black Acura on that night. Appellant contends that he did not drive from Ms. Lindsey's house. Instead, he gave an implausible story of setting out on foot with approximately 15-18 beer cans and a bottle of Jim Beam whiskey in his pockets. The abandoned Acura was later found with beer cans littered on the floorboard.

After a hearing on the admissibility of the other vehicle break-ins and the

black Acura, the trial judge examined the evidence solely under KRE 401 and 403 grounds. The court allowed the introduction of evidence of the fleeing Acura, but limited the evidence of the other break-ins to the stolen Victoria's Secret perfume bottle found in Ms. Sturgeon's vehicle and the vehicle from which it came. The Commonwealth used a redacted version of Appellant's video testimony from the second trial during its case in chief.¹ This video contained admissions by Appellant to entering the other vehicles and then rummaging around and falling asleep in them. After the close of the Commonwealth's case, Appellant moved for a directed verdict. This motion was denied. At the close of all evidence, Appellant did not renew his motion for a directed verdict. The jury ultimately returned a guilty verdict of second-degree burglary and being a second-degree persistent felony offender, recommending a sentence of twenty (20) years. He now appeals the judgment as a matter of right, Ky. Const. § 110(2)(b).

Appellant raises two arguments on appeal to this Court. First, Appellant argues that the trial court erred by allowing evidence of the other vehicle break-ins and the black Acura to be admitted at trial. Appellant also argues that the trial court erred in denying his motion for directed verdict on the charge of second-degree burglary.

Each argument shall be addressed in turn.

Admission of evidence of break-ins of other vehicles

¹ Appellant was tried three times on these charges, with the first trial ending in a mistrial after the discovery of new evidence. The second trial also ended in a mistrial after the jury, during the guilt phase, deadlocked and was unable to reach a verdict.

A trial court's ruling with respect to evidentiary matters will not be overturned absent an abuse of discretion. Commonwealth v. King, 950 S.W.2d 807 (Ky. 1997). Whether to admit or exclude evidence to ensure fairness during the trial is within the sound discretion of the trial court. Mullins v. Commonwealth, 956 S.W.2d 210 (Ky. 1997). In determining whether the trial court abused its discretion, we must find that "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Brewer v. Commonwealth, 206 S.W.3d 313, 324 (Ky. 2006) (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999)).

Appellant's first argument is that the trial court erred in allowing the Commonwealth to introduce evidence of the other vehicle break-ins on Baybrook Circle. Appellant contends that in so doing, the Commonwealth violated the trial court's partial granting of Appellant's motion in limine, which limited the allowable evidence to the Victoria's Secret perfume bottle found in Ms. Sturgeon's vehicle and the car from which it came. Appellant contends that the probative value of the evidence concerning the other vehicle break-ins on Baybrook Circle was substantially outweighed by its prejudicial effect on Appellant, and that the evidence falls under the framework of KRE 404(b) as laid out in Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994). We disagree.

"Opening the door," sometimes referred to as "curative admissibility," occurs when one party introduces an inadmissible fact that opens the door for the opponent to offer similar facts whose only claim to admission is that they

negative, explain, or counterbalance the prior inadmissible fact. Norris v. Commonwealth, 89 S.W.3d 411, 414 (Ky. 2002). Here, Appellant can hardly claim prejudice. Throughout Appellant's entire case, beginning during opening statements, Appellant made repeated references to the break-ins of other vehicles. Indeed, the goal of this trial tactic was to convince the jury that Appellant was so intoxicated as to not have the requisite mens rea for committing second-degree burglary. Per the trial court's ruling, such evidence should not have been admissible. The Commonwealth introduced evidence of the same simply to rebut claims of Appellant's intoxication. Appellant cannot seek the benefit of introducing the evidence for his own purpose, yet cry foul when the Commonwealth seeks to use it to his detriment. By making reference to the other break-ins throughout his case, Appellant waived any objection he may have had. "[T]he appellant[], having opened the book on the subject, [was] not in a position to complain when [his] adversaries sought to read other verses from the same chapter and page." Harris v. Thompson, 497 S.W.2d 422, 430 (Ky. 1973).

Additionally, evidence of offenses other than the one charged in an indictment is admissible to establish criminal intent under KRE 404(b)(1). Matthews v. Commonwealth, 163 S.W.3d 11, 17 (Ky. 2005). When a defendant raises the issue of his mental state at the time of the commission of the charged offense, evidence of prior bad acts is admissible because the defendant's mental state is a material issue. Walker v. Commonwealth, 52

S.W.3d 533 (Ky. 2001). The Commonwealth was required to prove intent as a separate element of the crime charged. This alone was probably enough to place the issue of Appellant's mental state in dispute. Appellant's intoxication defense, which attacked the intent element of the burglary charge, certainly placed it in dispute. The Commonwealth introduced evidence of multiple vehicle break-ins on Baybrook Circle which occurred directly prior to Appellant's entering Ms. Sturgeon's garage. In each of the vehicles, items were removed, or items were placed in them, that did not belong to the owners. This evidence is substantially probative of Appellant's state of mind when he entered Ms. Sturgeon's vehicle, located her remote control to open the garage door, and subsequently entered the garage. It certainly rebuts his explanation to Ms. Sturgeon as to his purpose for being in the garage. Therefore, the trial judge did not abuse his discretion in admitting the evidence of the other vehicle break-ins.

Admission of evidence concerning the black Acura

Appellant next argues that the introduction of evidence concerning the black Acura improperly cast Appellant in a negative light, which created an impermissible propensity inference. Furthermore, Appellant argues that the evidence is ultimately irrelevant to the burglary charge. The Commonwealth contends that the evidence is relevant to prove opportunity or absence of mistake or accident, and that it casts doubt on Appellant's intoxication defense. We agree with the Commonwealth.

KRE 401 provides that relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” To show that evidence is relevant, only a slight increase in probability must be shown. Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999). The Commonwealth asserts that this evidence shows that Appellant was too intoxicated to drive a car at the time he arrived in Baybrook Circle and further impugns his character for veracity. The Commonwealth also introduced statements by Appellant’s girlfriend that Appellant slept at her residence on April 30th, and that the black Acura was parked in her driveway that night. When Ms. Lindsey awoke the next morning, neither Appellant nor the Acura were at her home. This evidence clearly satisfies the minimal threshold for relevancy.

Moreover, this evidence is not so prejudicial to Appellant as to mandate its exclusion under KRE 403. The Commonwealth did not seek to introduce evidence of the fleeing Acura to show that Appellant had a criminal disposition. Instead, it was offered to explain the “necessary context, background, and perspective” of the criminal investigation. Norton v. Commonwealth, 890 S.W.2d 632, 638 (Ky.App. 1994) (“As further pointed out by Lawson, the case law from which the language utilized in KRE 404(b)(2) is extracted suggests ‘that the rule is intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed

by the defendant . . .”). The Acura evidence shows how Appellant reached Baybrook Circle and casts doubt on Appellant’s intoxication defense.² No inferential link between Appellant’s fleeing the police and the burglary was made by the Commonwealth during its presentation of the evidence. We cannot say that the trial judge abused his discretion in allowing the introduction of the evidence concerning the black Acura.

Motion for directed verdict on the second-degree burglary charge

Appellant lastly contends that the trial court erred in failing to grant his motion for a directed verdict on the charge of second-degree burglary. Although Appellant moved for a directed verdict at the close of the Commonwealth's evidence, he did not renew his motion at the close of all the evidence. A “motion for a directed verdict made at the close of the plaintiff’s . . . case is not sufficient to preserve error unless renewed at the close of all the evidence” Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977). Appellant nevertheless requests insufficiency of the evidence review under RCr 10.26, arguing that the trial court's failure to direct a verdict of acquittal constituted palpable error. For the reasons that follow, we disagree.

Palpable error is one “which affects the substantial rights of a party [and] may be considered . . . by an appellate court on appeal, *even though insufficiently raised or preserved* for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.” RCr 10.26 (emphasis added). The basic palpable error review, where an

² His driving the car is also more consistent with his statement of carrying 15-18 cans of beer and a bottle of Jim Beam whiskey on his person.

unpreserved error requires reversal, is “if a manifest injustice has resulted from the error,” which means there “is [a] probability of a different result or [the] error [is] so fundamental as to threaten a defendant's entitlement to due process of law.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

We recognize not only that “the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt and that the failure to do so is an error of Constitutional magnitude,” but also that the nature of the error alleged here is such that, if the trial court did, in fact, err by failing to direct a verdict of acquittal, that failure would undoubtedly have affected Appellant's substantial rights.

Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836-37 (Ky. 2003) (internal citations omitted).

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.

Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, he is entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

Considering all evidence and drawing all inferences in favor of the Commonwealth, the trial court did not err in failing to direct a verdict for the Appellant. The proof presented by the Commonwealth indicated that Appellant

entered Mr. Harmon's vehicle and stole a bottle of Ralph Lauren Romance cologne, leaving behind only the top; that Appellant entered Ms. Sturgeon's 2002 Volkswagen and rummaged through it, leaving inside beer cans and a bottle of Victoria's Secret perfume belonging to the owner of another vehicle down the street; that Appellant entered the garage of Ms. Sturgeon; that other vehicles had been entered and items either deposited in them or stolen from them; that after Ms. Sturgeon placed the 911 call, Appellant was found walking down the street with two pairs of sunglasses and one bottle of Ralph Lauren Romance cologne with a missing top, none of which belonged to him; and that in response to questioning by the police, Appellant gave multiple differing accounts as to what had transpired. Our cases have long held that proof of the act of felonious breaking and entering creates an inference of criminal intention. Patterson v. Commonwealth, 251 Ky. 395, 65 S.W.2d 75 (1933). A review of the evidence presented in this case clearly indicates that the trial judge correctly determined that a reasonable juror could fairly find guilt beyond a reasonable doubt. The Commonwealth produced evidence that was considerably more than a mere scintilla, and the case was properly presented to the jury for determination.

For these reasons, the judgment of the Jessamine County Circuit Court is affirmed.

All sitting. All concur.

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