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RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000187-MR

DAVID WILLIAM GRIDER — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN LYNN SCHULTZ, JUDGE
NOS. 08-CR-002820 AND 09-CR-000405

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On July 27, 2008, at approximately 11:00 p.m., Appellant, David William Grider, and Josey Kaelin knocked on Nicole Dougherty's apartment door. Dougherty lived on the second floor of an apartment complex located in Louisville, Kentucky. When Dougherty asked who was knocking at the door, she received no answer. She then peered through the peephole, but saw no one. Dougherty assumed that it was Appellant, as he had indicated earlier that day that he wanted to come by her apartment. Once Dougherty opened the door, she saw two individuals wearing hooded sweatshirts, one red and the other black. Both sweatshirts were worn backwards, with eye holes cut out in the hoods. Each man was aiming a chrome pistol at her face. One of the intruders pushed her aside and yelled: "Give me your money bitch. Give me all, every . . . . Give me your purse. Give me everything you have." The man

in the black hooded sweatshirt proceeded down her apartment hallway, while the man in the red hooded sweatshirt stayed with Dougherty in the living room. Again, the individual demanded Dougherty's purse.

At trial, Dougherty testified that she could see that the man wearing the red sweatshirt also wore glasses. Due to the glasses, as well as his body shape, height, and voice, Dougherty believed that the individual was Appellant, whom she had known since childhood. She even said to him during the burglary: "David, I don't have anything." Moments later, there was another knock on the door. The person who lived directly beneath Dougherty, Ernie Banks, had heard screams and saw that the door was slightly ajar. Appellant then told Kaelin that they needed to leave. At this point, the door swung open and Banks was confronted by Kaelin. As Banks took several steps backward, Kaelin fled down the stairs. As Appellant left the apartment, he pressed his pistol against Banks' chest before fleeing down the stairs as well.

As both men left her house, Dougherty called 911. She told the emergency operator that "[she] believed one of [the men] was David Grider," and that he took her money and wallet. Inside her purse was a check payable to Dougherty in the amount of $7,602.13 and drawn on National City Bank. This check was never cashed, and none of her personal belongings were ever recovered. A search of the nearby area failed to find the guns or clothing used by either individual.

Appellant was subsequently arrested on July 31, 2008. Kaelin, too, was

indicted for the same offenses and, in exchange for a plea of guilty, offered to testify against Appellant. Although additional facts are pertinent to this case, they will be developed in detail later in this opinion.

Appellant was ultimately convicted of first-degree burglary and sentenced to twenty years, enhanced as a first-degree persistent felony offender. He now appeals the final judgment entered as a matter of right. Ky. Const. § 110(2)(b).

Appellant raises three issues on appeal: (1) the trial court abused its discretion in allowing the introduction of prior bad acts evidence; (2) Appellant was entitled to a directed verdict on the burglary charge, as no evidence was introduced to show that the weapon was operable, and the trial court erred by instructing the jury that the weapon was a "deadly weapon" as a matter of law; and (3) the trial court impermissibly struck a juror because of his knowledge of the 85% parole eligibility rule.

Prior bad acts evidence

Nicole Dougherty testified at trial that, prior to the events of July 27, 2008, she and Appellant were driving to cash a check. While in the car, Appellant told Dougherty that she "should get a job there so that [Appellant] could come and rob the place and so that [Dougherty] would know how to get in and things like that." According to Dougherty, Appellant indicated that if he were to rob the store, he would do so by saying: "Bitch, give me everything you've got, you know, open . . . give me whatever's in the drawer, give me whatever money's there." The Commonwealth sought to introduce this

evidence due to the similarity of Appellant's statements in the car and during the burglary in an apparent attempt to prove identity. Over Appellant's objection, this testimony was deemed admissible as an admission of a party opponent pursuant to KRE 801A(b). Appellant now argues that the admission of Dougherty's testimony was error because it was not relevant and unduly prejudicial, and also because the statement was irrelevant to prove identification and only served to prove he had a criminal disposition under KRE 404(b).

It is well-established that determinations as to the relevance and admissibility of evidence are left to the sound discretion of the trial court. *Simpson v. Common*wealth, 889 S.W.2d 781, 783 (Ky. 1994). A judge's decision to admit certain evidence is subject to reversal only after a finding that the decision amounted to an abuse of discretion. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999) (citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)).

We reject Appellant's contention that a mere hypothetical phrase—what Appellant *would have said* had he robbed a check cashing store—is evidence of prior criminal acts that implicates KRE 404(b). However, we refrain from making the categorical declaration that mere statements can never be bad acts. In this case, we have a prior statement, not a prior bad act. KRE 801(c) defines

hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." That statement is not hearsay, nor is it inadmissible. It was not introduced for its truthfulness; however, it is both relevant and probative as to Appellant's *mens rea* and intent, as well as corroborating his identity. Accordingly, we do not believe that the trial court abused its discretion in admitting Appellant's prior statement.

Directed verdict on first-degree burglary charge

KRS 500.080(4)(b) provides that a "deadly weapon" is any weapon "from which a shot, readily capable of producing death or other serious physical injury, may be discharged." Appellant argues that, because the Commonwealth failed to introduce any evidence concerning the operability of the handgun used in this case, the evidence is insufficient to sustain a conviction for first-degree burglary. We disagree.

Recently, this Court has had the opportunity to revisit our opinions in *Merritt v. Commonwealth*, 386 S.W.2d 727 (Ky. 1965) and *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976). Those two opinions stood for the proposition that any object is a "deadly weapon" if used in a way that causes the victim to believe it is a deadly weapon, even, for example, a toy gun. However, in *Wilburn v. Commonwealth*, --- S.W.3d ----, 2010 WL 997164 (Ky. March 18, 2010) (No. 2008-SC-000787-MR), we expressly rejected such a reading of the statute. Instead, this Court stated that "the legislature's use of

the term 'any weapon' was intended to apply to the class of weapons as a whole, and not an individual weapon falling within the class." *Id.* at *7. We declined to interpret the phrase as referring to the specific weapon in question, because to do so

> would create a loophole allowing robbers to gain the decidedly advantageous benefit of pointing an actual pistol at the victim, but allowing him to escape the consequences of the deadly weapon enhancement to first-degree robbery by, for example, simply removing the firing pin or emptying the chamber. (Footnote omitted.)

Id.

In the context of this case, the chrome pistol observed by both Dougherty and Banks, regardless of its operability, falls into the class of weapons which may discharge a shot that is readily capable of producing death or serious physical injury. Thus, Appellant was armed with a deadly weapon within the meaning of KRS 511.020(l)(a), and he was not entitled to a directed verdict upon the grounds that the Commonwealth failed to prove the firearm met the statutory definition of a deadly weapon.

In addition, Appellant also claims error in the jury instructions. Appellant claims that the trial court defined, as a matter of law, the gun as both a "deadly weapon" and a "dangerous instrument." The instructions provided to the jury were as follows:

> You will find the defendant guilty of First-Degree Burglary under this instruction if and only if, you believe from the evidence beyond a reasonable doubt all of the following:

> A. That in this county on or about July 27, 2008, and before the finding of the indictment herein, acting alone or in complicity with another, he entered and remained in an apartment wherein Nicole Dougherty resided without the permission of Ms. Dougherty or any other person authorized to give such permission;
>
> B. That in so doing, he knew he did not have such permission;
>
> C. That he did so with the intention of committing a crime therein;
>
> AND
>
> D. That when in effecting entry or while in the building or in immediate flight therefrom, he *was armed with a gun, and used or threatened the use of a gun* against Nicole Dougherty, who was not a participant in the crime. (Emphasis added.)

Based on the structure of the jury instructions in this case, it appears that the jury was only allowed to make a determination on whether Appellant was carrying the object in question, and that the judge presupposed that the object was a deadly weapon. We have previously found this to be error. *See Thacker v. Commonwealth*, 194 S.W.3d 287, 290 (Ky. 2006). However, an error regarding an erroneous jury instruction that omits an essential element of the offense is subject to harmless-error analysis. *Neder v. United States*, 527 U.S. 1 (1999); *Thacker*, 194 S.W.3d at 291. As long as it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty," an actual jury finding on that element is not mandated and an appellate court

can find the error harmless. *Neder*, 527 U.S. at 18. In this matter, it is beyond question that the jury would have found the pistol carried by Appellant to be a deadly weapon. *See Thacker*, 194 S.W.3d at 291 ("[T]here is little doubt that the jury would have found a .22-caliber revolver to be a deadly weapon."). Thus, the error is harmless.

Striking juror for cause

Appellant's final allegation of error is that the trial court impermissibly struck Juror #33 for cause due, in part, to his knowledge of the "85% time" rule of KRS 439.3401(1)(l) and (3).

RCr 9.36 instructs that a trial judge shall excuse a juror for cause where there is a reasonable basis to believe that the juror cannot be fair and impartial. However, we recognize that the trial court is granted broad discretion in determining whether a prospective juror should be stricken for cause. *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994). We have long held that a trial court's decision on whether to strike a prospective juror for cause is reviewed for abuse of discretion. *See Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007); *Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002). A reviewing court must weigh the probability of prejudice or bias based on the entirety of the juror's responses. *Shane*, 243 S.W.3d at 338.

During the jury selection process, the Commonwealth asked the panel how many of them would lean towards the defendant and against the Commonwealth. Juror #33 raised his hand and explained that he had

previously served 13 years and 4 months for the wanton murder of his wife.[1] Also, when relating that his son was facing a robbery charge, Juror #33 indicated that he believed the "85% rule" was stiff, and that the Commonwealth had treated his son unfairly. Despite this, Juror #33 stated that he could be fair, and that his prior knowledge of the criminal justice system would not sway his decision. The Commonwealth moved to strike Juror #33. While noting that it was a "close call," the trial court ultimately struck the juror for cause over defense counsel's objection.

After considering the facts and circumstances surrounding Juror #33's responses, we cannot say that the trial judge abused her discretion. It matters not that Juror #33 felt he could remain impartial. *See Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991) ("It makes no difference that the jurors claimed they could give the defendants a fair trial."). Juror #33 unequivocally stated that he would lean towards the defendant and against the Commonwealth due to his own history, as well as his son's, in dealing with the court system. In addition, he stated that he believed the "85% rule," which was potentially applicable in this case, was "a little stiff." Despite Juror #33's protestations to the contrary, these statements indicate a reasonable possibility that they "would . . . subconsciously affect [his] decisions of the case adversely to the [Commonwealth]." *Tayloe v. Commonwealth*, 335 S.W.2d 556, 557 (Ky. 1960). His claims of impartiality, when viewed in light of all the above-

[1] Juror #33 later stated that he had been pardoned and that he was permitted to serve on a jury.

mentioned facts, "should not have been taken at face value." *Marsch v. Commonwealth*, 743 S.W.2d 830, 834 (Ky. 1987). Accordingly, we find no error.

Based upon the foregoing, we affirm the decision of the Jefferson Circuit Court.

Abramson, Cunningham, Schroder and Venters, JJ., concur. Scott, J., concurs in result only. Minton, C.J. and Noble, J. dissent for the reasons set forth in the dissent in *Wilburn v. Commonwealth*, --- S.W.3d ----, 2010 WL 997164, (Ky. March 18, 2010) (No. 2008-SC-000787-MR).

COUNSEL FOR APPELLANT:

Daniel T. Goyette
Louisville Metro Public Defender
200 Advocacy Plaza
719 West Jefferson Street
Louisville, KY 40202

Aline Falconer Blizard
Assistant Public Defender
Office of the Louisville Metro Public Defender
200 Advocacy Plaza
719 West Jefferson Street
Louisville, KY 40202

Ciceley Jaracz Lambert
Assistant Appellate Defender
Office of the Louisville Metro Public Defender
717-719 West Jefferson St.
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

William Bryan Jones
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601