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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: NOVEMBER 23, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000412-MR

KENT R. MASON — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY JON KALTENBACH, JUDGE
NO. 09-CR-00538

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Kent R. Mason appeals as a matter of right from a judgment finding him guilty of first-degree burglary, fourth-degree assault, and being a first-degree persistent felony offender (PFO I). Finding no reversible error, we affirm.

Appellant and Leticia Broadnax had an on-again/off-again romantic relationship over the course of 2008 and 2009. Broadnax lived in a townhouse apartment at Black Oaks Apartments in Paducah, Kentucky. She was the sole tenant, and only her name was on the lease. Appellant would frequently spend the night, and he kept some personal belongings in Broadnax's apartment, including clothing. However, according to Broadnax, Appellant did not have a key, and he was not permitted to stay in her townhouse while she was at work. Broadnax testified that every morning, before she went to work, she would drop

Appellant off at his sister's house, and then pick him up when she returned home from work.

Despite not permitting Appellant to remain in the apartment alone, Broadnax did permit Appellant to use her address to obtain a state-issued identification card and a new Social Security card. Appellant also used Broadnax's address for employment purposes and on a credit union application. Broadnax testified that Appellant used her address for the credit union so that the account statements would come to her address and Appellant's family would not know how much money he had. Appellant did not have a permanent address, but often stayed with his sister.

Broadnax and Appellant had a tumultuous relationship. According to Broadnax, Appellant frequently accused her of cheating on him. He claimed that there was a car he had never seen before parked at her townhouse. He also came to Broadnax's workplace and confronted her about allegedly cheating on him.

On November 17, 2009, Broadnax and Appellant had a conversation, and mutually agreed to end their relationship. Broadnax told Appellant that he could not stay at her townhouse anymore. The next day, Broadnax packed up Appellant's belongings and took them to Appellant's sister's house. The testimony indicated that, while Appellant may not have been aware that Broadnax had taken his belongings to his sister's house, he nevertheless had agreed with Broadnax that she would do this.

On the evening of the November 18, Appellant had been drinking and repeatedly called Broadnax. According to Broadnax, during one of the phone calls, Appellant told her, "If you play games, you get hurt." On the night of November 18, Broadnax locked her doors and went to bed.

At around 3:30 a.m. on November 19, Broadnax was awakened by the sound of breaking glass. She assumed that a recently hung picture had fallen. After a few minutes, she got up to use the restroom. As she prepared to enter the bathroom, she saw Appellant coming up the stairs. Appellant rushed up the stairs, grabbing Broadnax and turning her around. As she began to scream, Appellant put his hand over Broadnax's mouth. Broadnax broke loose and ran to her bedroom in an attempt to call 911; however, Appellant grabbed the phone and threw it.

A struggle ensued, and the two fell to the floor, with Appellant putting Broadnax in a headlock. Broadnax testified that Appellant told her that she was going to die and called her a "bitch," "tramp," "slut," and "whore." He continued to choke Broadnax while accusing her of cheating on him. According to Broadnax, Appellant removed her underwear in an attempt to see whether she had been cheating on him. He told Broadnax that he would cut her throat, and kept repeating, "If you play games, you're going to get hurt." He told Broadnax that her parents would find her dead in the morning. When Broadnax tried to get up, Appellant started punching her "like a man" in her side, chest, and face. Broadnax tried to convince him to leave her alone,

promising not to call the police. Eventually, Appellant passed out on top of Broadnax.

Broadnax called the police. When they arrived, they found that the townhouse's back screen door and the back door glass had been broken. Police officers went upstairs, finding Appellant still asleep on the bedroom floor. They awoke Appellant and arrested him. Police testified that, while Appellant smelled of alcohol, he did not appear to be extremely intoxicated. He was transported to the Paducah Police Department. Broadnax, meanwhile, was taken to the emergency room, where medical personnel diagnosed her with multiple facial, tongue, and scalp contusions.

Upon Appellant's arrival at the Paducah Police Department, Officer Rowley interviewed him. During the interview, Appellant admitted breaking in to Broadnax's residence, stating, "and then tonight I went over there and broke the window out. I ain't gonna lie." Later, he specifically said, "I broke in." He claimed that he put his hand over Broadnax's mouth to try to keep her from screaming. According to Appellant, he never hit Broadnax. He admitted that he did not have a key and that he was not allowed to stay in the residence when Broadnax was not there. He acknowledged that he knew his clothes had been taken to his sister's house.

Appellant did not testify at trial, but his strategy was to present evidence indicating that he lived in Broadnax's townhouse at the time of the assault. Defense counsel conceded that Appellant was guilty of fourth-degree assault, but argued he was not guilty of first-degree burglary.

Following a trial, the jury convicted Appellant of first-degree burglary and fourth-degree assault. The jury recommended a sentence of 12 months in jail for fourth-degree assault, and 20 years' imprisonment for first-degree burglary. The jury found Appellant guilty of PFO I, and recommended that the 20-year burglary sentence be enhanced to 30 years' imprisonment. The trial court imposed a 30-year sentence, and Appellant therefore appeals to this Court as a matter of right.[1]

Appellant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree burglary, because the Commonwealth failed to prove the element of intent to commit a crime.[2] At trial, defense counsel made a general motion for a directed verdict at the close of the Commonwealth's case, which the trial court denied. This general motion was insufficient to preserve the issue for appellate review.[3] At the close of all evidence, defense counsel again made a motion for a directed verdict. When the trial court asked defense counsel for specific grounds, defense counsel argued only that Appellant was a lawful resident of Broadnax's townhouse.

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[1] KY. CONST. § 110(2)(b).

[2] *See* KRS 511.020(1)(b) ("A person is guilty of burglary in the first degree when, *with the intent to commit a crime*, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building . . . he . . . [c]auses physical injury to any person who is not a participant in the crime . . . .") (emphasis added).

[3] *See Pate v. Commonwealth*, 134 S.W.3d 593, 597-98 (Ky. 2004) ("CR 50.01 requires that a directed verdict motion 'state the specific grounds therefor [,]' and Kentucky appellate courts have steadfastly held that failure to do so will foreclose appellate review of the trial court's denial of the directed verdict motion.") (footnotes omitted).

Therefore, the argument raised on appeal was not presented to the trial court, and it is not properly preserved for our review.[4]

Our review, therefore, is limited to a review for palpable error under RCr 10.26, i.e., whether manifest injustice occurred.[5] "In a number of cases this Court has struggled to arrive at a consistent conceptualization of burglary whereby the crime is reserved for appropriate circumstances."[6] However, we are satisfied that no manifest injustice resulted from Appellant's conviction for first-degree burglary.

Under KRS 511.020(1)(b), a person is guilty of first-degree burglary when he knowingly enters *or remains* unlawfully with the intent to commit a crime. At the time Appellant entered the townhouse, he did not have a key, and all of his belongings were at his sister's house. Further, the evidence suggested that Appellant was angry over the breakup, and that he believed Broadnax was cheating on him. He called Broadnax repeatedly on the night before he broke into her townhouse. He made statements to Broadnax such as, "If you play games, you get hurt." According to the evidence, after Appellant had entered the townhouse, he rushed up the stairs and immediately attacked Broadnax.

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[4] *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.") (citations omitted); *see also Pate*, 134 S.W.3d at 597-98.

[5] *See Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009).

[6] *Commonwealth v. Partee*, 122 S.W.3d 572, 574 (Ky. 2003). *See also Hedges v. Commonwealth*, 937 S.W.2d 703 (Ky. 1996); *McCarthy v. Commonwealth*, 867 S.W.2d 469 (Ky. 1993), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

He called her names such as "bitch," "slut," "tramp," and "whore." He accused her of cheating on him while beating her.

Based on the evidence presented, a jury could reasonably infer that Appellant formed the intent to assault Broadnax, either prior to entering or prior to remaining unlawfully.[7] Therefore, there was no manifest injustice, and no palpable error.

Appellant also argues that the trial court erred in failing to *sua sponte* instruct the jury on voluntary intoxication.[8] Appellant concedes that the issue is unpreserved, and requests review for palpable error pursuant to RCr 10.26. "A voluntary intoxication instruction is justified when there is evidence that . . . the intoxication negates the existence of an element of the offense. In other words, whenever a defendant adduces sufficient evidence of voluntary intoxication, the defendant is entitled to an instruction on the defense of intoxication."[9]

Appellant would have been entitled to an instruction on voluntary intoxication had he requested it. However, Appellant suffered no manifest injustice from the trial court failing to provide such an instruction *sua sponte*.

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[7] *See Partee*, 122 S.W.3d at 575. *See also McCarthy*, 867 S.W.2d at 471 ("[I]t was for the jury to determine whether appellant formed the requisite intent to be guilty of burglary rather than criminal trespass."); *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988) ("Intent can be inferred from the actions of an accused and the surrounding circumstances. The jury has wide latitude in inferring intent from the evidence.") (citation omitted).

[8] *See* KRS 501.080.

[9] *Nichols v. Commonwealth*, 142 S.W.3d 683, 688 (Ky. 2004) (footnotes and internal punctuation omitted). *See also Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999) (trial court has a duty to instruct on the whole law of the case).

The evidence suggested that, while Appellant had been drinking, he was not so intoxicated as to render him incapable of forming the intent necessary to be guilty of first-degree burglary or fourth-degree assault. Police testified that, while Appellant smelled of alcohol, he did not appear to be overly intoxicated. Appellant was also able to rush up the stairs and attack Broadnax. He spoke to her, threw the phone away when she tried to call 911, and repeatedly accused her of cheating on him. After the assault, Appellant spoke coherently to Officer Rowley. Under these circumstances, there was no manifest injustice in the court failing to give an instruction on voluntary intoxication *sua sponte*. There was no palpable error.

For the forgoing reasons, the judgment of the McCracken Circuit Court is hereby affirmed.

All sitting. All concur.

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