IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 23, 2013
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000491-MR

MONTRIAL DEMETRIUS JOHNSON — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 10-CR-01014

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND REVERSING AND REMANDING, IN PART

A circuit court jury convicted Montrial Demetrius Johnson of wanton endangerment, first-degree fleeing or evading, second-degree burglary, and of being a first-degree Persistent Felony Offender (PFO 1), resulting in a judgment sentencing him to twenty years' imprisonment.

Johnson now appeals as a matter of right,[1] seeking reversal on three grounds: (1) the trial court erred by denying Johnson's motion for directed verdict on the burglary charge; (2) the jury instructions for the burglary charge differed from the statutory language, resulting in palpable error; and

[1] Ky. Const. § 110(2)(b).

(3) palpable error occurred in closing argument when the Commonwealth said that Johnson had a motive to lie.

We conclude that the trial court erred in denying a directed verdict on the burglary charge. Because we reverse Johnson's second-degree burglary conviction, we do not reach Johnson's argument of error regarding the jury instructions. And we find no error in the Commonwealth's closing argument.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Police were dispatched to deal with a complaint of excessive noise emanating from an outdoor gambling activity. Upon arrival at the scene, the police, four in total, focused their attention on a car parked in an adjacent lot in which Johnson was sitting on the driver's side listening to music. Two of the police, Officers Terry and Doane, approached Johnson's vehicle because the music blaring from its speakers exceeded the noise ordinance's allowable level.

Officer Terry approached the driver's side of Johnson's vehicle while Officer Doane approached the passenger's side. Officer Doane testified that he immediately smelled the strong odor of burnt marijuana as Officer Terry was reviewing Johnson's driver's license and registration. Officer Doane pulled Officer Terry aside and informed him of the odor. In returning Johnson's driver's license and registration, Officer Terry reached through the passenger-side window; and he, too, smelled burnt marijuana.

Officer Terry then asked Johnson if there was anything illegal inside the car, to which Johnson replied in the negative. Officer Terry then walked to the driver-side door, opened it, and asked Johnson to step outside the vehicle.

Johnson refused, instead starting the car's engine and gripping the steering wheel. At this point, Officer Terry wedged himself in the open vehicle door, placed his right hand on the steering wheel, and set his right foot up on the doorsill. Again, Officer Terry asked Johnson to exit the vehicle but Johnson again refused. Johnson shifted the car into drive and quickly accelerated, forcing Officer Terry to jump to safety.

Johnson's vehicle fishtailed out of the parking lot and sped away. Officer Terry radioed a description of the vehicle and gave chase on his bicycle. Officers spotted Johnson's empty vehicle a short time later parked in front of the house at 340 Nelson Avenue. The officers received information that a stranger was inside that house, so the officers decided to sweep the house using a canine unit. When the officers entered the house, they immediately found Johnson and arrested him.

A grand jury indicted Johnson on drug trafficking, two counts of wanton endangerment, fleeing or evading police, tampering with physical evidence, burglary, violation of a noise ordinance, and being a PFO 1. At trial, a jury found Johnson guilty of one count of wanton endangerment, fleeing or evading police, second-degree burglary, and violating the city noise ordinance.[2] The jury also found Johnson guilty of being a PFO 1 and recommended a total sentence of twenty years' imprisonment. The trial court entered judgment in accord with the jury's recommendation.

[2] The jury found Johnson not guilty of one count of wanton endangerment, tampering with physical evidence, and trafficking.

II. ANALYSIS.

A. The Trial Court Erred in not Granting Johnson's Motion for Directed Verdict on the Second-Degree Burglary Charge.

Johnson first claims that the trial court erred by denying his motion for a directed verdict on the second-degree burglary charge. The issue was properly preserved for review by Johnson's motion for directed verdict at the close of the Commonwealth's case and after all evidence was presented.

When reviewing a ruling on a motion for directed verdict, we turn to the standard outlined in *Commonwealth v. Benham*:[3]

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. 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. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving the right to the jury questions as to the credibility and weight to be given to such testimony.[4]

On appellate review, this Court must determine if "it would be clearly unreasonable for a jury to find guilt" given the totality of the evidence.[5] If the answer is yes, the defendant is entitled to a directed verdict of acquittal. To overcome its burden on a defendant's motion for directed verdict, the Commonwealth must only produce more than a "mere scintilla" of evidence.[6]

Kentucky Revised Statutes (KRS) 511.030 requires that in order for an individual to be found guilty of second-degree burglary, the Commonwealth

---

[3] 816 S.W.2d 186 (Ky. 1991).

[4] *Id.* at 187.

[5] *Id.*

[6] *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1993).

must prove that the defendant knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime. Johnson highlights three aspects of the burglary conviction as lacking in proof: (1) that Johnson entered the premises unlawfully; (2) that Johnson acted knowingly; and (3) that Johnson intended to commit a crime on the premises. The evidence for the first two elements overlaps to such degree that we will deal with them together.

The Commonwealth presented testimonial evidence to prove that Johnson knowingly entered the premises unlawfully. Sheena Warren, the resident of 340 Nelson Avenue, was not at home when Johnson let himself into the house. She testified that she formerly had a sexual relationship with Johnson, the relationship lasting approximately two or three months, and that she had not communicated with him for approximately two years before the incident in question. Further, Warren testified that she did not give Johnson permission to enter her residence on the night in question. And Warren's sister, who was present in the residence, indicated her disapproval of Johnson's entering by calling the police.

Johnson argues that he may have been welcomed with open arms if Warren had been home that night, but this argument misses the mark and runs contrary to the testimony at trial. Warren made clear that her past romantic relationship with Johnson was only temporary and that on the few occasions Johnson was in her house, he was not there to "chill" but was there to pick her up and go to his house. Tellingly, Johnson admitted at trial that his relationship with Warren ended on "bad terms." Finally, the police officer

who transported Johnson to jail testified that Johnson could not even recall Warren's name, calling her Leslie and Lindsey before simply asserting that he had sexual relations with her.

No evidence was presented at trial to show that Johnson had reason to think he could enter the home. Indeed, Johnson was well aware that his entry was unlawful. The evidence presented at trial showed Johnson contacted Warren multiple times after his arrest, but before trial, in his efforts to persuade Warren to change her story and tell police she was home when he came to call that evening and invited him in. At some point in Johnson's relationship with Warren, he may very well have had permission to enter this home unannounced; but the evidence indicates that was well before the incident in question occurred. It is entirely reasonable—given the nature of Johnson's relationship with Warren and the fact that she was not even home at the time of the incident—for a jury to reasonably conclude Johnson knowingly entered the home unlawfully.

The evidence was much lighter with regard to Johnson's entering the Warren house with the intention to commit a crime. The indictment returned against Johnson charged that he intended to evade police apprehension when he entered the home. But the plain language of KRS 520.095 and 520.100 indicates that Johnson could not possibly have intended to commit the crime of fleeing and evading when he entered the home. The crime of fleeing and evading police, whether it be first or second degree, requires that an individual disregard a direct order from police. The evidence is uncontroverted that

Johnson disregarded an order from police when he accelerated his car and sped away; but there is no evidence that Johnson disobeyed any order when he parked the car, got out of his car, and entered Warren's house on foot. Here, the Commonwealth's proof simply fails to implicate Johnson in any crime he could have reasonably intended to commit when he unlawfully entered the house.

Admittedly, the language of KRS 511.030 is broad, only requiring that an individual intend to commit *any* crime. Although we recognize the Commonwealth's argument that the burglary conviction should not fail because Johnson could have intended to commit other crimes besides fleeing and evading, we are unable to glean from the evidence presented what those crimes might be. There is no evidence to suggest that Johnson intended anything other than to enter the house and wait out the police pursuit. The evidence supports this view as Johnson quickly and calmly surrendered to police, without incident, upon their entrance into the house. No reports were made of property destruction, theft, violence, or any other possible criminal activity inside the home. Simply put, it seems that Johnson drove to a house with which he was familiar and went inside to hide from the law. And "mere flight from an officer attempting to effect an arrest is not within the scope of the penal law."[7]

The Commonwealth attempts to argue on appeal that perhaps Johnson intended to solicit help from Warren in evading the police, a crime under

[7] KRS 520.100 Kentucky Crime Commission/LRC Commentary.

KRS 506.030(1); but this is nothing more than pure speculation. The evidence relied upon by the Commonwealth to prove this argument—that Johnson contacted Warren before trial—is more probative to show that Johnson, a convicted felon, was concerned about being convicted of another felony. It is not probative of Johnson's state of mind at the time of entering Warren's house.

The Commonwealth is correct in its assertion that KRS 511.030 does not require proof that a crime was actually committed inside the residence, but proof of intent to commit a crime is the cornerstone of the crime of burglary. Our case law is replete with declarations from this Court that "[e]vidence of criminal intent is the key to proper application of the burglary statutes."[8] "At a minimum, before there is a burglary, there must be a prior intent to commit a crime."[9] And a burglary conviction requires the crime intended to be committed upon entering the premises be a crime other than criminal trespass. Here, Johnson committed no other crime than criminal trespass by knowingly entering the home unlawfully. Allowing his burglary conviction to stand would effectively eliminate the intent requirement from the burglary statute.[10]

Considering the evidence as a whole and drawing all reasonable inferences in favor of the Commonwealth, we find it unreasonable for a jury to

---

[8] *Commonwealth v. Partee*, 122 S.W.3d 572, 575 (Ky. 2003).

[9] *Hedges v. Commonwealth*, 937 S.W.2d 703, 707 (Ky. 1996).

[10] *Id.* at 706 (quoting *McCarthy v. Commonwealth*, 867 S.W.2d 469, 472-73 (Ky. 1993) (Leibson, J., dissenting), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001)).

find guilt.[11] For this reason, we reverse Johnson's second-degree burglary conviction and remand to the trial court for the entry of a directed verdict of acquittal on the burglary charge. As a result, we do not reach Johnson's argument that the second-degree burglary jury instructions were in error.

B. The Commonwealth's Statements During Closing Argument were not Improper.

Johnson further claims that the Commonwealth essentially negated his presumption of innocence during its closing argument. Specifically, Johnson attacks the Commonwealth's assertion that he had more of a motive to lie than other witnesses. Johnson admits that this issue was not properly preserved for review and requests this Court review it under Kentucky Rules of Criminal Procedure (RCr) 10.26.[12]

In the beginning of its closing argument, the Commonwealth requested that the jury consider who of the witnesses presented had a motive to lie. The Commonwealth went on to say that Johnson, as a convicted felon on parole, had every motive to lie. The Commonwealth went on to discuss Johnson's

---

[11] *See Jones v. Commonwealth*, 331 S.W.3d 249, 256 (Ky. 2011) ("Our duty in considering a directed verdict on appeal is not whether the evidence would have persuaded us to return a guilty verdict. To the contrary, our role is strictly limited to determining if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt.").

[12] We review an unpreserved error on appeal only if the error is "palpable" and "affects the substantial rights of a party." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009). And the error is palpable only if it is clear and plain under the current law. *Id.* (citation omitted). The substantial rights of a party are affected only if "it is more likely than ordinary error to have affected the judgment." *Id.* (citation omitted). Relief, under palpable error review, is only appropriate "upon a determination that manifest injustice has resulted from the error" which will not be found unless the "error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Id.* (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

theory of the case and how it was contrary to all other testimony presented to the jury.

This is not a novel issue for this Court. In *Grundy v. Commonwealth*,[13] the Commonwealth argued in its summation that the defendant had the "greatest motive of all" to lie. Relying on *Tamme v. Commonwealth*,[14] we held that the "prosecutor is entitled to attack a defendant's credibility if the defendant testifies as a witness on his own behalf" because a defendant who testifies is "subject to the same rules as an ordinary witness."[15] And in *Tamme*, we noted that the presumption of innocence was not contravened by the Commonwealth's argument that the defendant had a motive to lie.[16] We find no meaningful distinction between these holdings and the circumstances presented here.

Because Johnson took the stand, it was not improper for the Commonwealth to attack his credibility. It has long been established that counsel has great leeway in closing argument to draw reasonable inferences based on the evidence. In doing so, the "Commonwealth may suggest that a defendant was lying if this is a reasonable inference."[17] In order for the Commonwealth's statement to be considered a reasonable inference, the "defendant must take the stand and there must be discrepancies between the

---

[13] 25 S.W.3d 76 (Ky. 2000).

[14] 973 S.W.2d 13 (Ky. 1988).

[15] 25 S.W.3d at 82 (quoting *Tamme*, 973 S.W.2d at 38-39).

[16] *Tamme*, 973 S.W.2d at 38-39.

[17] *Padgett v. Commonwealth*, 312 S.W.3d 336, 352 (Ky. 2010).

evidence and the defendant's testimony."[18] Misconduct will only be found "when a jury could reasonably believe that the prosecutor was . . . expressing a personal opinion as to the witness's credibility."[19] In this case, there was no misconduct because it was reasonable to infer that Johnson was lying.

Johnson's testimony strongly contradicted the testimony of several other witnesses. Accordingly, either Johnson was lying or the other witnesses were. For example, Johnson testified that the car door was not open when he sped away. But testimony from four police officers on scene agrees that the door was open. In general, Johnson's version of the events is nearly completely opposite to that of the Commonwealth. We hold there was no error, much less palpable error.

III. CONCLUSION.

For the reasons set forth above, we reverse Johnson's second-degree burglary conviction and the sentence imposed for that conviction. We affirm all other convictions and sentences. We remand the case to the trial court for entry of a new judgment consistent with this opinion.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Keller, J., dissents.

---

[18] *Id.*

[19] *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999).

COUNSEL FOR APPELLANT:

V. Gene Lewter
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeffrey Allan Cross
Assistant Attorney General