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RENDERED: OCTOBER 23, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000069-MR

JAMES SEABOLT — APPELLANT

V.

ON APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
NO. 12-CR-00029-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

James R. Seabolt appeals as a matter of right from a judgment of the Spencer Circuit Court sentencing him to a twenty-year prison term for second-degree burglary. Ky. Const. § 110(2)(b). Seabolt was also found to be a persistent felony offender in the first degree. Seabolt raises two issues on appeal: 1) the trial court erred when it refused to instruct the jury on the lesser included offense of criminal trespass; and 2) portions of the Commonwealth's penalty phase closing argument constituted palpable error. We affirm the judgment and sentence of the Spencer Circuit Court.

FACTS

On March 27, 2012, Spencer County resident Nathan Baker was in his kitchen when he heard a vehicle travelling down his gravel driveway towards his home. Baker looked out of his window and saw a man and woman in an unfamiliar car. The woman, later identified as Christina Lapointe, exited the

car and proceeded to knock repeatedly on Baker's door. Baker did not answer. The man, later identified as appellant Jason Seabolt, exited the vehicle and joined Lapointe on the steps leading to the front door. As the pair conversed, Baker overheard Lapointe say to Seabolt: "The garage door is open, we can go through there."

Baker called the sheriff's department and requested that an officer come to his home. He had been informed of a recent string of break-ins on his street and was becoming increasingly suspicious of Lapointe and Seabolt. As Baker spoke with the sheriff's department, Lapointe and Seabolt turned their car around, backed into the driveway, and opened the trunk. Lapointe then returned to the front door and resumed knocking. Baker moved to a window overlooking his garage to get a better view of the strangers' activities. He then observed Seabolt enter his garage, remove two totes filled with wrenches, and place them in the open trunk of the vehicle before losing sight of Seabolt. Moments later Baker heard his home security system announce: "Basement door ajar." The basement door in Baker's home opened to the garage, and the alert from the system indicated that someone had opened that door. Armed with a pistol, Baker waited at the top of the basement steps. He then heard Lapointe frantically shouting: "The police are here! The police are here!" Baker returned to his vantage point above the garage and witnessed Seabolt remove the totes and place them back in the garage as three Spencer County sheriff's department vehicles arrived.

When officers questioned Lapointe and Seabolt they claimed that they were having car trouble and stopped at Baker's home in order to borrow tools to fix their vehicle. They bypassed the other homes on the street, they explained, because it appeared as though someone was home at the Baker residence. Major Carl Reesor with the Spencer County sheriff's department did not observe any visible defect on the vehicle. Baker heard Seabolt state that he had been "set up" because the officers arrived at the home so quickly, stating that they were "eight minutes" from the police department. Lapointe and Seabolt were arrested.

Seabolt was charged and convicted of complicity to burglary in the second degree and of being a persistent felony offender in the first degree. The Spencer Circuit Court sentenced him to an enhanced sentence of twenty years. This appeal followed.

ANALYSIS

I. Appellant Was Not Entitled to an Instruction on the Lesser Included Offense of Criminal Trespass.

During a bench conference following the close of the Commonwealth's case in chief, defense counsel asked the trial court for an instruction on attempted burglary. In the course of that conference, defense counsel began to discuss the propriety of a criminal trespass instruction. The trial court advised the parties that an instruction on the lesser included offense of criminal trespass would not be given because the evidence would not support a criminal trespass verdict given that Seabolt's criminal intent could be inferred from his

conduct. Seabolt now complains that the trial court's decision to not instruct on criminal trespass was an error.

Burglary differs from criminal trespass to the extent that the burglary statute requires "with the intent to commit a crime." KRS 511.030; KRS 511.060.[1] Criminal trespass is a lesser included offense of burglary. *See Commonwealth v. Sanders*, 685 S.W.2d 557 (Ky. 1985). A trial court must instruct the jury on lesser included offenses when "it is so requested and it is justified by the evidence." *Martin v. Commonwealth*, 571 S.W.2d 613, 615 (Ky. 1978); RCr 9.54(1). On appeal, we review a trial court's refusal to issue an instruction on a lesser included offense under the familiar "reasonable juror" standard, asking if after considering the evidence in favor of the proponent of the instruction, "whether a reasonable juror could acquit of the greater charge but convict of the lesser." *Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011) (citing *Thomas v. Commonwealth*, 170 S.W.3d 343 (Ky. 2005)).

To distill the question to its finest point, we must determine whether it would be reasonable to conclude that Seabolt entered Baker's dwelling with no intent to commit a crime. In *Martin v. Commonwealth*, officers were dispatched to a home that appeared to have been "ransacked" while the homeowner was away. 571 S.W.2d at 614. The two defendants were found inside of the home

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[1] Second-degree burglary is defined in KRS 511.030 as:

> "(1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling."

Criminal trespass is defined in KRS 511.060 as:

> "(1) A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling."

where they quickly surrendered to police. *Id.* At trial, the men claimed that they noticed the door to the home was cracked open and entered the dwelling to investigate. *Id.* They denied having an intent to commit a crime once inside. *Id.* This Court held that the trial court's refusal to instruct the jury on the lesser included offense of criminal trespass was erroneous on the grounds that the instruction was warranted by the evidence that the defendants entered the home without a criminal intent. *Id.* at 615.

Seabolt, like the *Martin* defendants, does not deny that he was in Baker's home unlawfully, but insists that he had no intent to commit a criminal act therein. However, the testimony of the eyewitness homeowner distinguishes *Martin* from the case at bar. Seabolt did not testify, nor did he call any witnesses to testify. The *only* evidence introduced at trial that would support the criminal trespass instruction were the testimonies of Baker and Major Reesor concerning Seabolt's alleged car trouble. After knocking on the door and receiving no response, Lapointe and Seabolt moved the vehicle so that the trunk was facing the garage. Baker then observed Seabolt remove items from his garage and place them in the open trunk. Both of the totes were filled with multiple wrenches of the same make and model[2]-- not tools typically associated with auto repair. He further testified to hearing Lapointe suggest that they enter the home through the garage, and witnessed her panicked response to the arrival of law enforcement. In fact, it appears Seabolt *did* attempt to enter

[2] Baker's business was the buying and selling of tools. He testified that at the time of the events leading to Seabolt's arrest, his garage was filled with totes similar to the ones placed in Seabolt's vehicle.

the home through the garage, as Baker testified to hearing the alert from his home security system. Baker also heard Seabolt exclaim that he was "set up" as he balked at the quick response time of the sheriff's deputies. Despite Seabolt's claim that his car was experiencing tire trouble, Major Reesor observed no visible problems with the car tires. A reasonable juror could infer criminal intent from Seabolt's highly suspicious behavior.

Ordinarily, in prosecution for second-degree burglary, the Commonwealth need only show that the defendant entered or remained in the dwelling unlawfully to allow the jury to infer criminal intent. *Sanders*, 685 S.W.2d at 559; *Patterson v. Commonwealth*, 65 S.W.2d 75 (Ky. 1933). We agree that such an inference was permissible under these facts. Even construing the evidence in Seabolt's favor, it would be unreasonable to conclude that he was present in Baker's home with *no* intent to commit a crime. Accordingly, we find no error in the trial court's denial of Seabolt's request for a criminal trespass instruction.

II. Statements Made During the Penalty Phase Closing Arguments Did Not Constitute Palpable Error.

During the penalty phase of Seabolt's trial, Spencer County Circuit Clerk Becky Robinson was called to testify about Seabolt's prior convictions. Robinson testified that Seabolt was convicted of second-degree burglary in Spencer County in 2002. Later during closing arguments, the prosecutor led the jury through the persistent felony offender instructions. She stated that the Commonwealth had proven the elements of the first-degree PFO charge because the jury heard testimony from the circuit clerk concerning the dates of

Seabolt's two prior felony offenses. Regarding Seabolt's prior second-degree burglary conviction, the prosecutor remarked: "He was breaking in houses." The jury found Seabolt guilty of being a persistent felony offender in the first degree and recommended the maximum enhanced sentence of 20 years.

Seabolt now contends that the Commonwealth's statement that he was convicted of "breaking in houses" was unsupported by the evidence and went beyond the permissible evidentiary scope of prior convictions. Seabolt concedes that the error is unpreserved and requests palpable error review. *See* RCr 10.26. We will reverse on the grounds of a palpable error if we find an error that is "so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006).

Pursuant to the truth-in-sentencing statute, the Commonwealth is permitted to introduce evidence of the nature of prior offenses for the purposes of securing a PFO conviction. KRS 532.055(2)(a). In *Mullikan v. Commonwealth*, 341 S.W.3d 99 (Ky. 2011), this Court defined the scope of permissible evidence of the nature of prior offenses as limited to "conveying to the jury the elements of the crimes previously committed." We note that Seabolt does not challenge the evidence presented by the clerk, but instead alleges that the Commonwealth's closing argument ran afoul of our *Mullikan* rule. It is well settled that attorneys are not permitted to argue facts not in evidence or not reasonably inferable from the evidence during closing arguments. *Garrett v. Commonwealth*, 48 S.W.3d 6, 16 (Ky. 2001). Seabolt

correctly submits that "forced entry" or "breaking in" is not an element of second-degree burglary. However, the prosecutor's statement did not rise to the level of palpable error.[3]

Seabolt is ostensibly arguing that the Commonwealth engaged in prosecutorial misconduct during closing arguments by relying on extraneous facts not supported by the record. If a prosecutor engages in misconduct during the closing argument, we will reverse if the conduct is "flagrant" or if all of the following three conditions are satisfied: 1) proof of the defendant's guilt was not overwhelming; 2) defense counsel objected, and; 3) the trial court failed to cure the error with a sufficient admonishment to the jury. *Barnes v. Commonwealth*, 91 S.W.3d 564, 568 (Ky. 2002) (citing *United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994)). As Seabolt did not make an objection, he cannot satisfy all of the foregoing elements necessary for reversal, and we must address whether the prosecutor's conduct was flagrant. We readily agree that it was not.

When viewed in the context of the entire closing argument, the prosecutor's brief, seemingly offhanded statement appears as little more than an attempt to further explain the elements of a PFO charge. First, the prosecutor explained that the clerk had testified that Seabolt was convicted of trafficking in cocaine, a felony, in 2008. Then, regarding Seabolt's 2002

[3] To the extent Seabolt challenges the reference to breaking in "houses," we note that "dwelling," as used in KRS 511.030 regarding second-degree burglary, is defined in KRS 511.010(2) as "a building which is usually occupied by a person lodging therein." This definition would typically be understood as a "house" so there was nothing about the prosecutor's reference to "houses" that was not supported by the evidence given Seabolt's prior second-degree burglary conviction.

burglary conviction, the prosecutor stated: "You all know that is felony because that's what he's convicted of now." The subsequent statement that he was "breaking in houses" was not reasonably calculated to stir the jurors' emotions. "Breaking in" is not necessarily connotative of forced entry, but is generally considered common vernacular for the crime of burglary. There was nothing inflammatory about the statement nor was it repeated by the prosecutor. *See Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984) (repeated misstatements of a witness's testimony constituted prosecutorial misconduct).

This Court has held that a party claiming palpable error must show a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d at 3. Contrary to Seabolt's contention, the statement did not invoke images of a violent or aggressive past offense. Having convicted Seabolt of second-degree burglary, the jury heard evidence that Seabolt had been previously convicted of the very same crime. Six years later, Seabolt was convicted of trafficking in cocaine. The jury also heard evidence that Seabolt was on parole at the time of the burglary of Baker's home. Given the evidence of Seabolt's three felony convictions in ten years (including the current one), we cannot say that the result of the penalty phase would have been different had the prosecutor not stated that Seabolt was "breaking in houses." Accordingly, we cannot find palpable error in the Commonwealth's closing argument.

CONCLUSION

For the reasons stated herein, we affirm the judgment and sentence of the Spencer Circuit Court and remand for further proceedings consistent with this opinion.

Minton, C.J.; Abramson, Cunningham, Keller, Noble, and Venters, JJ., concur. Scott, J., concurs in result only.

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