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RENDERED: JUNE 13, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2017-SC-000672-MR

DATE 7/5/19 Kim Radwan, DC

JAMES PEARSON

APPELLANT

V. ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 15-CR-00857-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury found James Pearson¹ guilty of first-degree burglary and being a first-degree persistent felony offender, for which James received a total sentence of 25 years' imprisonment. James now appeals from the resulting judgment as a matter of right,² raising two issues for review. Finding no reversible error, we affirm the entirety of the judgment.

¹ We refer to the defendant as "James" because his brother, John Pearson, was a co-defendant in their joint trial. We affirmed the trial court's judgment in John's case today in *John Pearson v. Commonwealth*, 2018-SC-000020-MR (Ky. June 13, 2019).

² Ky. Const. § 110(2)(b) ("Appeals from a judgment of the Circuit Court imposing a sentence of . . . imprisonment for twenty years or more shall be taken directly to the Supreme Court.").

I. BACKGROUND.

Officer Greg Ullrich responded to a call informing emergency authorities that a house at 912 Leonard Street was on fire. By the time Officer Ullrich arrived at the scene, the house was engulfed in flames. As he was assisting with crowd control, a neighbor, Jerome Fredrick, approached him. Fredrick informed Officer Ullrich that the security cameras on his house captured images of two men making repeated trips from the direction of the 912 Leonard Street residence to another house on that same street, 926. The men were carrying objects away from the direction of the 912 residence before the fire.

Acting on this information, police surveilled the 926 Leonard Street residence. They saw James exit that residence and stopped him. He was carrying a black duffel bag containing, among other things, an Xbox gaming console and video games. Morgan Salisbury, the homeowner of 912 Leonard Street residence, identified those items as his.

After obtaining a search warrant, police searched the 926 Leonard Street residence and found other items that Salisbury identified as his, including two televisions, a .410 shotgun, the shotgun's case, an e-reader, a laptop, and a digital voice recorder. Police also arrested John Pearson, James's brother, on the premises at 926 Leonard Street.

After the grand jury indicted both John and James, they stood trial jointly. The jury convicted James of first-degree burglary and being a first-degree persistent felony offender but acquitted him of second-degree arson. The jury convicted John of first-degree burglary, second-degree arson, and being a

first-degree persistent felony offender. At a separate trial, John was also found guilty of possession of a firearm by a convicted felon, but James was acquitted of that crime. For his crimes, James received a sentence of 25 years' imprisonment.

II. ANALYSIS.

A. James suffered no prejudice from the trial court's denial of his request to dismiss a superseding indictment against him and his request for a separate trial.

James first argues that the trial court erroneously denied his request (1) to dismiss a superseding indictment against him and (2) to sever his trial from John's trial. That these issues are preserved for our review is undisputed.

Originally, James was indicted on November 15, 2015 separately from John on the charges of first-degree burglary, second-degree arson, being a first-degree persistent felony offender, and possession of a firearm by a convicted felon. After some pretrial proceedings, James's trial was set for June 21, 2016. But on April 25, a new prosecutor appeared in the case and moved to consolidate James's case with John's case. The trial court denied this motion to consolidate the cases, saying that the Commonwealth should try James and John separately. At the hearing on these motions, the Commonwealth announced its intention to seek a new indictment because the new prosecutor decided on a different approach to the prosecution of James and John.

On May 5, 2016, the Commonwealth sought and obtained from the grand jury a new, superseding indictment charging James with the exact same offenses as before but alleging that the burglary and arson counts were

committed individually or together. At the arraignment on the new indictment, the Commonwealth stated its intention to have the earlier indictment dismissed, a proposition to which James objected. At a June 7, 2016 hearing, the Commonwealth formally moved to dismiss the earlier indictment, and the trial court granted the motion. James then moved to sever his and John's trials on the superseding indictment, but the trial court denied James's motion.

James now argues that the trial court erred in denying his motion to dismiss the superseding indictment. Yet James fails to identify any prejudice to him resulting from the trial court's denial of his motion. "[T]o be reversible, an erroneous joinder of offenses must be accompanied by 'a showing of prejudice' to the defendant."³ "This showing of prejudice cannot be based on mere speculation but must be supported by the record."⁴

The only arguments James makes regarding any prejudice he suffered are that his due-process rights were violated and that the trial court's denial of his motion delayed his trial date, leaving him incarcerated in the county jail for five additional months. But James does not articulate exactly how his due-process rights were violated. He simply makes the general, unsubstantiated accusation that the Commonwealth acted to gain a tactical advantage, yet he does not suggest what that tactical advantage was. And regarding his additional pretrial incarceration because of the delay in his trial date, there is

³ *Hammond v. Commonwealth*, 366 S.W.3d 425, 429 (Ky. 2012) (citing *Rearick v. Commonwealth*, 858 S.W.2d 185, 187 (Ky. 1993)).

⁴ *Hammond*, 366 S.W.3d at 429 (citing *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000)).

no indication that James made a motion for a speedy trial, nor does he argue a speedy-trial violation before this Court. Moreover, James does not articulate how the additional incarceration he suffered prejudiced him in any way or affected the trial of his case.

Because of the absence of any prejudice occurring to James because of the trial court's denial of his motion to dismiss the superseding indictment, we can find no reversible error here.

James also argues that the refusal to dismiss the superseding indictment led to his erroneous joint trial with John. James makes two arguments pointing to identifiable prejudice stemming from this joint trial.

At trial, the Commonwealth introduced a recording of some of James's pretrial statements made to a detective. A part of their recorded conversation is as follows:

Detective: We did a search of the house, okay. And on Leonard Street where you live, in your room, we found some TVs. Do you know where they came from?

James: Naw, I don't know.

Detective: Had they been there for a while?

James: I don't, I didn't see none.

Detective: Well they were in there. I mean, if you were there in your room, you would have seen them because you can't miss it. That's a big TV.

James: I hadn't, I didn't see it before.

Detective: You didn't see it before when?

James: Before yesterday.

Detective: What about last night at 11:00, did you see it?

James: Yeah.

Detective: Okay. Do you know where it came from?

James: No.

Detective: So you saw it at 11:00 but not during the daytime you didn't see it.

The detective then asked James, "Did you ask [John] where it came from?" to which James responded in the negative. The jury did not hear this final question and answer because the trial court sustained John's objection to that portion of the interview being played for the jury. John argued that playing the last question and answer would violate the *Bruton* rule,⁵ and the trial court agreed.

James now argues that his inability to introduce into evidence that final question and answer violated his right to present exculpatory evidence in his defense. Specifically, James argues that this statement exculpates him by suggesting that John, not James, is really the one who might have information about the stolen TV. But James's argument rests on the flawed assumption that the final question and answer is exculpatory.

⁵ The U.S. Supreme Court in *Bruton v. United States* held that a defendant's Confrontation Clause rights are violated when a non-testifying codefendant's confession naming the defendant as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider the confession only against the defendant. 391 U.S. 123, 126 (1968).

The only revelation resulting from the interview between James and the detective is that James saw the stolen TV in his room at some point. The detective then asks if James asked his brother where it came from, to which James responds in the negative. We do not see how James's failure to ask John about the appearance of the TV in his room works to exculpate James. In fact, James's failure to inquire about a big, expensive TV inexplicably appearing in his room could arouse suspicion about the truthfulness of James's stated lack of knowledge about the origins of the TV.

Finally, James argues that he was prejudiced because he stood trial for arson, an offense of which he was acquitted, and the evidence presented at trial influenced the jury to discount his defense that he was not a part of the burglary because he was not the man depicted in the neighbor's security tapes. This argument is disingenuous, at best, because if the jury heard inflammatory arson evidence at James's trial and still acquitted him of that crime, it does not seem to follow that hearing the arson evidence would impel the jury to convict James of burglary. We cannot accept James's argument that "linking [James] to John and the arson confused the jury and made it more difficult to assess his defense" when the evidence adduced in the case reasonably supports the jury's finding that James was involved in the burglary but not the arson.

Simply put, James has not articulated any prejudice resulting from the trial court's denial of his motion to dismiss the superseding indictment and his motion for a separate trial. We find no reversible error in the trial court's denial of both motions.

B. Any purported trial court error in allowing an identification of James to be made through the security tapes was harmless beyond a reasonable doubt.

James also argues that the trial court should not have allowed neighbor Jerome Fredrick to identify him as one of the men depicted on the security tapes. That this issue is preserved for our review is undisputed.

As mentioned, Jerome Fredrick had security cameras set up to view the street in front of his home. The Commonwealth called Fredrick as a witness at trial to identify the men depicted in the security tapes. Fredrick testified that he knew the owner of the 926 Leonard Street residence and that he knew that John and James lived there, as well, but did not know their names. Fredrick then testified that the two men on the video were the two men who lived with the owner.

On cross-examination, James was able to elicit from Fredrick that his purported identification of the two men on the tapes was essentially a guess because the tapes obscure their faces:

Defense: You would agree with me that you can't see the faces of the individuals on your video?

Fredrick: No sir.

Defense: You *can't* see the faces.

Fredrick: Oh yeah, I agree with you.

...

Defense; You would agree with me, you're guessing as to who's on that video, correct?

Fredrick: More or less, yes sir.

On redirect, the Commonwealth wanted Fredrick to make an in-court identification of the individuals he believed to be depicted on the security tapes. Over defense objection based on the unreliability of the identification, the trial court allowed Fredrick to identify John and James as the men on the tapes.

James now argues that the trial court erred in allowed Fredrick to identify John and James as the men seen on the tapes. While James's argument is well-taken, we are convinced that any purported error is harmless beyond a reasonable doubt.

“No error in . . . the admission . . . of evidence . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice.”⁶ “The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.”⁷ “[T]he inquiry is not simply ‘whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.’”⁸ “As to those preserved constitutional errors which are subject

⁶ Kentucky Rules of Criminal Procedure (“RCr”) 9.24.

⁷ *Id.*

⁸ *Murray v. Commonwealth*, 399 S.W.3d 398, 404 (Ky. 2013) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

to harmless error review, they must be shown to be ‘harmless beyond a reasonable doubt’ to be deemed harmless.”⁹

Here, the jury saw for itself the impossibility of identifying the faces of the two men seen on the tapes—the faces of the men are too obscured. Not only that, but James was able to get Fredrick to admit that he was simply guessing as to the men’s identities based on his knowledge that John and James lived at the 926 Leonard Street residence. In sum, the jurors were able to decide for themselves from firsthand observation the reliability of Fredrick’s identification of the men shown in the security tape. We fail to see how the totality of Fredrick’s testimony prejudiced James.

The only impact Fredrick’s testimony had on the jurors was potentially to remove an inference that they would have had to make to convict John and James. As mentioned, the tapes reveal that two men went to and from the direction of the Salisbury residence and the 926 Leonard Street residence, hauling items as they went. The items found in the 926 Leonard Street residence had been stolen from Salisbury. Fredrick testified that he knew of two men that lived at the Leonard Street residence and that those men were John and James.¹⁰ And police found John and James at the 926 Leonard Street residence. Putting all of this together, the jurors could have reasonably

⁹ *Brown v. Commonwealth*, 313 S.W.3d 577, 595 (Ky. 2010) (quoting *Kotteakos*, 328 U.S. at 765).

¹⁰ Although James points to evidence suggesting that he did not actually live at 926 Leonard Street but instead was staying there for a few days, this does not discount the testimony provided by Fredrick.

inferred that the two men in the video were John and James. We cannot say that Fredrick's faulty identification had really any impact on the jury.

Any purported error committed by the trial court in allowing Fredrick to identify John and James on the security tapes was harmless beyond a reasonable doubt.

III. CONCLUSION.

Finding no reversible error, we affirm the entirety of the judgment.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Kathleen Kallaher Schmidt
Assistant Public Advocate

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Kenneth Wayne Riggs
Assistant Attorney General