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(FILE NO. 2007-SC-0127-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001850-MR

KEVIN TODD McCOMBS — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 02-CR-00201

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Kevin Todd McCombs appeals from an August 12, 2004, judgment of the Bullitt Circuit Court upon a jury verdict finding him guilty of first-degree burglary, fourth-degree assault, and violation of a protective order. We affirm in part, reverse in part, and remand.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Appellant and his former wife, Lisa McCombs, were divorced in September 2002. In October 2002, a domestic violence order was issued against appellant after he assaulted Curtis Carney, Lisa's son from a prior marriage. Although appellant and Lisa had made attempts at reconciliation, Lisa apparently told appellant, on the morning of December 4, 2002, that she was no longer interested in reconciliation.

On the evening of December 4, 2002, police were called to a disturbance at Lisa's home. Appellant was intoxicated and entered Lisa's home in violation of the domestic violence order.[2] Appellant entered the residence by breaking into the garage. He admitted cutting the telephone line to prevent the home security system from functioning.

The events that transpired after appellant's arrival at Lisa's home are largely disputed. Appellant contends he was in the garage retrieving personal items when Lisa's daughter invited him into the house. Appellant claims he believed Curtis was not home and proceeded inside with Lisa's daughter. However, Curtis was home, and a quarrel ensued. Appellant acknowledges that he and Curtis engaged in a physical altercation.

[2] An Amended Domestic Violence Order, dated November 8, 2002, prohibited appellant from having "contact with Petitioner's [Lisa's] residence" or with Lisa's son, Curtis Carney.

According to other testimony presented at trial, appellant forcibly entered the house. Appellant proceeded to Curtis's room armed with a crowbar from the garage and repeatedly struck Curtis with the crowbar. Appellant denied possessing a crowbar. Lisa intervened in the altercation by hitting appellant over the head with a fire extinguisher and stabbing him four times with a knife.

Appellant was indicted by the Bullitt County Grand Jury upon the charges of attempted murder, first-degree burglary, and violation of a protective order. A jury ultimately found appellant not guilty of attempted murder, but guilty of fourth-degree assault (Kentucky Revised Statutes (KRS) 508.030), first-degree burglary (KRS 511.020) and violating a protective order (KRS 403.763). Appellant was sentenced to fifteen years' imprisonment. This appeal follows.

Appellant contends the trial court erred by concluding as a matter of law that the crowbar was a "deadly weapon." The definition of deadly weapon is codified in KRS 500.080(4) and reads:

> "Deadly weapon" means any of the following:
>
> (a) A weapon of mass destruction;
> (b) Any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged;

(c) Any knife other than an ordinary pocket knife or hunting knife;
(d) Billy, nightstick, or club;
(e) Blackjack or slapjack;
(f) Nunchaku karate sticks;
(g) Shuriken or death star; or
(h) Artificial knuckles made from metal, plastic, or other similar hard material[.]

In Hicks v. Commonwealth, 550 S.W.2d 480, 481 (Ky. 1977), the Court specifically held:

> It should never be necessary in the instructions to define the words, "deadly weapon." Whether the particular instrument is or is not a deadly weapon should be determined by the court as a matter of law.

Consequently, the issue of whether the crowbar constituted a deadly weapon is a question of law for the court and not a question of fact for the jury. Even though the issue was properly a question of law for the court, we, nevertheless, believe the trial court erred by determining the crowbar constituted a deadly weapon within the meaning of KRS 500.080(4).

In KRS 500.080(4), the Legislature defined deadly weapon by providing a list of specific items, including "[b]illy, nightstick, or club." In this case, the trial court concluded that a crowbar was sufficiently similar to a "club" and, thus, constituted a deadly weapon under KRS 500.080(4)(d).

It is well-established that interpretation and construction of a statute is a matter of law for the court.

City of Worthington Hills v. Worthington Fire Protection Dist., 140 S.W.3d 584 (Ky.App. 2004). Our review of a lower court's interpretation or construction of a statute proceeds *de novo*. Id. When interpreting a term contained in a statute, the court is generally bound to give the term its ordinary meaning. Id.

The common definition of a "club" is "a heavy usu[ally] tapering staff esp[ecially] of wood wielded as a weapon." *Merriam-Webster's collegiate dictionary* 217 (10th ed. 2002). Under this definition, a club is described as a heavy tapering staff which is used as a weapon. A tapering staff is generally a long stick that progressively narrows at one end. A crowbar certainly does not fit such description; it is customarily of equal diameter on both ends.

Additionally, the specific items listed as deadly weapons in KRS 500.080(4) have one striking similarity – the fundamental nature and primary use of the denoted items are as "weapons." In comprising the list of deadly weapons in KRS 500.080(4), we think the General Assembly clearly and unmistakably signaled its intent that deadly weapons are those items that are quintessentially "weapons." A crowbar is not quintessentially a weapon, as its primary use is that of a tool.

Accordingly, we do not interpret the term "club", as found in KRS 500.080(4)(d), so broadly to include a crowbar. Hence, we hold the trial court erred by concluding as a matter

of law that the crowbar constituted a deadly weapon under KRS 500.080(4)(d).

Appellant also argues the trial court erred by determining as a matter of law that the crowbar constituted a dangerous instrument.[3] Rather, appellant insists that the issue of whether the crowbar constituted a dangerous instrument was a question of fact for the jury. For the reasons hereinafter elucidated, we agree.

In Commonwealth v. Potts, 884 S.W.2d 654, 656 (Ky. 1994), the Court addressed the precise issue of whether an object constituted a dangerous instrument was a question of fact for the jury or a question of law for the court:

> It is true that ordinarily the question of whether an instrument or object is a "dangerous instrument" is a question of fact for the jury to determine, depending upon the manner and circumstances in which it is used. As reflected by the statutory definition set out above, in order to be so classified, it must have been used, attempted to be used, or threatened to be used in a manner wherein it ". . . is readily capable of causing death or serious physical injury." If, however, it is undisputed from the evidence that the

[3] Dangerous instrument is defined in KRS 500.080(3) as follows:

> "Dangerous instrument" means any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury[.]

> instrument employed on the occasion in question is one so capable and that it was in fact used or attempted or threatened to be used in such a manner, then the question becomes one of law for the court to determine.

To become a question of law for the court, the evidence must be undisputed that the instrument was used, attempted to be used, or threatened to be used and under the circumstances is readily capable of causing death or serious physical injury. If the evidence is disputed, the question becomes one of fact for the jury.

In this case, the record reveals that appellant testified at trial and vigorously denied possessing a crowbar. Appellant testified he never used or threatened to use a crowbar to inflict physical injury upon Curtis. Appellant admitted to engaging in a physical altercation with Curtis and to biting Curtis.

As appellant denied using or threatening to use a crowbar, it is apparent the evidence at trial was disputed, thus creating a question of fact upon whether the crowbar constituted a dangerous instrument within the meaning of KRS 500.080(3). Simply put, appellant's testimony alone created a question of fact upon whether the crowbar constituted a dangerous instrument. Accordingly, the trial court erred by determining

the crowbar was a dangerous instrument as a matter of law and by not submitting the question to the jury.

We shall now address the effect of the trial court's error in determining as a matter of law that the crowbar constituted a deadly weapon and a dangerous instrument. Appellant was convicted of fourth-degree assault and first-degree burglary. Fourth-degree assault is codified in KRS 508.030:

> (1) A person is guilty of assault in the fourth degree when:
> (a) He intentionally or wantonly causes physical injury to another person; or
> (b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.
>
> (2) Assault in the fourth degree is a Class A misdemeanor.

First-degree burglary is codified in KRS 511.020:

> (1) 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 or in the immediate flight therefrom, he or another participant in the crime:
> (a) Is armed with explosives or a deadly weapon; or
> (b) Causes physical injury to any person who is not a participant in the crime; or
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

(2) Burglary in the first degree is a Class B felony.

At trial, the jury instruction upon fourth-degree assault read, in relevant part:

> [Y]ou will find the Defendant guilty of Fourth-Degree Assault 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 the 4th day of December 2002 and within twelve (12) months before the finding of the Indictment herein, he caused physical injury to Curtis Carney.
>
> AND
>
> B. That in so doing:
>
> (1) The Defendant was acting intentionally;
>
> OR
>
> (2) The Defendant was acting wantonly;
>
> OR
>
> (3) The Defendant was acting recklessly when he struck Curtis Carney (if he did so) with the "crow bar".[sic]

The jury instruction upon first-degree burglary read, in relevant part:

> 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 the 4th day of December 2002 and before the finding of the Indictment herein, he entered or remained unlawfully in a building owned by Lisa Presley without the permission of Lisa Presley or any other person authorized to give such permission;

AND

B. That in doing so, he knew he did not have such permission;

AND

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 there from[sic], he:

(1) Used or threatened the use of a "crow bar"[sic] against Curtis Carney;

OR

(2) Was armed with a "crow bar"[sic];

OR

(3) Caused physical injury to Curtis Carney.

If you find the Defendant guilty under this Instruction, you will not fix his punishment but will indicate in your verdict only that you have found him guilty of this offense and return your verdict to the Court without deliberating on the question of punishment.

Under the above submitted jury instructions upon fourth-degree assault and first-degree burglary, the trial court inserted the term "crowbar" for the terms "dangerous instrument" and/or "deadly weapon." As we have previously held that a crowbar is not as a matter of law a deadly weapon, the trial court committed reversible error by so instructing the jury. And, as we have previously held that whether the crowbar constituted a dangerous instrument is properly a question for the jury, the trial court committed reversible error by not submitting this question to the jury. By deciding the crowbar was a dangerous instrument as a matter of law and by not submitting the proper instruction to the jury, the trial court erroneously invaded the province of the jury. See Wells v. Commonwealth, 561 S.W.2d 85 (Ky. 1978).

Hence, we hold that appellant's convictions upon forth-degree assault and first-degree burglary are reversed. Upon remand, the trial court shall submit the question of whether the crowbar constitutes a dangerous instrument to the jury. The issue of whether the crowbar constitutes a deadly weapon is one of law. We have decided that it does not.

Appellant further argues that his conviction for first-degree burglary and fourth-degree assault violated the double jeopardy clauses of the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution.

To determine if convictions upon multiple offenses offend double jeopardy, the appropriate test is whether each offense requires proof of an element that the other does not. Blockburger v. United States, 284 U.S. 299 (1932); Taylor v. Commonwealth, 995 S.W.2d 355 (Ky. 1999).

In the case *sub judice*, the same physical injury (injury to Curtis) was arguably used to satisfy the necessary elements of physical injury under both first-degree burglary and fourth-degree assault. The physical injury element of first-degree burglary is found in KRS 511.020(1)(b) and reads, "[c]auses physical injury to any person who is not a participant in the crime[.]" The physical injury element of fourth-degree assault is found in KRS 508.030(1)(a) and reads, "[h]e intentionally or wantonly causes physical injury to another person[.]" When the same physical injury is utilized to satisfy the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a), it is clear that first-degree burglary contains more than one element that fourth-degree assault does not, thus satisfying Blockburger. However, the Supreme Court of Kentucky has held that fourth-degree assault does not contain an element different from first-degree burglary when the same physical injury is utilized, thus offending Blockburger.

In Butts v. Commonwealth, 953 S.W.2d 943, 945 (Ky. 1997), the Supreme Court held that a conviction upon first-

degree burglary and fourth-degree assault violated the prohibition against double jeopardy when the same physical injury was used to satisfy the physical injury elements of both KRS 511.020(1)(b) and KRS 508.030(1)(a):

> In Count I the indictment charged appellant with burglary in the first degree and in satisfaction of a necessary element alleged that appellant or another participant in the crime "caused physical injury to Tina Hannibal." KRS 511.020(1)(b). In Count III the indictment charged appellant with assault in the fourth degree and in satisfaction of a necessary element alleged that appellant "intentionally or wantonly caused physical injury to Tina Hannibal." KRS 508.030. . . . In the course of committing burglary, appellant committed an assault which resulted in physical injury to Tina Hannibal. However, the assault against Tina Hannibal was used as a necessary element to achieve a first degree burglary conviction. Under the authority of Walden v. Commonwealth, 805 S.W.2d 102 (Ky. 1991) (overruled on other grounds in Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1997)), on this issue, appellant's conviction for fourth degree assault must be vacated.

Because the same physical injury was used to satisfy the physical injury elements in KRS 511.020(1)(b) and KRS 508.030(1)(a), the Butts Court concluded that fourth-degree assault did not contain an element different from first-degree burglary. Thus, the Court held that double jeopardy was violated under these circumstances.

The Commonwealth suggests that Butts was erroneously decided. Even if the same physical injury is used to satisfy

the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a), the Commonwealth argues that double jeopardy is not offended. The Commonwealth points out the physical injury element of fourth-degree assault requires defendant acted "intentionally" or "wantonly" to cause physical injury; whereas, the physical injury element of first-degree burglary merely requires physical injury to any person and does not require a culpable mental state. Thus, the Commonwealth maintains that the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a) require different culpable mental states. Consequently, the Commonwealth believes that fourth-degree assault contains an element that first-degree burglary does not, thus satisfying Blockburger.

It is a cardinal rule of statutory interpretation that a statute need not expressly state that which is necessarily implied. Nat'l Sur. Co. v. Com., ex rel. Coleman, 253 Ky. 607, 69 S.W.2d 1007 (1934). In KRS 501.040, the General Assembly expounded upon this common law rule of statutory interpretation:

> Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state.

If conduct proscribed by a penal statute necessarily requires a culpable mental state, KRS 501.040 mandates implication of the requisite mental state.

Although the first-degree burglary statute (KRS 511.020(1)(b)) does not expressly provide the culpable mental state(s) relevant to the physical injury element, we believe that such culpable mental states are necessarily implied. KRS 511.020(1)(b) simply reads, "[c]auses physical injury to any person who is not a participant in the crime." In KRS 511.020(1)(b), the General Assembly clearly intended to broadly criminalize any conduct that causes physical injury and thus, did not specify the required *mens rea*. Consequently, the General Assembly obviously contemplated that all relevant culpable mental states be applicable to the physical injury element of first-degree burglary found in KRS 511.020(1)(b).

The culpable mental states applicable to the Kentucky Penal Code have been specifically designated in KRS 501.010(1):

> "Culpable mental state" means "intentionally" or "knowingly" or "wantonly" or "recklessly," as these terms are defined in KRS 501.020.

KRS 501.010(1) provides that the culpable mental states under the penal code are intentionally, knowingly, wantonly, or recklessly. To fulfill legislative intent, we now hold the physical injury element of first-degree burglary, found in KRS

511.020(1)(b), impliedly requires that defendant acted intentionally, knowingly, wantonly, or recklessly to cause the physical injury.

As we have implied the relevant culpable mental states to the physical injury element of KRS 511.020(1)(b), a jury may convict a defendant upon first-degree burglary only if the physical injury was perpetrated intentionally, knowingly, wantonly, or recklessly. Under fourth-degree assault, a jury may convict only if the physical injury was perpetrated either intentionally or wantonly. KRS 508.030(1)(a). However, to convict upon both first-degree burglary and fourth-degree assault, the jury must find that the physical injury was perpetrated either intentionally or wantonly. When the same physical injury is utilized to fulfill both physical injury elements under KRS 511.020(1)(b) and KRS 508.030(1)(a), it is axiomatic that the physical injury could only have been perpetrated with but one *mens rea*. Stated differently, if the jury believed defendant acted intentionally to cause the physical injury as to fourth-degree assault, the jury must, likewise, have believed that defendant acted intentionally to cause the physical injury as to first-degree burglary.

Where the same physical injury is used to satisfy the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a), these elements necessarily have identical

culpable mental states. As such, the Commonwealth's argument that the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a) have differing culpable mental states is in error. Where the same physical injury is used to satisfy the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a), it is clear that fourth-degree assault does not contain an element different from first-degree burglary, thus offending Blockburger, 284 U.S. 299.[4]

In the case at hand, the jury instructions upon fourth-degree assault and first-degree burglary did not require the jury to specify under which alternative theory it found guilt. Therefore, it is impossible to know whether the jury found appellant guilty under both KRS 511.020(1)(b) and KRS 508.030(1)(a) based upon the singular physical injury to Curtis. Upon remand, the jury instructions upon fourth-degree assault and first-degree burglary shall require the jury to specify which alternative theory was the basis for its findings of guilt. If the jury convicts appellant of both offenses based upon the singular physical injury to Curtis under KRS 511.020(1)(b) and KRS 508.030(1)(a), double jeopardy is offended and his convictions upon both offenses cannot stand.[5]

[4] We caution that our analysis is only valid where the same physical injury is used to satisfy the physical injury elements of KRS 511.020(1)(b) and KRS 508.030(1)(a).

[5] If appellant is convicted under both KRS 511.020(1)(b) and KRS 508.030(1)(a) based upon the singular physical injury to Curtis, we believe the proper procedure would be to vacate the lesser conviction (fourth-degree assault)

Appellant further contends the trial court committed reversible error by excluding his testimony concerning Lisa's "motivation to lie." By avowal, appellant testified that Lisa previously worked for an escort agency, appeared in a strip club contest, and fraudulently obtained money from his parents. Appellant claims the evidence was admissible as facts supporting a "sinister scheme" to obtain his property.

The trial court determined the evidence was irrelevant and, thus, inadmissible. Relevant evidence is defined in Ky. R. Evid. (KRE) 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Considering the case as a whole, we are inclined to agree with the trial court that the excluded evidence was irrelevant. However, even if the excluded evidence were relevant to attack Lisa's credibility, we believe it would, nevertheless, be excluded under KRE 403. KRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

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and sentence appellant upon the greater conviction (first-degree burglary).

Here, the excluded evidence was highly prejudicial and any probative value was substantially outweighed by the danger of undue prejudice to Lisa. Hence, we hold the trial court properly excluded the evidence.

Appellant finally argues the trial court erred by admitting into evidence a computer printout that revealed two previously dismissed charges. During the penalty phase of trial, the Commonwealth introduced into evidence a computer printout. The printout revealed that appellant had been charged with the offenses of stalking and menacing. As these charges had been dismissed, appellant claims the computer printout disclosing the dismissed charges was inadmissible.

We view Robinson v. Commonwealth, 926 S.W.2d 853 (Ky. 1996) as dispositive. Therein, the Court held it was error to introduce into evidence a computer printout of prior charges that were subsequently dismissed.

In the case *sub judice*, we observe this issue was not properly preserved for our review. As this appeal has been reversed on other grounds, we simply caution the trial court against admission of the computer printout containing the dismissed charges upon remand.

In sum, we affirm appellant's conviction for violating a protective order (KRS 403.736); we reverse his convictions

upon first-degree burglary (KRS 511.020) and fourth-degree assault (KRS 508.030).

For the foregoing reasons, the judgment of the Bullitt Circuit Court is affirmed in part, reversed in part, and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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