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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000410-MR

JAMES E. FORTE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 12-CR-00536

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND J. LAMBERT, JUDGES.

J. LAMBERT, JUDGE: Following a jury trial, the Christian Circuit Court convicted James E. Forte of first-degree robbery, first-degree assault, and first-degree burglary and sentenced him to thirteen years in prison. He appeals from the judgment and sentence as a matter of right, raising several errors for our review.

After review, we affirm except as to Forte's conviction for first-degree assault, which we reverse as explained fully herein.

According to testimony presented at trial, on October 30, 2012, Forte, Jay Carner, and Chris Taylor met at Taylor's grandmother's house and devised a plan to rob a local drug dealer, Antonio Green. The initial phase of the plan called for Carner, who knew Green, to go to Green's house ostensibly to sell Green a cell phone; however, the real goal was to determine what items of value Green had located in his apartment that could be stolen. The group carried out the initial phase of the robbery plan and discovered that the only perceptible item of value was a PlayStation 3 video gaming system. Nevertheless, the group proceeded with their plan to rob Green.

Later that same day, Forte, Carner, and Taylor went to Forte's cousin Ronnie's house to refine their robbery plan. After the planning was complete, the four got into Ronnie's car and drove to Green's apartment. Both Forte and Ronnie were armed with handguns. After the group arrived at Green's apartment building, Carner knocked at the door of the building, while Taylor and Forte stood hidden against the wall with their t-shirts pulled up over their faces. Ronnie parked his vehicle a few streets over and waited. When Green opened the door of the apartment building, Forte and Taylor rushed into the entrance. Taylor jumped on Green, pinning him down, while Forte and Carner ran upstairs to Green's apartment. Once inside, Forte and Carner located and took a quantity of marijuana, a handgun, and a cell phone from the apartment.

While Forte and Carner were inside the apartment, Taylor continued to hold Green down in the entryway to the apartment building. During that time, Taylor looked back and saw his uncle Tyrone Bailey in the doorway holding what Taylor believed to be a handgun. Bailey did not recognize Taylor, presumably because Taylor was wearing his makeshift mask. Taylor, not wanting to get shot by his uncle, decided it was time to leave. Taylor returned to Ronnie's car and waited with Ronnie for Forte and Carner to return.

As Forte and Carner made their way out of the apartment building and down the steps, they encountered Bailey standing in the yard near the outside steps of the building. As the two were descending the steps, Forte pulled his handgun out and shot Bailey in the head, wounding him. The two returned to the car, and Ronnie drove to a house where the proceeds of the robbery were split amongst the group.

On December 21, 2012, a Christian County grand jury returned an indictment against Forte charging him with one count of first-degree robbery, one count of first-degree burglary, and one count of first-degree assault. The case proceeded to trial on September 8, 2014, with Ronnie as Forte's co-defendant. At trial, pursuant to plea agreements, Taylor and Carner testified for the Commonwealth. Both Forte and Ronnie declined to testify, and neither presented any witnesses or evidence at trial.

At the conclusion of trial, Forte was found guilty of all charges. He was sentenced to ten years for the robbery and burglary convictions and to thirteen years for the assault conviction. The sentences were ordered to run concurrently

for a total of thirteen years. Forte now appeals the trial court's judgment and sentence.

I. UNANIMOUS VERDICT

Forte's first claim of error is that the jury was not unanimous when it found him guilty of first-degree robbery and first-degree burglary. Forte did not object to the alleged error at trial and therefore his claim is not preserved for appellate review. However, we grant Forte's request to review for manifest injustice resulting in palpable error under Kentucky Rules of Criminal Procedure (RCr) 10.26.

"[M]anifest injustice may be found upon a showing of a probability of a different result absent the error[,]" or upon a showing of "an error so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 456 S.W.3d 1, 8 (Ky. 2015) (internal quotation marks and citations omitted). All unanimous-verdict violations constitute palpable error resulting in manifest injustice. *Id*. at 9-10.

A defendant's right to a unanimous verdict is guaranteed by Section 7 of the Kentucky Constitution. *Hayes v. Commonwealth*, 625 S.W.2d 583, 584 (Ky. 1981). Our Supreme Court in *Martin v. Commonwealth*, *supra*, observed that there are two types of unanimous-verdict violations. The first occurs "when multiple counts of the same offense are adjudicated in a single trial" and the court submits "identical instructions to the jury." *Id*. at 6. The second occurs when "a general jury verdict [is] based on an instruction including two or more separate instances of

a criminal offense, whether explicitly stated in the instruction or based on the proof." *Id*. at 6-7, quoting *Johnson v. Commonwealth*, 405 S.W.3d 439, 449 (Ky. 2013).

In this case, the jury was instructed on first-degree robbery and first-degree burglary as follows:

> You will find the Defendant guilty of Robbery, First-Degree 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 30th day of October, 2012, and before the finding of the Indictment herein, that the Defendant stole a handgun, and/or a cell phone and/or marijuana from Antonio Green;
>
> AND
>
> B. That in the course of so doing and with intent to accomplish the theft, he used or threatened the immediate use of physical force;
>
> AND
>
> C. That the handgun was a deadly weapon as defined under Instruction No. 5;
>
> OR
>
> D. That James Forte, intending that Jay Carner and/or Christopher Taylor would do all of the foregoing, aided or attempted to aid them in planning or committing such conduct.
>
> You will find the Defendant guilty of Burglary, First-Degree 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 30th day of October, 2012 and before the finding of the indictment herein, that the Defendant entered into or remained in the dwelling of Antonio Green, at 1207 Walnut #4, without the permission of Antonio Green or any other person authorized to give such permission;

AND

B. That in so doing and with the intent to accomplish the theft, he knew he did not have such permission;

AND

C. That he did so with the intent of committing a crime therein;

AND

D. That when effecting entry or while in the residence or in immediate flight therefrom, Jay Carner and or James Forte and/ or Christopher Taylor

1. Were armed with a deadly weapon

OR

2. Caused physical injury to a person who was not a participant in the crime;

OR

3. Used or threatened the use of a dangerous instrument against a person who was not a participant in the crime.

AND

E. That the handguns were deadly weapons as defined under Instruction No. 5.

OR

F. That James Forte, intending that Jay Carner and/or Christopher Taylor would do all of the forgoing, aided or attempted to aide them in planning or committing such conduct.

Citing *Johnson v. Commonwealth*, *supra*, Forte argues that the jury instructions for both charges fall under the second type of unanimous-verdict violation that our Supreme Court recognized in *Martin*. In *Johnson*, the defendant was convicted of a single act of criminal abuse based on evidence that the victim suffered from two different bone fractures inflicted at different times. Because some jurors could have voted guilty based on one fracture, and other jurors based on the other fracture, the Supreme Court of Kentucky held that a unanimous-verdict violation occurred. 405 S.W.3d at 449. "The clear import of *Johnson* is that a verdict is not unanimous unless all of the jurors based their conviction of the defendant on the same criminal act[.]" *Ruiz v. Commonwealth*, 471 S.W.3d 675, 678 (Ky. 2015). Forte contends that the jury instructions given in his case were such that a juror could find that Forte acted as a principal and another juror could find that he acted as an accomplice, and therefore a unanimous verdict violation occurred. We disagree.

The Commonwealth presented evidence that Forte assisted in the planning and execution of the robbery that took place at Antonio Green's apartment on October 30, 2012. Unlike the situation in *Johnson*, where liability for one charge could have been based on two different acts, the evidence in this case consisted of

only one criminal act on which liability could be found for robbery and one criminal act on which liability could be found for burglary.

A person can be guilty of a criminal act as an accomplice to the principle actor under KRS 502.020. KRS 502.020(1)(b) provides that, "[a] person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he . . . [a]ids, counsels, or attempts to aid such person in planning or committing the offense[.]" Here, the Commonwealth submitted the case to the jury on the theory that Forte was guilty of the one criminal act as either a principle or an accomplice. Despite Forte's protestations, the Supreme Court of Kentucky has consistently held that the right to a unanimous verdict is not violated when a court gives combination instruction—instructions incorporating alternative theories of a single crime—so long as there is sufficient evidence to support both theories. *Gribbins v. Commonwealth*, 483 S.W.3d 370 (Ky. 2016); *Smith v. Commonwealth*, 366 S.W.3d 399 (Ky. 2012); *Travis v Commonwealth*, 327 S.W.3d 456 (Ky. 2010); *Beaumont v. Commonwealth*, 295 S.W.3d 60 (Ky. 2009); *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003). The evidence presented in this case by the Commonwealth clearly supported alternative theories that Forte acted as either a principle or an accomplice as to both the robbery and burglary charges. Forte's unanimous verdict argument is without merit.

Forte also argues that the jury instructions were so confusing that the only possible result was a non-unanimous verdict. However, we do not believe that the

instructions were so confusing or misleading as to lead the jury to believe that more than one criminal act was committed and that it could find guilt based on either one.

II. FACILITATION INSTRUCTIONS

For his second claim of error, Forte contends that the trial court improperly rejected his request for jury instructions on the theory of facilitation because the jury could have believed that he provided Carner and Taylor with the "means and opportunity" to commit the crimes, but that he did not intend for Carner and Taylor to commit crimes.

Forte requested a jury instruction on facilitation as a lesser-included offense to the complicity charges for robbery, burglary, and assault. The trial court denied Ford's request. "Whether a trial court issued the proper jury instruction is a question of law" that we review *de novo*. *Carver v. Commonwealth*, 328 S.W.3d 206, 209 (Ky. App. 2010).

It is the duty of the trial court to instruct the jury on "the whole law; that is, law applicable to every state of the case covered by the indictment and deducible from or supported to any extent by the testimony." *Luna v. Commonwealth*, 460 S.W.3d 851, 881-82 (Ky. 2015) (internal quotation marks omitted). "The duty to instruct on any lesser included offenses supported by the evidence does not require an instruction on a theory with no evidentiary foundation." *Thompkins v. Commonwealth*, 54 S.W.3d 147, 151 (Ky. 2001). "Instructing on a lesser-included offense is proper only if the jury could consider a doubt as to the greater offense

and also find guilt beyond a reasonable doubt on the lesser offense." *Lackey v. Commonwealth*, 468 S.W.3d 348, 355 (Ky. 2015) (internal quotation marks omitted).

Subsection (1) of KRS 506.080 provides that "[a] person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime." Our Supreme Court has explained that the principal difference between facilitation and complicity is intent. "[U]nder the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent." *Dixon v. Commonwealth*, 263 S.W.3d 583, 586 (Ky. 2008), quoting *Thompkins v. Commonwealth*, 54 S.W.3d 147, 150 (Ky. 2001). The Court further described facilitation as "reflect[ing] the mental state of one who is wholly indifferent to the actual completion of the crime." *Id*. (internal quotation marks omitted). Forte claims that there was "evidence from which the jury could find that Forte facilitated the crimes because he provided Carner and Taylor with means or opportunity by taking them to Ronnie's house, thereby finding them a getaway vehicle and aiding them in participating in the crime." We disagree.

In *White v. Commonwealth*, 178 S.W.3d 470 (Ky. 2005), the appellant was charged with the murder of Pulaski County Sheriff Sam Catron, who was running for re-election against former deputy Jeff Morris. The evidence at trial established

that Sheriff Catron was shot and killed by Danny Shelley. At trial, Morris and Shelley testified that White helped procure the getaway vehicle, bought the rifle shells used in the murder, and suggested the place where Shelley should hide in order to kill Sheriff Catron. White testified at trial that he was not involved in the murder, but overheard Shelley and Morris state that they wanted to kill Sheriff Catron.

In rejecting White's request for a facilitation instruction our Supreme Court noted:

> While "we have held that the jury may believe all of testimony of either or any one of witnesses in whole or in part," *Cheatham v. Chabal*, 301 Ky. 616, 619, 192 S.W.2d 812, 814 (1946), we also have held that "[a]n instruction on a lesser included offense requiring a different mental state from the primary offense is unwarranted unless there is evidence supporting the existence of both mental states." *Taylor v. Commonwealth*, 995 S.W.2d 355, 362 (Ky. 1999). That the jury could have disbelieved part of the testimony of Shelley and Morris does not constitute evidence of the lesser mental state required for a facilitation instruction. Rather, such disbelief would support a finding that Appellant was innocent, especially since the only other proof as to Appellant's mental state was his own testimony that he had nothing to do with the crime and was merely present when the various tools used in the shooting were obtained.

Id. at 490.

Here, to find that Forte was not guilty as an accomplice, but guilty as a facilitator, the jury would have to believe the parts of Carner's and Taylor's testimony wherein they stated that Forte took them to Ronnie's house, and

disbelieve the majority of their testimony wherein they implicated Forte as an active participant in the crimes. A jury is fully entitled to do this. *See Cheatham v. Chabal*, 301 Ky. 616, 192 S.W.2d 812, 814 (1946) ("[T]he jury may believe all of testimony of either or any one of witnesses in whole or in part[.]"). However, just because the jury might choose to disbelieve part of the testimony of Carner and Taylor does not constitute evidence of the lesser mental state required for a facilitation instruction.

At trial, Forte never suggested to the jury that Carner and Taylor were telling the truth about Forte taking them to Ronnie's house to procure a vehicle to be used in the robbery, but not telling the truth about anything else. Nor was evidence presented to the jury that Forte knew about the impending robbery, but did not care one way or the other whether or not it was completed. As with the jury in *White*, in order to find Forte guilty of facilitation, the jury would have to "find the existence of a mental state for which there was no affirmative evidence. Such an approach would require that a facilitation instruction be given in every case where the defendant is charged with complicity." *White*, 178 S.W.3d at 490. Because Forte presented no evidence demonstrating that he was wholly indifferent to the completion of the crime, we reject his claim that the trial court should have instructed the jury on facilitation.

III. EVIDENCE PRESENTED TO THE GRAND JURY

Just prior to trial, Forte filed a motion to dismiss the indictment. In his motion, Forte noted that Detective Albert Finley's grand jury testimony consisted

of recollections of the events of October 30, 2012, as told to him by Carner and Taylor. He took issue with the fact that the grand jury never heard that Carner had given inconsistent statements, nor did it hear that Carner's and Taylor's statements were inconsistent with statements given by Green, Bailey, and Bailey's girlfriend, Charlene Mumford. Forte's motion was denied by the trial court. On appeal, Forte argues that the trial court erred by not dismissing his indictment due to Detective Finley giving perjured testimony to the grand jury. We disagree.

Generally, a court will not go behind an indictment to scrutinize the quality or sufficiency of the evidence presented to the grand jury. *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000); *Commonwealth v. Baker*, 11 S.W.3d 585, 588 (Ky. App. 2000). A court may only utilize its supervisory power to dismiss an indictment where a prosecutor knowingly or intentionally presents false, misleading or perjured testimony to the grand jury resulting in actual prejudice to the defendant. *Id*., citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988).

In the present case, we do not believe that Forte demonstrated such a flagrant abuse of the grand jury process as to require dismissal of the indictment. There is simply no proof the prosecutor deliberately presented false testimony to the grand jury. Detective Finley merely relayed to the grand jury the events of October 30, 2012 as told to him by Carner and that the detective believed were true. Essentially, Forte's argument is that the prosecutor failed to present the grand jurors with evidence that would affect Carner's credibility. However, the

prosecution had no duty to disclose to the grand jury that Carner had at times had different recollections of the events. The grand jury serves its gatekeeping function by considering the sufficiency of evidence to support an indictment, not by weighing all the evidence to determine the likelihood of guilt. To insist that a prosecutor "present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *United States v. Williams*, 504 U.S. 36, 51, 112 S.Ct. 1735, 1744, 118 L.Ed.2d 352 (1992). Accordingly, we find no error in the trial court's denial of Forte's motion to dismiss the indictment.

IV. PROOF OF SERIOUS PHYSICAL INJURY

Forte next claims that the prosecution did not prove the "serious physical injury" prong of the assault charge. Forte admits that he did not preserve the error for review and requests that we review for palpable error pursuant to RCr 10.26. "When a defendant fails to preserve an error based upon the sufficiency of the evidence, an appellate court can review the issue for palpable error. But palpable error review will not be granted when a defendant did not move for a directed verdict or affirmatively waived the objection in the trial court." *Chavies v. Commonwealth*, 354 S.W.3d 103, 113 (Ky. 2011) (footnotes omitted). Here, Forte did not fail to move for a directed verdict, nor did he concede that the Commonwealth's proof for the offense of first-degree assault was sufficient to withstand a directed verdict. Therefore, we will grant Forte's request for palpable error review under RCr 10.26.

In *Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991), our Supreme Court set forth the standard for a trial court's consideration of a motion for a directed verdict. Therein the Court explained:

> 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 to the jury questions as to the credibility and weight to be given to such testimony.

The Court further explained in *Benham* that, "[o]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" *Id.* at 187, citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). In *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011), the Court held that "failure of proof on an element of the crime is a violation of Due Process and thus a manifest injustice pursuant to RCr 10.26."

KRS 508.010(1) provides:

> A person is guilty of assault in the first degree when:
>
> (a) He intentionally causes *serious physical injury* to another person by means of a deadly weapon or a dangerous instrument; or
>
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of

> death to another and thereby causes *serious physical injury* to another person.

(Emphasis added.) In order to sustain a conviction for first-degree assault under either subsection of KRS 508.010(1), the Commonwealth must prove that a victim suffered a "serious physical injury." KRS 500.080(15) defines "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ[.]"

In this case, there was no medical evidence produced as to Bailey's injuries. The only proof presented at trial of his injuries was Bailey's own testimony and that of his girlfriend, Charlene. Bailey testified that he suffered a gunshot wound on the upper left part of his forehead and has a scar from the wound in that location. Bailey testified that when he was shot, it felt like he was hit "with a little rock." He stated that he was airlifted to Vanderbilt University Hospital where he was treated and released that same evening. When asked by the Commonwealth if his memory was different from the time that the shot was fired than it was before, Bailey answered, "No." When asked if there were any repercussions or physical issues resulting from the gunshot to his head, Bailey testified that he had headaches "off and on." When asked if he had any issues with his vision, Bailey replied, "Not really." When the Commonwealth asked Bailey if he had any other problems besides headaches, he replied, "No, that's about it."

Charlene testified that since being shot, Bailey had experienced nightmares. She stated that Bailey's eye below the gunshot wound twitches "a lot" and waters "a lot." She told the jury that Bailey does not notice the twitching, but he does notice the watering. Charlene testified that since leaving the hospital, Bailey had not been to a doctor for a follow-up.

We recognize that it is not necessary that the Commonwealth present medical testimony to prove the "serious physical injury" element of a charged offense. *McDaniel v. Commonwealth*, 415 S.W.3d 643, 660 (Ky. 2013). However, especially in cases in which no medical testimony is given, an "exacting level of proof" is needed in order to establish "serious physical injury." *Id*. As stated by our Supreme Court in *Anderson*, *supra*:

> In cases where the Court has found serious physical injury, it has required a more exacting level of proof than the evidence presented in this case. In *Brooks v. Commonwealth*, 114 S.W.3d 818 (Ky. 2003), the Court held the victim, whose neck had been cut with a knife, had suffered a serious physical injury. However, unlike the present case, in *Brooks* there was evidence of a "substantial risk of death" where the victim had two long crossing slashes on his neck, stab wounds on the right side of his face and neck, and multiple defensive wounds on both upper extremities. *Id*. at 824. When emergency technicians reached the victim, a large amount of blood was pooled in his lap and he required close observation after treatment. *Id*. Similarly, in *Commonwealth v. Hocker*, 865 S.W.2d 323 (Ky. 1993), the Court found a "substantial risk of death" where the victim sustained a skull fracture, hemorrhaging, and blood clots, which required at least two days of continuous observation and monitoring in the intensive care unit (ICU), followed by six additional days of hospitalization. The Court in *Parson v. Commonwealth*, 144 S.W.3d 775 (Ky. 2004),

> considered for the first time what constitutes a "prolonged impairment of health" for purposes of KRS 500.080(15). In *Parson*, the Court determined substantial, prolonged pain constitutes a "prolonged impairment of health" and found "serious physical injury" under this prong where the victim suffered from headaches, neck pain, lack of range of motion caused by muscle spasms, upper back pain, and numbness in her right arm for five months after a car accident, and continued to have neck pain, for which she was required to take medication regularly, at the time of the trial. *Id*.

Anderson, 352 S.W.3d at 582.

Unlike the level of proof provided in the cases mentioned in *Anderson*, in this case, the Commonwealth only presented evidence through Bailey's testimony that he had been shot, that he has headaches "off and on," and that he has a small scar. The Commonwealth presented no evidence establishing the nature and severity of the gunshot wound, how much blood was lost, the nature of the medical treatment, the severity of Bailey's headaches, the time it took to recover, how much, if any, additional treatment Bailey received, or how much time, if any, Bailey took off from work in order to recover. Through Charlene's testimony, the Commonwealth presented evidence that Bailey may suffer from twitchy and watery eyes from time to time.[1] However, no evidence was presented establishing the frequency of the alleged eye twitch or watering, the amount of water that ran from Bailey's eye, or how Bailey was affected by the eye twitching and watering. Furthermore, there was no evidence presented connecting the headaches, eye

[1] Bailey's testimony that he had no other problems besides headaches contradicted Charlene's testimony in this regard.

watering, and eye twitching to the gunshot. Based on Kentucky Supreme Court precedent, we agree that the Commonwealth needed to provide "a more exacting level of proof" of a serious physical injury to convict Forte of first-degree assault.[2] "To convict [a defendant] when there is a failure of proof of an element of the crime charged is a violation of due process." *McDaniel*, 415 S.W.3d at 661. Accordingly, we reverse Forte's conviction for the first-degree assault of Bailey.

V. SUFFICIENCY OF THE EVIDENCE

Finally Forte complains that the trial court failed to direct a verdict of acquittal as to the counts of first-degree robbery and first-degree burglary. Forte moved for a directed verdict at the close of the Commonwealth's case and again at the close of all evidence. In reviewing a preserved challenge to a trial court's denial of a directed verdict claim, this Court must first construe all evidence in the light most favorable to the Commonwealth. *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) All evidence favoring the Commonwealth must be taken as true, and the Court must determine whether the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty of each and every element of the crime. *Pollini v. Commonwealth*, 172 S.W.3d 418, 426 (Ky. 2005), citing *Benham*, *supra*.

Under KRS 515.020(1), a person is guilty of first-degree robbery when:

[2] The Commonwealth in its closing argument argued that it could not think of anything which creates a "substantial risk of death" more than a gunshot to the head. However, "a finding of first-degree assault is dependent on the seriousness of the resulting injury, not the potential of the act to result in 'serious physical injury.'" *McDaniel*, 415 S.W.3d at 658.

> [I]n the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

Under KRS 511.020(1), a person is guilty of first-degree burglary when:

> [W]ith 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.

Forte argues that the Commonwealth failed to prove that the marijuana taken from Green's apartment was, in fact, marijuana or that the proffered evidence was the same evidence actually involved in the crime. We disagree.

We are convinced the Commonwealth introduced sufficient evidence to overcome the directed verdict motion. This is especially true since it is a "near universal recognition that the chain of custody need not be absolute[.]" *Thomas v.*

Commonwealth, 153 S.W.3d, 772, 779 (Ky. 2004), citing *Rabovsky v. Commonwealth,* 973 S.W.2d 6, 8 (Ky. 1998). "Any gaps go to the weight, rather than the admissibility of the evidence, and the proponent need only demonstrate a reasonable probability that it has not been altered in any material respect." *Id*. at 781, citing *McKinney v. Commonwealth*, 60 S.W.3d 499, 511 (Ky. 2001); *Rabovsky*, 973 S.W.2d at 8.

Here, Green testified that a Ziploc bag of marijuana was taken from his apartment during the robbery. Carner testified that he and Forte took a Ziploc bag of marijuana from under a pillow on the couch in Green's apartment. Warren Thompson, one of Ronnie's friends, testified that Ronnie came to his house shortly after the robbery and left a Ziploc bag for him to hold containing what "looked like marijuana." Thompson stated that he hid the bag in the rafters of his basement before the police arrived shortly thereafter and seized the marijuana. He identified a Commonwealth's exhibit as "look[ing] like the bag Ronnie gave him to hold."

Given the liberal standard for proving chain of custody, even a question of whether the "evidence has been misplaced, insecurely kept, or unstored for a significant period of time is not *per se* fatal to admissibility." *Thomas*, 153 S.W.3d at 781, citing *Gilmore v. United States*, 742 A.2d 862, 870-72 (D.C. 1999). Drawing all inferences in a light most favorable to the Commonwealth, we hold the chain of custody was sufficiently proven to overcome a directed verdict motion and to allow the evidence to be presented to the jury for its consideration of its credibility and how much weight it deserved.

Additionally, it is irrelevant whether the marijuana in the bag was real or not. For purposes of first-degree robbery, the jury must only believe that Forte was one of the assailants who went into Green's apartment and stole his property. The evidence established that something was stolen from Green's apartment and that Forte was one of the individuals doing the stealing.

Forte argues that there was insufficient evidence that he took the gun and cell phone. However, Carner testified that he saw a gun and a cell phone after he and Forte left Green's apartment that had not been in the bag before. It was not the same gun Forte had brought with him for the robbery. He testified that James used a bag that he had found in Green's apartment to carry the stolen items away.

Forte attempts to persuade this Court that Carner's testimony was not credible; however, under the *Benham* standard, Carner's testimony must be taken in a light most favorable to the Commonwealth. And the credibility of a witness is left up to the jury. Taken as true, it is clear that the Commonwealth presented sufficient evidence to defeat a directed verdict.

Forte also argues that there was insufficient proof that he entered Green's apartment, again challenging the credibility of Carner's testimony. As noted above, the assessment of the credibility of witnesses is beyond the scope of review. *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005). The trial court, in its role as a fact-finder, is better situated that the appellate court to judge the evidence and witness credibility. *Walker v. Blair*, 382 S.W.3d 862, 873 (Ky. 2012). "A reviewing court does not reevaluate the proof because its only function is to

consider the decision of the trial judge in light of the proof presented." *Benham*, 816 S.W.2d at 187. The Commonwealth presented proof that Forte entered Green's apartment. Therefore, the trial court did not err when it denied Forte's motion for a directed verdict on this issue.

For the reasons set forth above, Forte's first-degree assault conviction is reversed, and the case is remanded to the Christian Circuit Court for further proceedings consistent with this opinion. His convictions for first-degree robbery and first-degree burglary are affirmed.

ALL CONCUR.

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