

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001218-MR

JASON SHELTON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE R. JEFFREY HINES, JUDGE  
INDICTMENT NO. 97-CR-00035-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND GARDNER, JUDGES.

DYCHE, JUDGE: Jason Shelton (Shelton) brings this direct appeal from the final judgment of the McCracken Circuit Court sentencing him to twelve (12) years following his conviction by a jury for complicity to commit robbery in the first degree. After reviewing the record, we affirm.

On the night of October 26, 1996, Ken Olsen and Terry Williams went to a nightclub in a hotel complex in Paducah, Kentucky. At approximately 12:30 a.m., the two started to leave the nightclub. Williams went to his car and waited while Olsen had to go to the outside rear of the nightclub. While at the

rear, Olsen saw two young males approaching him. One of the men pointed a handgun at Olsen's face and stated, "Give me your money. Give me your wallet." Olsen reached up to push the gun away from his face and knocked the gunman off balance. Shortly thereafter, Olsen heard the gun fire, but he was not hit. When Olsen attempted to escape, the second man grabbed him from behind. As Olsen struggled to free himself, he was shot in the right shoulder. He was able to break away from the grasp of the second man and ran to Williams's car in the hotel parking lot. In a very excited state and bleeding from the shoulder, Olsen reached his friend's car and told Williams to go to the hospital because he had been shot. Williams took Olsen to a local hospital, where he was treated for the gunshot wound. Olsen immediately reported the incident to the police.

Detective Danny Carrol of the Paducah Police Department, who was assigned to investigate the incident involving Ken Olsen, received an anonymous tip that Michael Carper (Carper) had been involved in the shooting of Ken Olsen. At some point, Shelton voluntarily went to the police and told them that he was present when Carper attempted to steal money from and shot Ken Olsen. Shelton also admitted that he had grabbed Olsen, but he stated that he was merely trying to stop the incident from going any further. He indicated that he was surprised that Carper had pulled a gun and attempted to rob Olsen. Detective Carroll also interviewed Josh Carper, Michael's brother, who told him that he had taken Michael to the nightclub/hotel the day after the incident to retrieve the

discarded bullet shell casings from the two shots fired the night before. Detective Carroll also interviewed Benjamin Baker and Todd Griffith, who stated that they had accompanied Carper and Shelton to the nightclub the night of the incident, but both indicated that they had not participated in the crime.

In February 1997, the McCracken County Grand Jury indicted Shelton on one felony count of robbery in the first degree (KRS 515.020), one felony count of assault in the first degree (KRS 508.010), and one felony count of being a persistent felony offender in the second degree (PFO II) (KRS 532.080).<sup>1</sup> Shelton and Carper were tried jointly on October 1-2, 1997. During the trial, Shelton's motions for directed verdict at the close of the Commonwealth's case and at the close of all the evidence were denied. The jury found Shelton guilty of complicity to commit robbery in the first degree and not guilty of being a PFO II.<sup>2</sup> On April 30, 1998, the trial judge sentenced Shelton, consistent with the jury's recommendation, to twelve (12) years in prison for conspiracy to commit robbery in the first degree. This appeal followed.

On appeal, Shelton contends that the trial court erred in denying his motions for directed verdict because there was insufficient evidence to submit the case involving him to the

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<sup>1</sup>Michael Carper was also indicted for robbery in the first degree, assault in the first degree, and being a persistent felony offender in the second degree.

<sup>2</sup>The Commonwealth had moved to dismiss the assault in the first degree charge prior to trial because of double jeopardy considerations. The jury also found Carper guilty of robbery in the first degree and being a persistent felony offender in the second degree.

jury. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court delineated the standard for handling a criminal defendant's motion for directed verdict as follows:

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.

816 S.W.2d at 187 (citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 [1983]). See also Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997). The standard for appellate review of a denial of a motion for directed verdict alleging insufficient evidence dictates that, if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998).

In this case, Ken Olsen testified that he was confronted by two men, one of which was wielding a gun and demanding his money. The gunman fired two shots at Olsen, hitting him in the right shoulder with the second shot. Shelton does not contend that Carper did not commit robbery or that he was not present during the incident. Shelton, however, argues

there was insufficient evidence that he intended to actively participate in the commission of a crime.

A person may be guilty of complicity when, with the intention of promoting or facilitating the commission of an offense by another person, he aids or attempts to aid the other person in committing the offense. KRS 502.020(1). It is well-established that a criminal conviction properly may be based on circumstantial evidence. Baker v. Commonwealth, Ky., 860 S.W.2d 760, 761 (1993); Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 114 (1994), cert. denied, 513 U.S. 1174, 115 S. Ct. 1154, 130 L. Ed. 2d 1111 (1995). The same standard for evaluating a trial court's decision on a directed verdict motion set forth in Benham applies to cases involving circumstantial evidence. Commonwealth v. Collins, Ky., 933 S.W.2d 811, 815 (1996). Given its nature, proof of a defendant's state of mind or mens rea necessarily often involves circumstantial evidence. As the court stated in Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 86 (1998) (citations omitted): "It is elementary that intent may be inferred from the act itself or from the circumstances surrounding it." See also Parker v. Commonwealth, Ky., 952 S.W.2d 209, 212 (1997) ("Intent may be inferred from actions because a person is presumed to intend the logical and probable consequences of his conduct and a person's state of mind may be inferred from actions preceding and following the charged offense."), cert. denied, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1066, 140 L. Ed. 2d 126 (1998).

Shelton erroneously states that the prosecution failed to present evidence that he attempted to aid or assist Carper in

committing the robbery. Olsen testified that after the first shot missed him, he started to flee the scene. After taking a few steps past the gunman, he was grabbed by the second man (Shelton) so strongly that "it felt like (he) was being tackled." Olsen testified that he believed the person who grabbed him was trying to "pin me down" and "keep me from getting away." Later examination revealed that the person's hold was so tight that it left red marks or scratches across Olsen's chest. Olsen was shot in the shoulder just as he escaped the grasp of the person holding him.

Shelton has admitted that he was the person who grabbed Ken Olsen. He left the nightclub with Carper and accompanied him to the rear of the nightclub, which was away from the car in which they were going to leave. Shelton left hurriedly with Carper immediately after the incident. Chad McGregor testified that he saw Shelton with a handgun a few hours after the robbery. Shelton has yet to offer a cogent explanation for how restraining the victim, rather than the gunman, was designed to prevent the commission of the robbery. Shelton and the prosecution presented differing interpretations of the extent of his participation based on the facts. The decision whether to believe the defendant's or the prosecution's story of the case is an issue for the jury. See Webb v. Commonwealth, Ky., 904 S.W.2d 226, 229 (1995).

We believe there was sufficient evidence to infer that Shelton intended to and did assist Carper in the commission of the offense. Viewing the evidence as a whole and in the light

most favorable to the Commonwealth, there was sufficient evidence for a reasonable juror to believe that Shelton was guilty of complicity to commit robbery. Consequently, the trial court did not err in denying Shelton's motions for directed verdict.

For the foregoing reasons, we affirm the judgment of the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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