

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002149-MR

SHERRY WHITTLE

APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 05-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Sherry Whittle appeals from the final judgment of the Russell Circuit Court entered on September 19, 2005, sentencing her to six years' imprisonment following her conviction by a jury. Having concluded that Whittle was not entitled to a directed verdict of acquittal based on the evidence as a whole, we affirm.

¹ Senior Judge William L. Knopf 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.

On March 22, 2005, Whittle was indicted by a Russell County grand jury for theft of a controlled substance,² for theft by unlawful taking under \$300.00,³ and for being a persistent felony offender in the first degree (PFO I).⁴ At a jury trial held on July 21, 2005, the Commonwealth presented testimony from Amos and Lutha Cooper, who testified to the following events: The Coopers reside in Russell County, Kentucky. Close to their residence, on the same property, is a house owned by the Cooper's son, who has continually resided in Texas for more than 20 years. This house is maintained and rented out by the Coopers. In 2005 Aldon McQueary visited the Cooper's home several times to inquire about renting the vacant house. Particularly, on February 15, 2005, McQueary visited the Cooper's home and was accompanied by Whittle. While in the Cooper's home, Whittle asked to use the telephone. Mr. Cooper sat in the same room as Whittle while she used the telephone, but McQueary waited in the kitchen out of the sight line of Mr. Cooper. Following the phone call, McQueary and Whittle left the residence.

Thereafter, Mrs. Cooper arrived home from a doctor's appointment. As was her usual custom, she placed her purse in a chair in a spare bedroom next to the living room and closed the door. McQueary and Whittle returned to the Cooper's home accompanied by a child. During this visit, Whittle indicated that she would like to see the rest of the Cooper's home. Without consent from either of the Coopers, Whittle opened

² Kentucky Revised Statutes (KRS) 218A.1418.

³ KRS 514.030.

⁴ KRS 532.080(3).

the door to the spare bedroom next to the living room, went into the room with the child, and then commented on the carpet asking if it was “outdoor” carpet. Whittle knelt down and appeared to be feeling the carpet. Neither one of the Coopers could see Whittle doing anything other than touching the carpet. Whittle then indicated that she wanted to see the remainder of the house and started to go through the kitchen and upstairs, but Mrs. Cooper asked Whittle not to go upstairs. Whittle and the child abruptly left the house through a door in the kitchen. Later, Whittle sent the child back inside the house to get McQueary.

At some point during that night, Mrs. Cooper went to the spare bedroom to put some change into her purse. However, she noticed that her change purse, checkbook, and wallet were all missing. Mrs. Cooper contacted McQueary and inquired about his wife possibly taking the items, but McQueary advised Mrs. Cooper that Whittle was not his wife and that he did not know about the missing items. The Coopers reported the missing checkbook, wallet, and change purse to the police.

At some point thereafter, Mrs. Cooper was contacted by the police and asked if there were any bottles of medication missing from the home. She discovered that a bottle of Hydrocodone was missing from among Mr. Cooper’s medications. Mrs. Cooper told the police that the medication had been in a basket with all the other medications at least seven days prior to McQueary and Whittle being present in the residence, and that no one other than McQueary and Whittle had been to the residence

since the last time Mrs. Cooper had removed the bottle from the basket in the kitchen, filled Mr. Cooper's prescription tray, and replaced the bottle.

At the close of the Commonwealth's case, Whittle moved for a directed verdict of acquittal on all charges. She argued that the Commonwealth had proven only that she was in the residence, not that she had committed any of the crimes for which she was charged. The trial court denied the motion. Neither Whittle nor McQueary testified and the defense put forth no other evidence. At the close of the case for the defense, Whittle renewed her motion for a directed verdict of acquittal, but the motion was denied.

The jury found Whittle guilty of theft of a controlled substance, theft by unlawful taking, and being a PFO II.⁵ The jury fixed a penalty of three years in prison on the conviction for theft of a controlled substance, enhanced to six years by virtue of her conviction as a PFO II, and 12 months in prison on the conviction for theft by unlawful taking, with both sentences to run concurrently.

Whittle filed a motion for a new trial on July 26, 2005, claiming the trial court erred in denying her motions for a directed verdict of acquittal and that the trial court erred in denying counsel's motion to continue the trial. The trial court denied Whittle's request for a new trial and on September 13, 2005, Whittle was sentenced according to the jury's verdict. The trial court entered its final judgment on September 19, 2005. This appeal followed.

⁵ The indictment was amended on March 26, 2006, in accordance with the jury's verdict and sentence to show that Whittle was charged as being a PFO II.

Whittle's sole contention on appeal is that the trial court erred when it denied both of her motions for a directed verdict of acquittal. Specifically, Whittle claims the evidence presented at trial proved only that she was present in the home on February 15, 2005, not that she had committed any crime.

In *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), our Supreme Court restated the rule as applied to a motion for a directed verdict of acquittal 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 purposes 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.

In our review of the denial of a directed verdict, we are to determine "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . then the defendant is entitled to a directed verdict of acquittal" [citation omitted]. *Id.* at 187.

"Credibility and weight of the evidence are matters within the exclusive province of the jury" [citations omitted]. *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). *See also Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002); and *Young v. Commonwealth*, 50 S.W.3d 148, 165 (Ky. 2001).

The evidence in this case demonstrated that Whittle was present at the scene of the crime, she was in the rooms from which the items were taken, and she had

ample opportunity to take the items in question. The evidence presented by the Commonwealth showed the missing items were present in their proper places in the residence prior to Whittle's arrival in the home, and that the items were missing after she left. The Coopers testified consistently with one another and their testimony was not rebutted.

This case presents a close question because the evidence is primarily circumstantial. However, circumstantial evidence alone and reasonable inferences to be drawn therefrom may be sufficient to support a conviction. *Blades v. Commonwealth*, 957 S.W.2d 246 (Ky. 1997). Viewing the evidence and inferences in the light most favorable to the Commonwealth and leaving questions of credibility and weight to the jury, we conclude that it was not clearly unreasonable for the jury to find Whittle guilty.

Accordingly, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

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