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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000112-MR

VICTOR L. PETTIWAY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CR-01042

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

COMBS, CHIEF JUDGE: Victor L. Pettiway appeals from a jury verdict and judgment of the Fayette Circuit Court that found him guilty of theft by unlawful taking over $300.00 and of being a first-degree persistent felony offender. After our review, we affirm.

On June 20, 2006, Pettiway was arrested after he was observed stealing two stacks of polo-style shirts from a Dillard's department store in Lexington. He was

apprehended and received a *Miranda*[1] warning. He then confessed that he had stolen the shirts in order to sell them so that he could purchase crack cocaine. On July 31, 2006, the Fayette County Grand Jury indicted Pettiway on one count of theft by unlawful taking over $300.00, a Class D felony pursuant to Kentucky Revised Statutes (KRS) 514.030, and on one count of being a first-degree persistent felony offender, a Class B felony pursuant to KRS 532.080. On August 3, 2006, Pettiway entered a plea of "not guilty" to the indictment.

A one-day jury trial was held in the Fayette Circuit Court on November 8, 2006. At trial, Pettiway admitted that he had stolen the shirts. In closing, however, he raised the defense that the Commonwealth had not proven that the value of the shirts exceeded $300.00. The jury disagreed and found Pettiway guilty of the theft charge and of being a persistent felony offender. It recommended a one-year sentence of imprisonment enhanced to ten years as a result of the PFO count. On November 13, 2006, the trial court entered a judgment finding Pettiway guilty on both charges. On December 8, 2006, the court sentenced him pursuant to the jury's recommendation, withholding imposition of the sentence and granting him conditional probation for a period of five (5) years. This appeal followed.

Pettiway first argues that the trial court erred by failing to grant his requests for a mistrial because the Commonwealth's Attorney made improper comments regarding sentencing information during his closing argument. The Commonwealth's Attorney told the jury that the strategy of the defense was to obtain a lesser conviction of a

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

misdemeanor by arguing that the stolen shirts did not exceed $300.00 in value. Pettiway's attorney objected to this statement and moved the trial court for a mistrial. The court denied the motion but admonished the jury to disregard the statement. However, immediately after the court's ruling, the Commonwealth's Attorney inadvertently told the jury: "There is simply no evidence not to find the defendant guilty of the felony, excuse me, of over $300.00." Pettiway's attorney again objected and requested a mistrial; however, the court denied the motion and once again admonished the jury to disregard the statement.

A mistrial is not given lightly. "A mistrial is an extreme remedy to be utilized only when the record reveals a 'manifest necessity' for such action." *Turner v. Commonwealth*, 153 S.W.3d 823, 829 (Ky. 2005), quoting *Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001). The decision of a trial court not to award a mistrial should be disturbed only if the court has abused its discretion. *Id.* Pettiway contends that the statements made by the Commonwealth's Attorney were inappropriate because they informed the jury that the theft charge pending against him was a felony while the lesser-included offense was a misdemeanor – thus violating the bifurcated trial provisions of KRS 532.055 as well as the holding of *Carter v. Commonwealth*, 782 S.W.2d 597 (Ky. 1989). In *Carter*, the Kentucky Supreme Court held that "telling the jury sentencing information during the guilt/innocence phase of the trial violated the statutory process of a bifurcated trial as set forth in the new truth-in-sentencing statute, KRS 532.055," thereby depriving a defendant of due process of law. *Id.* at 601.

However, the Court tempered the bright-line rule of *Carter* in *Norton v. Commonwealth*, 37 S.W.3d 750 (Ky. 2001), a case involving facts similar to those presented here. In *Norton*, the appellant's defense counsel told the jury during closing arguments that the appellant had admitted all of the elements of second-degree burglary except that of entering a dwelling; thus, he could only be convicted of attempted burglary. In response, the prosecution advised the jury that the appellant had strategically admitted to every element of the crime with the exception of entering because he hoped to receive the lesser penalty that would result if he were convicted of attempted burglary instead of burglary. Defense counsel moved for a mistrial, but the trial court denied the motion. *Id.* at 753.

The Supreme Court affirmed the decision and overruled *Carter*'s *per se* rule that sentencing information is **always** inadmissible during the guilt/innocence phase of the trial. *Id*. The *Norton* Court held that the prosecution's argument was appropriate because:

> [t]he defendant here put the question of penalty at issue during the guilt/innocence phase of trial when he admitted all of the elements of the lesser offense and asked the jury not to "max" him out. Consequently, he invited the prosecutor to address his motive for so testifying and incriminating himself. It is entirely proper for the parties to comment on motive, tactics, evidence, and falsity of a defense.

Id. The Court continued:

> We remain adamant that sentencing issues must not be raised prior to the penalty phase of trial as a means to impermissibly influence the jury to convict based on the

> desired penalty rather than on the elements of each given offense. However, there are legitimate and appropriate reasons to inform a venire of the range of penalties that it may be called upon to impose as well as rational and logical reasons to discuss the potential penalties in the context of a defendant's possible motivations during closing argument.... We therefore overrule *Carter v. Commonwealth* insofar as it holds that sentencing information is always inadmissible during the guilt/innocence phase of the trial.

Id.

For the reasons set forth in *Norton*, we cannot conclude that the statements made by the Commonwealth's Attorney in this case warranted a mistrial. Pettiway's defense was clearly aimed at seeking conviction under the lesser offense of a misdemeanor by arguing that the Commonwealth failed to prove sufficient value for a felony conviction. Pettiway's counsel told the jury: "It's clear he's guilty of theft. The question is what type of theft it is that's been proven beyond a reasonable doubt that he is guilty of." After the defense raised the issue of the degree of the crime, it was not impermissible for the Commonwealth to argue in response as to Pettiway's probable motivation for admitting to every element of the charged theft with the exception of the value of the items stolen. Such an argument fits within the "rational and logical reasons to discuss the potential penalties in the context of a defendant's possible motivations during closing argument." *Id.*

Additionally, we note that the trial court admonished the jury not to consider the statements of the Commonwealth's Attorney **immediately after** the two instances in which they occurred. "It is ordinarily presumed that an admonition controls

the jury and removes the prejudice which brought about the admonition." *Clay v. Commonwealth*, 867 S.W.2d 200, 204 (Ky.App. 1993). It is presumed that a jury follows and obeys such an admonition. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 740 (Ky. 1996). Pettiway has provided us with nothing to suggest that these presumptions should not apply here. Therefore, we conclude that the trial court did not err by denying his motions for a mistrial.

Pettiway last argues that the trial court erred by denying his motion for directed verdict after the close of the Commonwealth's case. He admitted at trial that he had committed a theft, but he contends that the Commonwealth did not present sufficient evidence to establish that the value of the stolen shirts exceeded the amount of $300.00 as required for a conviction pursuant to KRS 514.030. Our standard of review of the denial of a motion for directed verdict was set forth by the Kentucky Supreme Court in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

> 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.
>
> On 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, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187.

Mike Macintosh, a loss prevention officer with Dillard's, testified at trial that twenty (20) shirts were recovered from Pettiway after he was apprehended. Macintosh indicated that he counted the shirts three (3) times in order to insure that the number was accurate. Detective Todd Iddings of the Lexington Police Department, a part-time security officer for Dillard's, also testified at trial. He recovered the shirts from Pettiway and testified that at the time of the theft they were being sold for $28.50 each. Pettiway offered nothing to refute this testimony that established the value at $570.00.

Our courts have held that criminal convictions for stealing property may be based upon evidence of the retail value of the property. *Irvin v. Commonwealth*, 446 S.W.2d 570, 572-73 (Ky. 1969). The evidence presented at trial properly established that the value of the property stolen by Pettiway clearly exceeded $300.00. Pettiway's motion for directed verdict was properly denied.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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