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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001540-MR
AND
NO. 2013-CA-001541-MR
AND
NO. 2013-CA-001542-MR

JEREMY DWAYNE ROGERS

APPELLANT

v. APPEALS FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NOS. 10-CR-00183, 10-CR-00218 AND 12-CR-00103

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, KRAMER, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Jeremy Dwayne Rogers appeals from judgments entered in three consolidated cases. A jury found Rogers guilty of three counts of burglary, one count of theft by unlawful taking, and being a first-degree persistent felony

offender. He argues that he was entitled to a directed verdict on two of the burglary charges, and that the trial court erred in imposing court costs. We affirm the judgments as to the burglary convictions, but reverse and remand for further proceedings in regard to the court costs. Rogers was indicted on three charges of second-degree burglary; each charge stemmed from a separate break-in, which will be styled the Bryson break-in, the Elliott break-in and the Brown break-in.

The Bryson break-in

On July 11, 2010, as Frank and Joy Bryson left their home to go to church, Joy Bryson noticed a slow-moving dark Nissan on her street. She observed a man and a woman in the car. Later, she identified a picture of Rogers's car as the same vehicle she saw that morning. When the Brysons returned from church, they found that someone had kicked in their back door and taken several items, including jewelry, medication, a Wii gaming system and several Wii games, with a total value over \$4,000. Rogers later pawned the Brysons' Wii system and games at Tri-State Pawn.

The Elliott break-in

The next break-in occurred less than a mile away, on August 15, 2010, at the residence of Anita Elliott, the Brysons' daughter. The Elliott family was on their way to church when Anita Elliott noticed a black Nissan Maxima driving slowly behind them. Anita was suspicious and took special note of the car because her parents' house had been burglarized on a Sunday morning. She later identified a picture of Rogers's car as the same car she saw that morning. While

the Elliotts were at church, the police received a report of a burglar alarm at their home. The police went to the home, where they found that someone had cut the screen on the screened-in back porch, unfastened the door latch and kicked the door leading to the garage. The Elliotts determined that nothing was missing. Their next-door neighbor provided video from a surveillance camera that showed someone, later confirmed to be Rogers, walking to and from the back of the Elliotts' house.

The Brown break-in

Shortly after the break-in at the Elliott house, someone broke through the back patio door of Joyce Brown's house while she was at church. An armoire full of jewelry, with an estimated value of \$3,000 to \$4,000, was taken. Brown's neighbor, Shelby Reynolds, remembered seeing a small black car that looked like a Nissan Maxima parked to the left of the Brown house that day. Reynolds called the police to report that a young woman, who looked like she was "on drugs" and "pretty much out of it," came to her door, asking for directions. The woman then got into the Nissan, and Reynolds recalled seeing a slender man with a receding hairline leave Brown's house.

Police officer Joe Carver was assisting with the investigation at the Elliott break-in when he heard a call on dispatch about the break-in at Joyce Brown's house. While en route to the Brown house, he passed a small black car matching the description given by Reynolds and coming from the direction of the break-in. Officer Carver tried to stop the car but was unable to catch up to it.

Soon afterwards, another officer found the car abandoned a short distance away. Although further investigation showed that Rogers's mother was the title owner of the car, it is undisputed that for all intents and purposes, it belonged to Rogers.

Police Detective Adam Davis obtained an arrest warrant for Rogers, who gave Detective Davis a recorded statement in which he confessed to burglarizing the Elliotts' house. He admitted that he was high and that it was affecting his recollection of the other break-ins.

The jury found Rogers guilty of second-degree burglary and theft by unlawful taking, \$500 or more, of the Bryson residence. He was also found guilty of second-degree burglary of the Elliott residence, and of the Brown residence. He was found guilty of being a first-degree persistent felony offender in all three cases, and received a sentence of ten years in each case, to be served concurrently. This appeal followed.

Rogers argues that the trial court should have granted his motion for a directed verdict as to the Bryson and Brown burglaries. "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." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The evidence presented by the prosecution must be more than a mere scintilla. *Id.* at 188.

In order to find him guilty of second-degree burglary, the instructions required the jury to find that Rogers "entered or remained" in the Bryson and

Brown dwellings without permission, that he knew he did not have such permission, and did so with the intention of committing a crime therein.

In regard to the Bryson break-in, Rogers argues that the only evidence offered by the Commonwealth to support the burglary charge was that he sold the Wii and that a vehicle matching the description of his car was seen near the residence. He points to the fact that in his statement to Detective Davis, which was played for the jury, he denied entering the house and told the detective that he sat in the car waiting.

It is well-established that “[a] conviction of dwelling house breaking may be sustained solely on circumstantial evidence.” *Franklin v. Commonwealth*, 477 S.W.2d 788, 790 (Ky. 1972). Rogers’s car was at the scene of the Bryson break-in, and he admitted pawning the stolen Wii.

The possession of stolen property is prima facie evidence of guilt of theft of the property. Where there is a breaking and entering and property taken from a dwelling and the property is found in possession of the accused, such showing makes a submissible case for the jury on a charge of burglary. Because the evidence is sufficient to support a conviction that appellant stole the property which was taken in a break-in, it follows that the evidence supports a jury finding that said appellant committed the burglary in which the property was stolen.

Riley v. Commonwealth, 91 S.W.3d 560, 563-64 (Ky. 2002) (quoting *Jackson v. Commonwealth*, 670 S.W.2d 828, 830 (Ky. 1984)).

In this case, the stolen Wii was not actually found in Rogers’s possession, but it is undisputed that he sold it at Tri-State Pawn. This fact, coupled

with the fact that his car was observed at the scene of the burglary, constituted sufficient evidence to support the jury's finding of guilt on this charge, and the trial court did not err in denying the motion for a directed verdict.

Rogers also argues that he was entitled to a directed verdict on the Brown burglary charge because there was no evidence he entered the home. In his recorded statement to police, Rogers described how he kicked in the back door of a screened porch, ran inside and grabbed some things, fled when he saw the police, and ultimately abandoned his car. He stated that he removed jewelry. Rogers argues that these remarks were made in reference to a different burglary. A jury could nonetheless reasonably infer that this statement referred to the Brown burglary because the facts are almost identical.

Additional circumstantial evidence supporting the Brown burglary charge consisted of Reynolds' identification of Rogers's car as the one she saw parked one house down the street. She also observed a male suspect from a distance of approximately 40-50 feet. Although Rogers does not have the receding hairline described by Reynolds, the description was otherwise sufficient to support the jury's finding that Rogers had entered the Brown residence. The trial court did not err in denying the motion for a directed verdict on this charge.

Court costs

Finally, Rogers argues that the trial court erred by imposing court costs in the written judgments because it had stated at final sentencing that such costs were waived. There is nothing in the record to show whether the trial court

made a finding regarding whether Rogers qualified as a poor person under KRS 453.190(2), nor is there a finding regarding his ability to pay court costs at that time or in the foreseeable future. The Commonwealth agrees that the case should be remanded to the trial court to make such findings, if necessary. Alternatively, if the imposition of court costs in the final written judgments was a clerical error, the trial court should correct the written judgments to reflect its judgments accurately. The matter is accordingly remanded for further proceedings in accordance with this opinion. The judgments are affirmed in all other respects.

ALL CONCUR.

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