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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000525-MR

RONALD RATLIFF — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
INDICTMENT NO. 13-CR-00095

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2014-CA-000545-MR

JONATHAN RATLIFF — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
INDICTMENT NO. 13-CR-00096

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

MAZE, JUDGE: Jonathan Ratliff (Jonathan) and Ronald Ratliff (Ronald) each appeal from separate judgments of conviction by the Lawrence Circuit Court. These appeals arise from common facts and a joint trial. Furthermore, Jonathan and Ronald raise the same allegations of error. Consequently, we shall consider their appeals together. We agree with Jonathan and Ronald that the trial court erred by denying their requests to instruct the jury on the defense of mistake of fact. However, we conclude that their remaining allegations of error would not compel a directed verdict in their favor or are not yet ripe for review. Therefore, we must set aside their convictions and remand for a new trial.

On July 16, 2013, a Lawrence County grand jury returned two separate indictments charging Jonathan and his brother, Ronald, with Theft by Unlawful Taking over $500 (complicity), and Criminal Trespass in the Third Degree. Each indictment alleged that, on May 30, 2013, Jonathan and Ratliff, acting in complicity with each other and with Matthew Webb, unlawfully entered onto the property of Greg Meek and unlawfully took over $500 in galvanized tin and angle iron.

At their joint trial, Deputy Mark Wheeler of the Lawrence County Sherriff's Office testified concerning the circumstances of the Ratliffs' arrest. Deputy Wheeler testified that Meek had spoken to him several days earlier. Meek

mentioned that some items had been taken from one of his properties and he asked Deputy Wheeler to keep a watch out. At approximately 8:00 am on May 30, Deputy Wheeler observed a truck backed up to a barn on Meek's property. As Deputy Wheeler pulled into the driveway, he saw Jonathan and Webb crouch or squat down behind the truck. As Deputy Wheeler got out of his vehicle, he also saw Ronald running up the hill away from the truck. Deputy Wheeler yelled, and Ronald stopped and came back down the hill.

Deputy Wheeler observed metal in the bed of the truck. He estimated that there were forty-one sheets of galvanized tin and twelve pieces of angle iron. Jonathan and Ronald told Deputy Wheeler that Webb told them they had permission to be on the property. Deputy Wheeler then placed all three men under arrest.

Meek and Deputy Wheeler also testified about the characteristics and value of the metal. Meek described the tin as "construction grade" and much heavier than roofing tin. He testified that it weighed approximately seventy-five to eighty pounds per sheet, and that the tin had never been used. Meek estimated the value of the tin at $30-$40 per sheet, and the angle iron at $25 per piece. Deputy Wheeler testified that he had seen smaller, thinner sheets of tin for sale at Lowes for $13 per sheet, and smaller pieces of angle iron ranging from $37 to $62 per piece.

Jonathan testified that Webb had contacted him the day before the incident. According to Jonathan, Webb told him that he had some "old roofing

tin" and Webb asked Jonathan if he knew anyone who would buy it. Webb suggested that Don Howard might be interested, and later that evening Webb and Jonathan went to see Howard. Webb told Howard that the tin was not stolen and that he had permission to haul it. Webb and Jonathan then made plans to take the metal to Howard the following day.

Jonathan further testified that he woke up his brother Ronald early the next morning and asked him to help them move the tin. Upon arriving at the property, Webb directed the brothers up a hill to a pile of tin. Jonathan testified that the tin was thin and appeared to have been laying there for some time. He also stated that some of the sheets bore the stamp of Armco Steel, a manufacturer which had been out of business for at least ten years. Jonathan testified that, when Deputy Wheeler arrived, he and Webb were sitting on the ground resting and Ronald was walking back up the hill for another load. Jonathan stated that he did not realize that anything was wrong until Deputy Wheeler arrested them. Finally, Jonathan testified that, following the arrest, Webb apologized to him and Ronald for lying and getting them in trouble.

The defense called Don Howard to corroborate Jonathan's account of the meeting the night before. The defense also called John Wayne Howard, a co-owner of T&B Recycling, to testify concerning the value of the metal. He indicated that the scrap price for tin is $10 per 100 pounds, and he further estimated the metal in Webb's truck would bring approximately $200-$250. Defense counsel attempted to ask him about an incident on May 28 in which Webb

brought other stolen items to the recycling center. The trial court sustained the Commonwealth's objection to the testimony, concluding that it was irrelevant to the charged offenses.

Ronald did not testify at the trial. At the close of the Commonwealth's case and the close of proof, both defendants moved for directed verdicts, which the trial court denied. Thereafter, the jury found Jonathan and Ronald guilty of the charged offenses. The jury fixed each of their sentences at one-year imprisonment on the theft charge, and a $250 fine for the trespassing charge. These appeals followed.

In each of their appeals, Jonathan and Ronald argue that the Commonwealth failed to prove the essential element of intent as to either offense. KRS[1] 514.030(1)(a) provides, in pertinent part, that a person is guilty of theft by unlawful taking when he "unlawfully … [t]akes or exercises control over movable property of another with intent to deprive him thereof…." KRS 511.080 provides, in pertinent part, that a person is guilty of third-degree criminal trespass when he "knowingly enters or remains unlawfully in or upon premises." The Commonwealth agrees that it bore the burden of proving that Jonathan and Ronald entered onto Meek's property knowing that they did not have permission to be there, and attempted to remove the tin and iron with the intent of unlawfully depriving Meeks of the metal.

[1] Kentucky Revised Statutes.

Jonathan and Ronald admit that they were on the property and were removing the metal when Deputy Wheeler arrived. However, they allege that Webb lied to them and claimed that he had permission to be on the property and haul away the metal. Based on this evidence, Jonathan and Ronald submitted a jury instruction for mistake of fact. However, the trial court declined to give the instruction, concluding that the issues of intent and knowledge were necessary elements of the theft and trespassing charges. Jonathan and Ronald argue the trial court's denial of this instruction constitutes reversible error.

Under the circumstances presented in this case, we agree. In pertinent part, KRS 501.070 provides "(1) A person's ignorance or mistake as to a matter of fact or law does not relieve him of criminal liability unless: (a) Such ignorance or mistake negatives the existence of the culpable mental state required for commission of an offense…" As noted above, intent and knowledge were necessary elements of the offenses of theft by unlawful taking and criminal trespass. Where a mistake of fact defense negates the existence of a statutorily required mental state, and there is evidence to support the defense, it is an abuse of discretion for a trial court not to give this instruction. *Cheser v. Commonwealth*, 904 S.W.2d 239, 242 (Ky. App. 1994), *overruled in part on other grounds by Walker v. Commonwealth*, 127 S.W.3d 596 (Ky. 2004).

The Commonwealth agrees that proof of intent and knowledge as elements of the theft and trespassing charges, respectively. Furthermore, the Commonwealth concedes that there was evidence supporting the defense of

mistake of fact. However, the Commonwealth argues that any error in failing to give the instruction was harmless. The instructions on the charges reflected the Commonwealth's burden of proof as to the culpable mental states. Furthermore, the Commonwealth points out that Jonathan and Ronald had ample opportunity to present their defense to the jury, claiming that they reasonably relied upon Webb's representations. Consequently, the Commonwealth maintains that Jonathan and Ronald were not prejudiced by the trial court's failure to instruct the jury on mistake of fact.

But as noted in *Cheser*, it is the duty of the trial court to instruct the jury on the merits of any lawful defense which the defendant may have. *Cheser*, 904 S.W.2d at 242, *citing Sanborn v. Commonwealth,* 754 S.W.2d 534, 550 (1988). Furthermore, where a defendant proves facts or circumstances to excuse his or her act which would otherwise in and of itself be a crime, or the specific issue is one of criminal intent such as mental capacity, an affirmative instruction should be given. *Id., citing Grigsby v. Commonwealth,* 299 Ky. 721, 187 S.W.2d 259, 261 (1945). The Kentucky Supreme Court reiterated this point more recently in *Commonwealth v. Adkins*, 331 S.W.3d 260 (Ky. 2011), holding that the instructions should expressly reflect a statutory defense if there is evidence reasonably supporting it, and this is so even where intent is an element of the alleged offense and the defense purports to negate that element or in some other way to justify or mitigate it. *Id.* at 265.

Given the clear authority on this point, we must conclude that the trial court's failure to give the requested instruction on mistake of fact constitutes reversible error. Consequently, we must vacate Jonathan's and Ronald's convictions and remand for a new trial. We will address other issues raised in their appeals to the extent that they are likely to recur during that trial.

Jonathan and Ronald further argue that they were entitled to directed verdicts because the Commonwealth failed to present sufficient evidence as to the essential elements of intent and knowledge. 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 is the defendant entitled to a directed verdict of acquittal. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) *citing Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). When ruling on a directed verdict motion, 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. *Id.* However, "[i]t should be remembered that the trial court is certainly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. Obviously, there must be evidence of substance." *Sawhill*, 660 S.W.2d at 5.

To establish intent, the Commonwealth focuses on the testimony of Deputy Wheeler concerning the actions of Webb, Jonathan, and Ronald when he

pulled into the driveway. The Commonwealth contends that Webb and Jonathan were attempting to conceal themselves behind the truck and Ronald was attempting to flee up the hill. Based upon these actions, the Commonwealth argues that the jury could infer that Jonathan and Ronald knew they did not have permission to be on the property or take the metal. Jonathan and Ronald argue that there was no factual basis to support this inference, and their behavior was equally or more consistent with innocence than with guilt.

The Commonwealth may prove intent by circumstantial evidence. *Varble v. Commonwealth*, 125 S.W.3d 246, 254–55 (Ky. 2004); *Blades v. Commonwealth*, 957 S.W.2d 246, 250 (Ky. 1997). Circumstantial evidence is evidence that makes the existence of a relevant fact "more likely than not." *Timmons v. Commonwealth*, 555 S.W.2d 234, 237–38 (Ky. 1977). The circumstantial evidence "must do more than point the finger of suspicion." *Davis v. Commonwealth*, 795 S.W.2d 942, 945 (Ky. 1990). However, the Commonwealth need not "rule out every hypothesis except guilt beyond a reasonable doubt." *Rogers v. Commonwealth*, 315 S.W.3d 303, 311 (Ky. 2010), *quoting Graves v. Commonwealth*, 17 S.W.3d 858, 862 (Ky. 2000).

On the other hand, a conviction obtained by circumstantial evidence cannot be sustained if the evidence is as consistent with innocence as with guilt. *Collinsworth v. Commonwealth*, 476 S.W.2d 201, 202 (Ky. 1972). Moreover, the inferences drawn from the evidence must be grounded in common sense and experience and in reason and logic. *Southworth v. Commonwealth*, 435 S.W.3d

32, 44-46 (Ky. 2014). Consciousness of guilt can be inferred from behavior such as flight or concealment from the authorities. *Day v. Commonwealth*, 361 S.W.3d 299, 303 (Ky. 2012). In turn, intent or knowledge can be inferred from the defendant's consciousness of guilt. *Southworth*, 435 S.W.3d at 46.

Although Jonathan offered an innocent explanation for his and Ronald's actions, we cannot say that the inferences which Deputy Wheeler drew from their conduct were clearly unreasonable. Therefore, the trial court did not err in denying their motions for a directed verdict on this ground. Assuming that the same evidence is presented upon retrial, we conclude that the trial court may properly submit the issues of intent and knowledge to the jury.

Jonathan and Ronald next argue that they were entitled to directed verdicts because the Commonwealth failed to prove that the value of the metal exceeded $500, as required by KRS 514.030(2)(d). They contend that Meek and Deputy Wheeler improperly based their estimates of the value on the cost of new tin and new iron. They also point to Jonathan's testimony that the tin was old and thin, and to John Wayne Howard's testimony concerning the "scrap" price of the metal. Given this evidence, they assert that the Commonwealth's evidence failed to meet the threshold for a felony theft charge.

To support the felony charge of theft by unlawful taking, the Commonwealth had the burden of proving that the market value of the items taken exceeded $500. *See Commonwealth v. Reed*, 57 S.W.3d 269, 270 (Ky. 2001). The testimony of the owner of stolen property is competent evidence as to the value of

the property. *Id., citing Poteet v. Commonwealth*, 556 S.W.2d 893, 896 (Ky. 1977). Both Meek and Deputy Wheeler testified concerning the value of the galvanized tin and angle iron. Even discounting their opinions as to the value of the metal, both contradicted Jonathan's testimony describing the tin as old and thin. Considering the evidence as a whole, we find that there was sufficient competent evidence which would allow the jury to find that the value of the metal exceeded $500.

Jonathan and Ronald also contend that the trial court abused its discretion by excluding the testimony of John Wayne Howard. The defense intended to ask him about his meeting with Webb on May 28, during which Webb brought in other items stolen from Meek's property. They assert that such evidence would have supported their claims that Webb had lied to them about having permission to haul the metal. They also argue that the evidence would be admissible as "reverse 404(b) evidence," showing Webb's sole culpability in the crime.

KRE[2] 404(b) permits the Commonwealth to introduce evidence of a defendant's prior bad acts under limited circumstances. Such evidence cannot be offered as direct proof of the defendant's guilt, but may be used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. "Reverse 404(b)" evidence is evidence of an alternative perpetrator's other crimes, wrongs, or acts offered by the defendant to prove that the alternative

[2] Kentucky Rules of Evidence.

perpetrator committed the offense with which the defendant is charged. *Beaty v. Commonwealth*, 125 S.W.3d 196, 207 *n. 4* (Ky. 2003).

Nevertheless, the evidence of prior bad acts by an alternative perpetrator must meet the relevancy standards of KRE 401 and 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. In this case, however, Jonathan and Ronald conceded that they were on Meek's property and participated in taking the metal. They sought to introduce the testimony to negate the elements of intent and knowledge.

Webb had been suspected of several other recent thefts, including the May 28 theft which led to Meek's report to Deputy Wheeler. The evidence of Webb's prior criminal activity would have been relevant to prove his criminal intent on May 30. However, issue in this case concerned Jonathan's and Ronald's intent or knowledge on that date. Jonathan and Ronald do not allege that Webb told John Wayne Howard on May 28 that he had permission to bring the metal. As a result, the testimony concerning his meeting with Webb was not relevant to support Jonathan and Ronald's claims that Webb lied to them on May 30. *See Blair v. Commonwealth*, 144 S.W.3d 801, 810 (Ky. 2004). Unless some additional showing of relevance is made at the new trial, the trial court will be within its discretion to exclude the testimony.

Finally, Jonathan and Ronald argue that the trial court erred by imposing the $250 fines upon them based upon their convictions for third-degree criminal trespass. Since we are vacating those convictions and remanding for a new trial, this matter is not yet ripe for review. However, we would direct the trial court to the holding of the Kentucky Supreme Court in *Roberts v. Commonwealth*, 401 S.W.3d 606 (Ky. 2013). In that case, the Court pointed to KRS 534.040(4), which specifically states: "Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." Since the trial court in *Roberts* had previously found the defendant to be an indigent person, the Supreme Court concluded that the imposition of fines for his misdemeanor convictions violated KRS 534.040(4) and was therefore clearly erroneous. *Id.* at 611. Upon remand, the trial court may again address Jonathan's and Ronald's status as indigent persons, and should appropriately determine whether they are subject to a fine upon any conviction for misdemeanor offenses.

Accordingly, the judgments of conviction by the Lawrence Circuit Court are vacated, that these matters are remanded to the trial court for new trials as set forth in this opinion.

ALL CONCUR.

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