

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002398-MR

JAMES D. LAMAR

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN HAYDEN, JUDGE
INDICTMENT NO. 97-CR-00112

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE, COMBS and GARDNER, JUDGES.

GARDNER, JUDGE. James Lamar (Lamar) appeals from a judgment of the Henderson Circuit Court following his conviction at trial for theft by unlawful taking over \$300. After review of the record, the arguments of counsel, and the applicable law, we affirm.

On April 6, 1997, Brian Gascon was working as the only clerk at the Pantry convenience store in Henderson, Kentucky. In the early morning hours at approximately 12:30 a.m., a woman came into the store and asked Gascon for directions for a certain street address. Gascon went to the rear of the store with the woman in order to consult some travel maps. Upon returning to

the front of the store, he noticed that a cigarette display rack near the cash register was missing. At about this time, a customer entered the store and told Gascon that there were packs of cigarettes littering the parking lot. When Gascon ran outside, he noticed a black, older model Chevrolet automobile quickly leaving the scene with the headlights turned off. Gascon notified the police and the store manager about the theft. The store was equipped with three video cameras that recorded the incident.

At around the same time, Henderson Police Detective Jamie Duvall saw a black Chevrolet Monte Carlo parked on the unlighted side of the Pantry Store with a white male standing next to the car. Det. Duvall left the area prior to the theft, but he later responded to a police radio announcement about the shoplifting theft at the Pantry Store. After viewing the store's security videotape, he discovered that the person he had seen near the Monte Carlo was involved in the theft. On April 27, 1997, while on patrol, Det. Duvall again saw the black Monte Carlo and recognized Lamar as the man he had seen at the Pantry Store on April 6th. After stopping the car, Duvall arrested Lamar, who was driving, and Rebecca Dyer, the passenger, on various charges including theft. Upon questioning, Dyer agreed to cooperate with the police and admitted being with Lamar at the time the theft at the Pantry Store took place.

In June 1997, the Henderson County Grand Jury indicted Lamar on one felony count of theft by unlawful taking over \$300 (KRS 514.030), one felony count of possession of a controlled

substance in the first degree (KRS 218A.1415), one misdemeanor count of carrying a concealed deadly weapon (KRS 527.020), one misdemeanor count of giving a false name to a police officer (KRS 523.110(1)), one misdemeanor count of operating a motor vehicle on a suspended license (KRS 186.620), and one felony count of being a persistent felony offender in the second degree (PFO II) (KRS 532.080). The felony theft and PFO II counts were severed for purposes of trial. After a trial, a jury convicted Lamar of theft by unlawful taking over \$300 and being a PFO II and recommended a sentence of five years for theft with the sentence being enhanced to ten years for being a PFO II. In September 1997, the trial court sentenced Lamar consistent with the jury's recommendation to serve ten years in prison. This appeal followed.

Lamar argues that the Commonwealth failed to present sufficient evidence of the value of the items stolen from the Pantry Store to support a felony, as opposed to a misdemeanor, offense for theft by unlawful taking. He contends that the trial court should have granted his motion for a directed verdict because the Commonwealth did not establish that the stolen items had a value of \$300 or more.

Generally, the Commonwealth bears the burden of establishing each and every element of an offense beyond a reasonable doubt. See, e.g., Brown v. Commonwealth, Ky., 890 S.W.2d 286, 288 (1994); Commonwealth v. Hamilton, Ky. App., 905 S.W.2d 83, 84 (1995); KRS 500.070(1). More specifically, in a prosecution for theft by unlawful taking over \$300, the

Commonwealth has the burden of proving the fair market value of the property at the time it was stolen. See, e.g., Beasley v. Commonwealth, Ky., 339 S.W.2d 179 (1960); Perkins v. Commonwealth, Ky., 409 S.W.2d 294 (1966); Braden v. Commonwealth, Ky. App., 600 S.W.2d 466 (1978).

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court set forth the standard for handling a motion for directed verdict. It stated:

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. See also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). When considering a criminal defendant's motion for directed verdict, a court must not substitute its own opinion about the credibility of witnesses or the weight that should be given to the evidence presented at trial. Rather, a court should be mindful of the rule that "[q]uestions of credibility and weight of the evidence are for the jury." Brown v. Commonwealth, Ky., 789 S.W.2d 748, 749 (1990) (citation omitted). See also Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996). In addition, the standard for appellate review of a denial of a motion for directed verdict based on 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 (emphasis added); Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998). Finally, a conviction may properly be based on circumstantial evidence when that evidence is of such character that reasonable minds would be justified in concluding that the defendant was guilty beyond a reasonable doubt. Baker v. Commonwealth, Ky., 860 S.W.2d 760 (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).

During the trial, the Commonwealth offered the testimony of Brian Gascon, the clerk on duty at the time of the incident, and Sue Campbell, the store manager, to establish the value of the stolen items. Gascon testified that when he started his shift on April 5th at 11:00 p.m., he counted all of the five-pack Marlboro cigarettes in the store and visually inspected the individual packs of cigarettes. He said that following the theft the following items were missing: 23 five-pack cartons of Marlboro cigarettes with a retail value of \$7.00 per carton; 127 individual packs of cigarettes valued at \$1.88 per pack; some baseball trading cards; and the cigarette display rack. The Commonwealth introduced the store security videotapes showing Lamar taking these various items.

Sue Campbell testified that she conducted an examination of the merchandise and sales records following the theft. She stated that as manager, she personally counts every pack of cigarettes in the store each morning while the clerks

only count cigarette cartons. Sales of cigarettes are recorded in the cash register and separate register keys were used for sales of the various generic, national brand or store brand cigarettes. Campbell compared the number of five-pack Marlboro cartons and individual cigarette packs she inventoried on the morning of the incident, the number of cigarettes still in the store after the incident and the number of cigarettes sold the day of the incident as reflected on the cash register sales receipts to derive at the number of cigarette packs taken in the theft. Based on her calculation, she determined that 23 five-pack Marlboro cartons and 127 individual packs of cigarettes were stolen. Although the cash register did not identify specific sales of the trading cards, Campbell testified there were two full 36 pack cartons of trading cards on the counter the morning of the incident that were missing. She stated that individual cigarette packs had a retail value of \$1.88 per pack. Campbell estimated that the value of the property stolen including the cigarettes, the trading cards and the store display was in excess of \$500.

Lamar argues that the Commonwealth's evidence was not sufficiently reliable to prove that the stolen property had a value of \$300 or more. He contends that the method Campbell used to derive the value was unreliable because she testified that occasionally clerks do not punch the correct cash register key and that in the past, she had been unable to account for a few packs of missing cigarettes. Lamar also suggests that the

missing cigarettes and trading cards could have been stolen earlier in the day.

The problem with Lamar's argument is that his criticisms of the method used to calculate the number and value of the stolen items goes to the weight of the evidence, rather than the complete absence of any evidence. In fact, Lamar centered his defense at trial on the accuracy of the Commonwealth's proof on the value of the stolen property, and argued this issue before the jury. The arguments presented on appeal were properly raised at trial and do not sufficiently undermine the evidence to justify reversal of the conviction. See, e.g., Brown, 934 S.W.2d at 247 (examination at trial is primary method to attack weight of witness testimony). As the court stated in Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997), "[o]n a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. The questions of credibility and weight of the evidence are jury matters." In this case, the fair market value of the missing cigarettes alone was \$399.76. Viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence for a reasonable juror to believe the market value of the items stolen from the Pantry Store was \$300 or more. Consequently, the trial court did not err in denying the motion for directed verdict.

Lamar also argues that the trial court erred in permitting Campbell to offer an opinion on the value of the stolen property. This argument is based on the same complaint

raised in the earlier argument that Campbell's opinion is speculative. This argument is without merit.

Campbell's method for determining the number and value of the items stolen was based on a rational, reasonable procedure comparing the beginning inventory on the day of the incident, the remaining inventory after the theft and the number of items sold during the day. Kentucky Rule of Evidence (KRE) 701 states that lay witnesses may give opinion evidence that is "(a) rationally based on the perception of the witness; and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Case law has long recognized the ability of property owners to give opinion evidence on the value of stolen property. See Davis v. Rhodes, 206 Ky. 340, 266 S.W. 1091 (1924); Brewer v. Commonwealth, Ky. App., 632 S.W.2d 456 (1982). Campbell was familiar with the number of items present at the store and the retail value of those items. Even if Campbell's testimony on the general value of stolen items constituted an opinion, it was properly admitted by the trial court.

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

ALL CONCUR.

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