

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002746-MR

TODD CARLTON GALLMAN

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY R. ASBURY, JUDGE
ACTION NO. 96-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, EMBERTON, and GARDNER, JUDGES.

EMBERTON, JUDGE. Todd Carlton Gallman (Gallman) appeals from a judgment of the Boyd Circuit Court following his conviction by a jury for intimidating a witness. We affirm.

On the night of November 6, 1995, someone burglarized a Chevron gasoline station and removed the safe inside. On January 8, 1996, the Ashland Police Department received a complaint about a loud party at a residence. When Officer William Serey responded to the complaint, he saw several persons that appeared to be fighting and intoxicated. Officer Serey arrested Gallman and Ted Mills for alcohol intoxication and disorderly conduct,

and placed them in his police cruiser. While Serey was transporting the two to the jail, he heard Gallman say the police were stupid because they could only catch him for being drunk while he had been ripping off people.

After Gallman and Mills had completed the booking process and been placed in separate rooms for questioning, Officer Serey heard Gallman say in a very loud voice that if Mills "ratted him out" to the police, people he (Mills) cared about would be hurt. During questioning, Mills told the police that Gallman had been involved in the Chevron burglary and had bragged about it. Mills said a couple of weeks after the burglary he had helped a third person move the stolen safe and he told the police the location where they could find the safe. When the police investigated, they discovered the safe at the residence identified by Mills. On January 10, 1996, Gallman was charged with third-degree burglary and he remained in jail on this charge.

While Gallman was in jail, he made several telephone calls to Mills and discussed the burglary case with him. Mills told the police that Gallman had made threats during these conversations. On one occasion on January 17, 1996, the police arranged to record the telephone conversation between Gallman and Mills. During that conversation, Gallman asked Mills about what he had told the police and what he would do if he were subpoenaed to testify at a trial. Gallman suggested that he could not be convicted if Mills did not testify. Based on the various

statements by Gallman, the police charged him with intimidating a witness.

In May 1996, the Boyd County Grand Jury indicted Gallman on one felony count of third-degree burglary (KRS 511.040) and one felony count of intimidating a witness (KRS 524.040). After a trial, the jury found Gallman guilty of intimidating a witness, but not guilty of third-degree burglary. In September 1996, the trial court sentenced Gallman consistent with the jury's recommendation to serve thirty (30) months in prison on the offense of intimidating a witness. This appeal followed.

Gallman argues the trial court erred by denying his motions for a directed verdict at the close of the Commonwealth's evidence and at the close of the defendant's evidence. He contends there was insufficient evidence presented at trial to support the jury's conviction for intimidating a witness.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court set out 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 Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997). 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; 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, Mills testified that Gallman telephoned him from jail and asked him what he had said to the police. Mills stated that on one occasion, Gallman said that he (Mills) would not make it to trial and that the other person involved in the burglary would "take care of him." Mills

testified that Gallman also said that Mills could not expect to live after giving the police information about other people. Mills stated that he understood Gallman's statements as a threat to have him shot. Mills said that he believed that Gallman would carry out the threats to keep from going to prison. The Commonwealth also played the audiotape recording of the January 17, 1995, telephone conversation between Gallman and Mills. During this conversation, Gallman questioned Mills about what he had told the police, and he made several oblique statements suggesting that Mills should not testify and that he would let other persons know about Mills' cooperation with the police.

In addition, Officer William Serey testified that after Mills and Gallman had been arrested and were being processed at the police station, Gallman shouted at Mills not to say anything to the police. Serey also testified that Gallman called Mills a "rat" and stated "you rat me out and a lot of people you love are going to get hurt." Serey stated that Gallman repeated several threats later while Gallman and Mills were at the jail. Officer Serey said that Mills went into hiding in another county for fear of his safety, and the police had to keep his exact location secret.

KRS 524.040 sets forth the elements for the offense of intimidating a witness. It provides in part:

(1) A person is guilty of intimidating a witness when, by use of physical force or a threat directed to a witness or a person he believes may be called as a witness in any official proceeding, he:

(a) Influences, or attempts to influence, the testimony of that person;

(b) Induces, or attempts to induce, that person to avoid legal process summoning him to testify;

(c) Induces, or attempts to induce, that person to absent himself from an official proceeding to which he has been legally summoned[.]

See generally Foley v. Commonwealth, Ky., 942 S.W.2d 876 (1996), cert. denied, ___ U.S. ___, 118 S. Ct. 234, 139 L. Ed. 2d 165 (1997).

In the case at bar, Ted Mills testified that Gallman asked him several times about his statements to the police and whether he was going to testify at Gallman's criminal trial. Mills stated that Gallman intimated that he would have Mills harmed if he continued to assist the police. Mills testified that he did take some of Gallman's statements seriously. Officer Serey also testified that Gallman made threats against Mills at the police station and at the jail. Serey stated that Gallman threatened to hurt other persons if Mills cooperated with the police. Officer Serey indicated that Mills had left the county because he feared for his safety. Although Gallman attacked Mills' credibility, the credibility of the witnesses was an issue for the jury. Viewing the evidence in the light most favorable to the Commonwealth, there was sufficient evidence for a reasonable juror to believe that Gallman attempted to influence the testimony of Ted Mills or attempted to induce him to avoid participating in the criminal trial. Thus, the trial court did not err in denying Gallman's motions for directed verdict.

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

ALL CONCUR.

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