

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002318-MR

ZACHARY H. KILGORE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 99-CR-00412-2

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUIDUGLI, KNOFF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Zachary Kilgore ("Kilgore") appeals from a final judgment of the Fayette Circuit Court reflecting a jury verdict of guilty on one count of second-degree escape. We affirm.

On February 7, 1999, Correctional Officer Jerry Burton ("Officer Burton") and his wife Amy Burton ("Amy") were traveling eastbound on Interstate 64 near the Blackburn Correctional Complex in Fayette County, Kentucky. As they approached the complex, they observed two persons leave the complex by climbing the fence. The two persons, whom Amy believed were men, got into a motor vehicle parked on the side of the road. The Burtons

exited the interstate, and Officer Burton notified the complex by telephone of a possible escape.

Upon receiving Officer Burton's call, an emergency count was conducted and two inmates, Kilgore and Bobby Burton ("Bobby Burton")<sup>1</sup> were found to be missing. Thereafter, Officers Bruce Sams ("Sams") and James Helpinstien ("Helpinstien") positioned themselves in a field adjacent to the interstate in the event that Kilgore and Bobby Burton returned. At approximately 7:50 p.m., two persons were observed exiting a vehicle on the shoulder of Interstate 64. The persons climbed the fence and entered the correctional complex. As they approached the officers, who were hidden from view, the Officers determined that the persons were Kilgore and Bobby Burton. Kilgore and Bobby Burton were taken into custody.

On April 12, 1999, Kilgore was indicted on one count of escape in the second degree and one count of persistent felony offender in the second degree. The latter charge was dismissed on June 30, 1999, and Kilgore proceeded to a jury trial on the escape charge. Kilgore was found guilty, and sentenced to two years in prison. The sentence was probated, and this appeal followed.

Kilgore first argues that he was entitled to a directed verdict of acquittal at trial. Specifically, he maintains that the Commonwealth failed to prove an element of the offense, i.e., that he physically departed from the correctional facility. It was Kilgore's assertion at trial that neither he nor Bobby Burton

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<sup>1</sup>No relation to Officer Burton.

left the facility. Rather, he maintained that two females had climbed the fence to rendezvous with Kilgore and Bobby Burton, and it was these persons who were observed entering and leaving the facility. Accordingly, he argues that the trial court erred in overruling his motions for a directed verdict of acquittal.

We have closely examined the record, the law, and the arguments of counsel, and find no error on the question of whether Kilgore was entitled to a directed verdict. As the parties are well aware, Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), sets out the test for a directed verdict: 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 whether, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Only after this determination is answered in the affirmative is the defendant entitled to a directed verdict of acquittal. Id.

In the matter at bar, the trial court clearly did not err by declining to grant a directed verdict in favor of Kilgore, because sufficient evidence was presented at trial upon which a

jury could reasonably find guilt. First, the chronology of events indicates that the two persons left the facility at approximately 6:30 p.m., then returned at approximately 7:50 p.m. If, as Kilgore maintains, the persons were the two females, the persons would have entered the complex at 6:30 p.m. and left at 7:50 p.m. Second, Amy Burton stated that she believed the two persons were male rather than female. And most important, the testimony of Officers Sams and Helpinstien regarding their direct observation of Kilgore's return provides an ample basis upon which the jury could have reasonably found guilt. In sum, the evidence formed a sufficient basis for the court's denial of Kilgore's motion.

Kilgore next argues that the trial court erred in allowing the introduction of evidence of a juvenile felony conviction for purposes of impeachment. Kilgore argues that the introduction of said evidence is barred by the operation of state and federal case law.

We find no error on this issue. As the Commonwealth notes, KRS 610.320(4) provides in clear and unambiguous language that ". . . records of adjudications of guilt of a child for an offense which would be a felony if committed by an adult shall be admissible . . . after the child becomes an adult . . . for impeachment purposes during a criminal trial." This language is directly on point, and leaves little question as to whether the trial court in the matter at bar acted properly in allowing the introduction of the contested evidence against Kilgore.

Lastly, Kilgore argues that the trial court cannot effectively admonish to the jury to consider the felony conviction only for the purpose of impeaching the defendant's credibility. We are not persuaded by this argument for at least two reasons. First, this argument apparently was not raised before the trial court and as such was not preserved for appellate review. Second, even if we were to get past the problem of preservation, there exists ample Kentucky case law supporting the proposition that an admonition is presumed to be effective. See generally, Pendleton v. Commonwealth, Ky., 685 S.W.2d 549 (1985), and its predecessor cases which refute Kilgore's argument. We find no basis on this issue for tampering with the judgment on appeal.

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

ALL CONCUR.

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