

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000935-MR

DAVID HIX

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 01-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

BAKER, JUDGE: David Hix ("Hix") appeals from a judgment entered by the Mason Circuit Court on April 9, 2002, following his conviction for receiving stolen property valued at three hundred dollars (\$300.00) or more and carrying a concealed weapon. Hix was sentenced to a total of five years' imprisonment as a result of this conviction. We affirm.

During the early morning hours of June 25, 2001, Maysville Police Officer Mark Branham responded to an alarm

being activated at the local Mitsubishi plant. Upon arriving at the scene, Officer Branham discovered that a chain that secured a pressure washer and trailer had been cut and left in the parking lot. Thirty minutes after Officer Branham's discovery, Maysville Police Officer Michael Fogleman saw a Ford dual-wheeled pickup truck enter the Mitsubishi plant parking lot. This pickup truck was pulling a trailer containing a pressure washer. Officer Fogelman further observed Hix at the rear of the truck preparing to set the stand down on the trailer. Based upon these observations, Officer Fogelman, with assistance from the Maysville and Aberdeen, Ohio, police departments, detained Hix and Teddie Weeks ("Weeks"), and proceeded to search Hix's truck. This search uncovered two bolt cutters, a camera, a key, a magazine for a .45 caliber pistol, a book entitled "Ohio Arrest Search and Seizure Handbook," and a knife stuck between the driver's seat and the console. Hix and Weeks were immediately arrested and taken into custody. The grand jury subsequently indicted Hix for receiving stolen property over \$300.00, carrying a concealed deadly weapon and being a persistent felony offender (PFO) in the first degree¹. The PFO charge was eventually dismissed.

¹ Weeks was also indicted for receiving stolen property over \$300.00 and tried jointly with Hix. Weeks was convicted of this indicted charge and sentenced to one year in prison. Weeks's conviction will not be addressed in this opinion.

At trial, Kevin Richards and Gary Wilms, employees of Cincinnati United Contractors, testified that the pressure washer and trailer belonged to their company. This equipment was being used by Cincinnati United Contractors to complete an ongoing job at the Maysville Mitsubishi facility. Richards described the pressure washer as a "huge" machine used for degreasing. The pressure washer was also used at the Mitsubishi plant to pressure wash parking lots. Wilms estimated the value of this equipment at approximately five thousand dollars (\$5,000.00).

At trial, Hix testified concerning the events leading up to his arrest. During his testimony, Hix stated that, on June 24, 2001, an unknown man approached him at his Ohio home and hired him to deliver a pressure washer and trailer from the Maysville Mitsubishi plant to a location in Cincinnati. The unknown employer agreed to pay Hix one dollar per mile to transport this equipment. Hix, despite being in the business of moving and transporting equipment, failed to obtain his employer's identity. However, the employer directed Hix to meet him either at the Maysville plant or at a truck stop in Aberdeen. After they retrieved the equipment, Hix was to follow the employer to Cincinnati.

After having contracted with the unnamed stranger to move the equipment, Hix enlisted Weeks's help to retrieve and

transport the pressure washer and trailer. Around 2:00 a.m. on June 25, 2001, Hix and Weeks arrived at the Mitsubishi plant and located the equipment matching the description provided by the unidentified employer. Hix hooked the trailer up to his truck and waited for fifteen minutes for his contact to appear. After this waiting period, Hix decided to go to the Aberdeen truck stop and wait for the employer. During the trip to Aberdeen, Hix noticed that his taillights were not working. Hix immediately stopped at a Marathon station in Aberdeen and attempted to fix the taillights. Hix was not able to fix the lights without a fuse, forcing him to visit an Aberdeen Citgo truck stop and purchase a fuse. While buying the fuse, Hix parked the truck, with the trailer attached, under some bright lights in front of the store so the employer could easily find him. Hix waited at this truck stop for twenty minutes before determining that he missed his employer. At this point, Hix returned to Maysville, but did not locate his employer. Hix immediately began to unhitch the trailer with attached pressure washer, but stopped after being surrounded by the police.

After considering the evidence produced at trial, the jury found Hix guilty of receiving stolen property over \$300.00 and carrying a concealed weapon. The jury recommended a sentence of five years in prison for the receiving stolen property charge and one year for the offense of carrying a

concealed weapon. The trial court sentenced Hix to a total of five years in prison. This appeal followed.

Hix presents three arguments for our review. First, Hix asserts that the Commonwealth failed to present sufficient evidence concerning the value of the pressure washer and trailer. He contends that the trial court should have granted his motion for a directed verdict on the charge of receiving stolen property over \$300.00 because the Commonwealth failed to present sufficient evidence that this equipment had a value exceeding \$300.00. We disagree.

Generally, the Commonwealth bears the burden of establishing each and every element of an offense beyond a reasonable doubt. 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 receiving stolen property, the Commonwealth has the burden of proving the value of the property received. Macklin v. Commonwealth, Ky. App., 687 S.W.2d 540, 542 (1984); Lee v. Commonwealth, Ky. App., 547 S.W.2d 792, 795 (1977). Moreover, the Commonwealth must establish the fair market value of the stolen property at the time the offense is committed. Tussey v. Commonwealth, Ky., 589 S.W.2d 215 (1979); Perkins v. Commonwealth, Ky., 409 S.W.2d 294 (1966). The property stolen, or a photograph depicting such property, need not be produced at

trial since verbal testimony describing the stolen property is sufficient to support a conviction. Irvin v. Commonwealth, Ky., 446 S.W.2d 570, 572 (1969). In fact, the owner of the stolen property may offer an opinion on the value of the property in order to establish the dollar amount at issue. Commonwealth v. Reed, Ky., 57 S.W.3d 269, 270 (2001). This testimony, however, must be of sufficient detail so that the jury can make a value determination. Id., at 271.

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 a motion for a 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. 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 concerning the denial of a motion for directed verdict dictates that, if under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, the defendant 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).

In this matter, Wilms testified that while serving as a project superintendent for his employer, Cincinnati United Contractors, he learned that the pressure washer and trailer were worth approximately \$5,000.00. Wilms established this value for the pressure washer on the fact that this piece of equipment was of industrial size and capable of producing steam. Wilms, however, possessed no knowledge concerning how much Cincinnati United Contractors paid to purchase this equipment,

whether the equipment was purchased new or used or from whom the equipment was purchased. Nevertheless, Wilms expressed that the pressure washer and trailer are worth more than \$300.00 because a person "couldn't put tires on the trailer for \$300.00. I have bought the tires."

We believe that Wilms's testimony was of sufficient detail to allow a reasonable juror to find that the value of the equipment at issue exceeded \$300.00. Wilms, as an agent of his employer, knew enough about this particular piece of equipment to place a value on it. Also, Wilms testified that he purchased tires for this equipment, with the purchase price of those tires exceeding \$300.00. Finally, Wilms noted that this equipment was used primarily for industrial purposes. Viewing this evidence in the light most favorable to the Commonwealth, sufficient evidence existed for a reasonable juror to believe and infer that the market value of the equipment stolen from the Maysville Mitsubishi plant on June 25, 2001, exceeded \$300.00. Consequently, the trial court did not err in denying the motion for a directed verdict.

For his second argument, Hix asserts that the trial court erred by not granting his motion for a directed verdict concerning the charge of carrying a concealed weapon. Hix argues that the Commonwealth failed to present evidence that the

knife found in his truck was concealed or that the weapon found constituted a deadly weapon as defined by KRS 500.080.

KRS 527.020(1) states that a person is guilty of carrying a concealed weapon when he carries concealed a firearm or other deadly weapon on or about his person. The words "on or about his person" mean concealed in such proximity to a person as to be of convenient access and within immediate physical reach. Collier v. Commonwealth, Ky., 453 S.W.2d 600, 601 (1970); Hampton v. Commonwealth, Ky., 257 Ky. 626, 78 S.W.2d 748 (1934). In this matter, the knife at issue herein was found in Hix's truck, stuck down between the driver's seat and the console. Hix acknowledges that the knife was found in his truck at that location. We believe that Hix, as the operator of his truck, could easily access the knife by simply placing his hand between the seat and the console. This evidence clearly indicates that the knife was on or about Hix's person. Thus, the knife was concealed for purposes of KRS 527.020(1).

We also believe that the evidence presented at trial sufficiently demonstrated that the knife at issue herein was, in fact, a deadly weapon. KRS 500.080(4)(b) provides that any knife other than an ordinary pocket knife or hunting knife is considered to be a deadly weapon. In this case, Hix testified that he did not use this knife for hunting. Additionally, there was no testimony that this knife was simply an ordinary pocket

knife. This knife was introduced into evidence by the Commonwealth and submitted to the jury for its inspection. This evidence, when viewed in a light favorable to the Commonwealth, could cause a juror to reasonably infer that the knife was anything other than a deadly weapon. Hence, we believe that the evidence was sufficient to support the jury's verdict convicting Hix of carrying a concealed deadly weapon.

Finally, Hix argues that the trial court abused its discretion by not granting his motion for a continuance. We reject this argument.

A continuance may be granted upon a showing of sufficient cause. RCr 9.04. The decision to grant or deny a continuance rests solely within the trial court's discretion. Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991). We will not disturb a trial court's ruling on a continuance motion unless it appears that there was a clear abuse of discretion such as to deny substantial justice to the accused. Williams v. Commonwealth, Ky., 644 S.W.2d 335, 336 (1982). The factors the trial court should consider in exercising its discretion include "length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice." Snodgrass,

814 S.W.2d at 581. The appropriateness of granting a continuance in any case depends on the facts and circumstances involved. Id.

We do not find any abuse of discretion in this case. From the transcript of his February 15, 2002 motion, it appears that the court weighed the factors specified for consideration in Snodgrass. The trial court concluded that there would be inconvenience to all the litigants and to the court if a continuance were granted in this matter. Furthermore, the trial court did not discern that this matter warranted additional time since the Commonwealth agreed to make its records available for inspection by Hix's newly retained trial counsel². The court also believed that Hix had sufficient time to confer with counsel during the four weeks remaining before trial. Therefore, we find no prejudice to Hix resulting from the denial of his motion for a continuance.

For the aforementioned reasons, the judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew Sanning
Maysville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

David A. Smith
Assistant Attorney General
Frankfort, Kentucky

² Hix retained attorney Debra Rigg to represent him on February 14, 2002.