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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002165-MR
AND
NO. 2001-CA-002166-MR

GLENN MILLER — APPELLANT

v.

APPEALS FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NOS. 00-CR-00056-001 AND 01-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Glenn Miller has appealed from a final judgment and sentence of the Rockcastle Circuit Court entered on September 7, 2001, which, following the jury trial in which Miller was found guilty of burglary in the third degree[1] and as being a persistent felony offender in the first degree[2] (PFO I), sentenced him to 15 years' imprisonment. Having concluded that

[1] Kentucky Revised Statutes (KRS) 511.040.

[2] KRS 532.080(3).

the trial court did not commit an error entitling Miller to relief, we affirm.

Danny McKinney was the owner of a self-storage facility in Rockcastle County, Kentucky. The facility consisted of individual buildings, each of which contained multiple storage spaces that McKinney leased to his customers. Each storage space was accessible from the outside through a large, bay door. McKinney testified that he reserved some storage spaces for his own personal use. Among the spaces McKinney reserved for his own use was unit #30.

At around 9:30 p.m. on September 24, 2000, McKinney was on his way home from working at his other businesses when he passed by the storage facility in Rockcastle County. McKinney testified that as he neared the facility, he noticed a U-Haul truck parked in front of unit #30. McKinney stated that as he pulled into the parking lot area alongside the U-Haul truck, he noticed one man standing near the door to unit #30 and another man walking out from inside unit #30.[3] At trial, McKinney identified Miller as the man he saw walking out from inside unit #30.

McKinney further testified that he told the two men to remain at the storage facility while McKinney called the police on his cellular phone. According to McKinney, Miller and the

[3] It is not clear from the record whether the other man with Miller was charged as a result of the events on the night in question.

other man ignored his request and fled the scene in the U-Haul truck. McKinney stated that he followed the men in his own vehicle and was able to contact the police during this pursuit. McKinney testified that he followed the U-Haul until Pulaski County Sheriff Sam Catron pulled the truck over and arrested Miller.

On September 29, 2000, a Rockcastle County grand jury indicted Miller on one count of burglary in the third degree.[4] On June 6, 2001, Miller was again indicted by a Rockcastle County grand jury on a PFO I charge,[5] which stemmed from two previous convictions in Jessamine County. Miller pled not guilty to both charges.

At a jury trial held on August 7 and 8, 2001, Miller's motion for a directed verdict of acquittal was denied, and the jury found Miller guilty of burglary in the third degree and the PFO I charge. On August 8, 2001, the trial court entered final judgments on the guilty verdicts. On September 7, 2001, following a pre-sentence investigation, the trial court sentenced Miller to five years' imprisonment on the conviction for burglary in the third degree, which was then enhanced to 15 years' imprisonment pursuant to the PFO I conviction. This appeal followed.

[4] Indictment No. 00-CR-00056.

[5] Indictment No. 01-CR-00038.

Miller first claims that the trial court erred by denying his motion for a directed verdict of acquittal. Specifically, Miller argues:

> In the case at bar, the evidence asserting [ ] Miller's presence was wholly inadequate to support a [burglary in the third degree] conviction. . . . That [ ] requires that two separate and distinct elements be met in order to support a conviction. One must (1) enter or remain unlawfully in a building (2) with the intent to commit a crime.
>
> Only the owner of the storage facility, [ ] McKinney placed [ ] Miller at the scene of the crime. . . . [McKinney] claims that [ ] Miller was 3-5 feet inside the shed when [McKinney] arrived on the scene to confront [ ] Miller.

In Commonwealth v. Benham,[6] our Supreme Court explained the test for a trial court to follow when ruling on a motion for a directed verdict of acquittal:

> 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.

[6] Ky., 816 S.W.2d 186, 187 (1991).

The Court went on to state the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on a motion for a directed verdict:

> 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 the defendant is entitled to a directed verdict of acquittal.

With these principles in mind, we turn to the evidence presented at trial. Our review of McKinney's testimony reveals the following:

1. McKinney testified that Miller did not have his permission to enter unit #30, a unit which McKinney had reserved for his own personal use.

2. McKinney testified that he observed a U-Haul truck backed up directly in front of unit #30, with the back door to the U-Haul open.

3. McKinney stated that as he pulled alongside the U-Haul truck, he saw Miller walking out from inside unit #30.

4. McKinney testified that when questioned, Miller asserted that he had leased unit #30.

5. McKinney stated that when he told Miller he was going to call the police, Miller and the other man quickly got into the U-Haul truck and drove away.

6. Finally, McKinney stated that upon returning to unit #30, he could not locate the lock that had been on the door earlier in the day.

Based on the foregoing testimony, we conclude that it was not "clearly unreasonable" for the jury to find Miller guilty of burglary in the third degree, since there was ample

evidence upon which the jury could have found that Miller knowingly entered or remained unlawfully in unit #30 with the intent to commit a crime therein.[7] McKinney testified that Miller did not have permission to be inside unit #30 and that McKinney could not find the lock which had been on the door earlier in the day. Hence, the jury could have reasonably found that Miller intentionally entered unit #30 unlawfully. McKinney also testified that the U-Haul truck was backed up directly in front of unit #30 with its back door open. Thus, the jury could have reasonably concluded that Miller entered unit #30 with the intent to commit a crime, i.e., take items from inside that did not belong to him.

In his brief to this Court, Miller places a great deal of emphasis on the fact that almost all of the evidence presented on behalf of the Commonwealth came from the uncorroborated testimony of McKinney. However, the testimony of a single witness is sufficient to support a finding of guilt, even if another witness testifies to the contrary.[8] We therefore hold that, based upon the evidence presented, a jury could have reasonably found Miller guilty of burglary in the third degree.

[7] See KRS 511.040.

[8] See Commonwealth v. Suttles, Ky., 80 S.W.3d 424, 426 (2002)(holding that "[t]he testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence").

Accordingly, the trial court did not err by denying Miller's motion for a directed verdict of acquittal.

Miller next argues that the trial court erred by admitting prejudicial evidence at trial. In particular, Miller argues:

> McKinney should not have been allowed to testify about the report of a prior break-in [that he received from Rodney Moberly, one of McKinney's renters,] because it does not relate to any material aspect of the charges against [ ] Miller. The evidence was offered under the guise of non-hearsay, but the [trial] court erred in not recognizing the [possible prejudicial effect]. The trial court should have excluded [ ] McKinney's testimony as irrelevant.

We disagree and hold that the trial court did not err by admitting McKinney's testimony on this issue.

In Young v. Commonwealth,[9] our Supreme Court explained that out-of-court statements offered not for the truth of the matter asserted, but to explain an individual's conduct after hearing that statement is admissible non-hearsay:

> A police officer may testify about information furnished to him by an absent witness only if that information tends to explain the action that was taken by the police officer as a result of the information and the taking of that action is an issue in the case. If so, the out-of-court statement is not hearsay, because it is not offered to prove the truth of the matter asserted but to explain why the

[9] Ky., 50 S.W.3d 148, 167 (2001).

> officer acted as he did [emphasis original] [citation omitted].

In the case at bar, McKinney testified that at around 6:00 p.m. on the night in question, he was at the storage facility when Moberly, one of McKinney's renters, told him that his storage bay had been broken into earlier. McKinney testified that as a result of this conversation, he replaced the lock on Moberly's bay and checked the other bays to see if they were secure, including unit #30. This testimony was relevant to show why McKinney checked all of the bay doors to see if the locks were in place before he left shortly thereafter. This testimony also explains why McKinney chose to investigate later that evening when he noticed the U-Haul truck parked near his own storage unit. Hence, these statements were properly admitted into evidence as non-hearsay testimony.

Miller further argues that even if the testimony was relevant, its probative value was outweighed by the danger of undue prejudice and should have been excluded under KRE[10] 403. Once again, we disagree. Immediately after McKinney testified regarding the statements that Moberly had told him, the trial court admonished the jury that the statements were not being offered to prove the truth of the matter asserted in those statements, but to explain the subsequent actions taken by

[10] Kentucky Rules of Evidence.

McKinney.[11] Further, nothing in McKinney's testimony with respect to what Moberly had told him implicated Miller in the break-in at Moberly's storage unit. Miller's name was not mentioned in this portion of the testimony. The trial court did not abuse its discretion by finding that the probative value was not outweighed by the danger of undue prejudice.[12] Accordingly, the trial court did not err by admitting this testimony.

Based on the foregoing, the judgment of the Rockcastle Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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[11] See Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 26 (1998)(holding that "[j]urors are presumed to have followed an admonition").

[12] See Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 103 (1998)(stating that "[a]n appellate court should reverse a trial court's ruling under KRE 403 only if there has been an abuse of discretion").