

RENDERED: MARCH 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002644-MR

ROBERT MICHAEL PERRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 00-CR-002245

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE and JOHNSON, JUDGES.

JOHNSON, JUDGE: Robert Michael Perry has appealed from the judgment of conviction and sentence entered by the Jefferson Circuit Court on September 7, 2004, which, following a bench trial, convicted him of three counts of theft by failure to make required disposition of property over \$300.00,¹ and sentenced him to three, concurrent, five-year prison terms to be probated for five years. Perry argues that the evidence was insufficient to support his conviction, that the trial court improperly applied

¹ Kentucky Revised Statutes (KRS) 514.070(1).

fiduciary duty principles from civil law in finding him guilty of a criminal offense, and that the amount of restitution he owes was improperly calculated. Having concluded that the Commonwealth presented sufficient evidence to establish Perry's guilt and the amount of restitution, we affirm.

Perry was indicted by a Jefferson County grand jury on October 17, 2000, for eight counts of theft by failure to make required disposition of property over \$300.00. The charges arose from a relationship Perry had with Minnie Gunn. Specifically, Perry was charged with failing to make the required disposition of Gunn's Phillip Morris disability income (Count I), Gunn's Social Security disability income (Count II), Gunn's 1983 Mercedes Benz 300D (Count III), furniture and furnishings belonging to Gunn (Count IV), jewelry belonging to Gunn (Count V), Gunn's home (Count VI), fire insurance proceeds on Gunn's home following a fire in 1992 (Count VII), and fire insurance proceeds on Gunn's home following a fire in 1993 (Count VIII).

On April 20, 2004, Perry was tried on all eight counts in the indictment in a bench trial before the Jefferson Circuit Court. Count II was dismissed by the trial court on Perry's motion for a directed verdict. After the parties filed post-trial briefs, the trial court on July 20, 2004, entered its findings of fact, conclusions of law, and judgment. Perry was

found not guilty of Counts III, IV, V, and VI, and guilty of Counts I, VII, and VIII. Perry was sentenced on September 7, 2004, to five years' imprisonment on each of the three convictions for theft by failure to make required disposition of property, with the sentences to run concurrently for a total of five years. The sentence was probated for a period of five years, and Perry was ordered to pay restitution in the amount of \$79,447.11.² This appeal followed.

Perry met Gunn when he attended the University of Kentucky in the late 1970's with Gunn's daughters and he moved into Gunn's home in the early 1990's. Perry resided in Gunn's home with Gunn, her daughter Chandra Crutcher (whom Perry eventually married) and Gunn's grandson, Clifford Crutcher. Perry lived in Gunn's home until August 1992, when the home was damaged by a fire.

In August 1992 Gunn was sentenced to five years in federal prison on convictions unrelated to the present matter. Prior to going to prison, in July 1992 Gunn appointed Perry her attorney-in-fact under a General Power of Attorney. The General Power of Attorney stated in relevant part as follows:

[I]t is my [Minnie Gunn's] desire
to appoint him [Robert Perry] to

² Perry filed a motion to vacate or to amend pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.02, which was denied except to the extent an order entered on November 24, 2004, ordered him to pay a minimum of \$400.00 per month in restitution with his probation being extended if restitution was not paid in full within five years.

act with full power for me and in my name and stead; to make contracts, lease, sell, or convey any real or personal property that I may now or hereafter own; to receive and receipt any money which may now or hereafter be due to me; to retain and release all liens on real and personal property; to draw[,] make and sign any and all checks, contracts, or agreements; to invest or reinvest my money for me; to institute or defend suits concerning my property or rights, and generally to do and perform for me and in my name all that I might do if present[.]

Gunn went to prison on August 19, 1992, and was released on December 20, 1996. The charges against Perry in the present matter pertain to his disposition of Gunn's property while she was incarcerated.

Since Gunn died before Perry's trial, the Commonwealth played a videotape of Gunn's May 17, 1999, testimony in a civil trial of a lawsuit she brought against Perry for breach of fiduciary duty and failure to account for certain money and property as her fiduciary. The Commonwealth also played a videotaped deposition of Gunn taken on February 15, 2001. Gunn testified that she appointed Perry her attorney-in-fact because she was going to prison and stated that she instructed Perry to sell her house and to use the proceeds of the sale to pay off her mortgage and to pay the attorney who represented her in the

federal criminal proceedings. Any remaining funds were to be used to pay off Gunn's other outstanding bills.

As noted, Gunn's house was damaged by fire in August 1992. Following the fire, Gunn, Perry, Chandra, and Clifford moved into an apartment. Very shortly thereafter, Gunn went to prison and pursuant to Gunn's General Power of Attorney, Perry received insurance proceeds as a result of the fire in the amount of \$43,000.00.³ Approximately a year later, a second fire occurred at the home and Perry, again pursuant to the General Power of Attorney, received additional insurance proceeds in the amount of \$40,000.00 for structural damage to the home. While Gunn was incarcerated, Perry also received her pension check from Phillip Morris in the amount of \$197.29 per month. Gunn testified that she instructed Perry to use this money to pay off the lien against her automobile so Chandra would have a vehicle to drive. Gunn further testified that since she was incarcerated and no longer eligible for Social Security disability benefits, she instructed Perry to have her Social Security disability check of \$746.00 per month stopped.

Gunn testified that when she was released from prison her house had been foreclosed upon and sold, her vehicle had been repossessed, her bank account was overdrawn by \$1,200.00, and she had no assets remaining. Gunn stated that she had not

³ \$24,778.00 was for damaged contents and the remaining \$18,222.00 for damage to the structure.

received any of the insurance proceeds dispersed after the two house fires. Gunn also testified that she had not authorized Perry to pay himself out of her assets, to use her money for personal expenditures, or to write checks on her bank account to himself.

Perry testified that he received the insurance proceeds following the fires at Gunn's residence in 1992 and 1993. He stated that he received one check in the amount of \$18,222.00 and paid \$500.00 out of that amount for something he could not recall. The balance of \$17,722.00 was deposited into Gunn's bank account, and Perry wrote a check to himself in that amount on September 10, 1992. Perry testified that he used some of the money to pay contractors working on Gunn's fire-damaged house, but he did not get any receipts for the payments and kept limited records. Perry further testified that he received a second insurance check for the 1993 fire in the amount of \$24,778.00, and he acknowledged that he lost approximately \$24,000.00 of the fire insurance proceeds he received through securities trading. Perry admitted that the trading account was not set up in Gunn's name, but he testified that Gunn understood he was investing her money in an attempt to make money for her.

Perry testified that he hired contractors to repair Gunn's house following the 1992 fire, and that repairs were completed in January 1993. He further testified that he had

repair work done to the house following the fire in 1993. Perry produced seven checks he wrote to contractors for work performed on the house, but stated that he did not have all the records for the money he spent on the repair work. He also testified that between 1992 and 1994 he made one mortgage payment on Gunn's home in the amount of \$440.00.

Perry argued at trial that the purpose of the appointment he received under Gunn's General Power of Attorney was to insure that Chandra, Clifford, and he maintained the lifestyle they had enjoyed prior to Gunn's going to prison. He claimed that he was not obligated to pay Gunn's mortgage, but paid as much as possible. Finally, Perry argued that he used most of Gunn's funds to take care of Gunn's daughter, Chandra, and grandson, Clifford.

On appeal, Perry claims the trial court erred in finding him guilty on any of the counts of theft by failure to make required disposition of property because the evidence was insufficient to support a finding of guilt, and that the trial court improperly applied principles of fiduciary duty from civil law regarding his inability to account for Gunn's property and money. Additionally, he argues that the trial court erred in calculating the amount of restitution he should pay to Gunn's estate.

When reviewing a case tried by the trial court without a jury, the trial court's findings of fact will not be disturbed unless clearly erroneous. Findings of fact are not clearly erroneous if they are supported by substantial evidence.⁴ "Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people."⁵ The trial court's conclusions of law, however, are subject to de novo review on appeal.⁶ Likewise, on a motion for a directed verdict, the trial court is required to view the evidence in the light most favorable to the Commonwealth and must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.⁷ A directed verdict should be granted to the defendant only if the Commonwealth produces evidence of guilt insufficient to induce a reasonable person to believe beyond a reasonable doubt that the defendant is guilty.⁸

Perry asserts that the trial court improperly presumed him guilty due to his failure to account for Gunn's money and property, and that the Commonwealth failed to meet its burden of

⁴ See Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409 (Ky. 1998); and Gosney v. Glenn, 163 S.W.3d 894 (Ky.App. 2005).

⁵ Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002).

⁶ Gosney, 163 S.W.3d at 898.

⁷ Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

⁸ Id. at 187 (citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983); and Trowel v. Commonwealth, 550 S.W.2d 530 (Ky. 1977)).

proof regarding Perry's disposition of Gunn's property.

However, the Commonwealth was required only to produce evidence that Perry received Gunn's money or property pursuant to an agreement or known legal obligation and failed to make the disposition of the assets as required by the agreement or legal obligation.

The evidence showed that Perry received the pension benefits and the insurance proceeds, but the money was not disposed of pursuant to the agreement as explained by Gunn. Perry admitted that at least \$24,000.00 was lost through securities trading. The remainder of Gunn's funds from the fire insurance proceeds and her Phillip Morris pension were largely unaccounted for; however, the evidence showed that Gunn's vehicle was repossessed and her home foreclosed upon. When Gunn contacted Perry while she was in prison and asked about the status of the fire insurance proceeds, he lied to her and denied having received the money. This evidence certainly supported the reasonable inference that Perry did not dispose of Gunn's money in a way to protect the assets she testified she directed him to protect. Perry testified he used the money he received as directed, but he had only limited records of his transactions. The trial court, as any finder of fact, was entitled to weigh the credibility of Perry's and Gunn's testimony and it was not bound by Perry's exculpatory

explanations.⁹ The record contains more than substantial evidence to support the trial court's finding of guilt in regard to the pension benefits and the fire insurance proceeds.

Perry also claims the trial court incorrectly calculated the amount of restitution he owes to Gunn's estate as a result of his failure to make the required disposition of her property. Perry asserts that he should be given a credit, or a set-off, from the amount of restitution equal to the amount Gunn's residence sold for at foreclosure.

The trial court ordered Perry to pay \$79,447.11 in restitution. This amount was comprised of the total of the insurance proceeds Perry received while Gunn was incarcerated (\$83,000.00) plus the amount of pension proceeds he received (\$6,132.11) for a total of \$89,354.11, less \$9,907.00 for the amount Perry showed he actually spent as directed by Gunn. We reject Perry's contention that he is entitled to a credit or a set-off for the amount Gunn's house sold for at foreclosure.

The legislative intent behind ordering restitution is to make the victim whole and to recoup the full amount lost.¹⁰ Perry was given ample opportunity to controvert the Commonwealth's allegations concerning the amount of restitution and he was given full credit for the amount shown to be disposed

⁹ Armstrong v. Commonwealth, 517 S.W.2d 233, 235 (Ky. 1974).

¹⁰ Hearn v. Commonwealth, 80 S.W.3d 432, 436 (Ky. 2002).

of properly.¹¹ The record below contains more than an "adequate factual predicate" for the trial court's restitution order,¹² and we decline Perry's invitation to speculate regarding the fair market value of Gunn's home at the time of the foreclosure sale and the amount of repair work actually done to the home. The trial court's determination of the amount of restitution owed was supported by substantial evidence and not clearly erroneous.¹³

Based upon the foregoing, the judgment and sentence of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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¹¹ See Fields v. Commonwealth, 123 S.W.3d 914 (Ky.App. 2003).

¹² Id. at 918.

¹³ Hearn, 80 S.W.3d at 436.