

RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002321-MR

ROBERT EARL SUMMERFORD, SR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 05-CR-00234

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Robert Earl Summerford, Sr. was convicted of receiving stolen property over \$300.00, possession of burglar's tools, unlawful possession of a radio that sends or receives police messages, carrying a concealed deadly weapon and third-degree criminal trespass. Summerford was also convicted of

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

being a persistent felony offender in the first degree. The trial court sentenced Summerford to serve a total of thirteen years in prison.

Summerford now appeals his conviction on the ground that there was insufficient evidence to support the jury's guilty verdict on the charge of receiving stolen property. He also argues that although his trial counsel failed to raise objections, the court permitted various police officers to offer prejudicial opinion testimony. After reviewing the record and finding no error, we affirm.

On January 20, 2005, Officer Robert Terry of the Lexington Urban Fayette County Police Department was on routine patrol in Lexington, Kentucky when, shortly after 11:00 p.m., he observed Summerford crouching behind a bush on the right side of a law office located at 217 N. Upper Street. Turning into an alley behind the building, Officer Terry observed Summerford rise and begin running away through the alley. When Summerford stopped running, Officer Terry got out of his vehicle and questioned him as to why he was hiding behind the bush. Summerford responded that he was looking through dumpsters. He also told Officer Terry that he was carrying a large knife.

Officer Terry arrested Summerford for third-degree criminal trespass and advised him of his Miranda rights. While searching him, Officer Terry discovered a large knife, a

leatherman tool, two pocket knives, a butane torch with an extra butane canister, three mini-flashlights with extra batteries, gloves, a notebook, a scanner programmed to receive police radio frequencies and an ear bud for use with the scanner. Officer Terry also found receipts for two watches that Summerford had sold to a pawn shop, and a small notebook containing a list of various addresses, including "205 N. Upper" and "217 N. Upper." While the latter was the address at which Officer Terry observed Summerford hiding behind the bush, the former was the location of an office that was burglarized on December 19, 2004 and was crossed out in the notebook.

During questioning by detectives, Summerford gave a number of different reasons as to why he was at 217 N. Upper Street. These included his contention that he was searching through dumpsters, that he was looking for a place to urinate, that he was looking for a stolen motor scooter, and that he was looking for methadone for a girlfriend. In part because of the notation in his notebook, the police also asked Summerford about the prior burglary that occurred at 205 N. Upper Street. During this questioning, Summerford granted permission for a search of his residence.

During the resulting search of Summerford's apartment, police discovered several items of jewelry that Summerford claimed belonged to a deceased girlfriend. The jewelry matched

descriptions of items stolen in the December 19, 2004, burglary that had occurred at 205 N. Upper Street. Dennis Bradley, the attorney whose 205 N. Upper Street office was burglarized, identified the jewelry found in Summerford's apartment as pieces belonging to an estate he was representing which were stolen from his office safe. Bradley initially identified the pieces from pictures taken of the recovered jewelry. Bradley later identified the actual jewelry pieces at trial. Additionally, using the pawn shop receipts found on Summerford's person as a starting point, the police were able to trace several additional pieces of the stolen jewelry that Summerford had sold to pawn shops.

At trial, Summerford moved for a directed verdict on the charge of receiving stolen property over \$300.00 on the ground that the Commonwealth offered no proof that he knew that the jewelry found in his apartment was stolen. He further argued that there should be no presumption of guilt based on his possession of the jewelry given the fact that approximately one month passed between the December 2004 burglary and the police finding the jewelry in his possession. The trial court overruled Summerford's motion, and the jury subsequently found him guilty.

Summerford now appeals his conviction, specifically challenging the trial court's decision overruling his motion for

a directed verdict. He also argues that his trial was manifestly unfair due to alleged misconduct by the Commonwealth. According to Summerford, despite the fact that his own trial counsel never objected, the Commonwealth continually sought and received prejudicial opinions and conclusions from testifying police officers. Our review of the record reveals no error.

Turning to the first argument, the Commonwealth contends that Summerford failed to preserve his challenge regarding the sufficiency of the evidence supporting the charge of receiving stolen property. According to the Commonwealth, though Summerford moved for a directed verdict of acquittal on this charge, he did not preserve the issue for appellate review because he did not object to the inclusion of a jury instruction on it. Relying on our Supreme Court's decision in Kimbrough v. Commonwealth, 550 S.W.2d 525 (Ky. 1977), the Commonwealth argues that Kentucky law requires that a defendant wishing to challenge the sufficiency of the evidence as to one or more, *but not all*, of the elements of a particular crime, must object to the giving of a jury instruction rather than moving for a directed verdict. At first glance, the broad language of Kimbrough seems to support this proposition. However, since that decision was rendered in 1977,² the Kentucky Supreme Court has refined the

² In fact, *Kimbrough* represents the first application of this concept in a criminal case. This is best seen by the Supreme Court's reliance on *Columbia*

law. In its most recent discussion of this matter in Combs v. Commonwealth, 198 S.W.3d 574, 578-79 (Ky. 2006), the Supreme Court explained:

The Commonwealth argues that the issue was improperly preserved because Appellant did not specifically object to the separate instructions on [first-degree unlawful touching of a minor]. "The proper procedure for challenging the sufficiency of evidence on one specific count is an objection to the giving of an instruction on that charge." Seay v. Commonwealth, 609 S.W.2d 128, 130 (Ky. 1980). However, that rule applies only when there are two or more charges and the evidence is sufficient to support one or more, but not all, of the charges. In that event, the allegation of error can only be preserved by objecting to the instruction on the charge that is claimed to be insufficiently supported by the evidence. Miller v. Commonwealth, 77 S.W.3d 566, 577 (Ky. 2002); Campbell v. Commonwealth, 564 S.W.2d 528, 530-31 (Ky. 1978); Kimbrough v. Commonwealth, 550 S.W.2d 525, 529 (Ky. 1977).

Thus, because Summerford's directed verdict motion contested the sufficiency of the evidence on the *single* count of receiving stolen property lodged against him, he was not required to preserve his challenge by further objecting to an instruction on it. Rather, his motion for a directed verdict properly preserved the question for appellate review.

We therefore turn to the merits of Summerford's claim.

When ruling on a motion for directed verdict

Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky. 1976), a civil case, as its authority for the doctrine's application.

[t]he 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, 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.

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

Applying this standard to the matter before us, we believe that there was sufficient evidence for the jury to arrive at a verdict of guilty. This evidence included several pieces of jewelry stolen during the December 2004 burglary being found in Summerford's possession as well as his contradictory and unsupported statements as to how he acquired them. Further, the police were able to use receipts in Summerford's possession to trace additional stolen items to pawn shops where he had sold them following the date of the burglary.

Additionally, we find no basis for Summerford's claim that the passing of one month between the December 2004 burglary and the discovery of the stolen items in his apartment should negate the presumption of guilt that normally arises when stolen

property is found in one's possession. See Combs v. Commonwealth, 341 S.W.2d 774 (Ky. 1961) (possession of stolen property is prima facie evidence of possessor being guilty of offense of receiving stolen property). Under Kentucky law, once the presumption arises, the burden shifts to the defendant to explain to a jury how he either lawfully acquired the stolen property or that he did not have any reason to believe that it was stolen. Deskins v. Commonwealth, 488 S.W.2d 697 (Ky. 1972). As in the present matter, the jury, upon hearing the defendant's explanation, is free to believe it or reject it. *Id.*

Also, contrary to Summerford's assertions, we can find no authority suggesting that a prima facie case of guilt cannot arise if the stolen items are discovered beyond a prescribed period of time (*i.e.*, one month) following the burglary in which the items were taken. Rather, as the Commonwealth suggests, the period of time elapsing between a burglary and the subsequent discovery of stolen items is but one factor that either the defendant or, for that matter, the prosecution may choose to present to a jury. Thus, while Summerford was free to argue before the jury that the length of time between the December 2004 burglary and the discovery of the stolen jewelry should mitigate against the Commonwealth's assertion of guilt, he was not entitled to a directed verdict because of it.

Summerford's second issue on appeal concerns various statements made by police officers while testifying on behalf of the Commonwealth. While conceding that his trial counsel failed to preserve the issue for appellate review, Summerford nevertheless argues that this Court should undertake such review because the error was "palpable" and will result in "manifest injustice" if review is refused.

Kentucky Rule of Criminal Procedure (RCr) 10.26

states:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

If the reviewing court does not believe that the result would have been any different had the alleged error not occurred, the error is non-prejudicial and does not warrant reversal.

Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003). In the matter *sub judice*, Summerford contends that the Commonwealth unfairly elicited statements by prosecution witnesses that he believes constituted prejudicial opinion testimony. Based upon our review of these statements, however, we do not believe that "a substantial possibility exists that the result would have been any different" had the witnesses not offered the testimony

at issue. Jackson v. Commonwealth, 717 S.W.2d 511, 513 (Ky. App. 1986).

In each of the instances complained of by Summerford, the challenged testimony concerned *why* a particular witness undertook some course of action. According to Summerford, these questions were prejudicial because they allowed various police witnesses to give their subjective views of both Summerford and the evidence. We disagree. Given the fact that the most serious charges against Summerford were unrelated to his trespass at 217 N. Upper Street, it was not error for the Commonwealth to have the investigating police officers explain how and why they linked Summerford to jewelry stolen over a month before. Gordon v. Commonwealth, 916 S.W.2d 176 (Ky. 1995) (testimony by police officer that defendant was considered a suspect in countywide drug investigation properly admitted to explain police officers' actions).

Moreover, even if we believed that admission of the challenged testimony by the trial court *over proper objection had it been made* would constitute reversible error, it does not rise to the level of palpable error. Setting aside the testimony of the police, the uncontroverted evidence strongly suggested Summerford's guilt:

- The stolen jewelry at issue was found in Summerford's possession;

- He possessed pawn shop receipts for additional pieces of stolen jewelry at the time of his arrest;
- He offered changing and contradictory explanations to police in an effort to explain how the items came into his possession;
- He possessed a notebook at the time of arrest that included the address from which the jewelry was stolen; and
- He possessed burglary tools at the time of his arrest.

Under these circumstances, we do not believe that there is a substantial possibility that had the challenged testimony been excluded, the result would have been different. Thus, the error was not palpable. See, e.g., Castle v. Commonwealth, 44 S.W.3d 790 (Ky. App. 2001) (in prosecution for trafficking in a controlled substance within 1,000 yards of a school, unpreserved error of admitting hearsay testimony of police detective, that he received information from confidential informant that defendant was trafficking in marijuana, was not palpable, as it was not likely that the result of the trial would have been any different without the improper testimony).

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Kristin N. Logan
Assistant Attorney General
Frankfort, Kentucky