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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000136-MR

DAVID TIDWELL, IV — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 06-CR-00161

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER AND WINE, JUDGES.

WINE, JUDGE: David Tidwell ("Tidwell") appeals from a jury verdict and judgment of the Pike Circuit Court that found him guilty of theft by unlawful taking over $300.00 and being a persistent felony offender in the second degree. After our review, we affirm.

On April 12, 2006, William and Daisy Ray watched out the window of their home on Nobson Fork Street, in Pike County, Kentucky, as a man walked

from Jeannie (Daisy's sister) and John Rivards' home up the street carrying various items, including a television, and up to a trailer located above the Rays' home. A short time later, William and Daisy stopped by the Rivards' house on their way to the doctor. They saw that the door was open, the place had been ransacked and items were missing, including the television. After the police responded to their call, the Rays told the officer that, while they did not know the identity of the man they saw packing the items up the road, they knew that Craig Varney ("Varney") owned the trailer above their home.

Trooper Jonathon Leonard went to the trailer to investigate. No one was home at the trailer but Trooper Leonard could see a television and other items on the floor which the Rivards later identified as stolen. Trooper Leonard left and returned with a search warrant. There was still no one home at the trailer when he returned with the warrant. Upon searching the trailer, Trooper Leonard was able to recover a number of the items stolen from the Rivards' home earlier in the day.

Upon questioning, Varney told police that his former stepbrother, Tidwell, was living in the trailer in exchange for providing upkeep and maintenance of the trailer. Varney also suggested the police check with Carl Tussey ("Tussey") to recover some of the jewelry taken from the Rivards' home. Tussey was an unlicensed pawn broker who bought and sold gold and silver out of his home. Tussey told police that Tidwell came to his home with two women to pawn some jewelry which one of the women said had belonged to her grandmother. Tussey negotiated a sale for $200.00 with Tidwell for the jewelry.

Tidwell was arrested in West Virginia and waived extradition to Kentucky. During the ride back to Kentucky, Tidwell made various statements to the Kentucky State Police. As a result, additional property stolen from the Rivards was recovered from the Big Eagle Gun & Pawns in Logan and Chapmanville, West Virginia.

On June 28, 2006, Tidwell was indicted by a Pike County grand jury on one count each of second-degree burglary and theft by unlawful taking over $300.00. Tidwell was also indicted as a second-degree persistent felony offender ("PFO II"). Tidwell entered a plea of not guilty to the charges and the matter was tried before a jury in a two-day trial on November 27 and 28, 2006.

At trial, the jury found Tidwell not guilty of burglary, but guilty of theft by unlawful taking over $300.00 and of being a PFO II. The jury fixed a sentence of five years' imprisonment, enhanced to ten years as a result of his PFO II status. On January 10, 2007, the trial court entered its final judgment and order of imprisonment and sentenced Tidwell to ten years in prison in accordance with the jury's verdict. This appeal followed.

On appeal, Tidwell first argues that the trial court erred by failing to grant his motion for a directed verdict at the close of the Commonwealth's case. Tidwell contends that the Commonwealth's evidence linking him to the stolen items was insufficient. Our standard of review for the denial of a motion for directed verdict was set forth by the Kentucky Supreme Court in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

> 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, 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.

Id. at 187.

The elements of theft by unlawful taking over $300.00 require proof that Tidwell exercised control over the property of another, knowing that it was not his own, and intending to deprive the owner of that property, which was valued over $300.00. KRS 514.030(1)(a). Tussey testified that Tidwell accompanied two women to his home to sell jewelry. He testified that one of the women claimed that the jewelry belonged to her grandmother. Tidwell testified that he believed the jewelry belonged to Paula Runyon, one of the women who accompanied him to Tussey's house. Tidwell further testified that he negotiated a deal with Tussey for the jewelry on behalf of the woman. Tidwell argues Tussey's testimony, in conjunction with the trooper's testimony that he offered to help recover the stolen jewelry and the fact that the Commonwealth failed to call either of the two women to testify, all indicate that he did not know that the jewelry was stolen. Thus, Tidwell argues the Commonwealth did not prove every element of the theft charge.

We disagree. Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of this Court is limited to determining whether the trial court erred in failing to grant a motion for a directed verdict. The reviewing court is not at liberty to determine what credibility or weight should be given the evidence, these being functions reserved to the trier of fact. *Witten v. Pack*, 237 S.W.3d 133, 135 (Ky. 2007). Varney's testimony was that Tidwell had access and control over the trailer where some of the stolen items were located. When considered with Tussey's testimony that Tidwell was involved in the sale of some of the stolen jewelry, and KSP Trooper Jimmy Nolte's testimony that Tidwell told him he knew he "messed up when he stole from a Christian," the jury could reasonably believe Tidwell was guilty of theft by unlawful taking over $300.00. In *Jackson v. Commonwealth*, 670 S.W.2d 828, 830 (Ky. 1984), *overruled on other grounds, Cooley v. Commonwealth*, 821 S.W.2d 90 (Ky. 1991), the Court held:

> Where there is a breaking and entering and property taken from a dwelling and the property is found in possession of the accused, such showing makes a submissible case for the jury on a charge of burglary. (Internal citation omitted). Because the evidence is sufficient to support a conviction that appellant stole the property which was taken in a break-in, it follows that the evidence supports a jury finding that said appellant committed the burglary in which the property was stolen.

Therefore, the trial court's decision to deny Tidwell's motion for a directed verdict on the original charges of second-degree burglary and theft by unlawful taking over $300.00 is without error.

Next Tidwell contends that the trial court erred by refusing to instruct the jury on the lesser-included offense of theft by unlawful taking less than $300.00. In Kentucky, it is well-established that "it is the duty of the trial judge to prepare and give instructions on the whole law of the case, . . . [including] instructions applicable to every state of the case deducible or supported to any extent by the testimony." *Taylor v. Commonwealth,* 995 S.W.2d 355, 360 (Ky. 1999), *citing* Kentucky Rules of Criminal Procedure (RCr) 9.54(1); and *Kelly v. Commonwealth,* 267 S.W.2d 536, 539 (Ky. 1954). It is fundamental in a criminal case that the trial court must instruct the jury on all of a defendant's lawful defenses. *Sanborn v. Commonwealth,* 754 S.W.2d 534, 550 (Ky. 1988), *citing Curtis v. Commonwealth,* 184 S.W. 1105, 1107 (Ky. 1916). An instruction for a lesser-included offense is required only if, considering the totality of the evidence, a reasonable jury could acquit the defendant of the greater offense and yet believe, beyond a reasonable doubt, that he is guilty of the lesser offense. *Taylor,* 995 S.W.2d at 362, *citing Skinner v. Commonwealth,* 864 S.W.2d 290 (Ky. 1993); and *Luttrell v. Commonwealth,* 554 S.W.2d 75 (Ky. 1977). Thus, it is the trial court's duty to instruct the jury on every possible offense supported by the evidence.

According to Tidwell, the Commonwealth failed to prove that the value of the stolen property from the Rivards' home was over $300.00. Relying on *Commonwealth v. Reed*, 57 S.W.3d 269, 271 (Ky. 2001), Tidwell argues that the Commonwealth was required to prove the market value of the stolen items at the time and place of the theft. Tidwell concedes that the Commonwealth can use the

owner's testimony to establish the value of stolen items, but asserts that the owner's testimony must contain sufficient detail for a jury to make a determination of value. However, such testimony must be limited to the items actually found in the defendant's possession. *Id*. at 271. Tidwell asserts that the jewelry bought by Tussey, which was the only jewelry connected to him, was valued at $200.00. He also points out that the Commonwealth offered no evidence of the value of the jewelry sold to the other pawn shops. As a result, Tidwell contends that this evidence would have supported an instruction on the lesser-included offense.

In *Reed, supra*, an unknown individual stole tools, a tool chest, three weed-eaters, a saw, and a drill from the victim. *Id.* at 270. The defendant sold a few of the stolen tools to a third party for $30.00. *Id.* The defendant was subsequently charged with receiving stolen property valued over $300.00. *Id.* At trial, the victim testified that all of the stolen items together were worth over $300.00; however, he never testified regarding the value of the items found in the defendant's possession. *Id.* at 271. This Court overturned the defendant's conviction because "the Commonwealth had failed to establish that the items which had been in the [defendant's] possession actually met the dollar amount required by the offense ($300.00)." *Id.* at 270. Upon discretionary review, the Supreme Court affirmed, noting, "[t]he Commonwealth presented proof that the only items *found* in [defendant's] possession were the tool box and a burlap bag with a few tools. Nowhere in the testimony did [the victim] give a specific value for the items found in [defendant's] possession. In fact, the only testimony at trial

regarding the value of the tools was given by [the victim], and he only discusses the value of *all* of the items taken from him." *Id.* at 271.

In *Reed,* the defendant was charged with receiving stolen property valued over $300.00; thus, the Commonwealth was limited to presenting evidence regarding the value of the items that were actually in the defendant's possession, which the Commonwealth did not do. *Id. See also* KRS 514.110. However, in the present case, Tidwell was charged with theft by unlawful taking over $300.00, which requires proof that the defendant "[t]akes or exercises control over movable property of another with intent to deprive him thereof . . . ." KRS 514.030(1)(a). Therefore, the holding in *Reed* does not apply. Consequently, the Commonwealth was not limited to presenting evidence regarding items solely found in Tidwell's possession.

As stated above, it has been well-established that "the testimony of the owner of stolen property is competent evidence as to the value of the property." *Reed*, 57 S.W.3d at 270, *citing Poteet v. Commonwealth*, 556 S.W.2d 893, 896 (Ky. 1977). And, in the present case, the owner of the stolen property testified in detail regarding the value of each item recovered, including those from Tussey. Jeannie testified that the total amount of the recovered items was valued at $17,686.44. Also introduced into evidence was Commonwealth's exhibit #2 which detailed not only the victim's evaluation of the value of all the items taken, but what was recovered, primarily jewelry. Furthermore, we note that Jeannie's testimony that the value of the stolen property exceeded $300.00 was

uncontradicted. Tussey conceded he purchased gold and silver at less than the market value in order to sell it for scrap at a subsequent profit. Given the totality of the evidence, it was reasonable for the jury to conclude that the stolen items were worth over $300.00 at the time of the theft. Thus, the Commonwealth met its burden of proof regarding the value of the stolen items. KRS 500.070.

Next, Tidwell asserts that the trial court erred by permitting the Commonwealth to call Varney as a witness in violation of the rule requiring the separation of witnesses. Following *voir dire* and opening statements and at counsel's request, the trial court admonished those in the courtroom who might be witnesses to excuse themselves from the courtroom pursuant to the separation of witnesses' rule. KRE 615. The Commonwealth told the court that it did not intend to call Varney as a witness in this case. However, after opening statements and the cross-examination of William Ray, which tended to cast Varney as the perpetrator of the break-in and theft, the Commonwealth asked Varney to leave the courtroom as it appeared he would be called as a witness for the Commonwealth. The Commonwealth then called Varney as its final witness to its case-in-chief. Tidwell objected but the trial court allowed Varney's testimony even though Varney had observed William Ray's testimony.

The purpose of the separation of witnesses' rule, now set out in KRE 615, is "to insure the integrity of the trial by denying a witness the opportunity to alter his testimony." *Reams v. Stutler*, 642 S.W.2d 586, 589 (Ky. 1982). In *Jones v. Commonwealth*, 623 S.W.2d 226, 227 (Ky. 1981), the Supreme Court reiterated

the long-standing rule concerning the trial court's discretion in passing on violations of the rule:

> We have uniformly interpreted the separation rule as providing a trial judge broad discretion to permit or refuse to permit a witness to testify who has violated the rule and have refused to intervene in such matters except in cases where that discretion has been abused.

More recently, in *Smith v. Miller*, 127 S.W.3d 644, 647 (Ky. 2004), the Supreme Court made clear that "a violation without prejudice would not entitle a party to any relief."

While it appears that Varney's presence in the courtroom was a clear violation of the rule, we are convinced that no abuse of the trial court's considerable discretion has been demonstrated in this case. Specifically, Varney's testimony did not add anything to the record that was not already included through other testimony or was simply irrelevant. Despite Tidwell's contentions otherwise, it does not appear that he was prejudiced by Varney's testimony, especially since he only heard the testimony of William Ray prior to leaving the room. Furthermore, Tidwell does not show any bad faith by the Commonwealth when it initially told the court that it did not intend to call Varney as a witness. Under these circumstances, there appears to be no reasonable probability that the outcome of the trial would have been different had Varney's testimony been excluded. Any error, therefore, must be considered to be harmless and provides no basis for overturning Tidwell's conviction.

Tidwell next argues the trial court erred in denying his motion to suppress evidence obtained pursuant to a search warrant lacking a supporting affidavit. The Commonwealth executed a search warrant on the trailer at Nobson Fork on April 12, 2006, following the break-in and theft from the Rivards' home. Tidwell filed his motion to suppress all evidence seized as a result of the warrant on the morning of trial. Tidwell argued he was denied due process because an affidavit was not included with the trial record. After conducting a hearing on the suppression motion, the trial court determined that Trooper Leonard did swear an affidavit in support of the search warrant based upon the witnesses' statements and his own observations and permitted the Commonwealth to reconstruct the record for the missing affidavit with the testimony of Trooper Leonard. Time was of the essence as the trial was underway; therefore, the Commonwealth made efforts throughout the day of trial to provide the search warrant and supporting affidavit. Eventually, the Commonwealth was able to provide the front page of the search warrant to the court.

The controlling issue is whether Tidwell has standing to raise this issue. Tidwell denies he ever lived in or possessed any control over the trailer. He further denied placing any stolen property in the trailer. Therefore, he does not have an expectation of privacy over the contents of the trailer. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S. Ct. 2556, 65 L. Ed. 2d 633, 641 (1980); *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980); *Rakas v. Illinois,* 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387, 401 (1978). *See also*

Colbert v. Commonwealth, 43 S.W.3d 777, 795 (Ky. 2001); and *Foley v. Commonwealth*, 953 S.W.2d 924, 934 (Ky. 1997).

Regardless, the Kentucky Supreme Court has held, in the absence of an affidavit, the presumption is that the warrant was regular and supported by an affidavit. *Jarrett v. Commonwealth*, 434 S.W.2d 808, 809 (Ky. 1968). The search warrant submitted to the court alleged that the probable and reasonable cause would be set out in the affidavit attached thereto. But no affidavit was attached. This language suggests that the affidavit did however exist. Trooper Leonard testified that he signed an affidavit which included the statements from the witnesses, as well as his own statements about what he had seen through the door of the trailer. Trooper Leonard then presented it to Commissioner Fred Hatfield for signature. Trooper Leonard testified that he gave the affidavit and the warrant to a court clerk for filing but did not keep a copy for himself. Considering these circumstances, we find no error.

Next, Tidwell argues the trial court committed reversible error when it failed to suppress photographs shown by the investigating officer to the eyewitnesses for purposes of identifying him. Tidwell also argues the photos were illegally taken during the execution of the search warrant as they were not included in the items to be seized in the warrant. The photos were of Tidwell wearing a black hat. Trooper Leonard testified that he showed the photos to the Rays and neither of them could identify Tidwell as the man they saw carrying items from the Rivards' home to the trailer. Aside from the fact that such testimony was actually

exculpatory, the failure to identify Tidwell as the perpetrator makes any analysis under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), unnecessary. As such we fail to see that Tidwell was prejudiced by Trooper Leonard's use of the photos.

Further, law enforcement officers may seize property not specifically mentioned in a search warrant as long as it is in plain view (*Massey v. Commonwealth,* 305 S.W.2d 755 (Ky. 1957)), and the items are relevant to the crimes suggested by the warrant (*Perkins v. Commonwealth*, 383 S.W.2d 916 (Ky. 1964)). Trooper Leonard testified that the pictures were in plain view, lying on the top of a dresser in the trailer. Tidwell contends the incriminating nature of the photos was not immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). But both William and Daisy Ray told Trooper Leonard that the man they witnessed on the date in question was wearing a black hat. Tidwell is wearing a black ball hat in the photo Trooper Leonard picked up from the trailer. Further, photos of Tidwell in the trailer showed a potential connection between him and the trailer. The incriminating nature of the photos was immediately apparent. Finally, even if the photos were improperly seized, the Rays could not identify Tidwell after viewing them. Thus, any error was harmless.

Tidwell next argues he suffered substantial prejudice when the trial court allowed the Commonwealth to impeach a defense witness on a collateral matter. Specifically, Tidwell's sister, Jackie Gauze ("Gauze"), testified as an alibi

witness for Tidwell. She testified that Tidwell was with her all day on April 12, 2006, celebrating his birthday. Tidwell contends that the Commonwealth's questions regarding her and her husband's unemployment, and the fact that she receives housing assistance, solicited inadmissible evidence of a collateral matter. Not only is this issue unpreserved, but the record reflects that Gauze testified about all of these issues initially on direct examination. Thus, we find no error, palpable or otherwise.

Finally, Tidwell asserts the accumulation of error requires reversal even if no single error would justify such a result. Having found no prejudicial error, there can be no cumulative effect.

Accordingly, the Pike Circuit Court's conviction and sentence are affirmed.

ALL CONCUR.

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