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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001852-MR

CHRISTINA HINKLE-EMBRY — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 06-CR-00136

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Christina Hinkle-Embry (Appellant) appeals her conviction of theft by unlawful taking over $300 and persistent felony offender in the first degree in the Grayson Circuit Court. On appeal Appellant argues that the trial court erred in denying appellant's directed verdict motion. Appellant also

[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 (KRS) 21.580.

argues that she was entitled to a jury instruction on a claim of right defense upon which the trial court failed to instruct. Finding no reversible error, we affirm,

A Grayson County Grand Jury indicted Appellant after testimony from Thomas C. Glasscock. At trial Glasscock testified that he co-owned industrial businesses that were housed in several buildings on a large commercial lot. Buildings on the lot included a shop which ran a trucking line and concrete ready mix plant not in operation. A gravel road ran through the lot which connected adjacent public roads. Although no trespassing signs were posted[2] marking the lot as private property, at times the public would use the gravel road as a thoroughfare to avoid traffic. On August 26, 2006, Glasscock drove from the commercial lot to the mobile home park he owned. After twenty minutes he came back to the commercial lot. There he found Appellant and her husband on the gravel road next to the shop with their car trunk and all four doors open. Inside the trunk was a forklift radiator. Glasscock estimated the value of the radiator at $2600. Glasscock admitted that there was a lot of junk on his property. However, Glasscock testified that the junk was his junk on his private property and he would sometimes sell the junk as scrap metal. He also testified that two dumpsters[3] were on the property and there was not a dumping ground for the public on the property. Glasscock was adamant that the radiator had not been discarded.

[2] Glasscock could not attest to whether the no-trespassing signs were still up when Appellant drove onto the property.

[3] Appellant did not testify that the radiator was by the dumpster. To the contrary, there is testimony, though controverted, as to the proximity of the radiator to the shop.

At trial Appellant testified that she believed the radiator to have been trash that would bring about $30 as scrap metal. She elaborated that the radiator was piled on top of junk, the area was not posted with no-trespassing signs, there was no fence, and the road was frequented by the public all the time. Appellant described the lot as having lots of stuff on it, some good, some junk, but you could tell the good from the junk.

Appellant testified that when questioned by Glasscock what she was doing with the radiator in her trunk, she responded that she was picking up scrap and trash. When Glasscock told her she was on private property and the junk was his junk, she profusely apologized and placed the radiator back on the ground. On cross examination, Appellant admitted that she knew she was on private property and that the gravel road was a driveway and not a public road.

After hearing the testimony of Appellant and Glasscock, the jury convicted Appellant of theft by unlawful taking over $300 and persistent felony offender in the first degree.

Appellant argues that the trial court improperly denied her motion for a directed verdict because there was insufficient evidence to establish intent to steal the radiator beyond a reasonable doubt; that the circumstantial evidence pointed to innocence as well as guilt; that the circumstantial evidence could not support a conviction because the only evidence of guilt would be the disbelief of her testimony; that the Commonwealth did not disprove her defense of a claim of right to the property beyond a reasonable doubt; and that she was entitled to an

instruction on the claim of right defense. The first three arguments will be presented together, then the last two in order.

First, we shall review KRS 514.030(1) which sets out the elements of theft by unlawful taking or disposition under which Appellant is charged:

> 1) Except as otherwise provided in KRS 217.181 or 218A.1418, a person is guilty of theft by unlawful taking or disposition when he unlawfully:
> (a) Takes or exercises control over movable property of another with intent to deprive him thereof; or (b) Obtains immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

Appellant argues she could not be convicted because intent is an element of the offense and that *Pendleton v. Commonwealth*, 172 S.W. 2d 52 (Ky. 1943) prevents the drawing of an inference that Appellant intended to steal the radiator when the only evidence of intent was Appellant's testimony which denied any intent to steal. *Pendleton* is a chicken theft case wherein the court reversed a conviction holding that when a fact that must be clearly established is based upon an inference, then no subsequent inferences may legitimately be based upon such a fact. In the case sub judice, the inference of theft is based upon the testimony of the witness and the facts and circumstances surrounding the location of the radiator, none of which are inferences. This is not an inference upon inference case.

More to the point, it has long been the law in Kentucky that a conviction may rest upon circumstantial evidence.[4] *See Newton v. Commonwealth,* 2 S.W.2d 661 (Ky. 1928). Sufficient circumstantial evidence is such evidence from which the judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt based on the totality of the evidence. *Hodges v. Commonwealth,* 473 S.W.2d 811, 812-813 (Ky. 1971). "Intent can be inferred from the actions of an accused and the surrounding circumstances." *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988). The jury has wide latitude in inferring intent from the evidence. *Rayburn v. Commonwealth*, 476 S.W.2d 187 (Ky. 1972). There was sufficient circumstantial evidence for the jury to conclude that the Appellant intended to commit theft.

Appellant then argues that since circumstantial evidence may not support a conviction that she could not be convicted because the only evidence of guilt would be the disbelief of her testimony. While correct that mere disbelief of testimony will not form a basis for affirmative findings on issues which the state bears the burden of proof; circumstantial evidence will support such a conviction. *See Marshall v. Lonberder*, 459 U.S. 422 (1983), and our prior analysis on circumstantial evidence. Therefore, Appellant's argument based on *Marshall* is misplaced.

[4] Nor do we agree that the circumstantial evidence impermissibly shifted the burden of persuasion onto the Appellant to disprove the inference that she intended the natural consequences of her actions as Appellant argues. *See Parker v. Commonwealth*, 952 S.W.2d 209, 212 (Ky.1997).

As to Appellant's motion for directed verdict based on the three prior arguments, we must first look to the trial court's actions and our standard of review.

The trial court when faced with a directed verdict motion:

> [M]ust 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.

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

The standard for appellate review of a directed verdict is:

> [I]f 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 citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky.1983).

Based on the evidence taken as a whole, it was not clearly unreasonable for a jury to convict the Appellant of theft. Glasscock testified that the gravel road was private property and Appellant admitted to knowing she was on private property when removing the radiator. Appellant also testified that while the radiator was on a pile of junk, there were both good items and junk on the lot. While the testimony was controverted as to whether the radiator was placed by the shop or by the gravel road, it was clear that the radiator was not placed by the dumpster. The jury could reasonably believe that Appellant knew she was taking

anothers property with the intent to deprive them of it, even if the item appeared to be less valuable than other items on the property. Therefore, it was not error to deny Appellant's motion for a directed verdict.

Appellant's fourth argument is that her testimony was sufficient to raise the defense of claim of right, that the Commonwealth failed to refute her defense of claim of right by a reasonable doubt and, therefore, she was entitled to a directed verdict. In reviewing Appellant's argument, we shall first review two statutes.

The Appellant argues that her testimony that the radiator was trash was sufficient to raise the defense of claim of right. KRS 514.020(1) states "[i]t is a defense to prosecution for theft that the actor ...(b) Acted under a claim of right to the property or service involved or a claim that he had a right to acquire or dispose of it as he did ...". Under KRS 500.070 subsection (1) provides:

> The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt, except as provided in subsection (3). *This provision, however, does not require disproof of any element that is entitled a "defense," as that term is used in this code, unless the evidence tending to support the defense is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal*. (emphasis added).

KRS 500.070 (3) provides "[t]he defendant has the burden of proving an element of a case only if the statute which contains that element provides that the defendant may prove such element in exculpation of his conduct."

While the Commonwealth has the burden of proof, "it does not have to rebut evidence of a defense". *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997). Thus, the Commonwealth need not rebut evidence of a defense. However consider KRS 500.070. Under KRS 500.070, only if Appellant's evidence under a particular defense was of such probative force as to warrant a directed verdict would the Commonwealth need to produce countervailing evidence. We do not find Appellant's evidence of claim of right to be of such magnitude. However, if we assume that the Appellant did produce evidence of such magnitude as to require the Commonwealth to produce countervailing evidence, then the defendant is not entitled to a directed verdict of acquittal unless the defense is conclusively established. *West v. Commonwealth*, 780 S.W.2d 600 (Ky. 1989). A review of the evidence provides a finding that the circumstantial evidence combined with the testimony of Glasscock is sufficient to conclude that Appellant's claim of right defense fell short of being "conclusively established". Therefore, the trial court did not commit error in overruling the motion for directed verdict.

Appellant also argues that the trial court improperly denied her request for a jury instruction on the claim of right defense. This issue is only partially preserved. Appellant submitted a claim of right instruction. The court did not agree that the instruction was warranted. When asked by the trial court if evidence was presented that supported the defense, Appellant's counsel agreed to withdraw the instruction. This claimed error was insufficiently preserved for

appeal and thus must be considered under a palpable error analysis of RCr 10.26. RCr 10.26 states that:

> 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.

Id. 'Manifest injustice' requires that the substantial rights of the defendant were prejudiced by the error, i.e., there is a substantial possibility that the result of the trial would have been different. *Schaefer v. Commonwealth,* 622 S.W.2d 218 (Ky. 1981), and *Jackson v. Commonwealth*, 717 S.W.2d 511 (Ky.App. 1986). In the case sub judice Appellant's substantial rights were not impaired with the alleged error. There is not a substantial possibility that the result of the trial would have changed had the instruction on claim of right been given. Without manifest injustice, the error is nonprejudicial. Further, the alleged error was not shocking or jurisprudentially intolerable. *See Martin v. Commonwealth*, 207 S.W.3d 1(Ky. 2006).

We also agree with the trial court that insufficient evidence was presented to merit the instruction. In considering whether such an instruction is warranted, one must consider first, what claim Appellant would have had to the property and second, whether abandoned. There is scant case law on the claim of right defense and not much more on abandonment.

Appellant's defense of claim of right appears wholly based upon the theory that Glasscock abandoned the property. Appellant offers nothing in support of her claim other than mere parroting of the words "claim of right". However, to Appellant's credit, such may be sufficient if Appellant were first in time to advance a claim and the person opposing Appellant were merely another claimant parroting "claim of right". This is not the case before us. Here we have the owner, Glasscock, claiming personal property that was located on his real property. While the owner claiming the personal property has a strong argument, we still must consider whether the personal property had been abandoned.

In considering whether property is abandoned, we look to 25 AM.JUR. Proof of Facts 2d 685, wherein the learned scholars opine that the conduct relied on to show an abandonment must clearly and unmistakably indicate a conscious purpose and intention[5] on the part of the owner (here, Glasscock) to repudiate ownership and to neither use nor retake the property into his possession. In the case sub judice, the radiator was on private property, of ready value, not located at the trash dumpster but rather in proximity to a "shop" located on the property, and there was no evidence of abandonment other than the purported

[5] Multifarious factors could certainly be considered when delving in to the owners intent, to wit: was it an isolated item or combined with other items, either similar or dissimilar; condition of the item; general appearance of the premises where located and of the item itself; ease of public access to the item; ongoing practice of persons removing items from the area, did they ask or was it a "free for all"; ease of conversion to cash (cash is not recognized as not readily abandoned for obvious reasons) ; ready market for the item; ease of transport of the item; proximity to a trash dumpster or other generally recognized location for disposal of items; statements of the owner; business of the owner and relationship of the item to the type of business; intrinsic value of the item, also whether its worth is to one, some, or all; located in an organized or disheveled area; surrounded by fencing or other containment or protective measure. Obviously, this list could continue ad nauseam.

"thoughts" of the Appellant. Therefore, the trial court correctly refused to give an instruction on claim of right based on the theory of abandonment.

After a thorough review, we hereby affirm the decision of the Grayson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Susan Jackson Balliet
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky