

RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001778-MR

BUDDY LEE MURRELL

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 06-CR-00155

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

ACREE, JUDGE: Buddy Murrell appeals from a judgment of the Bell Circuit Court convicting him of receiving stolen property valued at over \$300.00 and being a persistent felony offender in the second degree. He argues on appeal that the Commonwealth failed to produce sufficient evidence of his guilt to sustain the

conviction and, further, that he was denied a fair trial when inadmissible evidence was placed before the jury. We affirm.

Officer Robert Stevens, a twenty-eight year veteran of the Middlesboro Police Department, stopped a van driven by Murrell for a traffic violation in May 2006. Murrell's former stepfather, Jackie England, was a passenger in the vehicle. During the course of the stop, the officer noticed several bundles of what appeared to be utility wire in the back of the van. Believing that the wire might be stolen, he called for back-up and had the van towed to an impoundment lot. Officer Josh Burchett, who responded to the call for back-up, asked Murrell about the wire. Murrell stated that he had cut the wire off of power poles in the Hightight Hollow area.

Burchett conducted an investigation into the possible wire theft. He first contacted employees of Kentucky Utilities and established that KU owned the wire. A few days later, he went to Murrell's residence to interview him, but Murrell ran when he saw the officer approach. Burchett saw two more coils of wire at Murrell's home, one in the bed of a pick-up truck and one in the driveway outside the back door. When Murrell returned, Burchett informed him of his Miranda rights before taking his statement. Murrell told Burchett that he and England found the wire on the ground and thought it was abandoned. They were planning to take it to Knoxville to sell it as scrap. Murrell and England, who owned the pick-up truck, were both charged with felony receiving stolen property.

After an indictment was returned against the pair, England pleaded guilty and agreed to pay over \$5,000.00 restitution to KU. He was subpoenaed to testify against Murrell at trial. The Commonwealth also called officers Stevens and Burchett, as well as employees from KU who testified regarding the ownership of the wire and its value. At the close of the Commonwealth's case, the trial court denied Murrell's motion for a directed verdict. Murrell and his wife both testified for the defense. His renewed directed verdict motion was denied. Murrell was found guilty of felony receiving stolen property and being a persistent felony offender in the second degree. He was sentenced to serve five years, enhanced to ten years by the PFO. This appeal followed.

Murrell first argues that the trial court erred in denying his motions for a directed verdict. The Kentucky Supreme Court has previously articulated the standard of review for directed verdict motions.

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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Murrell contends that the Commonwealth failed to prove he knew the aluminum wire in his possession was stolen from KU. In order to convict a defendant of receiving

stolen property under Kentucky Revised Statute (KRS) 514.110, the Commonwealth must prove, beyond a reasonable doubt, that the person “receive[d], retain[ed], or dispose[d] of movable property of another **knowing** that it has been stolen, or having reason to believe that it has been stolen[.]” KRS 514.110(1)(emphasis supplied). Murrell and his co-defendant both testified that they believed the wire to be abandoned. Thus, he contends that the Commonwealth failed to prove the requisite *mens rea* needed to secure a conviction.

England testified that he and Murrell found the wire on the ground, covered with dirt, brush, and tree limbs. While admitting that he had pleaded guilty to receiving stolen property, England steadfastly maintained in his trial testimony that they thought the wire was abandoned. He described the area as being off of the main road and beside a rough, dirt road which had been used by loggers. According to England, the poles from which they removed the wire were lying on the ground. Some appeared to have been cut down by chainsaw, others bulldozed, and the rest pulled down by trees falling across the wires.

In his trial testimony, Murrell gave a description similar to England’s of the area from which the wire was taken. He said that he and England had gone looking for roots to dig up and happened across the wire. Murrell denied cutting wire off of any poles and further maintained that he had never told police that he cut any wire down. On the day of his arrest, Murrell told Burchett that he thought

the wire was abandoned and that he and England planned to sell it for scrap in Knoxville.

On the other hand, the Commonwealth introduced testimony from Danny Morrison, a KU line technician for twenty-nine years. Morrison stated that he was familiar with all KU power lines in Bell County. He was able to identify the wire taken from Hightight Hollow as KU's property. Because of the wire's size and type, Morrison was also able to identify the location of the poles from which it was taken. He was aware that poles in the Hightight Hollow area had been cut down and had reported the matter to his supervisor. Morrison further testified that the downed wires were not covered with dirt, brush, or trees.

But the most damning evidence regarding Murrell's *mens rea*, came from Burchett, who testified that, on the night of the traffic stop, Murrell told Burchett that he had cut the wire off of power poles in the Hightight Hollow area. Burchett also told the jury that Murrell ran when he saw the officer approaching his home a few days after the traffic stop. ("[E]vidence of flight . . . has a tendency to make the existence of the defendant's guilt more probable[.]" *Rodriguez v. Commonwealth*, 107 S.W.3d 215, 219 (Ky. 2003).) Following the test outlined in *Benham*, assuming the truthfulness of the evidence supporting the Commonwealth's case, we are unable to conclude that it was unreasonable for the jury to convict Murrell of receiving or retaining property which he knew to be stolen. The question of whose testimony was more credible was a matter for the jury to determine.

The next two errors complained of by Murrell allegedly occurred during the testimony of his co-defendant. Murrell claims he was denied a fair trial when the Commonwealth introduced evidence that his co-defendant had been convicted of the offense for which Murrell was then being tried. Further, he claims the prosecuting attorney inserted herself as a nontestifying witness during her examination of England. Neither error was preserved for review by contemporaneous objection, and we are asked to review them under the palpable error rule, Kentucky Rule of Criminal Procedure (RCr) 10.26. The rule defines a palpable error as one which “affects the substantial rights of a party” and limits appellate relief to instances where “manifest injustice has resulted from the error.” “[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial.” *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky.App. 1986)(citation omitted).

During the direct examination of Murrell’s former co-defendant, the Commonwealth introduced evidence of his guilty plea to receiving stolen property under the same indictment charging Murrell. Although he did not raise an objection at trial, Murrell now points out that the Kentucky Supreme Court has held that it is improper to introduce evidence of a co-defendant’s guilty plea as substantive evidence of a defendant’s guilt as to the same offense. *Tipton v. Commonwealth*, 640 S.W.2d 818, 820 (Ky. 1982). However, we also recognize

that a co-defendant's guilty plea may be admissible as impeachment evidence.

Brown v. Commonwealth, 174 S.W.3d 421, 431 (Ky. 2005).

On direct examination, England testified that he had been Murrell's stepfather for many years and that he was present pursuant to a subpoena, rather than voluntarily. He acknowledged that he had received no promises from the Commonwealth in exchange for his cooperation. The prosecuting attorney then engaged in the following discussion with England:

Commonwealth: You've been convicted yourself of this incident, have you not?

England: Yeah.

Commonwealth: On the twenty-sixth day of May 2006, did you and Buddy Lee Murrell receive, retain or dispose of aluminum wire belonging to KU valued at more than \$300.00?

England: We found some laying on the ground.

Commonwealth: Did you understand the question?

England: Not really.

The prosecutor approaches the witness with a copy of the record of his guilty plea, asks whether he acknowledges his signature, and allows him to read a paragraph from the document silently.

Commonwealth: On the twenty-sixth day of May 2006, did you and Buddy Lee Murrell receive, retain or dispose of aluminum wire belonging to KU valued at more than \$300.00? Did you do that?

England: Yes.

Commonwealth: And did he do that with you?

England: Yeah.

Commonwealth: And your signature on this document, did you say on this document that you knew that aluminum wire was stolen?

England: Yes.

(Video recording of jury trial, 7/24/07, 11:02:37-11:06:22). The witness' recalcitrance is evident throughout his exchanges with the prosecutor. He followed up on the above exchange by denying that Murrell showed him where the wire was. Instead, he testified that they happened across downed wire while digging for bloodroots. He describes the wire as covered by bushes and trees. England stated that he told police officers that they thought the wire was abandoned because it was not on poles, but rather was lying on the ground. He testified at Murrell's trial that the only reason he knew it was stolen is that they were arrested.

Clearly, had Murrell objected when the Commonwealth asked England about his guilty plea, the trial court would have been required to sustain the objection. However, once England denied any awareness of wrongdoing, the Commonwealth would have been entitled to introduce evidence of his guilty plea for the purpose of impeaching him. England's guilty plea was not introduced for the impermissible purpose of furnishing substantive evidence of Murrell's guilt. Rather, the fact that England had already admitted culpability under oath was used to call into question the truthfulness of the account provided by an obviously reluctant witness. Consequently, the fact that the plea was not introduced in the

proper manner did not rise to the level of manifest injustice necessary for a finding of palpable error under RCr 10.26.

The second exchange of which Murrell complains occurred immediately after the discussion of his guilty plea when the prosecutor asked England who had shown him where the wire was located. He responded that he and Murrell were digging and came across it. She then asked whether he understood the question, and he responded affirmatively. The prosecutor asked whether England recalled telling her who showed him the location of the wire. England told the jury that Murrell did not show him where it was, he showed England where the roots were and they saw the wire while digging roots. The question was asked a second time and, again, England denied ever telling the prosecutor that Murrell led him to the wire. Regardless of whether any error occurred when the jury heard this exchange, we find that there is no substantial probability that it changed the outcome of the case and, hence, no palpable error.

The trial court properly refused to grant a directed verdict. Further, the alleged errors which occurred during England's testimony, but which Murrell failed to preserve by objection, did not amount to palpable error. Consequently, the judgment of the Bell Circuit Court convicting the appellant of felony receiving stolen property and being a persistent felony offender in the second degree is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

David B. Abner
Assistant Attorney General
Frankfort, Kentucky