

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001220-MR

DENNIS R. JOHNSON

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 07-CR-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Dennis R. Johnson has appealed from the judgment of the Meade Circuit Court, in which he was convicted of theft by unlawful taking over \$300 and for being a persistent felony offender in the first degree. He was sentenced to fifteen years' imprisonment. We affirm.

FACTUAL BACKGROUND

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The events giving rise to Johnson's indictment and subsequent conviction occurred over a two-day period in late September 2006. Roy Lowe (Lowe), had recently acquired a red Chevrolet S10 pickup truck (the pickup) that he was attempting to sell. To that end, Lowe put photographs of the pickup on an internet website and parked it on US 60 and Shot Hunt Road with a "For Sale" sign displayed in the pickup's interior. The sign included his telephone number. Just before midnight on September 22nd, Lowe received a telephone call from an unidentified man, who offered to purchase the pickup for a lower price. Lowe refused the caller's offer and the conversation ended. A short time later, Lowe received a second call. This time, the caller indicated that he was standing by the pickup, and he again asked Lowe to reduce the price. Lowe testified that he declined to do so, and the call ended.

On the morning of September 23rd, Lowe went to US 60 and Shot Hunt Road to check on the pickup and discovered it was missing. He testified that he called several local towing companies to determine if the pickup had been towed at the request of the police. The companies he contacted stated that they had not towed the pickup. In the meantime, while he was listening to the local radio trading show, Tradio, Lowe recognized the voice of the caller as being that of the person who had called him about purchasing the pickup the previous night. The caller was offering to sell some steel pipe and Lowe called the number provided.

Lowe also testified he received a telephone call from his son, who reported that a friend had seen the pickup being towed by AA Collision Center

(AA) earlier that morning. Lowe contacted AA and spoke to the owner, Randy Ryan (Ryan). Ryan confirmed that he towed the pickup, and he took Lowe to the place where he had towed it, Johnson's property. When they arrived at Johnson's property, Lowe called the police and the deputy sheriff arranged to have the pickup towed to Lowe's property.

Ryan testified he received a telephone call from Johnson at approximately midnight of September 22nd asking him to tow a truck located at US 60 and Shot Hunt Road. Johnson reported that someone was trying to steal the truck. When Ryan quoted a \$75 fee for the tow, Johnson refused. However, approximately one hour later, Johnson again called Ryan and agreed to pay the \$75 fee. Ryan testified he met Johnson at US 60 and Shot Hunt Road, towed the pickup to Johnson's residence, and left it in Johnson's driveway. Ryan verified Lowe's testimony regarding their telephone conversation and subsequent trip to Johnson's residence. Furthermore, Ryan testified that the pickup was further back on Johnson's property than it had been when he left it.

Meade County Sheriff's Department Deputy Mike Robinson (Deputy Robinson) testified he went to Johnson's residence after receiving several calls from Lowe regarding the pickup. When he arrived at Johnson's residence, Deputy Robinson asked Lowe for the title to the pickup. Lowe gave the title to Deputy Robinson and explained that the title was not in his name because he had recently purchased the pickup and had not had the opportunity to obtain a new title. Deputy Robinson testified he checked the vehicle information number (VIN) on the title

against the VIN on the truck, and determined the two numbers matched. At that point, Deputy Robinson called for a tow truck and knocked on the door of Johnson's house. Johnson did not come out of the house until the tow truck arrived. He explained to Deputy Robinson that he had not heard him knocking because he was sleeping. However, he heard the tow truck and thought he should find out what was happening. Deputy Robinson testified that, in response to questions about the pickup, Johnson stated that he had traded for it with two men from Jennings Knob.

Johnson's testimony differed significantly from the testimony of Lowe, Ryan, and Deputy Robinson. According to Johnson, he heard about the pickup on Tradio at the about the same time he listed a riding lawn mower for sale or trade on Tradio. Johnson testified that Joe Popham (Popham) contacted him in response to the Tradio listing and offered to trade him the pickup in exchange for the lawn mower. Johnson stated that he gave Popham \$200, the lawn mower, and a rebuilt starter worth \$100, in exchange for the pickup. According to Johnson, Popham came to his house with a truck and trailer so that he could retrieve the pickup from its location at US 60 and Shot Hunt Road. However, the trailer had a flat tire and Johnson called several towing companies, eventually arranging for AA to get the pickup and tow it to his residence.

Johnson also testified that once he learned the pickup belonged to Lowe, he filed a police report in an attempt to retrieve his lawn mower from Popham. However, he did nothing else to retrieve the mower from Popham.

When asked if he thought it was significant that Popham did not have any registration and the pickup did not have a license plate, Johnson testified that he was not concerned because he only intended to drive the pickup on his property.

Finally, Johnson testified he and Popham became acquaintances through trading; he believed Popham made the phone calls to Lowe; and he had not seen Popham since the early morning of September 23rd.

Johnson's former girlfriend, Barbara Justice (Justice), testified that she recalled the deal Johnson made with Popham and that Popham's trailer had a flat tire. Furthermore, Justice testified she knew the pickup had been towed to Johnson's residence, but she did not know where the pickup had been dropped off. Finally, Justice testified that she had seen Popham several times following September 23rd, but she had not discussed Johnson's case with Popham.

Based on these circumstances, the Meade County grand jury indicted Johnson on three counts: 1) Theft by Unlawful Taking over \$300; 2) Theft of Motor Vehicle Registration Plate/Decal; and 3) for being a Persistent Felony Offender in the First Degree (PFO I). Following a trial, the jury returned a guilty verdict on the theft by unlawful taking charge, but returned a not guilty verdict on the second count. The jury then found Johnson guilty on the PFO I charge and sentenced him to an enhanced penalty of fifteen years' imprisonment. This appeal followed.

On appeal, Johnson raises two arguments: 1) prosecutorial misconduct, which Johnson concedes was unpreserved; and 2) that the trial court

should have granted his motion for a directed verdict of acquittal. The Commonwealth, in its brief, argues any prosecutorial misconduct did not rise to the level of palpable error, Johnson did not preserve his directed verdict argument by providing grounds for the motion, and that in any event there was sufficient evidence introduced to defeat a motion for a directed verdict.

ANALYSIS

1. Prosecutorial Misconduct

Because the issues Johnson raises under the category of prosecutorial misconduct are unpreserved, we must review these matters under the palpable error rule of Kentucky Rules of Criminal Procedure (RCr) 10.26:

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.

The law is clear that this rule

is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. . . . In determining whether an error is palpable, “an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.”

Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002). “To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable.” *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Johnson first argues that the Commonwealth’s cross-examination of him amounted to prosecutorial misconduct, because he was asked to comment on the veracity of other witnesses. The former Court of Appeals set forth the standard for cross-examination in *Howard v. Commonwealth*, 227 Ky. 142, 12 S.W.2d 324, 329 (1928).

Although to aid in the discovery of the truth reasonable latitude is allowed in the cross-examination of witnesses, and the method and extent must from the necessity of the case depend very largely upon the discretion of the trial judge, yet, where the cross-examination proceeds beyond proper bounds or is being conducted in a manner which is unfair, insulting, intimidating, or abusive, or is inconsistent with the decorum of the courtroom, the court should interfere with or without objection from counsel.

In *Howard*, the Commonwealth’s attorney asked the defendant to comment on the veracity of other witnesses, in one instance asking ““if what Maud Denton swore is a lie.”” *Id.* The Court held that the trial court not only should have sustained the objections to this type of cross-examination, but should have admonished counsel against such improper interrogation. *Id.*

In *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky. 1997), the Supreme Court reaffirmed *Howard*, stating:

A witness should not be required to characterize the testimony of another witness, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony. Counsel should be sufficiently articulate to show the jury where the testimony of the witnesses differ without resort[ing] to blunt force.

However, when claims of error such as this are unpreserved, as was the case in *Moss*, Kentucky's appellate courts have not identified any palpable error. Although holding the line of questioning to be improper, the *Moss* Court nevertheless held that “[a]ppellant's failure to object and our failure to regard this as palpable error precludes [sic] relief.” 949 S.W.2d at 583. Likewise, in *Tamme v. Commonwealth*, 973 S.W.2d 13, 28 (Ky. 1998), the Supreme Court held:

While we do not approve of this type of cross-examination, *i.e.*, asking one witness to characterize the testimony of another, there was no contemporaneous objection and we are unpersuaded that absent this inquiry, the result would have been different. [Citations omitted.]

In *Caudill v. Commonwealth*, 120 S.W.3d 635, 662 (Ky. 2003), the Supreme Court concluded that “the totality of the circumstances are persuasive that exclusion of the improper inquiries would not have resulted in different verdicts in this case.” Citing to its decision in *Caudill*, the Supreme Court again found no reversible error in *St. Clair v. Commonwealth*, 140 S.W.3d 510, 554 (Ky. 2004), despite the fact that the attorney for the Commonwealth asked questions that, under *Moss*, constituted impermissible cross-examination of the defendant.

In the present case, Johnson asserts that the Commonwealth's Attorney compelled him to comment on the credibility of several of its witnesses, and that the pattern of intentional prosecutorial misconduct affected the integrity of the trial and rose to the level of palpable error. Johnson relies on the following portions of his trial testimony to support this argument:

Commonwealth: You've heard all the testimony from everyone else here today, haven't you?

Mr. Johnson: Yes I have.

Commonwealth: So are all the other witnesses we've heard from so far this morning, have they been lying? Is that your position? That Mr. Lowe has lied to the jury and Mr. Ryan's lied to the jury and Deputy Robinson's lied to the jury?

Mr. Johnson: Not my position.

.....

Commonwealth: At that time, what you told Mr. Robinson was that you've made a deal with two men about the truck, is that different from what you are saying today?

Mr. Johnson: I never stated that. I said there was a guy around the corner, that knows of the deal I made with Mr. Popham. And he told me. . .

Commonwealth: So you're saying that Deputy Robinson fabricated his testimony earlier when he said that you told him that you made a deal with two men on Jennings Knob Road. Deputy Robinson took a statement from you that day.

Mr. Johnson: He told me that day that he'd be back the following Tuesday.

Commonwealth: So when Deputy Robinson testified earlier that you told him about the two men on Jennings Knob Road, it's clearly in his report.

Mr. Johnson: No, I did tell him there was some people that helped explain what happened with the truck, one was around the corner, and I was willing to go get him right then.

.....

Commonwealth: You moved the truck between the night before and the next morning.

Mr. Johnson: From US 60 to my house, yes.

Commonwealth: No from where it was left by Mr. Ryan.

Mr. Johnson: No.

Commonwealth: So now, Mr. Ryan, in addition to Mr. Lowe and to Mr. Robinson, Mr. Ryan falsifies testimony as well.

Mr. Johnson: If I'd have had the ability to move the truck I wouldn't have called him.

Commonwealth: Is it your position now that Mr. Ryan was lying when he said that to the jury?

Mr. Johnson: First, there's no trees to move anything behind.

Commonwealth: Yes or no, is it your position that he lied?

Mr. Johnson: If he states I moved the truck again, yes.

We agree with the Commonwealth that the cross-examination by the Commonwealth's Attorney, while probably not sanctioned by the controlling case law, did not rise to the level of palpable error. Johnson points to the number of

times the Commonwealth's Attorney violated the rules of cross-examination as supportive of a finding of palpable error. However, as the Supreme Court held in *Ernst v. Commonwealth*, 160 S.W.3d 744, 764 (Ky. 2005), while the questions may have been improper, Johnson had the burden of proving that, but for the questions, the outcome would have been different.

As in *Ernst*, the evidence of Johnson's guilt was such that had the questions been withheld, the result would not have been any different. Therefore, we hold that the prosecutor's questioning of Johnson during cross-examination did not rise to the level of palpable error to justify a reversal.

Johnson next argues that, when the Commonwealth questioned him about his failure to call Popham as a witness and then commented on Popham's failure to appear during closing argument, it impermissibly shifted the burden of proof. We agree with Johnson that the Commonwealth bears the burden of proving every element of its case beyond a reasonable doubt, *see* Kentucky Revised Statutes (KRS) 500.070(1). However, we do not agree that the Commonwealth impermissibly attempted to shift the burden of proof in this case. Any corroboration of Johnson's version of events rested squarely with Popham. By pointing out Popham's absence, the Commonwealth was simply attempting to establish that Johnson's version of events was neither believable nor reasonable, which it was entitled to do.

For these reasons, we hold there was no palpable error, based upon prosecutorial misconduct, that would justify a reversal of Johnson's conviction, nor

any defect in the trial that was either “shocking or jurisprudentially intolerable.”

Martin v. Commonwealth, 207 S.W.3d 1, 4 (Ky. 2006).

2. Directed Verdict

Johnson next argues that the trial court should have granted his motion for a directed verdict of acquittal, because the Commonwealth failed to meet its burden of proof on the theft charge. Johnson contends that, in order to meet its burden of proving that the pickup belonged to Lowe, the Commonwealth was required to tender either a title or registration to the pickup in Lowe’s name. The Commonwealth first argues that Johnson’s trial attorney did not state specific grounds to support his motion for directed verdict but only stated that the Commonwealth had failed to meet its burden. Additionally, the Commonwealth argues Johnson was not entitled to a directed verdict based on the evidence as a whole.

We first address the Commonwealth’s argument that this issue is unpreserved. The Commonwealth cites to *Hicks v. Commonwealth*, 805 S.W.2d 144, 148 (Ky. App. 1990), as supportive of its position.

We are not required to address the specific merits of this issue since our review of the record indicates that it was not preserved for review. While the record reflects the fact that appellant did move for a directed verdict at both the close of the Commonwealth's case and at the close of all the evidence, in both instances, he merely asserted that there was insufficient evidence as to each and every charge pending against him to submit the case to the jury. No specific mention was made concerning a lack of evidence as to any particular element of any of the charges Therefore, since no specific objection

was made by appellant to the element in either of his motions for a directed verdict . . . it may not be raised for the first time on appellate review. *Anastasi v. Commonwealth, Ky.*, 754 S.W.2d 860 (1988); *McDonald v. Commonwealth, Ky.*, 554 S.W.2d 84 (1977).

We further note that

CR 50.01 requires that a directed verdict motion “state the specific grounds therefor [,]” and Kentucky appellate courts have steadfastly held that failure to do so will foreclose appellate review of the trial court’s denial of the directed verdict motion.

Pate v. Commonwealth, 134 S.W.3d 593, 597-98 (Ky. 2004) (footnotes omitted.)

Based on the foregoing authority and our own review of the directed verdict stages of the trial, we must agree with the Commonwealth that Johnson’s trial attorney did not sufficiently preserve this issue by providing specific grounds for his motion for a directed verdict. However, we shall nevertheless review this issue.

The Supreme Court set forth the standard for determining whether a directed verdict of acquittal is warranted in *Commonwealth v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991), as follows:

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

As stated in *Sawhill*, there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

In support of his assertion that the Commonwealth failed in its burden of proving all of the elements of the theft charge,² Johnson cites to *Coomer v. Commonwealth*, 694 S.W.2d 471 (Ky. App. 1985). In *Coomer*, this Court held that the Commonwealth failed to introduce any direct proof concerning the type of land that had been burned, and the testimony introduced was not such that would allow the jury to infer the land in question was timberland. In the present case, Johnson is correct in that the Commonwealth did not introduce a registration or title in Lowe's name.

On the other hand, the Commonwealth points out that the statutory definition of "property of another" is written broadly:

"Property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor

² An element of theft by unlawful taking is that a defendant "[t]akes or exercises control over movable property of another with intent to deprive him thereof[.]" KRS 514.030(1)(a).

pursuant to a conditional sales contract or other security arrangement.

KRS 514.010(7). In order to establish that the truck was in fact “property of another,” the Commonwealth introduced testimony from Lowe that he had recently purchased the vehicle from the prior owner and had not yet transferred the title or registration into his name. Furthermore, Lowe had the title in his possession, which he provided to Deputy Robinson in order to establish his ownership. Deputy Robinson also testified that he verified Lowe’s statement by contacting the prior owner of the truck. While the Commonwealth’s proof certainly would have been stronger had Lowe produced a title and registration in his own name, the proof that was submitted was certainly more than a mere scintilla and therefore enough to defeat a motion for a directed verdict of acquittal. *See Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

For the foregoing reasons, the Meade Circuit Court’s judgment of conviction is affirmed.

ALL CONCUR.

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