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Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001441-MR

KEVIN BOOKER

APPELLANT

v. APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 07-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, KELLER, AND LAMBERT, JUDGES.

CLAYTON, JUDGE: Kevin Booker (Booker) was convicted by a Carlisle County jury of receiving stolen property over \$300 in connection with the theft of a Stihl Magnum 660 chainsaw. He appeals the final judgment of the Carlisle Circuit Court that sentenced him to one year, probated for five years, and also ordered him to pay \$1,039.95 restitution. On appeal, Booker challenges the introduction of a

charred chainsaw into evidence and the order of restitution for the chainsaw. For the reasons set forth, we affirm.

In November 2007, the Flegle Ace Hardware store and warehouse were burglarized several times. In one burglary, on November 30, 2007, a Stihl Magnum 660 chainsaw was stolen. Jeremy Ellis (Ellis), who was indicted separately, testified at Booker's trial and admitted breaking into Flegle's store and stealing items, which included at least one Stihl Magnum 660 chainsaw. Ellis testified that he remembered the chainsaw having a price of slightly more than \$1,000.

At the time of the burglaries, Ellis lived with his parents. Booker, too, resided at the home of Ellis's parents. Ellis testified that he intended to sell the stolen items. He asked Booker to sell the chainsaw on e-Bay, an internet-based auction website. At trial, Booker claimed that he did not know the chainsaw was stolen. Although Ellis testified that he never informed Booker that the chainsaw was stolen, Booker did know that Ellis could not afford to purchase a chainsaw. Furthermore, because Ellis was committing the burglaries at night and Booker lived at the same residence, it would not have been difficult for Booker to ascertain that the chainsaw was stolen.

Because the Ellis's home did not have internet access and Booker's mother did have it, Booker and Ellis took it to her home and posted an ad on Booker's e-Bay account. On December 8, 2007, a Marshall County sheriff recovered the chainsaw from the spare bedroom at the home of Booker's mother.

Later, on December 10, 2007, it was transferred over to the Carlisle County sheriff's office. This chainsaw was stored with a second stolen chainsaw from Flegle's at the Carlisle County sheriff's personal office, which is attached to the Carlisle County courthouse. Then, on December 26, 2007, someone broke into the sheriff's office and set it on fire. As a result of the fire, the entire courthouse was damaged. Whoever committed the arson placed the two chainsaws on a couch in the office, sprayed the couch with ether, and lit the couch on fire. As the chainsaws were at the center of the fire, only one charred chainsaw bar remained after the fire. This bar was introduced as evidence at Booker's trial.

Before the fire, on December 20, 2007, Booker had been indicted by the Carlisle grand jury for one count of burglary in the third degree and one count of theft by unlawful taking over \$300. Subsequently, on June 2, 2008, prior to the trial, the circuit court, following a motion by the Commonwealth, ordered that the third-degree burglary count be dismissed and the theft by unlawful taking over \$300 be amended to receiving stolen property over \$300.

Booker was tried before a jury on June 2, 2008. At the trial, the circuit court allowed the Commonwealth to admit into evidence, over strenuous objections by the defense, a charred chainsaw bar without any serial numbers. According to the Commonwealth, the bar was the remnants of the Stihl Magnum 660 chainsaw stolen from Flegle's. After a one-day trial, the jury found him guilty but mentally ill. Additionally, the jury noted on both the verdict form and the sentencing verdict form their desire for the circuit court to grant Booker probation

rather than jail time. Ultimately, the circuit court, on July 3, 2008, sentenced him to one year imprisonment probated for five years and ordered him to pay restitution for the chainsaw.

Booker raised two issues on appeal. Notwithstanding that the facts of the case are not substantially disputed, Booker contends that the trial court abused its discretion when it admitted the burnt chainsaw bar into evidence, as a proper foundation for it was not established by the Commonwealth. Additionally, Booker maintains that the trial court incorrectly ordered Booker to pay restitution to Flegle's Ace Hardware store for the stolen chainsaw. He suggests that because Kentucky Revised Statutes (KRS) 533.030 only requires restitution to be made as a condition of probation when a victim has suffered monetary damage, and because the chainsaw was in new condition when it was recovered, and because it was later destroyed by a fire in the sheriff's office, the order of restitution was improper. We will consider both issues in sequential order.

The first issue is whether the Commonwealth established a proper foundation for the purported chainsaw. The decision to admit evidence lies within the sound discretion of the trial court. *Johnson v. Com.*, 134 S.W.3d 563, 567 (Ky. 2004). Typically, to lay a proper foundation for the admission of evidence, the proponent must show that the proffered evidence was "materially unchanged from the time of the event until its admission." *Penman v. Com.*, 194 S.W.3d 237, 245 (Ky. 2006). When establishing chain of custody, however, there is no requirement that the chain be perfect. *Id.* Chain of custody can be established by a variety of

means, including circumstantial evidence. *See Thomas v. Com.*, 153 S.W.3d 772, 778-81 (Ky. 2004).

The authentication or identification of evidence is governed by Kentucky Rule(s) of Evidence (KRE) 901(a), which states in pertinent part:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In other words, a proper foundation requires the proponent to prove that the proffered evidence was the same evidence actually involved in the event in question and that it remains materially unchanged from the time of the event until its admission. *Beason v. Com.*, 548 S.W.2d 835, 837 (Ky. 1977). Hence, to some extent, the necessary foundation depends upon the nature of the evidence.

Evidence readily identifiable and impervious to change may be admitted based solely on testimony that it appears to be the actual object in an unchanged condition. *Id.* at 837. *See also Grundy v. Com.*, 25 S.W.3d 76, 80 (Ky. 2000).

The more fungible the evidence, however, the more significant its condition, or the higher its susceptibility to change, the more elaborate the foundation must be. *See Rabovsky v. Com.*, Ky., 973 S.W.2d 6, 8 (Ky. 1998)(laboratory-tested blood sample).

Moreover, under KRE 901(a), a party introducing the tangible evidence must reasonably, but not absolutely, identify the object for it to be admissible. *Grundy*, 25 S.W.3d at 80(citing *U.S. v. Johnson*, 637 F. 2d 1224 (9th

Cir. 1980). And because the foundation necessary for a tangible item's admissibility varies based on the nature of the item, trial courts are given wide discretion when admitting tangible evidence. *Grundy* at 80.

Here, we have a chainsaw that, for all practical purposes, would typically be considered impervious to change. Yet, given the destructive nature of a fire, it was materially changed after its recovery by law enforcement. The changed character of the evidence, prior to its introduction into evidence, makes the chain-of-custody issue significant. As the Court stated in *Grundy*:

On the other hand, if the offered evidence is of such a nature **as not to be readily identifiable**, or susceptible to alteration by tampering or contamination, sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimonially tracing the "chain of custody" of the item with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.

Id. (citing *Beason*, 548 S.W.2d at 837). (Emphasis added). Thus, the required foundation will be based on testimony as to the object's identity plus proof of chain of custody. *Thomas v. Com.*, 153 S.W.3d 772, 779 (Ky. 2004). The Commonwealth delineates in its appellate brief a thorough description of the testimony at trial regarding both the identification of the chainsaw and the chain-of-custody history of the chainsaw.

In light of the aforementioned trial evidence, the discretion allocated to a trial judge in determining whether to admit evidence, and the nature of the

incident which was responsible for altering the material composition of the chainsaw, we find no abuse of discretion on the part of the trial judge in admitting the charred chainsaw bar into evidence. Indeed, although a courthouse fire is a freak occurrence, it definitely explains the material change to the chain saw. Because the cause for the material change to the chainsaw is so obvious and undisputed, it mitigates the fact that the chainsaw was altered. Besides, Booker admitted possession of the chainsaw (it was recovered from his mother's home), and provides no evidence of tampering or misconduct rendering the introduction of the chainsaw as irrelevant or flawed. The chain of custody has been established and the chainsaw identified at trial, and, therefore, the trial judge did not abuse his discretion.

Booker's second argument in the case at hand is also about the charred chainsaw. In the second argument, he argues that because the chainsaw was destroyed in a courthouse fire, he should not have to pay restitution to Flegle's store. Interestingly, in his second argument, Booker ceases to suggest that the chain of custody was improper and apparently believes that it is the chainsaw in question. Thus, the question for us is whether Booker is liable for restitution, under KRS 533.030(3), since the chainsaw was destroyed by a courthouse fire after its seizure and was in new condition when taken from Booker by law enforcement.

Restitution has been defined as compensation paid by a convicted person to a victim for property damage and other expenses sustained by that victim because of the convicted person's criminal conduct. KRS 532.350(1). In short,

restitution is merely a system designed to restore property or the value thereof to the victim. Upon ordering restitution, the trial judge is required to set the amount of restitution to be paid. KRS 532.033(3). The purpose of restitution, as explained in *Com. v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), is not an “additional punishment exacted by the criminal justice system. . . . It is merely a system designed to restore property or the value thereof to the victim.” In addition, according to *Hearn v. Com.*, 80 S.W.3d 432, 436 (Ky. 2002), the “trial court has the statutory authority to establish restitution and is in the best position to make the appropriate and well-informed decision in a fair and impartial manner.”

The first part of our analysis of the propriety of the order of restitution is to ascertain the appropriate standard of review. Because KRS 532.033(3) charges the trial court with setting the amount of restitution, the statute contemplates the trial court as being the fact-finder in the matter. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 59.01. A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id.*

Following the trial, the trial court ordered total restitution of \$1,039.95. Testimony and evidence presented at trial supported the amount of

restitution ordered by the trial court. In fact, the Stihl Magnum 660 chainsaw still had its attached price tag of \$1,039.95. As such, it is clear that the correct amount of restitution was ordered.

Next, since the chainsaw was destroyed in a courthouse fire, our analysis addresses whether it was appropriate for the trial court to order Booker to make restitution for the chainsaw. Notably, the restitution statute states:

When imposing a sentence of probation or conditional discharge in a case where a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, stolen, or unlawfully obtained, or its value substantially decreased as a result of the crime . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the offense.

KRS 533.030(3).

In other words, when a victim has suffered a monetary loss **as a result** of a crime, the court shall order restitution. Flegle's store suffered a loss when the Stihl Magnum 660 chainsaw was stolen from the store. The theft was the direct cause of their loss. But for the theft, the chainsaw would not have been in the sheriff's office and would not have been destroyed by the fire. The occurrence of the fire does not change the reason for Flegle's loss. Because the trial court was following the mandate of KRS 533.030(3), it did not err in ordering Booker (and Ellis) to pay restitution to Flegle's store. Therefore, we will not disturb the trial court's decision regarding restitution.

To conclude, we are of the opinion that Carlisle Circuit Court was correct in its determination that a proper foundation was established for the entry of the chainsaw and that its order of restitution was proper. For the foregoing reasons, the opinion of the Carlisle Circuit Court is affirmed.

ALL CONCUR.

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