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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001907-MR

RUBEN SINGLETON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 06-CR-000422, NO. 06-CR-002214,
AND NO. 06-CR-002696

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Appellant Ruben Singleton was convicted by a Jefferson Circuit Court jury of one count of receiving stolen property valued at over $300 and one count of receiving stolen property valued at under $300. For

[1] Senior Judge Michael L. Henry 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.

these crimes, Singleton received a total sentence of three years and nine months, probated for a period of five years. Singleton now appeals the judgment to this Court as a matter of right. Because the Commonwealth did not present sufficient evidence to convict Singleton of receiving stolen property, we reverse the trial court's judgment and remand for dismissal of the indictment.

FACTUAL AND PROCEDURAL BACKGROUND

Sections of copper guttering at Byck Elementary School began disappearing in March 2005. In early September 2005, Byck's plant manager contacted Steve Cheatham, a security investigator for the Jefferson County Public Schools, to document the missing guttering for insurance purposes. Through various inquiries, Cheatham found that Singleton had sold copper guttering to Freedom Metals. Cheatham asked the manager of Freedom Metals to contact him if Singleton returned to sell additional copper. On October 1, the same day that the school's plant manager reported that more copper guttering had been taken, the manager of Freedom Metals informed Cheatham that Singleton was at Freedom Metals attempting to sell copper guttering. Cheatham instructed the manager to buy the material and hold it until Cheatham could conduct further investigation.

Cheatham and Officer Kessinger, a detective with the Louisville Metro Police Department, went to Freedom Metals to inspect the copper that Singleton had sold to the store. Thereafter, police arrested Singleton and brought him to the police station. Officer Kessinger testified that he did not believe that an arrest warrant had been served. As explained by Officer Kessinger, Singleton had

"open charges" and needed to be interviewed in order to have "actual charges" placed against him. While at the station, Singleton signed a rights waiver form and gave a taped statement to Officer Kessinger. In the statement, Singleton denied taking the copper guttering from Byck, and said that he received the guttering from a man named Rob. Singleton and Rob had agreed that Singleton would sell the copper and divide the profits. Singleton also stated that he did not know if the guttering was stolen from Byck, but admitted that he suspected that the guttering might be stolen when he heard that a reward had been offered relating to the Byck guttering.

Singleton was indicted and charged with one count of receiving stolen property valued at over $300 for the time period of September 24, 2005 through September 27, 2005. Subsequently, he was also indicted and charged with being a persistent felony offender in the second degree, as well as three counts of theft by unlawful taking of property valued at over $300 and one count of receiving stolen property valued at over $300 for the time period between September 28, 2005 and October 4, 2005.

Singleton's case went to a jury trial, and prior to seating the jury, a suppression hearing was held regarding Singleton's taped statement at the police station. The trial court denied the motion to suppress, finding that the police had probable cause to arrest Singleton for receiving stolen property before taking his statement and that Singleton knowingly and voluntarily waived his rights.

The jury acquitted Singleton of all of the theft charges, but found him guilty of one count of receiving stolen property valued at over $300 for being in possession of copper guttering between September 24 and 27, 2005, and one count of receiving stolen property valued at under $300 for being in possession of copper guttering between September 28 and October 4, 2005. Thereafter, the trial court conducted a joint persistent felony offender and sentencing proceeding. The jury ultimately found Singleton not guilty of being a persistent felony offender and fixed his sentence at three years and nine months for the felony offense. The court imposed this sentence, but probated the sentence for five years. The court also imposed a $250 fine for the misdemeanor offense and assessed court costs. Thereafter, Singleton filed a timely notice of appeal of the final judgment.

DISCUSSION

Singleton argues that the Commonwealth failed to present sufficient evidence that the copper material sold by Singleton was the same copper guttering that had been stolen from Byck and failed to present sufficient evidence of the value of the copper to support the felony conviction. We agree.

The Commonwealth has the burden of proving every element of a criminal offense beyond a reasonable doubt. KRS 500.070. When reviewing the denial of a directed verdict, this Court must determine whether, taking the evidence as a whole, "it would be clearly unreasonable for the jury to find guilt." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The test is the same when the sole evidence of guilt is circumstantial. *Bussell v. Commonwealth*, 882

S.W.2d 111, 114 (Ky. 1994). Further, "[r]eversal of a judgment of conviction on the ground that the evidence was insufficient to support the judgment precludes retrial of the defendant for the same offense." *Coomer v. Commonwealth*, 694 S.W.2d 471, 472 (Ky. App. 1985) (citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

Kentucky courts have addressed the identification of copper in cases with facts similar to those involved in this case. In *Beasley v. Commonwealth*, 339 S.W.2d 179 (Ky. 1960), Beasley was convicted of grand larceny for theft of copper wire from poles along railroad tracks. He appealed, arguing that the evidence did not sufficiently link the copper wire sold by him to the stolen copper wire. The Commonwealth provided evidence that Beasley sold sixty-one pounds of copper, while approximately sixty-two pounds had been stolen from the railroad poles. Additionally, Beasley sold No. 6 gauge wire, and the Commonwealth provided testimony that No. 6 gauge wire was not used widely by businesses other than the railroad industry, with railroads being "practically the only place" where that particular gauge of copper wire was utilized.

Here, it was unreasonable for the jury to find Singleton guilty of receiving stolen property because the Commonwealth failed to present sufficient evidence that the property sold by Singleton was the same property stolen from Byck. KRS 514.110(1) states that:

> A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason

> to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

Therefore, the Commonwealth was required to prove beyond a reasonable doubt that Singleton possessed copper guttering which belonged to the Jefferson County Public Schools. While the general manager at Freedom Metals testified that it was unusual that the copper sold by Singleton still had the manufacturer's stamp on it, the Commonwealth presented no evidence that either Cheatham or Officer Kessinger attempted to compare or match the stamp with the copper guttering remaining at Byck. Additionally, neither the police nor any school employees measured the amount of copper guttering that had been taken to compare to the amount sold by Singleton. Rather, the police and the school system simply made visual inspections from ground level. As stated by the Court in *Beasley*, the "identification of stolen property detected in the possession of an accused must be established by testimony as direct and positive as the particular case permits." *Beasley*, 339 S.W.2d at 180. Apart from Singleton's statement that he "had suspicions" about whether the copper might be stolen, the sum total of proof presented to the jury regarding Singleton's possession of stolen property in this case, was that he sold scrap copper on or near the dates that similar copper was stolen from Byck Elementary School grounds and that he sometimes stayed in an apartment near the school. It was within the Commonwealth's ability in this case to determine the amount of stolen guttering and to ascertain any unique characteristics that would have connected the copper sold by Singleton to the

copper stolen from Byck. Their failure to do so warranted a directed verdict of acquittal due to insufficient evidence regarding the receiving stolen property offenses.

Additionally, the Commonwealth failed to present sufficient evidence of the value of the copper to support the felony conviction, as the only evidence presented was hearsay that did not fall under any recognized exception. In the course of his investigations, Cheatham asked Wes Rodgers, a roof and gutter repairman for the school system, the cost of a linear foot of copper in September 2005. Rodgers provided the following handwritten note: "FOR MATERIAL ONLY $23.71 PER FOOT" and "Total 680 ft $16,122.80." Cheatham added a parenthetical notation when he received the estimate: "(copper)." Rodgers did not appear as a witness in the trial, and the Commonwealth provided no information as to how Rodgers arrived at those totals. While defense counsel objected to the introduction of these amounts, the trial court ruled that the Commonwealth could present testimony concerning the estimate Cheatham received from Rodgers. The trial court also allowed the Commonwealth to introduce the handwritten note as an exhibit over defense counsel's objection.

The note was "a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted," which was that the value of a linear foot of copper was to be determined by the dollar estimate listed in the note. KRS 801(c). *See Salinas v. Commonwealth*, 84 S.W.3d 913 (Ky. 2002), and *Gosser v. Commonwealth*, 31

S.W.3d 897 (Ky. 2000) (diagrams prepared out-of-court by absent witnesses or based on information furnished by absent witnesses were inadmissible hearsay). Although the Commonwealth argues that the owner of property in a receiving stolen property prosecution may provide information and opinion regarding the value of the subject property, the case cited by the Commonwealth does not deal with hearsay, but rather with the actual testimony of the owner at trial. *Phillips v. Commonwealth*, 679 S.W.2d 235 (Ky. 1984). Further, Kentucky courts have consistently held that "there is no separate rule, as such, which is an investigative hearsay exception to the hearsay rule" unless an officer is testifying "about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988) (emphasis original) (*overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17 (Ky. 2006)). That is clearly not the case in this situation. Because the statement does not fall under any hearsay exception, and because this was the only evidence introduced by the Commonwealth with regard to the value of the copper, the Commonwealth failed to present sufficient evidence of value to support the felony conviction.

Because we reverse on the insufficiency of the evidence, we do not reach Singleton's other assignments of error.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court is reversed and, because *Coomer* precludes retrial of Singleton for the same offenses, the case is remanded to that court for dismissal of the indictment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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