

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000801-MR

JESS SISSON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CR-00726

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jess Sisson appeals from the March 31, 2009, final judgment of the Kenton Circuit Court, which found him guilty of one charge of burglary in the second degree. Because we hold that the trial court did not abuse its discretion in allowing certain evidence, we affirm.

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 charge against Appellant stemmed from events which took place on July 15-16, 2008 at the home of Appellant's neighbors, Lori Putthoff and Brandon Hudson. On the evening of July 15, 2008, Hudson had left his residence to take a pet to the emergency vet. Putthoff stayed home with the couple's two sons. At approximately 10:00 pm, Hudson's car alarm went off, so Putthoff went outside and stood by the car until Hudson could return home. Appellant, who resided two doors down from Hudson and Putthoff, was also outside and began conversing with Putthoff. The two stood outside talking until approximately sometime between midnight and 1:00 am, when each returned to their respective homes.

Some time after reentering her home, Putthoff was watching television when Appellant knocked on her door and asked to use her restroom. Putthoff testified that she did not give Appellant permission to use the restroom and did not invite Appellant into her home but rather that he made his way in on his own. Appellant, however, testified that Putthoff showed him to the restroom, which he used. Both testified that Appellant stayed inside the residence for a bit, petting Putthoff's dog and talking. Putthoff testified that Appellant made several complimentary remarks about the television located in the living room. Next, a friend of Hudson's, Danny Meeks, arrived at the residence and then Hudson arrived home at approximately 1:00 am. Appellant left the residence, but remained on its porch conversing with Meeks and Hudson. In the meantime, Putthoff made

her way to Appellant's residence in order to speak briefly with his fiancé. Putthoff returned approximately 30 minutes later, at which time Appellant returned home.

At approximately 1:45 am, the emergency vet clinic phoned Putthoff and informed her that her pet was ready to be picked up. Putthoff went to the vet and returned home at approximately 2:45 am at which time Hudson and Meeks left to go play video games at Meeks' residence. Upon leaving the residence, Hudson locked the door. Putthoff testified that she checked the door before retiring to bed and confirmed that it had been locked.

After going upstairs to go to bed, Putthoff heard a knock at the door. She testified that she looked out of the upstairs window and saw Appellant leave the porch, go to her car parked on the street, look into the glove box, and then leave. A few minutes later, Putthoff heard two more knocks, followed by the sound of wood clattering, and a squeaky noise that she recognized as her downstairs front window being opened. Putthoff called 911 and informed the dispatcher that someone had entered her home. While on the phone with the dispatcher, she heard two loud "thuds" and heard the front door open and close and then open again. The dispatcher then informed Putthoff that the police had arrived and that she could go downstairs.

Sergeant Fred Roberts was only three blocks away when he received the dispatch call and arrived at Putthoff's residence within approximately one minute. Officer Roberts testified that he approached the house and tried to turn the door knob on the front door, but it was locked. He began backing off of the porch

when he heard the handle jiggle and saw the door open and close very quickly. Sergeant Roberts tried the door again. It had been unlocked and opened easily. Sergeant Roberts entered the home and discovered Appellant standing in the living room. Sometime prior to Putthoff's coming downstairs, Sergeant Roberts had been joined by Officer Spanyol and Officer Wright. Officer Spanyol noticed that Appellant had a gun and alerted the other officers. The gun was fully loaded with a round in the chamber. Appellant told Sergeant Roberts that he was in the home because the front door was open and he was waiting for Hudson to return.

The downstairs front window of Putthoff and Hudson's home was located in the living room and faced the street. The window could not be locked and was covered in plastic with a shade stapled over it. A flat screen television was placed in front of the window and next to the television was a video stand which housed video games. Sergeant Roberts testified that he observed the television had been swiveled out from the window and the plastic and the shade that covered the window had been disconnected on one side. Sergeant Roberts also testified that a speaker and speaker stand were turned over and that there was a handprint in the dust on the television and video stand.

Sergeant Roberts returned to Putthoff and Hudson's home at 9:00 p.m. in order to process the scene. At that time, the plastic and shade that had been covering the window had been removed and the window had been nailed shut by Hudson. The speaker and speaker stand had been placed back into their normal positions, but the handprints remained. Sergeant Roberts took pictures of the

prints and attempted to lift them, but they were of such poor quality that they could not be analyzed. Sergeant Roberts also staged the room to look as it had when he arrived that morning, and took photographs of the staged room.

Appellant was indicted on one count of second-degree burglary. At trial, the Commonwealth presented testimony from Sergeant Roberts, Putthoff, and Hudson, and introduced the photographs that Sergeant Roberts had taken of the handprints. The photographs of the staged room were not admitted. At the completion of his jury trial, Appellant was found guilty of second-degree burglary and sentenced to eight years' imprisonment. This appeal followed.

Appellant's first argument on appeal is that the trial court erred when it allowed the Commonwealth to introduce photographs which had not been properly authenticated. The photographs to which Appellant refers are a photograph of a palm print and a photograph of a fingerprint, located in the dust on the television and video stand. The photographs were taken while Sergeant Roberts was processing the scene, approximately seventeen hours after his initial inspection.

The proper standard of review for evidentiary issues is abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In support of his argument, Appellant cites to KRE² 901(a), which states: “[t]he 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.” The Commonwealth introduced the photographs as evidence that Appellant had entered the residence through the window. Appellant argues that the handprint photographs do not satisfy KRE 901(a), because the crime scene was tampered with before Sergeant Roberts was able to take the photograph, making it impossible to know if the handprints belonged to Appellant or someone else. We disagree.

One example of authentication, in conformity with KRE 901(a), is: “[t]estimony of witness with knowledge” or “testimony that a matter is what it is claimed to be.” KRE 901(b). The Supreme Court of Kentucky has previously held that someone who was present after a crime has personal knowledge of the crime scene and is capable of reconstruction of that scene. *Gosser v. Commonwealth*, 31 S.W.3d 897 (Ky. 2000). It has also held that pictures introduced of the interior of a car that had been destroyed by fire were admissible when “the detective specifically testified as to each of the photos that they truly and accurately depicted the scene when the automobile was discovered, which supplies the necessary foundation.” *Eldred v. Commonwealth*, 906 S.W.2d 694, 704 (Ky. 1994) (abrogated on other grounds). In the matter before us, Sergeant Roberts testified as to the authenticity of the photographs and their content. Specifically, he testified

² Kentucky Rules of Evidence.

that the prints were present when he originally arrived at the crime scene, and that they appeared unchanged upon his second arrival. Accordingly, we do not find that the trial court abused its discretion in allowing the photographs and Appellant's argument is therefore without merit.

Appellant's second, and final, argument on appeal is that the trial court erred by allowing the Commonwealth to elicit testimony regarding the gun. Appellant maintains that because the presence of a weapon is not an essential element of the crime with which he was charged, it was therefore not relevant evidence and instead unfairly prejudiced him. In support of this argument, Appellant maintains that he always carried the gun, and therefore its presence at the scene was not relevant to the alleged crime.

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” KRE 401. “A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling.” KRS 511.030(1). The trial court allowed evidence of the gun under the condition that the Commonwealth not argue that the gun was instrumental in the burglary. The existence of a gun is not a fact of consequence in a charge for second-degree burglary. Accordingly, we agree with Appellant that any evidence pertaining to the gun was not relevant in regard to the crime with which he was charged.

However, we do not believe that the introduction of the evidence was prejudicial to Appellant.

The evidence against Appellant was overwhelming: the testimony of the witnesses indicated that the front door was locked when Appellant entered the residence; that the coverings on the front window had been tampered with; that furniture had been knocked over; and that the television had been moved. Putthoff and Hudson also testified that although they were friendly with Appellant, they were not friends. Furthermore, it was made clear to the jury that Appellant was always in possession of the gun. In fact, one juror inquired as to whether or not Putthoff had seen Appellant with the gun earlier in the evening, and Putthoff answered that she had and that Appellant always wore the gun. The presence of the gun does not appear to have been a relevant factor in the jury's verdict of guilt and therefore any error in allowing evidence of the gun was harmless.

For the foregoing reasons, the March 31, 2009, final judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon Dupree
Assistant Public Advocate
Kentucky Department for Public
Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky