

RENDERED: FEBRUARY 10, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001963-MR

CHRISTOPHER ALLEN PINKSTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 09-CR-00361

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND THOMPSON, JUDGES.

MOORE, JUDGE: Christopher Pinkston appeals the judgment of the Fayette Circuit Court convicting him of one count of tampering with physical evidence and sentencing him to one year of imprisonment. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2010, Pinkston was found guilty of one count of assault in the second degree¹ and one count of tampering with physical evidence. By way of background, Pinkston became romantically involved with a young woman, Brooklyn Niehaus, who had previously been involved with Christopher Eversole. Pinkston accompanied Niehaus when she went to retrieve some of her belongings from Eversole's residence. Pinkston claimed that Niehaus had informed him that Eversole had been abusive throughout their relationship. Not wanting for her to go alone and not wanting to create trouble with Eversole, Pinkston asked his friend, Tim Gelentser, to accompany Niehaus into the house. Pinkston waited in Gelentser's truck.

Both Pinkston and Gelentser testified that when Gelentser exited the home Eversole followed Gelentser out of the house and into the yard, coming toward Gelentser in an aggressive manner. Gelentser testified that Eversole took a swing at him while he had his back turned. Pinkston then got out of the truck, and Eversole began to move toward Pinkston. Pinkston waived his firearm, revealing that he had a gun. Eversole then became more hostile and proceeded toward Pinkston. Pinkston fired three times, striking Eversole in the neck on the third shot. Pinkston and Gelentser then fled the scene and returned to Pinkston's home, claiming that they feared that Eversole's cousins, who were present during the altercation, might be armed.

¹ Pinkston was also convicted of assault and sentenced to six years' imprisonment. Both sentences are to run concurrently. His assault conviction is not before the Court on appeal.

While en route, Pinkston dialed 911 and advised the authorities about what had just happened. Before the police arrived at Pinkston's residence, Pinkston concealed his firearm in the bushes beside his home. When the police questioned Pinkston about the location of the gun, Pinkston first informed the police that he had left the gun at Eversole's home. He then informed them that he had thrown the gun out of the window of the truck after leaving Eversole's home. Police canvassed Eversole's neighborhood in search of the gun but were unsuccessful in finding it. Pinkston later informed police that he had hidden the gun in the bushes.

At trial, Pinkston did not contest that initially he did not tell the officers where he had placed the gun. Instead, Pinkston testified that initially he tried to "play the gun down" and did not believe that the gun was relevant to the investigation because "[he] hadn't committed a crime in [his] mind." Although Pinkston testified that the gun was located on the dash of Gelenster's vehicle when he decided to place it in the bushes, he indicated that he placed it in the bushes because he did not wish to have a weapon on his person when the police arrived.² He also testified that he had purchased the gun off the street and wanted to avoid being charged with any crime that may have been committed with the gun prior to his purchasing it.

² Officer Mitchell testified that both Pinkston and Gelentser were standing outside the apartment complex upon his arrival.

At trial, Pinkston moved for a directed verdict regarding the tampering charge based upon the insufficiency of the evidence at the close of the Commonwealth's evidence and at the close of all of the evidence.³ The trial court denied both motions, indicating that it believed that the evidence was sufficient to allow a jury to make a determination on both the assault and tampering counts. As stated previously, the jury found Pinkston guilty on both counts. Pinkston now appeals.

II. STANDARD OF REVIEW

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 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. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). Furthermore,

³ The Commonwealth argues that Pinkston did not raise the tampering charge in his motions for a directed verdict, and is therefore precluded from raising it on appeal. These circumstances make the issue of preservation a close one. However, the trial court addressed both the assault and tampering charges when entertaining the motions for directed verdict. Accordingly, the Commonwealth had an opportunity to oppose the motion, and the trial court had an opportunity to pass on the issue in light of all the evidence. See *Baker v. Commonwealth*, 973 S.W.2d 54, 55 (Ky. 1998). Consequently, under the limited circumstances of this case, we will deem the issue as preserved.

the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. . . . [T]he reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact.

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461 (Ky. 1990).

III. ANALYSIS

Pinkston’s arguments focus solely on his tampering with physical evidence conviction.⁴ Specifically, Pinkston argues that the trial court erroneously denied his motion for directed verdict based upon insufficiency of the evidence. We disagree.

Kentucky Revised Statute (KRS) 524.100(1)(a) provides that “[a] person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he: (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability to the official proceeding” With respect to the requirement of intent, “[t]he compelling logic . . . is that one who has committed a criminal act and then conceals or removes the evidence of his crime does so in contemplation

⁴ On appeal, Pinkston does not raise any claim(s) regarding his assault conviction. Because he failed to raise any argument on appeal regarding that conviction, any claim he may have raised concerning it is waived. *See Hugenberg v. West American Ins. Co.*, 249 S.W.3d 174, 187-88 (Ky. App. 2006).

that the evidence would be used in an official proceeding which might be instituted against him.” *Burdell v. Commonwealth*, 990 S.W.2d 628, 633 (Ky. 1999).

As previously mentioned, the Commonwealth presented evidence that Pinkston concealed the weapon in the bushes and that Pinkston allowed the police to search for the weapon while fully cognizant that the officers would not find the gun where he told them it was located. Moreover, Pinkston concedes that he placed the gun in the bushes and initially misinformed the police as to its whereabouts. Thus, the trial court, drawing all inferences in favor of the Commonwealth, properly determined that a reasonable jury could conclude that Pinkston was guilty of tampering with evidence when he concealed the weapon with the intent to impair its availability. Therefore, we conclude that the trial court correctly denied Pinkston’s motion for a directed verdict. Accordingly, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert C. Yang
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
Frankfort, Kentucky