

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001381-MR

RICHARD BUTCHER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 10-CR-01281

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Richard Butcher, was convicted in the Fayette Circuit Court of receiving stolen property over \$500, second-degree fleeing and evading, reckless driving, disregarding a stop sign, and for being a first-degree persistent felony offender. He was sentenced to fifteen years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

In the early morning hours of August 19, 2010, Officer Banford Hill was patrolling an area near the University of Kentucky when he observed a white Chevrolet Impala roll through a stop sign. Officer Hill proceeded to follow the vehicle, which began traveling at an excessive rate of speed and not making full stops at intersections. Officer Hill thereafter ran the license plate number through dispatch and discovered it was stolen. As he was attempting to catch up with the Impala, Officer Hill activated his lights and siren. Although the speed limit was 25 miles per hour, Officer Hill stated that he could not close the gap between the vehicles even though he was driving over 60 miles per hour. A short time later, the Impala apparently failed to negotiate a turn and crashed into a chain link fence. As he approached the scene, Officer Hill turned on his spotlight and saw what he described to dispatch as a small, thin white male, approximately 5'9" and weighing between 155-160 pounds, wearing a dark blue shirt, jean shorts and a white ball cap running away from the Impala. Officer Hill thereafter lost sight of the suspect.

Within moments of Officer Hill radioing in the suspect's description, Officer Darryl Jones and his K-9 dog, Darro, arrived at the scene. Darro picked up a scent near the Impala and within a few moments became interested in a particular house with a screen porch. After Officers searched the porch, the dog alerted to a truck sitting in the driveway. Appellant was discovered hiding under a mattress in the back of the truck. Officer Hill positively identified Appellant as the suspect he saw fleeing from the Impala. He was thereafter arrested.

On October 5, 2010, a Fayette County Grand Jury indicted Appellant for receiving stolen property over \$500, first-degree fleeing and evading police, reckless driving, disregarding a stop sign, and for being a first-degree persistent felony offender. Following a trial on February 1, 2011, a jury convicted Appellant on six counts, including the lesser-included offense of second-degree fleeing and evading. For reasons irrelevant to this appeal, however, Appellant was subsequently granted a new trial. On retrial, he was again convicted on the same six charges and was sentenced to a total of fifteen years' imprisonment. This appeal ensued.

On appeal, Appellant argues that the trial court erred in denying his motion for a directed verdict. It was Appellant's theory at trial that this was simply a case of mistaken identity. He points out that, contrary to Officer Hill's description of the suspect, Appellant was wearing a black t-shirt and a light gray hat at the time of his arrest. Further, Appellant claims that he is much thinner than the suspect, citing to the fact that he only weighed 136 pounds three weeks after his arrest. As such, Appellant claims there was no substantial evidence linking him to the crimes and the jury improperly found him guilty based upon "speculation, suspicion and conjecture." We disagree.

The standard for determining whether a directed verdict should be granted is well-settled:

On motion for a 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.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). On appellate review, the test of a directed verdict is, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, then the defendant is entitled to a directed verdict of acquittal. *Benham*, 816 S.W.2d at 187 (Ky. 1991) (citations omitted). “This standard applies whether the evidence is direct or circumstantial.” *Brewer v. Commonwealth*, 206 S.W.3d 313, 318 (Ky. 2006).

At trial, the Commonwealth presented evidence that the suspect Officer Hill saw fleeing on foot generally fit the physical description of Appellant at the time of the crimes, *i.e.*, height, weight, race; that when he was arrested, Appellant was wearing a dark shirt, jean shorts and a light-colored ball cap; that he was sweaty and had dirt on his hands and clothing, as if he had fallen while running; and that the K-9 dog detected a scent on the Impala and tracked it to a truck where Appellant was found hiding. Additionally, Officer Hill testified at the second trial that Appellant told him he could not be charged with fleeing and evading because he never saw Officer Hill “light him up”, referring to the cruiser’s emergency lights.

We are of the opinion that a jury could have reasonably inferred from the evidence presented at trial that the man found in the back of the truck was the same man who Officer Hill saw fleeing from the stolen Impala. The discrepancies in the suspect's description – whether his shirt was dark blue or black and the hat white or light gray – were matters within the province of the jury. The jury was entitled to consider all of the evidence and testimony, and determine the weight and credibility to be given to such. However, we conclude that under the evidence as a whole, it was not clearly unreasonable for the jury to find Appellant guilty. *Benham*, 816 S.W.2d at 187. Accordingly, the trial court did not err in denying Appellant's motion.

The judgment and sentence of the Fayette Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Erin Hoffman Yang  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

James C. Shackelford  
Assistant Attorney General  
Frankfort, Kentucky