

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000837-MR

GEORGE SULLIVAN

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 09-CR-00225

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT AND MAZE, JUDGES.

MAZE, JUDGE: Appellant, George Sullivan (hereinafter “Sullivan”), appeals from the final judgment of the Taylor Circuit Court on charges of Criminal Mischief in the First Degree and Criminal Mischief in the Second Degree, both of which he was later convicted. Specifically, Sullivan contends that the trial court erred in denying his motions for a directed verdict and permitting the case to go

before the jury. As we find no error in the trial court's denial of directed verdict, we affirm.

Background

The following facts are not in dispute. Sullivan and his estranged wife, Deborah, were married in 2004 and lived in a home she owned in a rural area of Taylor County. In June of 2009, Sullivan moved out of the home and Deborah filed for divorce. The next month, Deborah sought and received an emergency order of protection against Sullivan. Sullivan was served with this order the following day and received a domestic violence show cause order on August 3 for a court appearance scheduled for the next day. On August 4, while Deborah was at the courthouse, an employee of the store Deborah managed received a phone call from a person whose voice she recognized as Sullivan's. The employee was told to inform Deborah that "she did a good job in court today."

The next morning, Deborah, now living with her mother and nephew, awoke to find that two tires on her car were flat, the side-view mirror had been damaged and the windshield wipers were missing. Her nephew's car had also been sideswiped, causing transfer of a deep red paint onto the vehicle. Upon being interviewed by police, Sullivan claimed to have been home with his father on the night the damage occurred.

At Sullivan's trial for Criminal Mischief in the First and Second Degree, the testimony of several persons was taken. Deborah testified that until three weeks before the incident, she had owned a deep red-colored pickup, but had

traded it in for a smaller car. Sullivan's father later bought the truck from the dealer. When shown a photograph of this truck at trial, Sullivan responded, "that's my red truck." At least one witness testified that Sullivan, and not his father, drove the truck. Sam Cox, an employee of a local auto service company, testified that the sidewalls of Deborah's tires had been punctured and that the total cost of repairing the damage to her vehicle was \$461.50.¹ Christopher Burton, an employee of a local body shop and Deborah's stepson, also testified that the estimated cost of repairing Deborah's nephew's vehicle was \$4,000, in excess of its value. Burton was also familiar with the deep red-colored pickup, as it had formerly belonged to Deborah, and testified that it was the correct height to leave the marks observed on Deborah's nephew's car.

Deborah and her mother also testified that they saw the pickup in question after the August 4 incident and that it had long scratches down its driver's side. Sullivan testified that these scratches were caused by dogs. Sullivan further testified that, contrary to his prior statement to police, he had been at a casino the evening of August 4 and arrived home around 3:00 a.m. He testified he had been driving a rental car that evening because his vehicle (not the pickup in question) was being repaired. None of the witnesses who testified saw Sullivan cause the damage and none claimed to have specific knowledge that he had done so.

At the conclusion of the Commonwealth's case, Sullivan's attorney moved the court for a directed verdict. Citing the specific issue of preservation for

¹ Deborah also paid another repair service \$47.19 to repair the mirror on her vehicle, bringing the total cost of repair to her vehicle to \$508.69.

the purposes of appeal, Sullivan’s counsel made his motion for directed verdict “based on the insufficiency of the evidence.” Counsel stated that he would not make further argument unless the court wished to hear it. Though offered this chance to hear brief argument on Sullivan’s motion, the trial court stated its belief that the evidence was sufficient to move forward and the case proceeded. At the conclusion of proof, Sullivan renewed his motion for directed verdict, which was again denied. The jury found Sullivan guilty of both charges of Criminal Mischief. The jury set Sullivan’s sentence at two years’ imprisonment on the first count and six months’ imprisonment and a \$500 fine for the second count, to run concurrently. Sullivan now appeals from the trial courts final judgment of conviction.

Analysis

In appealing the trial court’s denial of his motions for directed verdict, Sullivan argues that there was insufficient evidence to support his conviction, including the absence of evidence identifying him as the person who caused the damage. Sullivan contends that the Commonwealth relied exclusively upon “suspicion, probability and conjecture” to obtain his conviction.

As a preliminary matter, the Commonwealth contends that the sole issue upon which Sullivan appeals is not preserved. The Commonwealth argues that, contrary to Kentucky Rules of Civil Procedure (“CR”) 50.01’s requirement that a directed verdict motion “state the specific grounds therefor,” Sullivan gave

only a general statement which was insufficient for preservation purposes. We disagree.

The Commonwealth cites to *Pate v. Commonwealth*, 134 S.W.3d 593 (Ky. 2004), in which counsel twice simply uttered that he wished to make a motion for directed verdict without providing any grounds or argument in support. Understandably so, this was found to be insufficient for purposes of preserving the denial of his motion for appeal. Indeed, “[t]he purpose of the rule is to apprise fairly the trial judge as to the movant's position and also to afford opposing counsel an opportunity to argue each ground before the judge makes his ruling.” *Gulf Oil Corporation v. Vance*, 431 S.W.2d 864, 865 (Ky. 1968); *see also Hercules Powder Co. v. Hicks*, 453 S.W.2d 583, 590 (Ky. 1970). We feel, by stating that the motions were based on “the insufficiency of the evidence,” that, unlike in *Pate*, Sullivan’s motions served this purpose and sufficiently preserved the matter of their denial for appeal to this Court. Accordingly, we proceed to the substantive legal issue at hand.

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 is the defendant entitled to a directed verdict of acquittal. *Commonwealth v. Benham*, 817 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). When ruling on a directed verdict motion, the trial court must assume the evidence for the Commonwealth is true and draw all fair and

reasonable inferences from the evidence in favor of the Commonwealth. *Id.*

However, “[i]t should be remembered that the trial court is certainly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. Obviously, there must be evidence of substance.” *See Sawhill, supra.*

A directed-verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011). KRS 512.020 states, in pertinent part,

- (1) A person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of \$1,000 or more.

The pecuniary requirement for Criminal Mischief in the Second Degree under KRS 512.030 is \$500 or more. Otherwise, that statute is identical to Section 1 of KRS 512.020.

In reviewing the statutory elements necessary for a claim of Criminal Mischief, we find that the Commonwealth presented more than a “mere scintilla” of evidence tending to demonstrate Sullivan’s guilt. We find fault with Sullivan’s contention that the evidence presented could not reasonably have led a juror to conclude that he had committed the charged offenses. Despite Sullivan’s apparent belief that the whole of the Commonwealth’s case was circumstantial (or based in “suspicion, probability and conjecture,” as he puts it), even if it was, circumstantial

evidence can suffice to support a criminal conviction. *See Bray v. Commonwealth*, 177 S.W.3d 741, 748 (Ky. 2005) (*overruled on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010)).

We take further exception to his statement that there had been no physical evidence presented, nor any motive for Sullivan to have caused the damage to the vehicles. To the contrary, testimony at trial was that one car had been sideswiped by a deep red-colored vehicle and that Sullivan's deep red-colored pickup truck had a visible scratch on it after the incident. Furthermore, there was testimony that a truck like that of Sullivan's was the right height to have caused the sideswipe damage. Regarding motive, the testimony and evidence presented at trial demonstrated a tumultuous divorce between Deborah and Sullivan. There was a history of domestic violence and a very recent emergency order of protection issued against Sullivan. The events in question occurred one day after Sullivan was summoned to court to answer for the allegations Deborah had leveled against him.

The implication of all of this testimony and evidence is that Sullivan was the perpetrator of the damage to the vehicles. In ruling upon Sullivan's motions, the trial court was required to view all such implications in favor of the Commonwealth. The trial court was required to hold as true the implication that Sullivan had a motive to commit these acts and drove the vehicle which caused the damage. In light of these implications, we cannot agree with Sullivan when he argues that the Commonwealth failed to present more than a mere scintilla of

evidence in favor of guilt. To the contrary, the Commonwealth met its extraordinarily low burden of proof for purposes of directed verdict. Hence, the trial court properly permitted the case to proceed to the finder of fact.

For the foregoing reasons, the final judgment of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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