

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000763-MR

WENDELL LEE GROVES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 12-CR-000535

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Jurors convicted Wendell Groves of two crimes—criminal attempt to commit theft by deception over \$500 but less than \$10,000,¹ for which they recommended a sentence of nine months; and criminal possession of a forged instrument in the second degree,² for which they recommended a sentence of one

¹ Kentucky Revised Statutes (KRS) 514.040(1)(a)/506.010, a Class A misdemeanor.

² KRS 516.060, a Class D felony.

year, enhanced to ten years by virtue of Groves's status as a persistent felony offender in the first degree (PFO I).³ Consistent with the jury's verdict, the trial court ran the two sentences concurrently for an enhanced term of ten years.

Groves now appeals, claiming the trial court erroneously denied his motion for a directed verdict on the possession charge.

At a McDonald's restaurant on October 20, 2011, a man approached Groves—homeless, broke and drug addicted—offering him an opportunity to make money. All he had to do was go to a bank and cash a check for \$2,342.18 drawn on Maysville Auto Sales (Auto Sales). In return, Groves would receive \$500.00. Groves agreed and the man left for about thirty minutes with Groves's identification card and upon his return, gave Groves a printed check bearing the name "Wendell Grove"⁴ as payee.

The man and two others drove Groves to a U.S. Bank branch in Jefferson County, Kentucky. Groves handed the check and his identification card to the teller. When presented with the check, due to the amount exceeding \$1,000.00, the bank's branch manager discovered Auto Sales—a U.S. Bank customer—had already issued a check bearing that same number to a different payee. A telephone call confirmed Auto Sales had not authorized issuance of a

³ KRS 532.080.

⁴ The "s" was omitted from Groves's name.

check to Groves. Upon being told Auto Sales disputed the check, Groves left the bank leaving both the check and his identification card.

Groves returned to the man and his two companions with news that he had not successfully cashed the check. The man and his friends drove away—leaving Groves in the parking lot.

About seven months later, on May 16, 2012, Groves was one of seven homeless men⁵ arrested and indicted for charges relating to forged checks.⁶ Each of the seven men had been approached by someone offering money in return for cashing a forged check. The men creating the counterfeit checks and running the scam were not caught.

A jury trial, resulting in conviction and an enhanced sentence of ten years, occurred on March 11-12, 2013. On June 4, 2013, Groves received shock probation. Groves now appeals his conviction of criminal possession of a forged instrument in the second degree on the ground that the Commonwealth failed to prove he intended to “defraud, deceive or injure another” by possessing and presenting the check drawn on Auto Sale’s account. We disagree and affirm.

ANALYSIS

Our resolution of this case is based on *Commonwealth v. Benham*, 816 S.W.2d 186, 187-88 (Ky. 1991), wherein the Supreme Court of Kentucky clarified

⁵ The other defendants pled guilty.

⁶ Groves was also charged with criminal syndication-engaging in organized crime. KRS 506.120, a Class B felony. On the Commonwealth’s motion, this charge was dismissed with prejudice.

the standard for denying a directed verdict motion and reviewing that decision on appeal.

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 to 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. Sawhill*], 660 S.W.2d 3 (Ky. 1983)].

As stated in *Sawhill*, there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

In the case *sub judice*, there is more than a “scintilla of evidence” that Groves criminally possessed a forged instrument with intent to defraud. Thus, the trial judge properly determined a reasonable juror could fairly find guilt beyond a reasonable doubt. This is particularly true in light of Groves’s own testimony that he knew he had no business with a check from Auto Sales, he knew he was not supposed to have the check, and he signed and attempted to pass the check intending to receive \$500.00 for his actions. He even acknowledged on cross-examination that in a prior court proceeding he had stated, “I was in possession of the check. I was wrong.”

Groves hangs his hat on his own testimony that he did not know the check was fake, but yet in the next breath said he knew he “didn’t earn a penny of the amount” and he knew he wasn’t supposed to have the check. Groves appears to assert that unless he specifically testified he knew the check was fake, granting a directed verdict was mandatory. We disagree.

Were the law as Groves suggests, a criminal defendant could thwart prosecution simply by invoking his right to remain silent. Furthermore, just because Groves testified he did not “know” the check was counterfeit, jurors were not required to believe him to the exclusion of all other proof.

It has long been held that the trier of fact has the right to believe the evidence presented by one litigant in preference to another. *King v. McMillan*, 293 Ky. 399, 169 S.W.2d 10 (1943). The trier of fact may believe any witness in whole or in part. *Webb Transfer Lines, Inc. v. Taylor*, Ky., 439 S.W.2d 88, 95 (1968). The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness. *Hayes v. Hayes*, Ky., 357 S.W.2d 863, 866 (1962).

Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996).

The Commonwealth introduced the Auto Sales check listing “Wendell Grove” as payee and bearing his endorsement on the back. The endorsement matched Groves’s signature on his identification card. The bank manager identified Groves as the man who tried to cash the check. A video of the transaction was introduced. At the close of the Commonwealth’s case, defense counsel moved for a directed verdict arguing the Commonwealth had not met its

burden, but said no more. The trial court found reasonable jurors could find guilt and denied the motion.

Groves was the sole witness offered by the defense. At the close of his testimony, defense counsel renewed the directed verdict motion arguing the Commonwealth could not prove intent due to Groves's testimony. We view the proof differently.

Groves endorsed the check. He then presented the check for payment—with the intention of receiving \$500.00 for his role in the scheme—knowing he had not earned any money and had no business having the check drawn on Auto Sales in his possession. In our eyes, these facts are sufficient to prove intent. We, therefore, agree with and affirm the Jefferson Circuit Court's denial of a directed verdict.

ALL CONCUR.

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