

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000113-MR

THOMAS MOORE

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 16-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND L. THOMPSON, JUDGES; HENRY, SPECIAL
JUDGE.¹

HENRY, SPECIAL JUDGE: Thomas Moore appeals from the Todd Circuit

Court's judgment and sentence of conviction, entered January 4, 2017. We affirm.

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Realtor Kelvin DeBerry was retained by Wienona Moore to sell real property of which she had become sole owner upon the death of her husband Jackie. On February 28, 2016, DeBerry went to the property to check on its condition. When he arrived he found Jackie's brother, Tommy Moore, and two other people with a pickup truck backed up to an outbuilding. There were several items in the bed of the pickup. DeBerry spoke to Tommy and learned of Tommy's relationship to Wienona. DeBerry, suspecting that Moore was not authorized to remove items from the property, called Wienona's residence and spoke to Tommy's ex-wife, Sandra Moore, who lived with Wienona. Sandra contacted the Todd County Sheriff's Office and a deputy was dispatched to the scene. Upon his arrival he found Moore securing items in the pickup. The pickup was backed up to an outbuilding with a "no trespassing" sign. The doors of the building were open. The deputy, having been advised that Moore did not have permission to take anything from the property, placed him under arrest. While searching Moore incident to the arrest, the deputy found drugs and drug paraphernalia.

Moore was found guilty after a jury trial on November 30, 2016, of the charges of criminal trespass in the second degree; attempted theft by unlawful taking under \$500; possession of a controlled substance in the first degree, methamphetamine, a schedule II controlled substance, second offense; possession of marijuana; and possession of drug paraphernalia. The jury recommended an

aggregate sentence of three years' imprisonment. In a judgment entered on January 4, 2017, the trial court sentenced Moore accordingly with all terms of incarceration to run concurrently. This appeal followed.

Moore's sole argument on appeal is that the trial court should have granted his motion for a directed verdict on the criminal trespass charge. Moore admits that the issue is "at best partially preserved" and requests palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26. "[W]here a sufficiency-of-the-evidence challenge was not properly preserved at trial, the issue is subject to review on appeal . . . under the palpable error standard of RCr 10.26." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (citation omitted). RCr 10.26 permits review of unpreserved error if it affects the substantial rights of a defendant resulting in manifest injustice. To rise to the level of palpable error, a reviewing court must find a defect in the proceeding which is "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 3-4 (Ky. 2006). "Courts are to direct verdicts of not guilty only in the most drastic situations where the Commonwealth has failed to produce proof whereby reasonable jurors could conclude beyond a reasonable doubt that a defendant is guilty." *Commonwealth v. O'Connor*, 372 S.W.3d 855, 857 (Ky. 2012).

Moore contends his directed verdict motion should have been granted because the Commonwealth failed to prove an element of criminal trespass in the

second degree. As relief, Moore requests we reverse the trial court and dismiss his conviction.

Criminal trespass in the second degree is proscribed by KRS 511.070 which states:

- (1) A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon premises as to which notice against trespass is given by fencing or other enclosure.
- (2) Criminal trespass in the second degree is a Class B misdemeanor.

Moore argues the Commonwealth failed to present any evidence that he personally entered the shed.

At trial, DeBerry testified that he saw Moore removing items from the shed and that Moore volunteered to him that he was “helping to clean up” the property. When the deputy arrived, Moore was securing items in the pickup. Wienona testified that those items had been stored in the outbuilding.

Even if there had been no direct evidence of Moore’s presence in the building, it has long been established in Kentucky law that all elements of a crime may be proven by circumstantial evidence. *O’Connor*, 372 S.W.3d at 857. It is the province of the jury to weigh the evidence of guilt in the light of any evidence to the contrary. *Hack v. Commonwealth*, 418 S.W.2d 216, 217 (Ky. 1967).

For the foregoing reasons, we affirm the judgment and sentence of the
Todd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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