

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2001-SC-0863-MR

FINAL
DATE 2-13-03 SJA/Grow/TC

ROBERT L. MCNEESE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
INDICTMENT NO. 2001-CR-0339-2

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Robert L. McNeese, appeals his conviction for theft of services over \$300 and for being a first-degree persistent felony offender (PFO). Appellant was sentenced by the Fayette Circuit Court to five years imprisonment on the theft of services conviction, which was enhanced to twenty years as a result of the PFO conviction. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

Appellant was found guilty of robbing Wright Way Transmissions after he authorized its owner, Greg Wright, to replace the transmission on his car, and thereafter demanded the keys and absconded without paying the \$975 repair bill. While Mr. Wright testified that Appellant pulled a gun, the jury convicted on the lesser charge of theft of services. Appellant alleges two issues on appeal. First, Appellant charges that the trial court erred when it did not dismiss a potential juror for cause because she had been the victim of an armed robbery fifteen years earlier. Second, Appellant alleges

reversible error due to the trial court's failure to instruct the jury on the lesser-included offense of theft of services under \$300.

JUROR SELECTION

Appellant takes issue with the trial court's decision to overrule his motion to strike Juror #544 for cause, thus requiring Appellant to exercise a peremptory challenge on an unqualified juror. Juror #544 had been working in a department store fifteen years prior when it was held-up by a masked armed robber. Appellant challenged the juror's ability to be impartial due to the similar nature of the circumstances between the two incidents; namely, that both robberies occurred at the work place and both involved a gun. The trial court inquired as to whether Juror #544 had any emotional problems as a result of the incident and asked if she could set aside her own experience and base her decision solely on the evidence presented at trial. She responded that she would have no problem being an unbiased juror and that she did not suffer from any emotional problems stemming from the robbery. The trial court found that the juror's experience was too remote in time to render her an unqualified or biased witness, and therefore overruled defense counsel's motion to strike her for cause. Defense counsel ultimately struck Juror #544 with a peremptory challenge and she was not a member of the jury in Appellant's trial.

Kentucky Rule of Criminal Procedure (RCr) 9.36(1) states in part: "When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." Whether to excuse a juror for cause is within the sound discretion of the trial court. Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 373 (2002). We will not disturb the trial court's decision absent an abuse of discretion. Maxie v. Commonwealth, Ky., 82 S.W.3d 860,

863 (2002). Having reviewed the record in this case, we cannot say that it was unreasonable for the trial court to have found Juror #544 qualified to sit on the jury. The trial judge asked the juror if she was able to set aside the experience of having been robbed and base her decision on the evidence. Further, the trial judge noted that the juror's demeanor suggested that she would have no problem putting her feelings aside. Therefore, it was not error for the trial court to refuse to excuse Juror #544 for cause.

JURY INSTRUCTIONS

Appellant also finds fault with the trial court's failure to instruct the jury on the lesser-included offense of theft of services under \$300. Appellant argues that the jury could have reasonably believed that the Commonwealth's witness, Greg Wright, the owner of the repair shop, was not truthful when he valued the cost of rebuilding the transmission at \$975. Appellant contends that Wright's testimony was vague and evasive, and because Wright was a convicted felon, the jury might have concluded that he was lying about the value of his services. Appellant, however, does not point to any evidence in the record that suggests the cost of rebuilding the transmission was less than \$300. The only evidence in the record regarding the value of services was the testimony of the shop owner who performed the work, and the repair bill itself. Wright testified that he took out the transmission, evaluated what parts needed to be replaced, and rebuilt and reinstalled the transmission. The repair bill stated that Wright replaced all gaskets, seals, rings, bushings, bands, bearings, washers, clutches and filters, and rebuilt the torque converter. Wright testified that he spent approximately sixteen hours working on Appellants car. He also testified that he told Appellant several times what the estimated cost of the repair would be. In addition, Appellant did not dispute the

value of the services when he testified in his own defense at trial. Although it is true that it is the Commonwealth's burden to prove that the value of the services was over \$300, this Court has held that the testimony of the owner of the stolen property or service is competent evidence of its value. Commonwealth v. Reed, Ky., 57 S.W.3d 269, 270 (2001); Poteet v. Commonwealth, Ky., 556 S.W.2d 893, 896 (1977). There being no evidence to the contrary, we find that Wright's testimony, along with the repair bill, is sufficient evidence to relieve the Commonwealth of its burden of proof. Therefore, the trial court did not err when it refused to instruct the jury that it could consider the lesser-included offense of theft of services under \$300.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

Lambert, C.J.; Graves, Johnstone, Keller, Stumbo and Wintersheimer, JJ., concur. Cooper, J., concurs on the juror selection issue but dissents on the jury instructions issue, believing that a jury, not the presiding judge, should decide the credibility of the victim's testimony as to the value of his services.

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