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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000372-MR
2006-SC-000373-MR

BRIAN D. BENTON — APPELLANT

V.

ON APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL REID SPARKS, JUDGE
NOS. 04-CR-00110-001 AND 04-CR-00132

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Brian Benton, was convicted of complicity to commit robbery in the first degree, complicity to receiving stolen property over $300.00, and of being a persistent felony offender in the second degree. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). On appeal, he argues that the Johnson Circuit Court erred by: (1) overruling his motion to suppress evidence; (2) overruling his motion for a directed verdict on the charge of receiving stolen property over $300.00; and (3) allowing the Commonwealth's Attorney to make certain statements which deprived him of his constitutional right to a fair trial. For the reasons set forth herein, we affirm.

On July 12, 2004, three men robbed the Citizen's National Bank on Route 40 in Paintsville. The tellers were unable to identify the men as their faces were obscured with stockings. A total of $11,415.00 was taken from the bank in a robbery that lasted less than one minute.

After the men exited the building, witnesses saw them get into a maroon and silver pick-up truck. The police were immediately alerted and pursued the pick-up truck. En route, one of the officers was pointed in the direction of the truck by a group of people who had allegedly seen the vehicle pass by at a high rate of speed. The officers located the vehicle and came within view of it, but at no time caught up to the truck. Other officers were alerted and they eventually found the abandoned truck parked against a wall with its doors still open. A canine unit was dispatched and officers searched the area. The canine handler testified at trial that the dog followed a scent away from the truck and up to a dirt road where the scent was lost. The canine handler speculated that the suspects may have gotten away on ATV's or other vehicles.

The truck had no license plate and the VIN number had been scraped away or painted over. Further investigation revealed that the truck had been reported stolen from West Virginia. In addition, the steering column had been rigged with vice grips to "hot-wire" the truck so that it could be driven without a key. An assault rifle was also found in the bed of the truck.

The truck was impounded at a body shop owned and operated by a deputy sheriff. The body shop was not open to customers and was locked after normal business hours. As there was no key to the vehicle, the vehicle itself was not locked while impounded. At the impoundment lot, palm prints, cigarette butts, and a cigarette pack were retrieved from the truck and submitted for scientific testing. The record is unclear as to when these contents were removed.[1] Three cigarette butts were tested by the KSP forensic lab and were determined to match Appellant's DNA profile.

[1] The police record for the recovered evidence (the "KSP 41") was lost.

The day after the robbery, police received information from a witness, Claudetta Bailey, implicating Appellant and two others in the crime. Bailey told police (and later testified at trial) that she planned to attend a party with Appellant's wife on the night before the robbery and that she was picked up by Appellant and his wife in a maroon and silver pick-up truck matching the description of the getaway vehicle. Appellant told Bailey that he had stolen the vehicle from West Virginia. Bailey spent the night at Appellant's house and awoke the next morning to Appellant's wife screaming, "Oh God, they've robbed a bank." Bailey further stated that Appellant arrived at the house a few hours later on an ATV with a black satchel bag. Bailey recounted that Appellant and another individual went to a back bedroom to count cash. She overheard a male voice mention that there were a large number of two dollar bills. Bailey never actually saw the money or guns.

The police arrested Appellant. A large number of bills were discovered under the driver's seat of Appellant's vehicle, although none matched the recorded serial numbers of the "bank money" stolen from the bank. Police found receipts in the vehicle showing numerous purchases made by Appellant and his wife, as well as a receipt for the purchase of the new vehicle they were driving.

Appellant was indicted and tried before a Johnson County jury. He was convicted of complicity to robbery in the first degree, complicity to receiving stolen property over $300.00, and of being a persistent felony offender in the second degree. He was sentenced to ten and five years on the robbery and receipt of stolen property charges, respectively. The sentence was enhanced to twenty years by virtue of the persistent felony offender conviction. This appeal followed.

Appellant first argues that the trial court erred in overruling his motion to suppress the DNA evidence obtained from cigarette butts found in the GMC truck. In support, Appellant argues that it was never established when the cigarette butts were removed from the vehicle and that the body shop where the truck was impounded was not a secure location as to preclude tampering.

Although the police record for recovery of the evidence was lost, it is clear that the cigarette butts must have been removed some time between July 12, 2004 (when the truck was discovered) and July 29, 2004 (when the evidence was collected from the evidence locker to be sent to the crime lab for analysis). Thus, there is a seventeen day time period during which the evidence could have been gathered from the vehicle. The testimony of the deputy sheriff and body shop owner, Doug Saylor, established that the truck was kept inside the body shop until "released" by the Johnson County Sheriff. His testimony further established that customers were not allowed entry into the shop and that the shop was locked after hours.

As part of its role as gatekeeper, the decision to admit evidence lies within the sound discretion of the trial court. Johnson v. Commonwealth, 134 S.W.3d 563, 567 (Ky. 2004). A proper foundation for the admission of evidence requires that the proponent prove the proffered evidence was materially unchanged from the time of the event until its admission. Penman v. Commonwealth, 194 S.W.3d 237, 245 (Ky. 2006). When establishing chain of custody, however, there is no requirement that the chain be perfect. Id. Chain of custody can be established by a variety of means, including circumstantial evidence. See Thomas v. Commonwealth, 153 S.W.3d 772, 778-81 (Ky. 2004).

Although no police record for recovery of the evidence was produced in this case, formal documentation of the chain of custody is not required. See Mollette v. Ky. Personnel Bd., 997 S.W.2d 492, 496 (Ky. App. 1999) ("Testimony as to routine practice sufficient to dispel any inference of substitution or change in the contents of the exhibit in question may be used to establish a chain of custody."). Both the officers and the body shop owner were able to testify as to the chain of custody, including Saylor's testimony regarding the normal security procedures at the yard. Such testimony is acceptable as proof that the cigarette butts were unchanged from the date the vehicle was discovered.

Further, there is no requirement that the proponent of proffered evidence eliminate all possibility of tampering, so long as there is a reasonable probability that the evidence has not been altered in any material respect. Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998). Here, where the body shop owner was able to testify that the truck was locked in the body shop, such burden has been met. Moreover, gaps in the chain of custody go toward the weight of the evidence rather than toward its admissibility. Id. The trial court did not abuse its discretion by admitting the cigarette butts.

Appellant next claims that he was entitled to a directed verdict of acquittal on the charge of receiving stolen property. He argues the Commonwealth failed to establish that he was aware the vehicle was stolen. Further, he asserts there was no proof offered that the vehicle was worth more than $300.00.

When considering a motion for a directed verdict, the trial court must view the evidence in a light most favorable to the Commonwealth and draw all fair and reasonable inferences in its favor. Commonwealth v. Sawhill, 660 S.W.2d 4, 5 (Ky.

1983). The question then becomes whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. On appellate review, we determine whether it would be clearly unreasonable for a jury to find guilt under the evidence as a whole. Commonwealth v. Benham, 816 S.W.2d 186,187 (Ky. 1991).

Here, the Commonwealth was required to establish that Appellant received, retained, or disposed of movable property belonging to another, while "knowing that it has been stolen, or having reason to believe that it has been stolen[.]" KRS 514.110(1). There was ample evidence upon which a reasonable juror could find Appellant guilty. The Commonwealth conclusively established that the vehicle had been stolen from West Virginia and that its VIN number had been scraped off or painted over. Even more importantly, the vehicle was being operated without an ignition key and had been "hot-wired." An individual, when operating a vehicle with vice grips affixed to the steering column, would have reason to believe that the vehicle was stolen. Further, Claudetta Bailey testified that Appellant told her he had stolen the vehicle from West Virginia. This evidence was sufficient to support a finding that Appellant knew the vehicle was stolen.

Appellant also claims he was entitled to a directed verdict because the Commonwealth failed to establish that the truck was valued over $300.00. The Commonwealth bears the burden of proving each and every element of a criminal offense. KRS 500.070. In this case, it was the Commonwealth's burden to prove that the vehicle was valued over $300.00. Commonwealth v. Reed, 57 S.W.3d 269, 270 (Ky. 2001). To establish value, there need only be "sufficient detail for the jury to make a value determination." Id. at 271.

The evidence established that the automobile was a GMC Sierra pick-up truck in working condition. Numerous photographs of the vehicle were admitted. The body shop owner, Doug Saylor, testified that any truck in operating condition would be valued over $300.00. Later, he testified that this vehicle, even in its "hot-wired" condition, would be valued over $300.00.[2] This evidence was sufficiently detailed for the jury to make a determination regarding the truck's value.

Likewise, we reject the argument that Saylor was unqualified to provide testimony regarding the truck's value. He testified that he had previous experience valuing vehicles as part of his business operation and that he relied on the National Automobile Dealers Association Bluebook to establish values. Further, it must be noted that he was not asked to provide an exact value of the pick-up truck, but only to give an opinion as to whether it was worth more than $300.00. We find no abuse of discretion in the trial court's determination that Saylor was qualified to state an opinion as to whether the truck's value exceeded $300.00. Cf. Mondie v. Commonwealth, 158 S.W.3d 203, 213 (Ky. 2005).

Finally, Appellant contends that the Commonwealth's Attorney made improper comments during the closing argument, requiring reversal of Appellant's convictions. During his closing argument, the Commonwealth's Attorney stated that it was the defense counsel's "job" to distract the jury from the facts. The Commonwealth's Attorney stated, in pertinent part: "His job is to distract you from the evidence . . . . But what I'm going to show you is what is important." Appellant avers that this mischaracterization of defense counsel's role was unduly prejudicial.

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[2] Appellant seems to argue that Saylor never actually provided this testimony. The transcript is somewhat unclear as to whether Saylor actually articulated an answer to the Commonwealth's question because a defense objection was made and the trial court injected a comment. However, it is evident through the trial court's later comments that Saylor did, in fact, reply "yes" when asked if the pick-up truck was worth more than $300.00.

In analyzing claims of prosecutorial misconduct, the standard of review is whether the conduct was of such an egregious nature to deny the accused his constitutional right of due process of law. Foley v. Commonwealth, 953 S.W.2d 924, 939 (Ky. 1997). Our analysis must focus on the overall fairness of the trial rather than the culpability of the prosecutor. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky. 1987). "Great leeway" is given to both defense counsel and prosecutor during closing arguments. Id. at 412. As we have stated previously, closing arguments are just that – *arguments*. Id. To warrant reversal of a conviction, the prosecutor's statements must be both improper and prejudicial. Jones v. Commonwealth, 281 S.W.2d 920, 924 (Ky. 1955).

Though perhaps unprofessional and misleading as to defense counsel's role, the comments made by the Commonwealth's Attorney were not of such an egregious nature as would deprive Appellant of a fair trial. See Holloman v. Commonwealth, 37 S.W.3d 764, 770 (Ky. 2001) (Commonwealth's statement during closing argument that the prosecution had to "convince all twelve jurors" while defense counsel only had to "confuse one juror" was ambiguous and did not constitute palpable error.). Moreover, even if improper, any supposed error was undoubtedly harmless. RCr 9.24. We do not believe that the Commonwealth Attorney's comment contributed to the jury's verdict in light of the overwhelming evidence against Appellant. Anderson v. Commonwealth, 231 S.W.3d 117, 122 (Ky. 2007).

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

All sitting. All concur.

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