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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000482-MR

DANIEL SAYRE — APPELLANT

V.

ON APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
NO. 09-CR-00257-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Daniel Sayre, was convicted by a Jessamine Circuit Court jury of first-degree robbery, receiving stolen property (firearm), tampering with physical evidence, unlawfully providing a handgun to a juvenile, and being a second-degree persistent felony offender. He received a sentence totaling forty-two years for these crimes. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

I. Background

On September 16, 2009, Appellant, armed with a stolen semi-automatic handgun, went to a Nicholasville grocery store to find someone to rob. He was accompanied by his friend, J.C. After entering and exiting the store, Appellant and J.C. waited in the parking lot, looking for the right victim. At

approximately 1:00 a.m., Appellant and J.C. watched a man leave the store, walk through the parking lot, and sit on the tailgate of his pickup truck. Appellant and J.C. agreed that this man, who happened to be a store employee on his lunch break, would be their victim.

Appellant and J.C. then approached the victim from behind. After asking to borrow the victim's lighter, Appellant pointed the gun at him and demanded his money and the contents of his pockets. The victim complied by placing his wallet, a cell phone, some change, a pack of cigarettes, a lighter, and his keys on the tailgate of the truck. Appellant and J.C. collected the victim's possessions and fled to the area behind the store.

Once behind the store, Appellant gave the gun to J.C., telling him, "Hold on to this – I can't carry it." Meanwhile, the victim returned to the store and asked his co-worker to call 911. Shortly thereafter, the police apprehended Appellant and J.C.. The police found the victim's wallet in Appellant's possession. His cell phone, change, and cigarettes, along with the gun, were found in J.C.'s possession. Appellant was twenty years old at the time of his arrest and on probation for second-degree burglary.

On May 3, 2010, Appellant, then twenty-one, was tried by a Jessamine Circuit Court jury.[1] Following the trial, the jury found Appellant guilty of first-degree robbery, receiving stolen property (firearm), tampering with physical

[1] Prior to the commencement of trial, the court denied Appellant's motion to dismiss the PFO charge. During the trial, Appellant did not dispute his guilt as to the robbery and tampering with physical evidence charges; instead, he contested only the firearm-related charges.

evidence, unlawfully providing a handgun to a juvenile, and being a second-degree persistent felony offender (PFO).

On appeal, Appellant raises two allegations of error: (1) that the trial court erred by denying his motion for a directed verdict on the receiving stolen property (firearm) charge, and (2) that the trial court erred by denying his motion to dismiss the PFO charge. Finding no cause for reversal, we affirm Appellant's convictions.

II. Analysis

A. The Receiving Stolen Property (Firearm) Conviction was Proper

Appellant first contends that the trial court erred by denying his motion for a directed verdict on the receiving stolen property (firearm) charge. Specifically, Appellant asserts that the Commonwealth failed to prove an essential element of this crime: that he knew the firearm in question, the semi-automatic handgun used in the robbery, was stolen. We disagree.

This Court outlined the standard by which a trial court should evaluate a motion for a directed verdict in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> [T]he 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.

For our purposes, "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." *Id.* (*citing Commonwealth v. Sawhill,* 660 S .W.2d 3 (Ky. 1983)); *See also Beaumont v. Commonwealth,* 295 S.W. 3d 60 (Ky. 2009). Thus, "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." *Benham,* 816 S.W.2d at 187-88. However, we reemphasize that an evaluation of the sufficiency of evidence depends on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Beaumont,* 295 S.W. 3d at 68 (*citing Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

To warrant a conviction for receiving stolen property, the Commonwealth must prove that the defendant knew or should have known that the property he received was stolen. KRS 514.110. However, pursuant to KRS 514.110(2), proof that the defendant had possession of recently stolen property constitutes "prima facie evidence" that the defendant knew the property was stolen.[2] According to the official commentary to KRS 514.110, if the Commonwealth presents proof that the defendant had possession of stolen property, "there is sufficient evidence . . . to submit the question of guilt to the jury."

---

[2] J.C. testified that Appellant had possession of the gun from the time they went to the grocery store until after the robbery. The victim confirmed that Appellant had possession of the gun during the robbery, testifying that Appellant pointed the gun at him. Appellant did not dispute these facts.

Furthermore, once the question is presented to the jury, it is entitled to infer that the defendant has actual knowledge of the stolen character of the property based on circumstantial evidence. *See Love v. Commonwealth*, 55 S.W.3d 816, 825 (Ky. 2001) (noting that "though actual knowledge is required, proof of actual knowledge can be by circumstantial evidence."). The jury may find the requisite knowledge if the defendant received the property "under circumstances that would cause a reasonable man of ordinary observation to believe or to morally know that [it was] stolen." *Mason v. Commonwealth*, 477 S.W.2d 140, 142 (Ky. 1972) (quoting *Ellison v. Commonwealth*, 190 Ky. 305, 227 S.W. 458, 461 (Ky. 1921)).

In the case at bar, our review of the record reveals that the Commonwealth produced sufficient proof to establish prima facie evidence of Appellant's knowledge under KRS 514.110(2). Appellant's accomplice, J.C., testified that Appellant acquired the gun from a friend and maintained possession of it until after the robbery. The owner of the gun, John Vest, testified that the gun belonged to him and that it had been stolen less than a week before the robbery. These undisputed facts established that Appellant had possession of the recently stolen gun. Therefore, under KRS 514.110(2), the trial court correctly determined that there was sufficient evidence to submit the issue to the jury.

Moreover, based on the circumstantial evidence presented, it was reasonable for the jury to infer that Appellant knew the gun was stolen.

Appellant's accomplice, J.C., testified that Appellant obtained the gun from a friend, who gave it to him free of charge. J.C. further testified that Appellant sought to dispose of the gun by giving it to him immediately after the robbery. Finally, J.C. testified that he knew the gun was stolen. Considering these facts in the light most favorable to the Commonwealth, it was not unreasonable for the jury to conclude that Appellant also knew the gun was stolen.

Based on the foregoing, we hold that the trial court did not err by denying Appellant's motion for a directed verdict.

B. The PFO Conviction was Proper

Appellant next contends that the trial court erred by denying his motion to dismiss the second-degree PFO charge. He asserts that his PFO conviction should be reversed because he was under age twenty-one when he committed his second felony. Appellant acknowledges that in *Hayes v. Commonwealth*, 660 S.W.2d 5, 6 (Ky. 1983), we held that a defendant may be convicted of being a second-degree PFO despite the fact that he was under age twenty-one when he *committed* his second felony, so long as he is twenty-one when he is *convicted*. However, Appellant asks that this Court overrule *Hayes* and reinterpret the language of the PFO statute by holding that a defendant is not PFO-eligible unless he is twenty-one when he commits his second felony.

KRS 532.080(2) provides that, "[a] persistent felony offender in the second degree is a person *who is more than twenty-one (21) years of age and who stands convicted of a felony* after having been convicted of one (1) previous

felony." (Emphasis added). In *Hayes*, we held that the plain and unambiguous language of KRS 532.080(2) provides that a defendant is a second-degree PFO if he is twenty-one years old at the time he is convicted of his second felony. 660 S.W.2d at 6. The statute makes no mention of the defendant's age at the time of the crime; therefore, a defendant need not be twenty-one when the crime is committed to be PFO-eligible. *Id.*

Moreover, we recently issued an opinion reaffirming the holding of *Hayes*. *See Harris v. Commonwealth*, 338 S.W.3d 222 (Ky. 2011). In *Harris*, the defendant, who, like Appellant, was twenty when he committed his second felony and twenty-one when he was convicted, also asked us to reconsider our interpretation of KRS 532.080(2) and overrule *Hayes*. *Id.* at 226. We declined to do so, addressing the issue as follows:

> By its plain wording, KRS 532.080(2) directs that the defendant's age for PFO purposes be examined at the time of his adjudication as a second-degree PFO ("*is* more than twenty-one"). It does not say "*was* more than twenty-one" at some former point in time (for instance, when the crime was committed). Moreover, KRS 532.080(2)(b) provides the additional criterion to PFO-eligibility "[t]hat the offender was over the age of eighteen (18) years *at the time the* [prior felony] *offense was committed* [.]" (Emphasis added). By specifically requiring that the defendant be over eighteen at the time of the prior felony, but not specifically placing the same requirement as to the present felony, and instead avoiding that specific language, the legislature drew a clear distinction between the defendant's age at the time the crime was committed and his age at the time of sentencing. As such, we are persuaded that *Hayes* properly interpreted the statutory language.
>
> In the twenty-seven years since *Hayes* was

> rendered, KRS 532.080 has been amended and reenacted in new form on more than one occasion. *See, e.g.*, 2006 Ky. Acts c 182, § 45; 1998 Ky. Acts c 606, § 76; and 1996 Ky. Acts c 247, § 1. Nevertheless, in all that time, the statutory language under consideration remains undisturbed. Because the General Assembly has not acted upon the matter, we presume that the legislature agrees with, or at least has adopted, our interpretation. "[T]he failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted." *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996).
>
> Nevertheless, Harris urges us to adopt an alternate interpretation of the statutory language, as given in Justice Leibson's dissenting opinion in *Hayes*. We decline the invitation because doing so would require this Court to re-define the elements that establish a second-degree PFO enhancement of a felony offense. The power to define crimes and assign their penalties belongs to the legislature, not the judiciary. *See McClanahan v. Commonwealth*, 308 S.W.3d 694, 700 (Ky. 2010). Thus, as we stated in *Hayes*, any change in our interpretation of KRS 532.080 must come as a result of legislative action.

Id. at 227-28.

Our decisions in *Hayes* and *Harris* establish clear precedent as to the interpretation of KRS 532.080(2). Precedent must be given considerable weight because *stare decisis* is "an ever-present guidepost" in appellate review and requires "deference to precedent." *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 795 (Ky. 2009). *Stare decisis* ensures that the law will "develop in a principled and intelligible fashion" rather than "merely change erratically." *Chestnut v. Commonwealth*, 250

S.W.3d 288, 295 (Ky. 2008). It is the difference between the "rule of law" and the "rule of man."

We see no sound reason for ignoring our precedent in this case. *See Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky. 2009) (stating that we ignore *stare decisis* only for "sound reasons to the contrary"). Accordingly, we hold that the trial court did not err by denying Appellant's motion to dismiss the PFO charge.

III. Conclusion

For the aforementioned reasons, we hereby affirm Appellant's sentence and convictions.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Susan Jackson Balliet
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Kentucky Attorney General

Jeffrey Allan Cross
Criminal Appellate Division
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601