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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 25, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000602-MR

CURTIS HALL — APPELLANT

V.

ON APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY ALLEN LAY, JUDGE
NO. 11-CR-00057

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A Knox Circuit Court jury found Appellant, Curtis Hall, guilty of third-degree burglary, attempted theft by unlawful taking (less than $500), and being a first-degree persistent felony offender (PFO). For these crimes, Appellant received a total sentence of twenty years in prison. He now appeals as a matter of right, Ky. Const. § 110(2)(b), alleging that the trial court erred to his substantial prejudice when it denied his motion for a directed verdict of acquittal on the third-degree burglary charge. For the reasons that follow, we affirm.

KRS 511.040(1) provides: "A person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." Appellant contends that he was entitled to a directed verdict of acquittal because the Commonwealth failed to meet its

burden of proving that he entered the building "with the intent to commit a crime." "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. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (*citing Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983)).

I. BACKGROUND

Around 12:30 a.m. on the night of February 11, 2011, the Barbourville Police Department received a report of a prowler near the Mountain Ridge Drilling Company ("Mountain Ridge") in Bimble, Kentucky. Mountain Ridge's property consists of several buildings used for storage and work. Kentucky State Police Trooper Jason Bunch was visiting the Barbourville Police Station when the report came in. Bunch accompanied police officers Winston Tye and Josh Lawson to the location to investigate the report.

When they arrived at the scene, they found a pickup truck, with its tailgate down, backed up to within fifteen or twenty feet of one of the buildings' doors. There were no lights on in the building. Using flashlights, Trooper Bunch and Officer Tye entered the building while Officer Lawson remained outside to investigate. Trooper Bunch saw Appellant laying on the floor under an object with his hands and face hidden. The trooper told Appellant to come out and Appellant complied. The trooper later testified that Appellant was not asleep when he found him and that he seemed unhappy.

The building Appellant was found in was used to store angle iron, and Mountain Ridge's owner testified that no work was being done in the building and that nobody had permission to move the iron, which had a value of about $10 per pound. Trooper Bunch testified that several pieces of iron were stacked by the door on top of a generator. Officer Tye testified that the pieces of iron were about five feet in length—small enough for one person to carry—and looked as though they had recently been moved to the generator because the dust that had settled on top of the generator had been disturbed. Further, the iron was not covered with dust.

Appellant was arrested and Officer Lawson transported him to the police station. While driving to the station, Appellant volunteered that some man had given him permission to go into the building to get iron for scrap, although he did not identify this man. Neither did Appellant explain why he was retrieving the iron at 12:30 a.m., nor explain why he was doing so with the lights out.

A Knox County Grand Jury indicted Appellant for third-degree burglary, theft by unlawful taking (less than $500), and being a first-degree PFO.[1] At trial, Appellant testified on his own behalf. His version of events is as follows: around midnight on February 11, 2011, he was driving from Manchester to Middlesboro to stay with his nephew, as his wife had recently passed away and he did not like being at home; he had been "taking a lot of things" to kill the pain; he was looking for a gas station at which he could urinate but could not

[1] Appellant had previously been convicted in Laurel County of theft by unlawful taking ($300 or more) and third-degree burglary; and in Knox County of third-degree burglary.

find one that was open; rather than relieve himself at a nearby church he decided to use Mountain Ridge's property; he sat down in the doorway of a building, attempted to get up, fell backwards, and laid there until an officer woke him up—he assumed he had passed out; and he initially thought he was being arrested for DUI. He also admitted on the stand that he had no permission to be in the building, and he denied telling Officer Lawson that he was at the building to get scrap metal.

Appellant was ultimately convicted of third-degree burglary, criminal attempted theft by unlawful taking (less than $500), and being a first-degree PFO. The jury recommended enhanced sentences of twenty-years' imprisonment on the burglary charge, and ninety days in county jail for the attempted theft charge. The trial court adopted these recommendations and ordered Appellant's prison and jail sentences to run concurrently.

II. ANALYSIS

We first note that in light of the totality of the evidence, we reject Appellant's argument that the guilty verdict was based on mere disbelief of his own testimony. Rather, the facts testified to by the law enforcement officers, *in addition to* the unreliability of his own testimony, could lead a reasonable juror to conclude beyond a reasonable doubt that he was guilty of third-degree burglary.

It is true that, at least with respect to the "intent to commit a crime" element, the Commonwealth's case consisted almost entirely of circumstantial evidence: Appellant's presence in the building, the placement of his truck, the

position of its tailgate, and the appearance of the angle iron on the generator. This, however, is immaterial; "[c]riminal intent, of course, can be inferred from the circumstances." *McClellan v. Commonwealth*, 715 S.W.2d 464, 466 (Ky. 1986).

We must determine whether in light of all the evidence, "it would be clearly unreasonable for a jury to find guilt." *Benham*, 816 S.W.2d at 187. The test for a directed verdict "is the same when the only evidence of guilt is circumstantial." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 267 (Ky. 2006) (*citing Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994) and *Nugent v. Commonwealth*, 639 S.W.2d 761, 763–64 (Ky. 1982)). "Although circumstantial evidence 'must do more than point the finger of suspicion, *Davis v. Commonwealth*, 795 S.W.2d 942, 945 (Ky.1990), the Commonwealth need not 'rule out every hypothesis except guilt beyond a reasonable doubt.' *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)." *Id.*

Appellant argues that the circumstantial evidence presented in this case did nothing *but* "point the finger of suspicion" at his intent to commit a crime in the building. Rather, he points us to *Hodges v. Commonwealth*, where our predecessor Court found insufficient evidence to sustain a criminal conviction. 473 S.W.2d 811, 814 (Ky. 1971). We stated in *Hodges* that denying a motion for directed verdict is justified "if all the circumstances when considered together point unerringly to his guilt." *Id.* at 813. The circumstances in *Hodges* did not meet that standard and a directed verdict of acquittal should therefore have been granted. *Id.* at 814.

We need not determine if the circumstances of this case, "when considered together point *unerringly* to [Appellant's] guilt." *Id.* (emphasis added). This is not the appellate standard of review for a directed verdict. Rather, as noted above, "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." *Benham*, 816 S.W.2d at 187 (*citing Sawhill*, 660 S.W.2d at 5). In fact, in *Commonwealth v. Collins*, the appellant alleged that a directed verdict was proper unless the evidence pointed "unerringly to the accused's guilt." 933 S.W.2d 811, 815 (Ky. 1996). We began our analysis of his claims by rejecting this standard and noting that he was "incorrect to imply that a different standard of review is required in evaluating whether or not a directed verdict should have been granted in cases involving circumstantial evidence . . . ." *Id.* Instead, we reiterated and employed the "clearly unreasonable" standard stated in *Benham*. *See id.* This Court has not used the "unerringly" standard since its 1971 *Hodges* decision.[2]

---

[2] We also believe that the facts in *Hodges* are distinguishable. In that case, the appellant was convicted of breaking and entering a storehouse with intent to steal property therefrom based on (1) being found hiding under a log (at least two-and-one-half miles from the scene of the crime) with a co-defendant five hours after the co-defendant (but not the appellant) had been seen running from the burglarized store, and (2) the appellant running away from police when they sought to apprehend him. *Id.* at 812. Thus, nobody ever saw the appellant anywhere *near* the storehouse that he was accused of breaking and entering, nor was there *any* evidence whatsoever that he intended to steal property therefrom.

Here, (1) Appellant was found hiding *in* the building he was accused of entering; (2) the truck he was driving was backed up to the building with its tailgate down; and (3) angle iron was found stacked on a generator near the door of the building, and

Here, there is sufficient evidence by which a jury could reasonably conclude that Appellant was in the building with the intent to commit a crime. In addition to the circumstantial evidence recited above, Officer Lawson testified that Appellant told him he was in the building with permission to remove metal for scrap. This evidence contradicted Appellant's trial testimony and the testimony of Mountain Ridge's owner that *nobody* had permission to move the iron. Given the evidence as a whole, it was not clearly unreasonable for the jury to infer beyond a reasonable doubt that Appellant was in the Mountain Ridge building with the intent to commit a crime—the crime of theft by unlawful taking. *See* KRS 514.030.[3]

III. CONCLUSION

For the foregoing reasons, we hold that Appellant was not entitled to a directed verdict, and that the trial court therefore properly denied his motion. Accordingly, we affirm the trial court's judgment.

All sitting. All concur.

---

appeared to have been recently moved there. Thus, we believe the evidence is more suggestive of guilt than that in *Hodges*.

[3] KRS 514.030(1)(a) provides, in relevant part: "[A] person is guilty of theft by unlawful taking or disposition when he unlawfully . . . [t]akes or exercises control over movable property of another with intent to deprive him thereof[.]

COUNSEL FOR APPELLANT:

Julia Karol Pearson
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

William Bryan Jones
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601