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# Supreme Court of Kentucky

2013-SC-000204-MR

CHRISTOPHER BRYANT

APPELLANT

V. ON APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE DAVID L. WILLIAMS, JUDGE  
NO. 12-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Christopher Bryant appeals as a matter of right from a judgment of the Monroe Circuit Court sentencing him to a twenty-year prison term after the jury found him guilty of receiving stolen property in the first degree and of being a persistent felony offender (PFO) in the first degree. Bryant raises two issues on appeal: 1) the trial court erred in denying his motion for a directed verdict on the receiving stolen property charge; and 2) the trial court's institution of a trifurcated penalty phase constituted palpable error. We affirm the judgment and sentence of the Monroe Circuit Court.

### FACTS

Tommy Turner arrived at his commercial mechanic shop on the morning of August 11, 2011 to find a back door pried open. Inside he discovered that tools and money had been taken from the shop. Mr. Turner contacted the Kentucky State Police to report the theft of the items. During the course of the

initial investigation, law enforcement officers identified a tan or grey Chevy pick-up truck as potentially involved in the crime and set out to locate the vehicle.

That evening, deputy constables Frank Massingale and Billy Pickerell stopped a vehicle matching the description of the truck allegedly involved in the burglary as it arrived at a private residence. Shane Emberton was the driver of the truck and Appellant Christopher Bryant and Timothy Green were the passengers. After asking the three men to exit the truck, the officers sought and received permission from Emberton to search a large cooler located in the bed of the truck. Bryant and Green fled the area on foot as the constables conducted their search. Turner's missing tools were found inside the cooler.

A Monroe County Grand Jury returned an indictment against Bryant on charges of receiving stolen property over \$500.00, third-degree burglary, and first-degree persistent felony offender (PFO). At trial, Emberton testified that the three men had conspired to burglarize Turner's mechanic shop. Bryant was convicted of receiving stolen property and being a PFO in the first degree. The jury fixed his sentence on the receiving stolen property charge at five (5) years and his enhanced sentence at twenty (20) years' imprisonment. The Monroe Circuit Court sentenced him in accordance with the jury's recommendation and this appeal followed.

## ANALYSIS

### **I. The Trial Court Properly Denied Bryant's Motion for a Directed Verdict on the Receiving Stolen Property Charge.**

At trial, Shane Emberton testified that on the night of the burglary, he drove his father's truck to pick up Green and Bryant. Emberton drove the men to Turner's shop, dropped them off, and then continued driving. Fifteen minutes later, Emberton returned to the shop to find Green and Bryant standing on the side of the road holding a cooler filled with the stolen goods. After the cooler was loaded into the truck, Emberton, Green, and Bryant travelled to the residence of Burton Woosley to attempt to sell the stolen goods. After Mr. Woosley declined to buy the tools, the trio set off to find another buyer. Mr. Woosley's trial testimony largely corroborated Emberton's version of events. Mr. Woosley testified that Bryant had called his brother offering to sell some tools. After Bryant, Green, and Emberton arrived at Woosley's home, Woosley declined to buy the items and the men left. Constables stopped the truck as it arrived at Emberton's sister's home.

Bryant moved for a directed verdict on the receiving stolen property charge, arguing that the Commonwealth failed to prove that he possessed the stolen tools. He now appeals the trial court's denial of the motion. Due process demands that the prosecution in a criminal case prove every element of the case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307 (1979) (failure to prove every element beyond a reasonable doubt violates a defendant's due process rights). On review, the test for a directed verdict is whether 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).

A person is guilty of receiving stolen property “when he receives, retains, or disposes of movable property of another knowing that it has been stolen[.]” Kentucky Revised Statute (KRS) 514.110(1). The statute further provides that “[t]he possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.” KRS 514.110(2). “Possession” means that a person has “actual physical possession or otherwise to exercise actual dominion or control over a tangible object.” KRS 500.080(14). Merely being in the presence of stolen property, or having access to that property, is insufficient to prove that a defendant has “retained” stolen property for the purposes of KRS 514.110. *Hayes v. Commonwealth*, 175 S.W.3d 574 (Ky. 2005).

Bryant attests that the Commonwealth failed to prove beyond a reasonable doubt that he actually possessed the cooler carrying the stolen tools and, therefore, failed to prove that he “retained” stolen property. However, Bryant’s assertion that the Commonwealth *only* proved Bryant’s presence in the truck and nothing more completely ignores Emberton and Woosley’s testimonies. Emberton testified that he witnessed Bryant and Green with the cooler of tools outside the mechanic’s shop. He further testified that Bryant carried the cooler to the truck and loaded it into the bed. Mr. Woosley testified that Bryant called him and, after speaking to his brother, offered to bring, and

did bring, the tools to his residence. In viewing this evidence in the light most favorable to the Commonwealth, the testimony of Emberton and Woosley established that Bryant actually possessed the stolen goods. *See Cooley v. Commonwealth*, 821 S.W.2d 90, 91 (Ky. 1991) (“The crime [pursuant to KRS 514.110(1)] is complete upon the initial receipt and no additional offense occurs when the property is retained or disposed of by the recipient of the stolen property.”).

The Commonwealth produced more than a mere scintilla of evidence that Bryant possessed the stolen goods, and we agree that the question of whether Bryant was guilty of receiving stolen goods was sufficient to proceed to the jury. *See Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). Bryant contends that the jury necessarily “rejected” Emberton’s testimony because the jury acquitted him of burglary. However, Bryant’s acquittal on the burglary charge has no bearing on whether the Commonwealth met its burden of proof with respect to the elements of receiving stolen property set forth in KRS 514.110. Under the evidence as a whole, the jury could have reasonably believed that Bryant “received” or “retained” the stolen tools. Therefore, we find no error in the trial court’s denial of Bryant’s motion for a directed verdict.

## **II. The Trifurcated Penalty Phase Did Not Constitute Palpable Error.**

After returning a guilty verdict on the receiving stolen property charge, the jury returned for the penalty phase which began with the trial court’s reading of the PFO instructions. Thereafter, probation officer Brian Brumley testified concerning Bryant’s former felonies. The jury briefly retired and then

returned a guilty verdict on the first-degree PFO charge. The trial court then instructed the jury on the penalty ranges. After Mr. Brumley was recalled to testify about penalty ranges and parole eligibility, the jury heard closing arguments and began deliberations. The jury finally returned, having set Bryant's sentence at five years, enhanced to twenty years by virtue of his PFO status.

Bryant argues that the trial court's use of a trifurcated penalty phase ran afoul of the standard declared by this Court in *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987). Bryant concedes that this issue is unpreserved and requests palpable error review pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.26. We will reverse for palpable error upon finding that an appellant's substantial rights have been affected and the error resulted in manifest injustice. *Barker v. Commonwealth*, 341 S.W.3d 112, 114 (Ky. 2011) (citing *Commonwealth v. Pace*, 82 S.W.3d 894 (Ky. 2002)). *Reneer* states:

If the accused is also charged as a persistent felony offender, the penalty phase and a persistent felony offender phase can be combined because the same evidence that is pertinent toward fixing the penalty is also pertinent for consideration in the enhancement of sentence, and the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender.

734 S.W.2d at 798. As no sentence was fixed for Bryant's underlying charge before the jury considered whether to convict him of being a PFO in the first degree, Bryant correctly asserts that the trial court failed to adhere to the *Reneer* standard. However, this Court has consistently held that a trial court's

failure to follow the *Renner* format in the penalty phase does not constitute palpable error. *Owens v. Commonwealth*, 329 S.W.3d 307, 319-320 (Ky. 2011) (“While we continue to cite *Renner* as the required practice for trial courts to follow for PFO sentencing, we have not yet held that the failure to do so is palpable error.”); *see also Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009); *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991). There is no palpable error here, and Bryant is not entitled to a new penalty phase.

**CONCLUSION**

For the reasons stated herein, we affirm the judgment and sentence of the Monroe Circuit Court.

All sitting. All concur.

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