

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID ROSS KNIFFEN,

Defendant-Appellee.

UNPUBLISHED

May 18, 2004

No. 247905

Macomb Circuit Court

LC No. 01-002793-FH

Before: Owens, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's grant of defendant's motion for judgment of acquittal following his conviction by a jury of possession of a taser, MCL 750.224a(1).¹ Defendant had moved for a directed verdict at the close of the prosecutor's proofs. The court expressed the view that the evidence was insufficient, but granted the prosecutor's request to reopen its proofs. Additional evidence was presented, and the court denied defendant's subsequent request for directed verdict, and submitted the case to the jury, which found defendant guilty.² Later, the court determined that it should not have reopened the proofs, and granted defendant's motion based on the evidence initially submitted. We affirm in part, and reverse in part.

¹ MCL 750.224a(1) provides:

[A] person shall not sell, offer for sale, or possess in this state a portable device or weapon from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure or kill.

² Defendant was charged with delivery of the controlled substance methamphetamine (ecstasy), MCL 333.7401(2)(b)(i), conspiracy to possess with intent to deliver the controlled substance Phenobarbital, MCL 333.740(2)(c), possession of a taser, MCL 750.224a(1), possession of the controlled substance marijuana, MCL 333.7403(2)(d), and maintaining a drug house. MCL 333.7405(1)(d). He was acquitted of all charges except the instant charge of possession of a taser.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The prosecution asserts that the trial court erred in granting defendant's motion for directed verdict of acquittal. When reviewing a trial court's decision on the sufficiency of evidence to maintain a conviction, this Court reviews the record de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). This court reviews a trial court's grant of relief from judgment for an abuse of discretion, and the findings of fact supporting its ruling for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003).

The trial court granted the post-trial judgment of acquittal on the basis that it had erred in its initial ruling allowing the prosecution to reopen its proofs after determining that the prosecution had failed to produce sufficient evidence to overcome defendant's motion for directed verdict. The court indicated that the prosecution was aware for a two-year period of the necessity for investigating the taser more fully to prove the device could temporarily incapacitate, injure or kill. The trial court corrected its error by reversing defendant's conviction and, in effect, granting defendant's original request for a directed verdict.

First, we conclude that the trial court did not abuse its discretion in permitting the prosecution to reopen its proofs. We also conclude that with the additional testimony, the prosecution presented sufficient evidence to establish a violation of the criminal statute. We further conclude that the court did not abuse its discretion in finding, after the proofs were reopened and the verdict was rendered, that defendant had been prejudiced by the manner in which the prosecutor handled the issue. Specifically, defendant was not sufficiently aware of the need to obtain expert testimony to rebut the prosecution's claims regarding the device, and had inadequate notice of the evidence relied on by the prosecutor, most particularly an advertisement of the manufacturer. The trial court did not err in concluding, in retrospect, that "the defendant was denied a fair trial and left shortchanged by a failure to counter the additional evidence."

Nevertheless, we conclude that the proper remedy was to grant a new trial, not to retroactively grant the motion for directed verdict. While there may be a certain logic to the court's approach - - the evidence was insufficient when the prosecutor first rested; the reopening of proofs turned out to be unfair; therefore, the proofs should not have been reopened; therefore, the original proofs should determine whether the proofs were sufficient; the original proofs were insufficient; therefore a directed verdict was appropriate - - entry of a directed verdict of acquittal was improper because it was not an abuse of discretion to reopen the proofs and the proofs actually presented were sufficient.

The reopening of the proofs was within the discretion of the trial court. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). Defendant was not surprised or prejudiced by the fact that the proofs were reopened. Defendant had not yet begun presentation of his case and was not hampered in his ability to re-cross or recall witnesses pertinent to the issue. The court was presented with the simple question whether the prosecutor should be permitted to present additional evidence in light of the fact that when the sufficiency of the evidence was challenged by defendant, the Court agreed that insufficient evidence had been produced, and did not abuse its discretion in answering that question in the affirmative.

The prejudice here stemmed from the nature of the evidence presented when the proofs were reopened, most particularly the advertisement. While the court did not abuse its discretion in permitting the prosecution to reopen its proofs, it was still within the court's discretion to later evaluate the effect of reopening the proofs and admitting the evidence that it admitted, and to determine that the overall effect was to deny defendant a fair trial. While the court determined in retrospect that it should have left the case where it was when the prosecution first rested, and should have granted the motion for directed verdict at that time, the court did not exercise its discretion in that manner, and instead exercised it in favor of permitting the prosecution to reopen its proofs. Because this was not in itself an abuse of discretion, we conclude it was error for the court to later reverse that ruling and grant the motion. Rather, the court should have simply granted a new trial based upon its assessment of the unfairness that developed after the proofs were reopened.

We affirm the court's decision to set aside the verdict and reverse the court's decision to enter judgment of acquittal. We remand for a new trial. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs