NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. SAMUEL JOSEPH KISS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 323 WDA 2012

Appeal from the Judgment of Sentence January 27, 2012
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0001992-2011

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.: Filed: February 15, 2013

Samuel Joseph Kiss brings this appeal from the judgment of sentence imposed on January 27, 2012, in the Court of Common Pleas of Fayette County. A jury found Kiss guilty of theft by unlawful taking, and theft by receiving stolen property.[1] The trial court sentenced Kiss to serve a term of imprisonment of 14 months to 48 months on the charge of theft by unlawful taking, and imposed no further penalty on the theft by receiving stolen property charge. The sole issue raised in this appeal is a challenge to the sufficiency of the evidence. Based upon the following, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] ***See*** 18 Pa.C.S. §§ 3921(a), 3925(a), respectively. Both crimes were graded as misdemeanors of the first degree. ***See*** 18 Pa.C.S. § 3903(b).

The parties are well acquainted with the facts underlying Kiss's convictions, and we adopt the trial court's factual summary. ***See*** Trial Court Opinion, 1/27/2012, at 1–5. Kiss contends that "[t]he Commonwealth failed to prove beyond a reasonable doubt that [Kiss] took or removed the items in question." Kiss's Brief at 7.[2]

Our standard of review and the applicable criminal statutes are as follows:

> In reviewing a claim regarding the sufficiency of the evidence, an appellate court must determine whether the evidence was sufficient to allow the fact finder to find every element of the crimes charged beyond a reasonable doubt. In doing so, a reviewing court views all the evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth. Furthermore, in applying this standard, the Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence. When performing its review, an appellate court should evaluate the entire record and all evidence received is to be considered, whether or not the trial court's rulings thereon were

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[2] Kiss timely complied with the order of the trial court to file a statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b), and claimed "[t]he Commonwealth failed to prove beyond a reasonable doubt that [Kiss] took or removed the items in question." Kiss's Concise Statement, 2/22/2012.

We note that the claim framed by Kiss in his Rule 1925(b) statement, and the issue and argument set forth in Kiss's brief only concern his conviction on the charge of theft by unlawful taking, 18 Pa.C.S. § 3921(a). ***See*** Kiss's Brief at 7, 9–12. Therefore, only that conviction is properly before us for review, and the question of sufficiency of the evidence as it relates to the conviction for theft by receiving stolen property, 18 Pa.C.S. § 3925(a), may be deemed subject to waiver.

> correct. Additionally, we note that the trier of fact, while passing on the credibility of witnesses and the weight of the evidence, is free to believe all, part, or none of the evidence.
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> To uphold a conviction for theft by unlawful taking, the Commonwealth must establish the accused "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S.A. § 3921(a).
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> * * * *
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> Receiving stolen property is established by proving that the accused "intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner." 18 Pa.C.S.A. § 3925(a).

Commonwealth v. Galvin, 985 A.2d 783, 789, 791–792 (Pa. 2009), *cert. denied*, 130 S. Ct. 2345 (U.S. 2010) (case citations omitted).

Testimony at Kiss's trial established that, on the morning of July 23, 2011, Mark Metger, the manager of Sprouts Place, a salvage company, located in Hopwood, Pennsylvania, discovered that a portion of inventory was missing: 30 batteries, two racing wheels, and six radiators. Later that morning, after calling police and other recycling shops, Metzger received a return call from Cherokee Fur Post, which he relayed to Pennsylvania State Trooper Edward Stasko, who was investigating the matter. Metzger later identified the missing parts from pictures taken by Trooper Stasko at Cherokee Fur Post. N.T., 1/5/2012, at 9–18. Meanwhile, Trooper Stasko

interviewed Ed Regula, the owner of the Cherokee Fur Post, who informed Trooper Stasko he had made a purchase of batteries, racing wheels and radiators that morning. ***Id.*** at 24, 28–30, 37–38. Regula could not identify the seller, but was able to provide the seller's name, and information recorded during the transaction. ***Id.*** at 29–32, 39. Trooper Stasko, having the seller's name, a check amount ($219.00), and an operator's license number — used NCIC and CLEAN[3] databases to obtained an address, where he went and found several individuals exiting a Jeep vehicle in front of the residence. ***Id.*** at 39–41. Trooper Stasko asked for "Samuel Kiss," who identified himself and, when Trooper Stasko explained to Kiss why he was there, Kiss immediately said, "I did it, I needed the money." ***Id.*** at 41–42, 53–54. Trooper Stasko then took Kiss into custody, provided him with ***Miranda***[4] warnings, and transported him to the police barracks where Kiss wrote out a statement detailing his actions. ***Id.*** at 42, 47–48, 51–52.[5]

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[3] National Crime Information Center and Commonwealth Law Enforcement Assistance Network, respectively.

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[5] Kiss's July 23, 2011 written statement reads:

> I went to a place in Hopwood last night around 11:30. I went behind the big blue building and took batteries, 2 wheels and radiators to Cherokee Fur Post for $219.00 …. Yes, I did take the belongings and it did not belong to me. I took all the

(Footnote Continued Next Page)

Kiss now claims that the Commonwealth failed to sustain its burden of proof for theft by unlawful talking, because no one identified him as the person who took the items from Sprout's Place, as neither Metzger or Regula could identify him. This argument is meritless since the name and license number recorded at the Cherokee Fur Post sale, together with Kiss's admission and his written statement, were ample evidence upon which the jury could conclude beyond a reasonable doubt that Kiss "unlawfully [took] moveable property of another with intent to deprive him thereof."[6] In this regard, the jury, as fact-finder and assessor of credibility, was free to reject Kiss's defense that he only assisted his brother-in-law in selling the items without knowing they were stolen;[7] that his admission to Trooper Stasko simply meant that he had transacted a sale at the Cherokee Fur Post;[8] and that the only true part of his written statement was the last part, *i.e.*, that

(Footnote Continued) ———————————

> belongings with a vehicle that was a black Cherokee Jeep by myself. I took the belongings (items) this morning around 10:00 to Cherokee Fur Post. [It] issued me a check of $219.00 and [I] cash[ed] it this morning at First Niagara Bank.

N.T., 1/5/2012, at 51–52; Commonwealth Exhibit 1.

[6] 18 Pa.C.S. § 3921(a).

[7] N.T., 1/5/2012, at 60–61.

[8] ***Id.*** at 63, 74.

he had sold the items at the Cherokee Fur Post and cashed the check for $219.00.[9]

Accordingly, applying our standard of review, and viewing the evidence — both direct and circumstantial — in the light most favorable to the Commonwealth, Kiss's sufficiency challenge fails.[10] ***See Commonwealth v. Galvin***, ***supra***.

Judgment of sentence affirmed.

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[9] ***Id.*** at 66, 77.

[10] Furthermore, were the sufficiency challenge for the conviction for theft by receiving stolen property, 18 Pa.C.S. § 3925(a), not waived, we would reject such contention based upon the above discussion of the evidence.

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

CRIMINAL ACTION

COMMONWEALTH OF PENNSYLVANIA, :

Vs. :

SAMUEL JOSEPH KISS, :

Defendant. : NO. 1992 of 2011

OPINION

WARMAN, J.

Following a trial by jury, the defendant, Samuel Joseph Kiss, was found guilty of Theft by Unlawful Taking[1], M-1, and Theft by Receiving Stolen Property[2], M-1. The defendant was sentenced on the conviction for Theft by Unlawful Taking to a term of incarceration of not less than 14 months nor more than 48 months. With regard to the Theft by Receiving Stolen Property conviction, the Court accepted the guilty verdict without further penalty being imposed.

FACTS

Mark Metzger is the manager of Sprouts Place located at 42 Atlas Road, Hopwood, Fayette County, Pennsylvania. Sprouts Place is a salvage company involved in the buying and selling of cars and selling vehicle parts online (N.T. 10). The business is situate upon approximately 50

[1] 18 Pa. C.S.A. §3921(a).
[2] 18 Pa. C.S.A. §3925(a).

acres of land located off Atlas Road on which are situate seven separate buildings and garages. (N.T. 11)

On July 22, 2011, Metzger, as is his practice every day at the close of business, made his rounds of the premises to make sure that everything was secure and in its respective place. The following day on July 23, 2011, at approximately 9:00 A.M., Metzger returned to Sprouts Place and made his rounds of the premises to check on workers and examine the premises. (N.T. 12)

Upon walking around one of the garages located approximately 500 feet from the road, Metzger observed that a portion of the inventory of the business was missing. The missing inventory included approximately 30 batteries, two race car wheels and a few of radiators. The missing items had a total value to Sprouts Place of $1240.00. (N.T. 13-15)

Upon determining that inventory had been stolen from the business, Metzger called the Pennsylvania State Police to report the theft. Metzger thereafter called a number of recycling yards in the area and visited several recycling yards to determine if the stolen items had been resold to another business in the area. Later that morning Metzger received a return call from the Cherokee Fur Post that items matching the description of the stolen inventory had been sold at that recycling business. (N.T. 18) Metzger passed this information on to the Pennsylvania State Police.

Metzger subsequently confirmed that the property sold to the Cherokee Fur Post was, in fact, the property stolen from Sprouts Place. (N.T. 18)

Ed Regula, the owner of Cherokee Fur Post, confirmed that on the morning of July 23, 2011, he purchased a quantity of batteries, radiators and two racing wheels. (N.T. 28) Regula remembered the transaction involving the stolen items since it was very unusual for racing wheels to be sold at his business. (N.T. 28) Regula was unable to identify the male individual who sold the stolen property to his business but was able to provide to the police with his business records regarding the transaction. Regula explained that it was the practice of his business to require the seller to provide a driver's license and the operator's number. (N.T. 27) That information together with the name of the individual is recorded on the books of the business. (N.T. 27, 28)

Pennsylvania State Police Trooper Edward Stasko was dispatched from the Uniontown State Police Station at approximately 10:00 a.m. July 23, 2011 in response to the reported theft at Sprouts Place. After completing an interview with Mark Metzger and examining the scene, Stasko returned to the Uniontown station. Shortly thereafter Metzger called the station and reported that he had located the stolen items at the Cherokee Fur Post. (N.T. 37) Officer Stasko then proceeded to the Cherokee Fur Post, spoke with the owner, photographed the batteries,

racing wheels and radiators, and examined the records of the business. (N.T. 39) The records disclosed that the stolen items had been sold by Samuel Kiss.

Officer Stasko ran the name and the operator's license number through NCIC and obtained the address of 156 Bailey Avenue, Uniontown, Pennsylvania. (N.T. 40, 41) Upon arriving at 156 Bailey Avenue in Uniontown, Officer Stasko observed a black Jeep Cherokee which had just stopped at that address. (N.T. 41) Stasko approached the individuals who were exiting the Jeep and asked for Samuel Kiss. Defendant identified himself as Samuel Kiss. (N.T. 41) Upon explaining to the defendant that the officer was there investigating a theft from Sprouts Place, defendant indicated "I did it, I needed the money." (N.T. 42)

Officer Stasko thereupon took the defendant into custody and provided him with the Miranda warnings. Defendant was then transported to the police station for processing. Stasko also asked the defendant to provide him with a written statement following which defendant wrote out a statement, "I went to the place in Hopwood last night around 11:30. I went behind the big blue building and took batteries, two wheels and radiators to Cherokee Fur Post for $219.00. Yes, I did take the belongings and I did, they did not belong to me. I took all the belongings with a vehicle that was a black Cherokee Jeep by myself. I took the belongings,

items this morning around 10:00 to Cherokee Fur Post, issued me a check of $219.00 and I cashed it this morning at the First Niagara Bank." (N.T. 51, 52)

DISCUSSION

In his Concise Statement of Issues Complained of on Appeal, the defendant raised the following:

1. The Commonwealth failed to prove beyond a reasonable doubt that the defendant took or removed the items in question.

The defendant contends that the evidence introduced by the Commonwealth was insufficient to prove beyond a reasonable doubt that the defendant committed the theft from Sprouts Place.

In considering whether the Commonwealth presented sufficient evidence to prove the defendant guilty of the crimes of Theft by Unlawful Taking and Theft by Receiving Stolen Property, we are guided by the standards provided by our appellate courts. In Commonwealth v. Zingarelli, 839 A.2d 1064 (Pa. Super 2003), *appeal denied* 579 Pa. 692, 856 A.2d 834 (2004), the Superior Court indicated:

> The standard we apply in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of

> the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of the witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Zingarelli, 839 A.2d at 1069.

In order to convict a defendant for Theft by Unlawful Taking, the Commonwealth must prove beyond a reasonable doubt that the defendant unlawfully took or exercised unlawful control over moveable property of another with the intent to deprive him thereof. 18 Pa.C.S. §3921.

The evidence introduced by the Commonwealth established that at the close of business on July 22, 2011, Sprouts Place in its inventory 30 batteries, two racing wheels and radiators. These items were located at a garage approximately 500 feet from the road. The manager, Mark Metzger, observed that the inventory was in place at the close of business on July 22, 2011.

Testimony was provided by Ed Regula, the owner of Cherokee

Fur Post, a recycling business located in Fayette County, that on the morning of July 23, 2011, a male individual appeared at his place of business and sold to him approximately 30 batteries, two racing wheels and a couple of radiators. In the course of his business Regula maintains records and issues checks for items purchased. In order to receive payment for items brought to the Cherokee Fur Post, the seller must display his driver's license. The person's name and Pennsylvania operator's number are recorded before payment is made.

Regula provided Officer Stasko with his records relative to the transaction which revealed that the batteries, racing wheels and radiators were sold to the Cherokee Fur Post by Samuel Kiss.

Upon entering the information into the NCIC, Officer Stasko obtained an address for Samuel Kiss of 156 Bailey Avenue, Uniontown, Pennsylvania. Shortly thereafter Trooper Stasko arrived at the residence 156 Bailey Avenue, Uniontown, Pennsylvania, and observed the defendant and other persons exiting a Jeep vehicle in front of the residence. The officer approached and asked for Samuel Kiss. The defendant identified himself following which the officer explained that he was investigating a theft from Sprouts Place. The defendant immediately confessed that he had committed the theft indicating that he needed the money.

It is the law in Pennsylvania that the trier of fact is free to

believe all, part or none of the evidence introduced at the trial. Commonwealth v. Fahey, 512 Pa. 298, 516 A.2d 689 (1986). The uncorroborated testimony of a prosecution witness may be sufficient to convict, if the trier of fact finds the prosecution witness to be credible. Commonwealth v. Wienckowski, 371 Pa. Super. 153, 537 A.2d 866 (1988). The court must recognize and honor the right and obligation of the trier of fact to believe all, part or none of the evidence. Commonwealth v. Griscavage, 512 Pa. 540, 517 A.2d 1256 (1986).

The trier of fact has the right to reject part or all of the defendant's testimony even if uncontradicted. Commonwelath v. Young, 494 Pa. 224, 431 A.2d 230 (1981); Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968). The credibility of witnesses and the weight to be accorded the evidence produced are matters within the province of the trier of fact. Commonwealth v. Taylor, 324 Pa. 420, 471 A.2d 1228 (1984).

From the evidence introduced by the Commonwealth the jury could reasonably find that the defendant took possession of the moveable property of Sprouts Place and that he did so for the purpose of selling that property thus depriving the owner of its batteries, racing wheels and radiators.

The defendant was also convicted of Theft by Receiving Stolen Property which is defined in the Crimes Code as follows:

Receiving Stolen Property.

> (a) Offense defined. – A person is guilty of theft if he intentionally receives, retains, or disposes of moveable property of another knowing that it has been stolen or believing that it has probably been stolen unless the property is received, retained or disposed of with intent to restore it to the owner.
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> (b) As used in this section the word "receiving" means acquiring possession, control or title, or lending on the security of the property.

This evidence introduced at the trial was sufficient to establish circumstantially that the defendant acquired the property of Sprouts Place after the business had been closed for the evening on July 22, 2011, and that on the following morning he sold that property to the Cherokee Fur Post knowing that the property had been stolen from Sprouts Place. Circumstantial evidence may be sufficient to prove any element, or all elements, of the crime charged. Commonwealth v. Zimmick, 539 Pa. 548, 653 A.2d 1217 (1995).

Upon review of the evidence presented in the light most favorable to the Commonwealth as the verdict winner and drawing all proper inferences favorable to the Commonwealth, as we must, we find that the trier of fact could reasonably have concluded that the elements of both Theft by Unlawful Taking and Theft by Receiving Stolen Property were established beyond a reasonable doubt. The defendant's request for a

new trial based on the sufficiency of the evidence should, therefore, be DENIED.

BY THE COURT:

ATTEST:

_____, J.
RALPH C. WARMAN, JUDGE

_____
CLERK OF COURTS