

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000457-MR

KELVIN REED

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-CR-001385

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Kelvin Reed appeals from a jury verdict finding him guilty of burglary in the third degree¹ and possession of burglar's tools.² We affirm.

Reed's convictions stemmed from a break-in at a BP Store at 7733 Dixie Highway in Jefferson County on March 6, 1999. Shortly before 5:00 a.m., Ms. Carla Murphy, the store manager who resided in a house next door to the store, was

¹ Kentucky Revised Statutes (KRS) 511.040.

² KRS 511.050.

awakened by the store's alarm. The alarm company called to confirm that the police had been notified. Ms. Murphy then went to the store to investigate and saw the police arrive about the same time. When she approached the front of the store, she saw an African-American man in the store running toward the back. The man was wearing a black toboggan and dark clothing. Ms. Murphy became frightened and started to back up. When she did so, she heard someone outside. She turned and saw an African-American man heading to the area behind the store. Ms. Murphy's fiancé was watching from the house next door. Ms. Murphy heard him yell from the house, "Here he is", referring to the subject near the rear of the store.

The responding police officer, John Forst, also observed a man inside the store when he arrived at the scene. He described him as a black male with a black toboggan, wearing dark clothing and standing near the doorway at the back of the building. When Officer Forst heard Ms. Murphy's fiancé yell, he then observed Reed coming from the back of the building. Officer Forst ordered Reed to the ground and when police back-up arrived, Reed was placed under arrest. Reed was searched and a blue and white striped bag was retrieved from his coat pocket.

The crime scene investigation revealed that a window casing and glass had been removed to gain entry to the store. A grocery cart was lying on its side under the window. Inside the

store, a cigarette rack had been knocked over. There was no evidence that money or merchandise was actually removed from the store.

Sometime after Reed's arrest, Ms. Murphy called police to report that there was a strange car parked beside her house. Upon investigation the police discovered that the vehicle was registered to Reed. The vehicle had an Ohio license plate, which was later identified as having been stolen from an auto dealership near the BP store. A license plate issued to Reed was found on the seat of the car. The police also discovered cutters, a pry tool, pliers and several screw drivers lying in plain view in the vehicle.

When Reed was arrested, he denied that he had entered the store. He told the police that he had only been behind the BP store to urinate when he observed two men running from the store.

Reed was indicted by the Jefferson County Grand Jury on June 7, 1999. He was charged with burglary in the third degree, possession of burglar's tools, and theft of a motor vehicle registration plate. The indictment also charged Reed with receiving stolen property valued at over \$300, giving a police officer a false name or address, operating a motor vehicle on a suspended license, operating a motor vehicle without an operator's license, and speeding. The additional

charges stemmed from events occurring on March 24, 1999. The Jefferson County Grand Jury returned a separate indictment charging Reed with being a persistent felony offender in the second degree³ (PFO II).

The March 6 charges were severed from the March 24 charges for trial. The trial was conducted from October 24, 2001, through October 26, 2001. On October 26, 2001, the jury returned a verdict finding Reed guilty of burglary in the third degree and possession of burglar's tools. The jury found him not guilty of theft of a motor vehicle registration plate.

Reed agreed to waive jury sentencing, enter a plea of guilty to the PFO charge and enter pleas of guilty to amended charges on the severed offenses. In exchange, the Commonwealth agreed to the following sentencing recommendations: five years for burglary in the third degree, six months for possession of burglar's tools, twelve months for receiving stolen property, 90 days for giving a police officer a false name or address, 90 days for operating a motor vehicle without a license on his person, and a \$100.00 fine for speeding. The Commonwealth also agreed to a one year enhancement on the PFO charge, with all

³ KRS 532.080(2).

sentences to run concurrently for a total of six years. Reed retained the right to appeal.⁴

On December 19, 2001, the trial court, following the sentence recommendation by the Commonwealth, sentenced Reed to six years. The judgment of conviction was entered on January 2, 2002. Reed did not file a timely notice of appeal. However, on May 16, 2002, this Court granted Reed's motion to file a belated appeal.

Reed makes the following arguments on appeal: 1) the trial court committed prejudicial error by condoning the Commonwealth's failure to produce exculpatory evidence in a timely manner; 2) the evidence was insufficient for the jury to find Reed guilty of burglary in the third degree and possession of burglar's tools; 3) the trial court committed reversible error by failing to instruct the jury on criminal trespass in the third degree; 4) the trial court committed reversible error by condoning the Commonwealth's misstatement of evidence during closing argument.

Reed claims that the Commonwealth failed to comply with a discovery order by failing to timely provide a videotape

⁴ The Commonwealth argues that Reed only reserved the right to appeal the burglary conviction. While the signed guilty plea supports that claim, a review of the colloquy at the guilty plea seems to indicate that Reed understood he was reserving the right to appeal trial errors, including everything but the PFO II and March 24 offenses.

of Reed recorded while Reed was in the police cruiser after his arrest on March 6, 1999.

The Commonwealth first mentioned the possible existence of the videotape in a pretrial conference conducted on May 25, 2000. The prosecutor stated that he had not viewed the videotape and that the police officer was not even sure it still existed. On September 21, 2001, counsel for Reed⁵ made a written request that the Commonwealth let him know if there were any audio or videotapes. The attorneys for the Commonwealth provided the defense with a copy of the tape two days prior to trial, on October 22, 2001, stating that it had just come into their possession. There is nothing in the record to indicate that the defense filed a motion to compel or even objected to the timeliness of the production of the videotape. Rather, the record shows that the defense agreed to the introduction of the tape and stated that there were portions of the tape it would use to establish the defense that Reed was not the perpetrator of the burglary of the BP station. At no time did the defense ask for a continuance or indicate that it needed additional time to review the tape. The first objection to the tape came after an unfavorable outcome at trial in a motion for a new trial.

⁵ We note that this was the fourth attorney assigned to Reed. The record establishes that Reed's first attorney left the Public Defender's office. The next two assigned attorney's were allowed to withdraw at Reed's request.

The Commonwealth Attorney is required to provide discoverable material upon request as soon as reasonably possible after it is received.⁶ However, the failure to supply discoverable material, although error, will not result in relief where a defendant is not prejudiced by the error.⁷ Even if we believed there was a discovery violation, Reed has failed to establish the requisite prejudice. He claims that he could not properly prepare his case for trial, but fails to specify what he would have done differently. In fact, Reed used the videotape in his defense, thereby waiving any claim that he was somehow prejudiced by its introduction.

Reed's next claim of error goes to the sufficiency of the evidence to convict him of the burglary and the possession charges. These errors were preserved by Reed's motions for a directed verdict.

A directed verdict is mandated when, viewing the evidence in the light most favorable to the Commonwealth, it would be unreasonable for a jury to find guilt. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that a defendant is guilty, a directed verdict should not be given.⁸

⁶ Lefevers v. Commonwealth, Ky., 558 S.W.2d 585, 590 (1977).

⁷ Robinson v. Commonwealth, Ky., 490 S.W.2d 481 (1973).

⁸ Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

It is a well-settled rule in the Commonwealth that a conviction may be obtained on circumstantial evidence.⁹ Officer Forst testified that when he arrived he observed a black male, wearing a black toboggan and dark clothing in the BP store near the back door. While waiting for backup he heard someone yell, "He's over here." He then encountered Reed coming from the back of the building. Forst testified that Reed matched the description of the person he observed inside the building just minutes before. Ms. Murphy testified that she observed a black male dressed in dark clothing and a toboggan in the store. She also testified that she believed the person inside the store was the same person she observed outside the building. When Reed was questioned about the two individuals he claimed he saw running from the store, he was unable to offer even a general description. Officer Forst testified that the officers investigated the claim by searching the area near the store. The officer also testified that there was an 8' chain link fence behind the BP. This was sufficient evidence for the jury to reasonably conclude that it was Reed inside the store.

Reed next complains that the Commonwealth failed to prove that he intended to commit a crime inside the BP store. Reed bases this claim on the fact that there was no evidence that any store property was found on him and no evidence that

⁹ Baker v. Commonwealth, Ky., 860 S.W.2d 760 (1993).

property or money had been removed from the store.

Nevertheless, a showing that the defendant entered or remained in a dwelling unlawfully is enough for a jury to infer an intent to commit the crime.¹⁰ The Commonwealth presented evidence that a window had been removed to gain entrance to the BP store. Reed was arrested with what he testified was a laundry bag in his pocket. Once the jury concluded that Reed had unlawfully entered the store, they could infer that Reed intended to steal from the store but was interrupted when the alarm sounded.

As to the sufficiency of the evidence for the possession conviction, the police found the tools lying inside the back hatch of the vehicle registered to Reed. The defense argued that in order to accept the Commonwealth's theory of the crime, one would have to believe that Reed parked his car near the scene, took the tools, removed the window and then returned the tools and came back to the window and entered. The defense also argued that there was no forensic evidence showing those tools had been used to take out the window.

(1) A person is guilty of possession of burglar's tools when he possesses any tool, instrument or other thing adapted, designed or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking under circumstances which leave no reasonable doubt as to his:

¹⁰ See Commonwealth v. Sanders, Ky., 685 S.W.2d 557 (1985).

- (a) Intention to use the same in the commission of an offense of such character;
- or
- (b) Knowledge that some other person intends to use the same in the commission of an offense of such character.¹¹

The statute does not require proof that the tools were actually used in the commission of a crime but only that a person possessed them with the intent of using them to commit an offense involving forced entry or theft. Under the facts here, even if the jury didn't believe Reed used the tools to gain entrance to the BP, it would still be reasonable for them to believe that he had them in his possession to do so. Perhaps he found that he didn't need tools to remove the window, or perhaps the Commonwealth's theory was correct and he used them to remove the window and then put them back in the car. In any event, the tools were found in plain view in a car registered to Reed, near where a window had been removed from a place of business and the business unlawfully entered. Once the jury concluded that it was Reed inside the BP store, the circumstances were sufficient for the jury to conclude that Reed possessed the tools with the intent of committing a forced-entry burglary.

Reed next claims that the trial court erred by failing to give an alternative instruction on the offense of third-degree criminal trespass. Reed's counsel asked for an

¹¹ KRS 511.050.

instruction on criminal trespass in the second and third degree, arguing that based on Reed's testimony, the jury could reasonably believe that someone else was in the store and he had merely trespassed outside. The Commonwealth argued that the case of Colwell v. Commonwealth,¹² precluded an instruction on criminal trespass as a lesser-included offense of burglary. The trial court acknowledged that, based on the evidence, the jury could believe that Reed entered the store but had no intent to commit a crime therein, and agreed to instruct the jury on criminal trespass in the second degree.

Reed argues on appeal that the trial court misinterpreted the holding in Colwell and that the case of Sanborn v. Commonwealth¹³ required that an instruction for criminal trespass in the third degree be given. He argues that Colwell only addressed the meaning of lesser-included offenses and that Reed was requesting the instruction, not as a lesser-included offense, but as an alternative theory of the case.

While we agree with Reed that a "trial court is required to instruct on every theory of the case reasonably deducible from the evidence," Manning v. Commonwealth,¹⁴ we do not believe the trial court erred in the case sub judice.

¹² Ky., 37 S.W.3d 721 (2000).

¹³ Ky., 754 S.W.2d 534 (1988).

¹⁴ Ky., 23 S.W.3d 610, 614 (2000).

A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon premises as to which notice against trespass is given by fencing or other enclosure.¹⁵

A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.¹⁶

Colwell is instructional in defining and distinguishing the differing degrees of criminal trespass. The court defined "premises" in third-degree criminal trespass as being unimproved land.¹⁷

Reed's testimony was that he had just been in the "wrong place at the wrong time." At trial he testified that his girlfriend had borrowed his car the previous night but was forced to leave it near the BP store because it had stopped running. Reed said that he had asked some unidentified friends to drive him to retrieve the car but when they drove too far, he asked to be dropped off and walked to the store. He testified that he attempted to start or fix the car and then noticed a car for sale behind the house and decided to look at it. He said that he heard the alarm as he entered the back yard and panicked, thinking he had set off a motion detector. He said that in an effort not to trigger it again, took a path that led

¹⁵ KRS 511.070 (1).

¹⁶ KRS 511.080 (1).

¹⁷ Colwell, 37 S.W.3d at 726-727.

him behind the BP store, where he observed two individuals running away from the store. Reed said that he then decided to stop to urinate behind the store. Even if the jury believed this story, clearly the property where the BP store is constructed with an 8' chain-link fence in the back is not unimproved property, warranting a third-degree criminal trespass instruction.

Further, even if Reed was entitled to an instruction on criminal trespass in the third degree, the court's failure to so instruct was harmless beyond a reasonable doubt. In Colwell, the Supreme Court distinguished criminal trespass from burglary, in that burglary required the intent to commit a crime. To convict Reed of burglary, the jury was required to find he had the intent to commit a crime. Since the jury found Reed had the requisite intent, it could not have reasonably believed that Reed committed any level of criminal trespass.

Reed's final assignment of error is that an admonition by the trial court to remedy a mis-statement of the evidence by the prosecutor was inadequate. The complained of statement by the prosecutor was that this was "a burglary in which tools were used to get into the building." Defense counsel objected, noting that no evidence had been presented that the tools were actually used to gain access. The Commonwealth argued that Officer Forst had testified that he believed tools would have

been needed to remove the window.¹⁸ The trial court then admonished the jury as follows: "Members of the jury . . . you'll remember the evidence as it was presented." The defense did not object to the admonition given by the court. However, Reed now complains that he did not request further admonition because what he wanted was for the trial court to sustain his objection.

We note that under certain circumstances a general admonition, such as the one given by the trial court, may be inadequate.¹⁹ However, Reed did not request a more specific admonition, thereby indicating that he was satisfied with the admonition as given.²⁰ Even so, in closing argument a prosecutor may draw all reasonable inferences from the evidence and propound his explanation of the evidence and why it supports a finding of guilt.²¹ The Commonwealth's theory of the case was that Reed had used the tools from his car to remove the window from the BP and then returned them to the car. Ms. Murphy testified that she believed tools would have been necessary to remove the window. There was evidence that the window casing and the glass were removed to gain entry. Based on this

¹⁸ In actuality, it was Ms. Murphy that gave this testimony.

¹⁹ Brandenburg v. Addison, Ky., 298 S.W. 1091, 221 Ky. 442 (1927).

²⁰ See Commonwealth v. Goforth, Ky., 692 S.W. 2d 803, 805 (1985).

²¹ Bills v. Commonwealth, Ky., 851 S.W.2d 466 (1993).

evidence, a reasonable inference could be drawn that tools were used to remove the window. As such there is no basis for reversal.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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