

RENDERED: AUGUST 20, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000023-MR

CARRIE TABOR

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CR-00124

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.

TACKETT, JUDGE: Carrie Tabor appeals from the judgment of the Franklin Circuit Court finding her guilty of criminal mischief in the first degree, for which she was sentenced to one year's imprisonment, probated for three years. Tabor argues on appeal that the evidence was insufficient to convict her of the charge and that she should have been granted a directed verdict at the close of the evidence, that she was entitled to funds for an expert witness who could have testified to the nature of the

damage done and the reasonable cost of repair, that the Commonwealth should not have been permitted to introduce evidence of a prior visit by the police to her apartment in connection with charges against her live-in boyfriend, and that she was prejudiced by the introduction of irrelevant and inflammatory photographs. We reverse and remand for a new trial.

Tabor was a tenant in an apartment owned by the complaining witness, L.T. West. Tabor was a Section 8 housing client. Tabor first rented the apartment in March 1998, and stayed until March 1999. The apartment was, by all accounts, in bad shape when Tabor moved out, after the landlord refused to renew the lease. The apartment was very dirty, and there was a substantial amount of damage. The damage included a split front door, damaged appliances in the kitchen including a refrigerator with a burnt-out motor due to a diaper being stuffed underneath and a garbage disposal full of pennies, holes in the walls, damaged carpet, broken windows, missing switch plates and door hardware, and a great deal of garbage was left in the apartment.

West did the repair work himself, over the course of nine months. West testified that he spent \$4,568.98 to repair the apartment. West also testified that a contractor quoted \$2,550 as the cost of cleaning and repairing the apartment.

At trial, West conceded that he did not witness Tabor damaging the apartment. He did testify that he observed the window being broken when a man tried to crawl out of it, during an unrelated police search of the apartment. The evidence of this search is one of the issues raised on appeal. West also testified that Tabor told him that a boyfriend had put a hole in the wall.

Tabor, testifying as the only defense witness, stated that she did not cause the damage to the apartment, though she admitted that she left it in a dirty state. She testified that some of the damage was caused by her boyfriend, specifically when he kicked in the front door, ripped the screens out of two windows, and put holes in the wall by throwing a beer bottle. She testified also that some of the damage was caused due to a leak in the air conditioning system, a water leak in the upstairs apartment, a termite infestation, and water damage due to windows that would not close properly. She denied taking the door hardware, the light bulbs and fixtures, stuffing the diaper underneath the refrigerator and putting pennies in the disposal.

The Commonwealth introduced through West a number of pictures, which depicted the state of the apartment and some of the damage done. The defendant objected to the pictures as they showed only a dirty apartment, and one photograph was taken of

the toilet, which was full of excrement and had not been flushed. These photographs are discussed below.

Tabor moved twice for a directed verdict, but these motions were denied by the court. The jury convicted Tabor of the charge and recommended a sentence of one year, which the court imposed and granted probation of three years on condition of restitution. This appeal followed.

On appeal, Tabor raises four arguments as outlined above. We first turn to the question of funding for an expert witness, and hold that Tabor was entitled to funds for an expert.

The standard for whether an indigent defendant is entitled to funds for an expert witness is whether it is "reasonably necessary". Young v. Commonwealth, Ky., 585 S.W.2d 378 (1979), Hicks v. Commonwealth, Ky., 670 S.W.2d 837 (1984). Hicks also contained a caution that the state was not required to finance a "fishing expedition" by the defense, and the Commonwealth asserts that a grant of expert funds in this case would have been exactly that. The Commonwealth argues that Tabor was unable to articulate the manner in which the proposed expert witness, a contractor, would assist the defense, and therefore Tabor was not entitled to the funds. We disagree. It is fairly obvious, as the defense argues on appeal, how a contractor could assist the defense. In a prosecution for

criminal mischief, the defendant must be shown to act either intentionally or wantonly in causing the damage. It is not enough, in a case such as this, to show only that the defendant was in custody and control of the premises when the damage was caused, because it is possible that damage can occur through normal wear and tear or through the simple negligence of the defendant, a matter properly addressed in a civil action rather than a criminal prosecution. A contractor specializing in repair could testify as to the possible causes of the damage as well as the reasonable expense of repair. The evidence presented by the Commonwealth illustrates a great disparity between the quote given by the contractor the landlord consulted and the total amount the landlord spent. A defense expert could properly identify what expenses would be necessary for cleaning as opposed to repair of damage, and could further identify damage caused by wear and tear as opposed from intentional acts. Granted, the apartment has long since been repaired, and so a contractor cannot observe the damage firsthand. However, the landlord did take a number of pictures, and a contractor could form an opinion based in part on the photographic evidence. Due to the paucity of evidence, we conclude that an expert would be reasonably necessary to assist the defense, and reverse the judgment of the circuit court.

We turn to issues likely to recur on remand. First, some of the pictures do not in fact depict damage, but instead depict a dirty apartment. However, we also note that a criminal mischief charge can be based on 'defacement' of property as well as damage, and if it is caused intentionally or wantonly, Tabor can still be held criminally responsible. With respect to the photograph of the toilet, it is acknowledged that it could be considered inflammatory, but the landlord did testify that he had to make repairs to the toilet, and the photograph can be said to fairly reflect the condition the toilet was left in. Accordingly, the photographs are admissible, and the Commonwealth may introduce them on remand.

With respect to the evidence regarding the police raid, we note that the trial court took pains to prevent evidence of Tabor's drug use or the reason for the raid, and the bare minimum of factual circumstances was still required to explain how the window was broken, because it is "inextricably intertwined with other evidence essential to the case" under Kentucky Rule of Evidence 404(b)(2). We conclude that the trial court could have pared nothing else from the essential facts and still permit the Commonwealth from introducing the evidence of how the window was broken in any meaningful way. We therefore hold that the trial court did not err, and that it did precisely what the Rules of Evidence require to satisfy both the

Commonwealth's need to present evidence and the defendant's right to a fair trial free of unnecessarily prejudicial, unrelated evidence of bad acts.

Lastly, addressing the Tabor's argument that she was entitled to a directed verdict, we must conclude that she was not. In reviewing a sufficiency of the evidence argument, we must determine whether under the evidence taken as a whole, it would be clearly unreasonable for a jury to find the defendant guilty. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). Here, we acknowledge that the evidence is not the most convincing, given the disparity between the contractor's quote and the landlord's testimony about his expenditures, and the general paucity of evidence regarding the circumstances under which this damage was caused. It is arguable that this should have been a civil action rather than a criminal prosecution. However, it still does not meet the standard in Sawhill, in that a reasonable jury could conclude, based on the testimony of the landlord regarding the type of damage cause, that the damage was caused, if not intentionally, then certainly wantonly. We therefore hold that Tabor was not entitled to a directed verdict.

For the foregoing reasons, the judgment of the Franklin Circuit Court is reversed and remanded for a new trial in accordance with this opinion.

COMBS, CHIEF JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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