RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000253-MR

KEITH HELTON — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CR-00072

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND GUIDUGLI, JUDGES.

BUCKINGHAM, JUDGE: Keith Helton appeals from his conviction and sentence to two and one-half years in prison for the offense of criminal possession of a forged prescription in violation of KRS[1] 218A.284. The sole issue on appeal is whether the trial court erred in denying Helton's motion for a directed verdict. We conclude that it did not, and we thus affirm.

On April 29, 2003, Dr. Daniel Manley, a dentist in Montgomery County, extracted three of Helton's teeth. Dr.

[1] Kentucky Revised Statutes.

Manley then issued a prescription to Helton for 14 Lortab pills. The prescription was dropped off at the Kroger Pharmacy drive-thru in Mt. Sterling in Montgomery County later that day, although the Commonwealth did not present evidence concerning who left the prescription at the pharmacy.

As Denise Vice, a pharmacist, began to fill the prescription, she noticed that the number of pills stated on it appeared to have been changed from 14 to 19. Knowing that it was Dr. Manley's custom to always write his Lortab prescriptions for 14 pills, she called Dr. Manley at his office. Dr. Manley confirmed that he had written the prescription for 14 pills, and he directed Vice to mail it back to him. Thus, neither Vice nor any other pharmacist at the Kroger Pharmacy filled the prescription.

Laney Huff, a pharmacy technician, was working the drive-thru later that day when a vehicle pulled up to the window to obtain the Helton prescription. Huff testified that the driver of the vehicle was a woman with dark hair and that Helton was seated in the passenger seat. Huff told the woman that there was a problem with the prescription, that it could not be filled, and that she should call Dr. Manley. Dr. Manley received a phone call from a woman purporting to be Helton's wife within an hour after these events. The woman asked for

another prescription for Helton, but Dr. Manley refused to write one.

Helton was indicted by a grand jury in Montgomery County on a single count of criminal possession of a forged prescription. The case was tried before a jury in the Montgomery Circuit Court on January 12, 2004, and the jury returned a verdict of guilty. A final judgment sentencing Helton to two and one-half years in prison was entered following final sentencing, and this appeal by Helton followed.

Helton's sole argument on appeal is that the trial court erred in not directing a verdict of acquittal in his favor. He argues that the Commonwealth did not prove any of the elements of the offense. Specifically, he first argues that the Commonwealth did not prove that the prescription was altered or who uttered the prescription. Helton states that he gave his girlfriend, who was not identified until the trial, the prescription, and he argues that he cannot be held criminally responsible for what his girlfriend may have done with it after he gave it to her. He emphasizes that both he and his father testified that he was asleep on the couch in his father's home during the time the prescription was presented at the pharmacy and that the Commonwealth failed to present any evidence that the prescription was presented by him. Finally, Helton argues that there was insufficient evidence for the jury to conclude

that he was the male passenger in the vehicle that returned to get the pills and that, even if he had been the passenger, that fact did not establish that he was involved in the crime.

The directed verdict rule was stated by the Kentucky Supreme Court in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991), as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187. Furthermore, "[o]n appellate review, the test of a directed verdict is, if 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." Id.

The crime of criminal possession of a forged prescription is set forth in the statutes as follows:

> (1) A person is guilty of criminal possession of a forged prescription when, with knowledge that it is forged and with intent to defraud, deceive, or injure another, he utters or possesses a forged prescription for a controlled substance.

KRS 218A.284(1). Citing various authorities, including cases from this jurisdiction, Helton attempts to define "uttering," a word that is not defined in the statutes. We have no quarrel with these definitions, which essentially state that to "utter" means "to put or send (a document) into circulation." See Black's Law Dictionary (7th ed. 1999).

We conclude that the evidence was sufficient to overcome Helton's motion for directed verdict. First, the Commonwealth did offer proof that the prescription had been altered. The pharmacist testified as to her observation, and Dr. Manley himself testified in this regard. Second, Huff testified that Helton was in the vehicle at the pharmacy drive-thru when an attempt was made to get the pills under the forged prescription. On these two matters, the jury could easily conclude beyond a reasonable doubt that the prescription had been forged and that Helton was a passenger in the vehicle when the attempt was made to get the pills.

In short, the Commonwealth presented evidence that Dr. Manley gave a prescription to Helton for 14 Lortab pills, that the prescription was altered within a few hours to indicate 19 pills, that someone delivered the prescription to the pharmacy so that it could be filled, and that Helton was a passenger in a vehicle that returned the same day to pick up the filled prescription. Furthermore, the truthfulness of Helton's alibi

is called into question due to the inconsistencies in the testimony of his father as to the exact times Helton was at his residence.

"Circumstantial evidence is sufficient to support a criminal conviction." Reynolds v. Commonwealth, 113 S.W.3d 647, 652 (Ky. App. 2003). "It is not required, in order to sustain a conviction based on circumstantial evidence, that the evidence be such as to exclude every possibility of the defendant's innocence; it is sufficient if all of the circumstances, when considered together, point unerringly to the defendants' guilt." Holland v. Commonwealth, 323 S.W.2d 411, 413 (Ky. 1959). Having reviewed the evidence in this case, we conclude that it was sufficient to overcome Helton's motion for a directed verdict and to support the jury's finding of guilt. The jury could reasonably infer from the evidence that it was Helton, not the woman who drove the vehicle, who committed the crime.

The judgment of the Montgomery Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. I do not believe the Commonwealth met its duty to prove the elements of the crime beyond a reasonable doubt and, therefore, Helton was entitled to a directed verdict. KRS 218A.284(1)

requires that proof be shown that the defendant utter[ed] or possess[ed] a forged prescription. In this case, no one testified that Helton uttered or possessed the forged prescription. I do not believe the fact that he may or may not have been a passenger in a vehicle in which the driver sought to pick up the prescription is sufficient circumstantial evidence to meet the statutory criteria, as does the majority. Therefore, I would reverse Helton's conviction and remand for dismissal of the charge.

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