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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-000271-MR

ERICK BERNARD HICKS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00364

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: Erick Hicks challenges as erroneous a judgment convicting him of the offenses of theft by unlawful taking over $300, possession of burglary tools, and being a persistent felon in the first degree. Alleging the denial of his right to a fair trial, appellant advances six arguments for reversal: 1) that there was proof that the verdict was tainted

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

when the jury foreman informed the trial judge after they had been dismissed that the jury had given little thought to the value of the property taken; 2) that it was error to allow an unreliable valuation of the stolen items to be presented to the jury; 3) that the police failed to maintain a chain of custody or properly inventory the stolen property; 4) that he was entitled to a directed verdict of acquittal on the charge of possession of burglary tools; 5) that he was the victim of racial bias and selective enforcement in the manner in which he was charged; and 6) that he was entitled to a mistrial following a witness's statement concerning a matter the trial judge had ruled inadmissible as a prior bad act. We affirm.

The facts which precipitated the charges against appellant are neither complex nor in dispute. On September 28, 2002, Jill Schmitt, an employee of Lowe's Home Improvement Center in Paducah, Kentucky, parked her car in the employee lot, locked the car but left the sunroof open. Inside the car were 18 compact discs and her cellular telephone. Kyle Walker, a Lowe's employee working in the garden center, testified that because several cars had been broken into the previous week, he was unusually attentive to suspicious behavior. Walker stated that around 8:45 a.m. he noticed someone circling around the employee lot, then stopped and approached Schmitt's car, entering it through the open sunroof. Walker also noted that

that the man who had entered the car was African-American, that there was a passenger he could not identify in the car which had been circling, and that one of the car's tires was a small spare tire. After Walker notified the store manager that he believed he had witnessed a theft, the police were called and took a report. Walker described the car as a small, black, four-door Honda with "extremely high-polished" tire rims and a spare tire on one wheel. The store manager also notified Schmitt that someone had broken into her car and she informed the police that her cellular telephone, CD's and a CD case had been taken from the car.

Shortly thereafter, appellant was apprehended by a Paducah Police Detective who noticed a car drive by which matched a description just broadcast by police dispatch. Appellant admitted entering Schmitt's car and taking the CD's the cell phone and the CD case. These items, along with a pair of wire cutters, a screwdriver, a sledge hammer, a paring knife and a coat hanger which had been bent into a "slim jim" type instrument were found in appellant's car. Appellant was subsequently indicted and convicted of one count of theft over $300., possession of burglary tools, and being a first-degree persistent felon. Although the trial judge sentenced appellant in accordance with the jury's recommendation of five (5) years on the theft count, enhanced to fifteen (15) years by virtue of

the PFO I count, and nine (9) months and a $500 fine for possession of burglary tools, he granted appellant's request for a probated sentence.

The primary focus of this appeal is propriety of the jury determination that the value of the property taken was in excess of $300. Appellant argues that the Commonwealth failed to meet its burden of establishing an essential element of felony theft by its failure to maintain a proper chain of custody concerning the items stolen and its failure to introduce any competent evidence as to the property's value. We disagree.

In order to elevate a charge under KRS 514.030 from a Class A misdemeanor to a Class D felony, the Commonwealth is required to prove that the market value of the property at the time and place of taking is $300 or more.[2] It is now very well settled that the testimony of the owner of stolen property is competent evidence as to value.[3] In Perkins v. Commonwealth,[4] the former Court of Appeals clarified the burden placed on the Commonwealth with respect to valuation and offered the following rationale which we find particularly apropos to the issue in this case:

> It is true that the only evidence as to the value of the saw at the time it was taken

[2] Commonwealth v. Reed, 57 S.W.3d 269 (Ky. 2001).

[3] Id.

[4] 409 S.W.2d 294, 296 (Ky. 1966).

> was its $169 purchase price a year before and its apparent condition when displayed as an exhibit to the jury. The owner testified that it had been used very little and that it still had its original chain. In its instructions, the trial court informed the jury in effect that the saw had to be worth $100 or more for them to find the appellants guilty of the charge of grand larceny. The evidence as to value—the purchase price and the condition of the saw—was all the jury had to go on. It is said in 52 C.J.S. Larceny § 118, at pages 941 and 942: '. . . Where it does not appear that there is any absolute standard by which the market value may be determined with definiteness and certainty, any facts which reasonably tend to show the present value of the stolen property may be admitted. Thus it has been held that evidence of the purchase price and the condition of the property when stolen is admissible, especially when the property has been used but a short while.'

Here, the jury was presented not only with the victim's testimony as to purchase price and condition of her property, but it also had the benefit of a vigorous cross-examination of the victim as to alleged conflicts in her trial testimony with statements made to a defense investigator, as well as testimony from defense experts as to appellant's theory as to value. Thus, the jury was well-equipped to make an informed decision as to the value of the property taken and we cannot disturb its decision on the basis that there was no competent evidence supporting its conclusion as to value.

Appellant also complains of the lack of a chain of custody concerning the property in question. Again, we find no

error. It is the generally-accepted rule in this jurisdiction that "the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody . . . ."[5] The Supreme Court of Kentucky has clearly explained the rationale behind this rule:[6]

> [I]f the offered item possesses characteristics which are fairly unique and readily identifiable and if the substance of which the item is composed if relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition.

Both the victim and the arresting officer testified offered testimony concerning the CD's and the cell phone found in appellant's car. That testimony was fully sufficient to establish within a "reasonable probability" that the CD's and phone were indeed the items taken from the victim's car and that they had not "been altered in any material respect."[7]

Appellant's final argument concerning valuation centers on the trial judge's statements at sentencing concerning a conversation he had had with the jury foreman at his business and his own opinion as to the value of the stolen property. The

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[5] Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998).

[6] Beason v. Commonwealth, 548 S.W.2d 835, 837 (Ky. 1977), quoting McCormick, Evidence, ss 212, p. 527 (1972).

[7] Rabovsky, supra at 8.

trial judge stated that he was surprised that the jury found the property had a market value of $300 and that when he asked the foreman how the jury reached that determination, the foreman stated that they didn't really give valuation that much thought. RCr 10.04 provides: "A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot." Thus, courts of this Commonwealth have long observed the rule that jurors may give evidence to prove that the jury was not guilty of misconduct but may not impeach the verdict by stating that the jury acted wrongfully or irregularly.[8] Similarly, the Sixth Circuit[9] has stated juror's statements are incompetent to challenge internal factors affecting the jury:

> Whether the jury understood the evidence presented at trial or the judge's instructions following presentation of the evidence . . . are all internal matters for which juror testimony may not be used to challenge a final verdict.

In this situation, we have no affidavit or other testimony of a juror, merely the trial judge's statement as to what was reported in an out of court encounter with a juror after discharge. Furthermore, a review of the record confirms defense counsel's statement at sentencing to the effect that

[8] Bowman v. Commonwealth, 284 Ky. 103, 143 S.W.2d 1051 (1940).

[9] Doan v. Brigano, 237 F.3d 722, 733 (6th Cir. 2001), Abrogated on other grounds as recognized by Maples v. Stegall, 340 F.3d 433 (6th Cir. 2003).

valuation was what this trial was about. Thus, even if such a challenge to the verdict were possible, on this state of the record it is almost inconceivable that the jury failed to consider value in returning its verdict.

Nor does the trial judge's disagreement with the jury's decision affect the outcome because valuation in this case was properly presented as a jury question:

> In cases like this, where the degree of the offense depends upon the value of the property, it often happens that the witnesses will differ as to its value; and, when there is a difference of opinion as to this matter, it is for the jury to form their own conclusion from the evidence as to the value of the property stolen.[10]

We therefore find no error in the jury's determination that the value of the property appellant admitted taking from the victim's automobile was sufficient to sustain a charge of felony theft.

Next, appellant argues that he was entitled to a directed verdict of acquittal concerning the offense of possessing burglary tools, alleging that the Commonwealth failed to prove that he intended to use the items to commit a burglary. In light of the fact that appellant admitted burglarizing the victim's car just prior to the discovery of the items in his possession and the well-established rule that "the intentions of

[10] Allen v. Commonwealth, 148 Ky. 327, 146 S.W. 762-63 (1912).

an accused may be ascertained from the surrounding facts and the jury is allowed a reasonably wide range in which to infer intent from the circumstances,"[11] it was not patently unreasonable for the jury to infer he intended to use them in the commission of a crime. Because it was not unreasonable, under the evidence as a whole, for the jury to find appellant guilty of the possession charge, he was not entitled to a directed verdict of acquittal.[12]

Appellant next argues that he was the victim of racial bias or profiling in light of the "overwhelming disparity between the 8% population of the Commonwealth as opposed to the 37% African Americans filling Kentucky's prison systems." Despite an admitted lack of preservation, appellant suggests that this Court nevertheless consider the matter as constituting palpable error affecting his substantial rights. Appellant's only support for his claim of bias is alleged "overcharging" by the police: "the prosecution's insistence on a felony charge without the proof to support the felony and the added charge of possession of burglary tools without proof of any *specific intent* to use the paltry tools in the trunk of his car reeks of unfairness." Because we have previously addressed both of these issues and resolved them against appellant, they cannot serve to support his claim of bias in this case.

[11] Rayburn v. Commonwealth, 476 S.W.2d 187, 189 (Ky. 1972).

[12] Trowel v. Commonwealth, 550 S.W.2d 530 (Ky. 1977).

Finally, appellant argues that the prosecution intentionally elicited a statement from a defense witness concerning a matter the trial judge had previously ruled inadmissible as a prior bad act. The line of questioning on cross-examination concerned whether the victim was afraid of talking to the investigator because the appellant had previously attempted to contact her. The trial judge instructed the prosecutor not to mention the fact that the appellant had attempted to contact the victim. In response to the prosecutor's next question concerning the victim's state of mind during the interview, the defense witness stated: "She told me she had been contacted by Mr. Hicks but that she was not afraid of me talking to her."

The trial judge denied appellant's motion for a mistrial stating that the witness had been informed to steer away from mentioning the fact appellant had attempted to contact the victim and that the prosecutor did not intentionally elicit that response. Review of the record confirms the propriety of the trial judge's ruling and dispels appellant's contention that the prosecutor intentionally used the line of questioning to tamper with or intimidate the defense witness. Even were we to accept the contention that it was prejudicial to allow the jury to be informed that appellant had attempted to contact the victim and that the attempted contact had frightened her, that

error cannot be ascribed to the prosecution. Furthermore, the fair and equitable administration of justice does not guarantee an error-free trial.[13] All that is required is that upon a consideration of all the evidence it appear that the result would have been no different had the error not occurred. Applying that standard to the totality of evidence presented in this trial, we perceive no reasonable possibility that the witness' comment in any way altered the result.

In sum, we are persuaded that appellant received a fundamentally fair trial. Accordingly, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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[13] See, Martin v. Parker, 11 F.3d 613 (6th Cir. 1992).