

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000951-MR

TOMMY L. WEATHERS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, SPECIAL JUDGE
INDICTMENT NO. 03-CR-01583

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

KNOPF, JUDGE: Tommy L. Weathers appeals from a judgment of the Fayette Circuit Court which confirmed a jury verdict convicting him of second degree criminal possession of a forged instrument,¹ and being a persistent felony offender in the first degree.² The jury fixed his sentence at ten years' imprisonment, which the trial court imposed. Weathers argues that there was

¹ KRS 516.060. Criminal possession of a forged instrument is a class D felony.

² KRS 532.080(3).

insufficient evidence to support the conviction and that his trial was rendered unfair due to prosecutorial misconduct and the introduction of inadmissible evidence. Finding no error, we affirm.

At trial, the victim, Linda Melton, testified that she ordered two boxes of checks from her bank in August of 2003. Melton further testified that only one box of checks was delivered. In early September, Melton discovered that a check for \$200.00 had been written on the account. The check was made out to Weathers's landlord and the memo line indicated that it was for Weathers's rent. Melton testified that she never wrote that check and she did not know Weathers. Melton added that the check number was from the box of checks that she never received. Weathers's landlord testified that Weathers had personally given her the check. The landlord accepted the check because she knew that other people had helped Weathers pay his rent before. The landlord also testified that she wrote Weathers's name on the memo line after he gave it to her and she gave him a receipt.

Weathers first argues that the trial court erred by denying his motion for a directed verdict. We disagree. The Commonwealth bears the burden of proving each element of the charged offense beyond a reasonable doubt.³ On a motion for

³ KRS 500.070.

directed verdict, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth.⁴ An appellate court can disturb a jury's verdict only if it would be clearly unreasonable for a jury to find guilt.⁵

KRS 516.060 provides that a person is guilty of criminal possession of a forged instrument in the second degree "when, with knowledge that it is forged and with intent to defraud, deceive, or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.030." Weathers asserts that the Commonwealth failed to prove that he knowingly possessed a forged instrument or that he had the intent to defraud, deceive or injure another.⁶ However, when the evidence shows that the name attached to the instrument had been forged, the inference arises that the person who uttered it as genuine either forged the instrument or knew it was forged, and unless the uttering or forgery was explained satisfactorily the presumption becomes conclusive.⁷ In the absence of any contrary evidence, the jury could reasonably infer that Weathers knew the check was forged.

⁴ Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

⁵ Id. at 187.

⁶ See Caudill v. Commonwealth, 723 S.W.2d 881, 883 (Ky. App. 1986).

⁷ Smith v. Commonwealth, 307 S.W.2d 201 (Ky. 1957); and Gregory v. Commonwealth, 557 S.W.2d 439, 440 (Ky. App. 1977).

Weathers next argues that the Commonwealth improperly intimidated him against testifying in his own behalf. On the morning the trial began, the Commonwealth informed the trial court that it did not intend to introduce any evidence of prior crimes or bad acts by Weathers. The Commonwealth also acknowledged that it had not given any notice that it intended to do so, as required by KRE 404(c). However, the Commonwealth noted that Weathers had a prior conviction for theft by deception where he had written a bad check. The prosecutor stated that the prior conviction might be relevant to impeach Weathers. The trial court stated that it would evaluate the admissibility of the prior conviction based upon Weathers's testimony at trial. Weathers did not testify and the Commonwealth never introduced the evidence.

Weathers contends that the Commonwealth's pre-trial reference was improper and was intended to discourage him from testifying. After reviewing the trial tape, we find that this allegation is without merit. The prosecutor merely advised Weathers that the prior conviction might be relevant if he testified that he did not understand how checks worked. There is no indication that the Commonwealth raised the issue for an improper purpose. Furthermore, at the point defense counsel objected, the relevance of the prior conviction was entirely

speculative. Since Weathers did not testify, the admissibility of the prior conviction was never before the trial court.

Lastly, Weathers argues that his trial was tainted by the admission of improper evidence. Prior to the beginning of proof, defense counsel made a motion *in limine* to exclude any evidence that the box of checks was stolen from Melton's mailbox. Melton admitted that she did not know when the checks were stolen, and counsel did not want the jury to infer that Weathers had stolen the checks. The trial court granted the motion. Shortly thereafter, the investigating police officer, Detective Maria Wells, testified regarding her investigation of the forgery report. Wells testified that Melton had told her that the box of checks had been stolen from her mailbox. Defense counsel did not object to the statement, but did later object to hearsay statements in Detective Wells's testimony.

In the absence of a contemporaneous objection, this claim of error is not preserved for review.⁸ Furthermore, we find no palpable error in this case.⁹ After considering the substantial and uncontested evidence against Weathers, there is no substantial possibility that the result would have been any

⁸ RCr 9.22; KRE 103(a).

⁹ RCr 10.26.

different absent Detective Wells's brief statement that the check was stolen from Melton's mailbox.¹⁰

Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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¹⁰ Commonwealth v. McIntosh, 646 S.W.2d 43, 45 (Ky. 1983).