

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000210-MR

MATTHEW K. RANKIN

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 04-CR-00122

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Matthew K. Rankin appeals from a January 14, 2005, judgment of the McCracken Circuit Court upon a guilty plea to third-degree criminal mischief and a conditional guilty plea to theft by unlawful taking over \$300.00. We affirm.

Appellant was originally indicted on March 12, 2004, for first-degree criminal mischief and theft by unlawful taking over \$300.00. The charges arose from the theft of personalty in an automobile and damage to same as a result of the theft.

Appellant entered a conditional plea of guilty to both charges. At a hearing to determine restitution, the circuit court found that the criminal mischief resulted in damages of less than \$500.00, and thus, the court amended the indictment from first-degree criminal mischief to third-degree criminal mischief. The court further found that appellant took \$278.00 in cash, twenty compact discs valued at \$7.50 each, and a stereo amplifier valued at \$100.00, for a total theft of \$528.00. As the theft amounted to over \$300.00, the court declined to amend the theft charge. As some stolen items had been returned to the victim, the court ordered restitution in the amount of \$205.50.

On January 14, 2005, the circuit court entered judgment upon the guilty plea to third-degree criminal mischief and the conditional guilty plea to the charge of theft by unlawful taking over \$300.00. Appellant was sentenced to a total of two years' imprisonment, with appellant ordered to serve one day. The remaining sentence was probated for a period of two years. The conditional plea was accepted upon appellant's right to appeal the court's ruling as to the restitution amount and as to whether the theft was a felony (over \$300.00) or a misdemeanor (under \$300.00). This appeal follows.

Appellant contends the restitution order did not "conform to the constitutional guarantees of minimal

reliability." Appellant's Brief at 4. Appellant specifically contends the circuit court erroneously relied upon "misrepresentations" made by the victim, Callie Davis, to determine the amount actually stolen for purposes of computing restitution.

At the restitution hearing, Davis testified that she had \$280.00 in cash and twenty compact discs in her car that were stolen by appellant. Davis testified she paid approximately \$15.00 for each compact disc, with the exception of one that she had copied from another disc. The testimony at the hearing reflected that she recovered all but one of the compact discs. Additionally, Davis testified that a 500-watt amplifier was also stolen. Davis testified she believed the value of the amplifier was \$200.00, although she had paid approximately \$100.00 for the amplifier about a year before it was stolen.

Appellant and two other witnesses testified at the restitution hearing. Appellant claimed that he stole only \$80.00 from Davis's automobile, although he could not determine the exact amount until the morning following the theft. Appellant admitted he was under the influence of valium at the time of the theft and could not recall where he went after taking the items from Davis's automobile. Appellant discovered that he had \$80.00 in his wallet the next morning after he woke

up and he further alleged that he could not recall spending any of this money. Chris Stone and Stephen Burnett both testified that Davis had told them that appellant had stolen \$278.00 from her automobile, but purportedly later contradicted her statements by claiming that a lesser amount had been stolen.

It is well-established that questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness' credibility. CR 52.01; Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002). A factual determination made by the circuit court will not be disturbed on appeal unless it is clearly erroneous. Ky. R. Civ. P. (CR) 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Sherfey, 74 S.W.3d 777. If the testimony before the trial court is conflicting, as in this case, we may not substitute our decision in place of the judgment made by the trial court. R.C.R. v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998).

In the case *sub judice*, the circuit court was at least partially persuaded by the testimony of the victim, Callie Davis. Davis testified that \$278.00 in cash, an amplifier valued at \$200.00, and twenty compact discs valued at \$15.00 each were stolen from her automobile. The circuit court accepted Davis's testimony that \$278.00 in cash was stolen;

however, the court valued the amplifier at \$100.00 and the discs at \$7.50 each. It is wholly within the discretion of the fact-finder to believe or disbelieve certain portions of a witness's testimony. We thus reject appellant's contention that the circuit court erroneously relied upon Davis's testimony. Upon the whole, we think substantial evidence exists to support the circuit court's findings that the theft amounted to \$528.00.

We view appellant's remaining contentions as moot or without merit.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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