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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000478-MR

CHESTER A. WALKER

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 04-CR-00206

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; KNOFF, JUDGE; BUCKINGHAM, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: Chester A. Walker appeals from a Final Judgment and Sentence of Imprisonment entered by the Madison Circuit Court on December 17, 2004. A jury found Walker guilty of Theft by Unlawful Taking Over \$300.00 and of being a First-Degree Persistent Felony Offender. He was committed to serve an indeterminate term not to exceed fifteen years and was ordered to pay restitution of \$450.00 within six months of his release

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

from custody. On appeal, Walker argues that the evidence presented at trial was insufficient to support his conviction for theft. We disagree and affirm the Final Judgment and Sentence.

The theft charge arose from an episode that occurred on June 16, 2004, at the Magic Mirrors Beauty Shop in Richmond, Kentucky. Darlene Noble, the owner of the salon, arrived at work and placed her unzipped purse on a dryer in the laundry room. She went to the restroom located a few feet away. Thinking that she was alone, she did not shut the door of the restroom completely. She heard a noise and opened the door far enough to see a man running out of the salon with her wallet. She was able to see him only from behind. She described him as "not very tall," black and stocky.

She grabbed her purse and pursued him through the building and into the driveway. She saw him getting into a car that she described as an older model, "sunbleached," "bluish" Oldsmobile. The man put the car into reverse, "squealed the tires" and drove off around the corner. While this pursuit was underway, Noble was shouting for help and trying unsuccessfully to call 911 on her cell phone.

As the Oldsmobile left the driveway, it nearly collided with a van coming from a nearby parking lot. The driver of the van was Aaron Hackworth, a seventeen-year-old high

school student. Hackworth recognized the driver of the Oldsmobile as Chester Walker, whom he had trained at the local McDonald's restaurant. Hackworth told Noble that he knew the person driving the car as "Chester." Hackworth used her cell phone to call the police. Noble testified that she had approximately \$450.00 in cash in her wallet -- as well as three checks totalling \$88.00 and several gift cards worth approximately \$100.00. Noble was able to replace the checks, but the cash and gift cards were never recovered.

At trial, Hackworth testified that he was the head crew trainer at McDonald's and had personally trained Walker for two weeks in March 2004. They had then worked side by side during their six-hour shifts until Walker resigned at the end of April. Walker had told Hackworth that he owned a blue, older model Oldsmobile, and Hackworth later saw the Oldsmobile parked at McDonald's and had observed Walker driving it. Hackworth testified that he had **no doubt at all** that Walker was the driver of the car coming from the Magic Mirror driveway. He described the shirt, glasses, and distinctive cap that Walker had been wearing -- all of which he had seen Walker wearing before. Records were entered into evidence showing that Walker was the owner of a light blue 1986 Oldsmobile.

At the close of the Commonwealth's evidence, Walker moved for a directed verdict, arguing that the Commonwealth had

not proven its case because it had failed to show that Hackworth could not have been mistaken about his identification of Walker. The trial court disagreed and held that the evidence was sufficient for the case to go to the jury. The defense closed without presenting any evidence and did not renew its motion for a directed verdict.

The first issue on appeal is whether the argument concerning the sufficiency of the evidence was preserved for review since defense counsel did not renew the motion for a directed verdict. "[A] motion for a directed verdict made at the close of the plaintiff's . . . case is not sufficient to preserve error unless renewed at the close of all the evidence[.]" Baker v. Commonwealth, 973 S.W.2d 54, 55 (1998)(citation omitted). Since no additional evidence was presented after the close of the Commonwealth's case, the issue was adequately preserved for our review.

Accordingly, we shall address Walker's contention that the trial court erred in failing to grant a directed verdict.

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.

On 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) citing
Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

Walker alleges that numerous flaws in the evidence entitled him to a directed verdict of acquittal: (1) that Darlene Noble only saw the back of the man who took her wallet; (2) that there was no testimony as to whether the laundry room where she first saw him was well lighted; (3) that she admitted that she was distracted while pursuing the man because she was "very upset" and was attempting to call 911 on her cell phone. Walker contends that Noble's identification was not accurate enough and that she had not seen Walker well enough or long enough to satisfy the standard of reasonable doubt.

Walker also alleges two theories as weaknesses in Hackworth's identification: (1) that he was attempting to avoid a car accident at the same time that he claims to have seen Walker; and (2) that he saw the distinctive car rather than its driver, leaving for speculation that he may have erred in assuming that Walker was the driver. Walker concludes that the evidence was not "of such character that reasonable minds would

be justified in concluding that the person charged was guilty beyond a reasonable doubt." Moore v. Commonwealth, 488 S.W.2d 703, 705 (Ky. 1972).

We disagree. Noble never saw Walker's face, and she did not identify him as the man who took her wallet. Nevertheless, she kept him under constant observation from the moment that he took her wallet until he was identified by Aaron Hackworth. She was also able to describe in detail the distinctive color and make of his car. Although Hackworth saw the driver only briefly, he recognized him immediately because he was an individual with whom he was very well acquainted because of their work history.

Walker attempts to cast further doubt on the reliability of the identification by citing the theories of E. Loftus in *Eyewitness Testimony* 10 (1997). According to Walker, Loftus has demonstrated that the initial perception of an event by a witness (the "acquisition stage") is affected by factors such as the lighting conditions and the length of time involved. Walker theorizes that because Noble and Hackworth saw the perpetrator only very briefly and under stressful conditions, their identification of him may have been flawed. However, Walker did not introduce Loftus's theories at trial (see Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002)), and they may not, therefore, be considered on appeal. "[O]ur review is

limited to the pleadings and evidence considered by the circuit court[.]” White v. White, 883 S.W.2d 502, 505 (Ky.App. 1994).

Furthermore, as the Commonwealth has correctly observed, even if the Loftus study mitigating eyewitness reliability had been presented at trial, its impact would have gone to the weight of the identification issue rather than having prevented the case from going to the jury. It is solely the prerogative of the jury to judge the credibility of witnesses. Benham, 816 S.W.2d at 187, citing Davis v. Commonwealth, 147 S.W.3d 709, 730 (Ky. 2004).

We affirm the judgment of the Madison Circuit Court.

ALL CONCUR.

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