

RENDERED: JUNE 9, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court Of Appeals**

NO. 2005-CA-000482-MR

JAMES LAWRENCE TINSLEY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE HENRY M. GRIFFIN, III, JUDGE  
INDICTMENT NO. 04-CR-00382-001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2005-CA-000483-MR

TORIANO WINSTEAD

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE HENRY M. GRIFFIN, III, JUDGE  
INDICTMENT NO. 04-CR-000382-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER AND KNOPF, JUDGES, AND EMBERTON, SENIOR JUDGE.<sup>1</sup>

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<sup>1</sup> 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.

KNOFF, JUDGE: On August 2, 2004, a Daviess County grand jury indicted James Lawrence Tinsley and Toriano Winstead on one count each of third-degree burglary and being a first-degree persistent felony offender. Following a trial, the jury convicted both men of the charges. The jury fixed Tinsley's sentence at five years, enhanced to eighteen years by virtue of his status as a PFO I. Similarly, the jury fixed Winstead's sentence at five years, enhanced to eighteen years by virtue of his status as a PFO I. The trial court imposed the jury's sentences in both cases. Tinsley and Winstead separately appeal from their convictions, and their appeals have been consolidated before this Court. Finding no error, we affirm in both appeals.

The burglary charges in this case arose out of an incident that occurred on June 22, 2004, at the State Building in Owensboro. Around 6:00 a.m. on that morning, Olivia Clark, who worked in the building for Community Based Services, arrived early and noticed a Nissan Maxima parked near the entrance. She noticed two black males get out of the car and enter the building. She considered this conduct suspicious because she did not recognize the men as employees and the building did not open to the public until 8:00 a.m. Clark wrote down the license plate number of the car. Another employee, Josephine Frazier, arrived, and both Clark and Frazier entered the building. They observed the two men inside the building, and they also noticed

that several vending machines had been forced open and their coin-boxes had been removed. Thereafter, one of the men asked Frazier about the location of an office in the building, and then both men left. Frazier and Clark called the police and gave descriptions of the men. Clark also provided the police with the license plate number that she had written down.

On the way to the scene, Owensboro Police Officer Chris Watkins observed Winstead standing near a bank sign. Although the morning was cool, Winstead was sweating profusely. When Officer Watkins approached Winstead, Winstead volunteered that he had been to the State Building to talk to someone about spousal abuse, and that someone had accused him of something while he was there. No incriminating evidence was found on Winstead.

Later that day, Officer Jeff Williams saw the Maxima which matched the description and license number of the vehicle which Clark and Frazier described. Tinsley was the owner and driver of the vehicle. Officer Williams stopped the vehicle and took Tinsley to the police station. Tinsley made a videotaped statement stating that he was with his girlfriend at the time of the burglary. (Her testimony at trial contradicted Tinsley's statement). No evidence of the crime was found in Tinsley's car or on his person.

In his appeal, Tinsley first argues that the trial court erred by admitting a document that was not properly authenticated and was not provided during pre-trial discovery. At trial, Clark testified that she could not remember the license number of the Maxima that she observed in front of the State Building. However, she pulled out the paper on which she had written it and gave it to the prosecutor. The Commonwealth had Clark review the paper and recite the number. The Commonwealth then offered the paper into evidence over defense counsel's objection. Tinsley argues that the Commonwealth was required by RCr 7.26 to produce prior to trial the paper on which Clark wrote the license plate number. He further contends that the paper was subject to the authentication requirements of KRE 901(a). Because the paper was not produced prior to trial or properly authenticated, Tinsley asserts that the trial court erred by allowing its admission.

However, Tinsley did not raise the alleged discovery violation at the time he objected to the evidence. Furthermore, RCr 7.26 only requires the Commonwealth to produce "all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness." Clark's notation of

the license number does not fall within the rule. The paper was never in the possession of the Commonwealth, and it did not purport to be a substantially verbatim statement made by the witness. Rather, Clark wrote the note herself so she could remember the license plate number when she called the police.

As to the authentication issue, Clark testified that the note had been in her possession since she wrote it. Clark also testified that the license number written on the note was the same number which she gave to the police on the day of the burglary. Furthermore, Clark was entitled to use the note to refresh her recollection.<sup>2</sup> Finally, Tinsley was not prejudiced by the admission of the note because the license number written on the note was admitted through the testimony of Sergeant Saffron.

Tinsley next argues that the trial court erred by overruling his objection to the composition of the jury pool. During voir dire, the trial court ordered the only two African-American members of the jury panel stricken for cause. Both individuals stated that they knew Tinsley, Winstead, and the defendants' respective families. Tinsley did not object to their exclusion at the time, but at the close of voir dire he stated that their removal left the panel without any other African-Americans.

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<sup>2</sup> KRE 803(5).

We find this argument to be without merit. The requirement that a venire reflect the composition of the population at large applies only to the jury panel, not to the actual jury selected.<sup>3</sup> Defendants are not entitled to a jury of any particular composition.<sup>4</sup> Tinsley does not contend that the trial court's reasons for excluding the jurors were improper, nor does he suggest that African-Americans were systematically excluded from or underrepresented in the jury panel. Consequently, the trial court properly overruled Tinsley's objections to the jury panel.

In his appeal, Winstead argues that the trial court erred by overruling his motion for a directed verdict at the close of proof. The Commonwealth bears the burden of proving each element of the charged offense beyond a reasonable doubt.<sup>5</sup> On a motion for directed verdict, the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth.<sup>6</sup> An appellate court can disturb a jury's verdict

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<sup>3</sup> Holland v. Illinois, 493 U.S. 474, 482-83, 110 S. Ct. 803, 808, 107 L. Ed. 2d 905 (1990).

<sup>4</sup> Id. at 483, 110 S. Ct. at 808-09.

<sup>5</sup> KRS 500.070.

<sup>6</sup> Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

only if it would be clearly unreasonable for a jury to find guilt.<sup>7</sup>

A person is guilty of third-degree burglary “. . . when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building.”<sup>8</sup> Winstead admitted that he was in the State Building that morning, but asserts that there was no evidence that he illegally entered or remained in the building. However, Clark and Frazier both testified that the offices in the building did not open until 8:00 a.m., and that it was necessary to use a key or a card to gain access to the building before that time. Furthermore, Winstead claimed that he was in the State Building looking for the spouse-abuse center, although there was no such office in that building. In addition, the vending machines were vandalized about the same time as Winstead was seen in the building. Based on this evidence, the jury could reasonably conclude that Winstead had entered or remained in the building with the intent to commit a crime.<sup>9</sup> And while the Commonwealth’s other evidence against him was highly circumstantial, we hold that it was sufficient to support a reasonable juror finding Winstead guilty beyond a reasonable doubt of burglary in the third degree.

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<sup>7</sup> Id. at 187.

<sup>8</sup> KRS 511.040(1).

<sup>9</sup> See Commonwealth v. Partee, 22 S.W.3d 572, 575-76 (Ky. 2003).

Accordingly, the judgments of conviction by the Daviess Circuit Court against James Lawrence Tinsley and Toriano Winstead are affirmed.

ALL CONCUR.

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