

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001174-MR

WALTER COOK

APPELLANT

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 04-CR-00031-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: SCHRODER, JUDGE; KNOPF,¹ SENIOR JUDGE; MILLER,² SPECIAL JUDGE.

SCHRODER, JUDGE: This is an appeal from a judgment pursuant to a jury verdict convicting appellant of theft by unlawful taking over \$300 for taking 100 wheels from a home scrap yard.

Appellant's sole argument is that there was insufficient evidence to sustain the conviction. Upon review of all the evidence presented at trial, we believe the trial court properly

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

refused to enter a directed verdict for appellant. Hence, we affirm.

On June 18, 2004, James "Sammy" Caudill drove past the entrance to his property and noticed that the cable on the gate was down. Upon further investigation, Sammy noticed fresh tire tracks on the property and that a pile of used, cleaned, aluminum automobile wheels, numbering from 100 to 150, were gone. Sammy immediately notified the police of the theft and put word out to local recycling centers that he was missing about 100 to 150 cleaned wheels.

A neighbor of Sammy's, Amy Gorman, testified at trial that she observed a red full-sized pick-up truck with its lights on near Sammy's property late in the evening of June 17 or early in the morning of June 18. Gorman testified that seeing a truck at that hour in that location was unusual. Although Gorman could not positively identify a photograph of the truck belonging to appellant's co-defendant, James Reed, as the one she saw that night, she indicated it was very similar to or the same as the one she had seen.

Lawrence Caudill, who happened to be Sammy's first cousin, testified that around 7:00 a.m. on June 18, 2004, appellant, Walter Cook and James Reed appeared at his recycling center in a red, full-sized Chevrolet pick-up truck loaded with 100 cleaned aluminum wheels. According to Lawrence, when Cook

and Reed were unloading the wheels, Cook noticed two "uni-lug" wheels which Cook pulled from the pile to keep for himself. Lawrence testified that he paid a flat fee of \$10 per wheel for a total of \$980. Lawrence stated that he had bought from Cook before, but never wheels and he had never paid him that much money for a load. Usually Lawrence paid him \$200-\$300 a load for what he brought. Lawrence also testified that when people usually bring him wheels, they have not been cleaned because he pays the same whether they are clean or not.

After his transaction with Cook and Reed, Lawrence received a message from Sammy Caudill asking if he had recently bought a load of approximately 100 wheels. Lawrence called back and told him that he had just bought a load of 100 wheels. It was Lawrence's testimony that when Sammy came to look at the load of wheels to see if they were his, Sammy went right to the stack of wheels Lawrence had just purchased, although there were other stacks on the premises.

Sammy testified that he knew those were his wheels because they were cleaned, with the valve stems and weights removed, and because he observed cedar shavings on them. Sammy explained that the area where the wheels were stored on his property had a row of cedar trees around it and the debris from the trees would fall on the ground around the wheels. The testimony of Fleming County Deputy Sheriff Scotty Royse

corroborated the fact that there were cedar trees on Sammy's property where the wheels had been stored, and Royse also noted that the grass was dead in that area. Additionally, a photograph taken by Royse was offered into evidence which showed two of the wheels Lawrence had purchased with wood shavings on them.

Cook's theory of the case was that the wheels he and Reed sold Lawrence belonged to him and Reed who were in the business of collecting wheels and other junk. Cook and Reed, who were tried together, presented the testimony of several witnesses who testified that they had seen wheels in Reed's yard in the past, that they had given wheels to Cook or Reed on occasion, or they knew of people who had given wheels to Cook or Reed. There was also testimony that Cook would sometimes clean junk at Reed's house, that Reed and Cook were cleaning wheels at Reed's house on the night of June 17, and that the two left Reed's house with a load of wheels on the morning of June 18.

Pursuant to a jury trial on March 28, 2005, Cook was found guilty of theft by unlawful taking over \$300 and sentenced to four years' imprisonment. This appeal followed.

Cook argues that the circumstantial evidence presented by the Commonwealth in his case was not sufficient to sustain the conviction for theft because it did not prove he ever

exercised control of the wheels belonging to Sammy Caudill. We do not agree.

The standard of review for determining whether or not a directed verdict is warranted was set out by the Court in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

On a 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.

Circumstantial evidence alone and reasonable inferences to be drawn therefrom may be sufficient to support a conviction. Blades v. Commonwealth, 957 S.W.2d 246 (Ky. 1997). There is no different standard of review for a case involving circumstantial evidence. Commonwealth v. Collins, 933 S.W.2d 811 (Ky. 1996). "Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a

reasonable doubt." Graves v. Commonwealth, 17 S.W.3d 858, 862 (Ky. 2000), cert. denied, 531 U.S. 982, 121 S. Ct. 435, 148 L. Ed. 2d 442 (2000) (citing Howard v. Commonwealth, 787 S.W.2d 264 (Ky.App. 1989)).

Cook does not dispute that he and Reed sold a load of wheels to Lawrence Caudill on the morning of June 18, 2004. Thus Cook was clearly connected to the load of wheels sold to Lawrence. And there was plenty of circumstantial evidence that the wheels sold to Lawrence were the wheels taken from Sammy's property. First, 100 to 150 wheels were noticeably gone from Sammy's property on June 18, the very day the load of 100 wheels was sold to a local recycling center. Secondly, a truck very similar to or just like Reed's truck was seen near Sammy's property late on the night of June 17 or in the early morning hours of June 18. Thirdly, like the wheels taken from Sammy's property, the wheels sold to Lawrence were all clean, with the valve stems and weights removed. Lawrence testified that it was unusual for him to get a load of cleaned wheels because he pays the same price whether they are cleaned or not. This evidence also tended to discredit Reed's testimony that he and Cook stayed up all night cleaning the load of wheels, since they did not need to be cleaned to sell to Lawrence for the same price.

Finally, there was evidence that some of the wheels sold to Lawrence had cedar shavings on them, and that the wheels

on Sammy's property had been stored near a row of cedar trees. Cook challenges this evidence because there was no scientific proof offered by the Commonwealth that the wood shavings were, in fact, cedar and none of the Commonwealth's witnesses were qualified to positively identify the wood shavings on the wheels as cedar shavings.

Expert testimony is not necessary in matters of common knowledge, experience or observation. Baptist Healthcare Systems, Inc. v. Miller, 177 S.W.3d 676 (Ky. 2005); Greer's Adm'r v. Harrell's Adm'r, 306 Ky. 209, 206 S.W.2d 943 (1947). Under KRE 701, a lay witness may give an opinion or testify to an inference if the testimony is "[r]ationally based on the perception of the witness" and it is "[h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In our view, differentiating common tree varieties such as cedar is a matter of common knowledge. And even if the witnesses in the instant case could not testify with scientific certainty that the wood shavings on the wheels were cedar, the testimony was admitted not to prove that the shavings were actually cedar, but to show that the shavings were identifiable as being from the same type of tree growing on Sammy Caudill's property. Sammy Caudill testified that from his observation of the shavings, they looked like they came from the same kind of trees he had on his property, which he and Deputy

Royse both believed to be cedar. We believe this testimony was proper and relevant, giving rise to a reasonable inference that the wheels had come from Sammy's property or property with trees of the same variety as those growing on Sammy's property.

Given the evidence as a whole, it was not clearly unreasonable for the jury to find Cook guilty of theft by unlawful taking over \$300. Accordingly, we affirm the judgment of the Fleming Circuit Court.

ALL CONCUR.

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