

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-001291-MR

SHERMAN LEWIS TOWNSEND

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 05-CR-00001-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,<sup>1</sup> SPECIAL JUDGE.

GUIDUGLI, JUDGE: Sherman Lewis Townsend appeals the judgment of conviction rendered in Casey Circuit Court reflecting a jury verdict of guilty on one count of first-degree robbery and one count of first-degree burglary. Townsend argues that he was entitled to a directed verdict of acquittal, and maintains that the evidence did not support the Commonwealth's alternate theories of criminal conduct. For the reasons stated below, we affirm the judgment on appeal.

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<sup>1</sup> 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.

On December 27, 2003, Maleen Lawless was asleep at her home in Casey County, Kentucky, when she was awakened by the sound of an intruder. When Lawless confronted the intruder, he fired one shot from a pistol at her and demanded money. When she said she didn't have any money and told him to leave, he fired a second shot. Neither shot struck Lawless.

The intruder went from room to room using a flashlight, and after a few minutes exited the house. Lawless's jewelry box, a cedar chest, and a bedroom drawer containing jewelry were discovered to be missing. Lawless would later state that she recognized the intruder's voice as that of Ryan Davis, a person to whom she had rented a house.

The intruder disabled the telephone before leaving, so Lawless located a neighbor who contacted the sheriff's office. Casey County Sheriff Jerry Coffman responded, and after speaking with Lawless drove to the home of Davis's uncle, Ronnie McMullin, to look for Davis.

On arriving at McMullin's house, Sheriff Coffman saw a black Ford Thunderbird with its trunk and passenger door open. Visible from outside the vehicle were jewelry boxes in the trunk and passenger seat. Coffman asked McMullin if he had seen Davis or Townsend, and if Davis had a gun. Earlier in the morning, McMullin saw Davis brandishing a gun in McMullin's home, but McMullin denied this to Sheriff Coffman when asked.

After speaking with McMullin, Coffman located Townsend in the home. Townsend was intoxicated, smelled of alcohol, and was either passed out or asleep on the couch. Coffman arrested Townsend, and recovered the jewelry boxes from the vehicle. Lawson later identified the jewelry as hers. Sometime thereafter, a third party found a drawer containing some of Lawson's jewelry in a field. Davis was arrested several months later in Pulaski County, Kentucky.

The Casey County grand jury indicted Townsend on one count each of robbery in the first degree, or complicity, and burglary in the first degree, or complicity. Davis was charged by way of a separate indictment. In April 2005, Townsend and Davis were jointly tried in Casey Circuit Court. Each denied any involvement in the robbery. Townsend acknowledged that he was with Davis on the morning of the robbery, but claimed that he merely agreed to accompany Davis to retrieve some stereo equipment from Davis's former wife. Townsend admitted to have been using methamphetamine for several days, and stated that he remembered nothing more than having fallen asleep in the Ford Thunderbird and then waking up in someone's house.

Davis also denied any involvement in the robbery, stating that Townsend took him to a field to show him some jewelry that Townsend wanted to trade for methamphetamine. He

told of having been in the Thunderbird when it ran into a ditch, requiring him and Townsend to ask McMullin for help removing it.

Davis's parents and cousin testified that Townsend had picked up Davis in a black car on the morning of the robbery. McMullin admitted lying to Sheriff Coffman on the day of the robbery, and stated that when Davis came to McMullin's home on that morning, Davis was brandishing a 22 caliber black and brown pistol and that McMullin told him to put it away. McMullin also testified that Davis was showing off some gold rings.

Finally, Lawless recounted the events of that morning. When pressed as to how she knew that Davis rather than Townsend was the intruder, she said she recognized Davis's voice. She also described Davis as "the skinny one" and Townsend as "the chubby one." Lawless stated that Townsend was waiting in the car during the robbery, but on cross-examination said she had not actually seen either Townsend or the car because it was dark.

At the close of the evidence, Townsend moved for a directed verdict of acquittal. He claimed that the Commonwealth's theory of the case was not supported by the evidence. That is to say, he argued that his mere presence with the real perpetrator, Davis, after the robbery did not support a theory of direct criminal involvement or complicitous conduct. Townsend's motion was overruled, and the case went to the jury.

The jury was instructed to return a guilty or not guilty verdict on 1) whether Townsend committed one count of burglary, or was complicitous in Davis's commission of that act, and 2) whether Townsend committed one count of robbery, or was complicitous in Davis's commission of that act. The jury returned a guilty verdict on each count. Townsend was sentenced to 13 ½ years in prison, and this appeal followed.

Townsend now argues that the trial court committed reversible error in overruling his motion for a directed verdict of acquittal. He claims that the weight of the evidence supported the theory that Davis rather than Townsend broke into Lawless's home and robbed her, and argues that Townsend's mere presence with Davis after the crime is not evidence of guilt. In sum, he argues that there was no basis for his conviction apart from Davis's implausible version of events, and he maintains that as such he was entitled to a directed verdict of acquittal.

Having closely examined the record on this issue, we find no basis for reversing the circuit court's denial of Townsend's motion for a directed verdict. As the parties are aware, Commonwealth v. Benham<sup>2</sup> sets forth the standard for reviewing motions for a directed verdict. It states that,

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<sup>2</sup> 816 S.W.2d 186 (Ky. 1991).

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.<sup>3</sup>

Under the evidence as a whole, it was not clearly unreasonable for the jury to find that Townsend was complicitous in the robbery of Lawless and burglary of her home. Townsend was found to be in possession of the keys to the black Ford Thunderbird, in which Lawless's property was found. Furthermore, Davis, his cousin and his father each testified that they saw Townsend driving the Thunderbird. It is also uncontested that Davis and Townsend were together on the morning of the break-in, and that Lawless identified Davis as the individual who entered her home. Finally, some of the stolen jewelry was found in the car for which Townsend had the keys, and which Townsend was seen driving. When one draws all fair

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<sup>3</sup> Id. at 187.

and reasonable inferences from the trial record in favor of the Commonwealth and assumes that the evidence against Townsend is true, the evidence as a whole was sufficient for a reasonable jury to find guilt. Accordingly, we find no error with the circuit court's denial of Townsend's motion for a directed verdict.

Townsend also argues that he was denied a unanimous verdict in violation of the Kentucky Constitution because the jury was instructed on the alternate theories of a) robbery and burglary, and b) complicity to robbery and burglary. Since alternate theories were presented in the same instruction and one of those theories allegedly was unsupported by the evidence, he contends that he suffered a denial of due process which rises to the level of palpable error. As such, he seeks a reversal of the judgment of conviction.

We find no error on this issue. First, as Townsend admits, this claim of error is unpreserved. In fact, Townsend affirmatively stated that he had no objections to the instructions tendered by the Commonwealth and thereby concurred with the court giving these instructions. Second, Townsend's reliance on Burnett v. Commonwealth<sup>4</sup> is misplaced. Burnett held in relevant part that the Commonwealth must prove beyond a reasonable doubt every fact necessary to constitute the crime

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<sup>4</sup> 31 S.W.3d 878 (Ky. 2000).

with which a defendant is charged and that the jury instructions must be worded to insure a unanimous verdict.

Here, Townsend contends the instructions permitted him to be found guilty under alternate theories of principal or complicity liability. In Burnett, the jury instruction “[was] circular in that it required the jury to find Burnett guilty of trafficking in cocaine if it believed from the evidence that he trafficked in cocaine. In other words, this instruction failed to set forth the statutory elements of the trafficking statute.”<sup>5</sup> This case is distinguishable as evidence was adduced in the instant case to support the theory that Townsend committed the crimes or in the alternative that he was complicitous in Davis’s commission of those acts. The evidence at trial was that Townsend was in possession of the keys to the vehicle containing Lawless’s property, was seen driving the vehicle, and admitted to being with Davis on the morning of the crime. When arrested, he exhibited signs of intoxication and claimed not to have remembered how he ended up sleeping on McMullin’s couch. It would not be clearly unreasonable for a jury to conclude that the two men were acting in complicity with one another.

For the foregoing reasons, we affirm the judgment of the Casey Circuit Court.

ALL CONCUR.

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<sup>5</sup> Id. at 881.

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