

RENDERED: DECEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002222-MR

MICHAEL DAUZAT

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 05-CR-00178

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, JUDGE; ROSENBLUM, SENIOR JUDGE;¹ MILLER, SPECIAL JUDGE.²

MILLER, SPECIAL JUDGE: Michael Dauzat (Dauzat) brings this appeal from a judgment of the Christian Circuit Court entered upon a jury verdict finding him guilty of second-degree burglary and violation of a protective order. Dauzat contends that he was entitled to a directed verdict upon the second-degree burglary charge because he had a right to enter the victim's

¹ Senior Judge Paul W. Rosenblum, 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.

residence, and, therefore, did not unlawfully enter the dwelling. For the reasons stated below, we affirm.

The appellant married Robin Dausat in 1992. Two years later the couple moved into a mobile home located at 4001 Ashley Court in Hopkinsville, Kentucky. The mobile home was the appellant's residence for nine years.

In 2003 the couple decided to divorce. According to Robin's testimony, in connection with the decision to divorce, Dausat vacated the marital residence in January 2003. While the original intention was for an uncontested divorce, Dausat later refused to sign the dissolution papers. Later in 2003, Robin obtained an Emergency Protective Order (EPO) against the appellant. On December 16, 2003, a Domestic Violence Order (DVO) was issued against the appellant, effective through December 15, 2006.

In February 2005, the divorce still had not gone through. On February 14, 2005, the appellant went to the Ashley Court residence during the evening hours. The appellant entered into the residence and damaged property therein. He also threw various items out of the mobile home, including a computer, a recliner, glass candles, and a dog carrier with a small, live dog inside. An open pocket knife was found on the ground among the various items the appellant had thrown out of the trailer.

Based upon the foregoing, the appellant was indicted for first-degree burglary, KRS³ 511.020, and violation of an emergency protective order, KRS 403.763. Following a jury trial, the appellant was convicted of second-degree burglary KRS 511.030,⁴ and violation of the protective order.⁵ This appeal followed.

Before us, Dauzat contends that the trial court erred when it failed to grant him a directed verdict upon the burglary charge because he entered the dwelling at issue - the former marital residence - lawfully. According to Dauzat, though he had vacated the marital residence over two years prior to the incident and a DVO had been entered prohibiting him from being within 500 feet of Robin or anyone in her household, he nevertheless could lawfully enter into the trailer as long as she, or any other member of her household, was not there.

When ruling on a motion for a directed verdict of acquittal, the trial court is required to consider all evidence presented in the light most favorable to the Commonwealth. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). On appeal, the standard of review is whether or not it was clearly

³ Kentucky Revised Statutes.

⁴ The Commonwealth agreed to a directed verdict on the first-degree burglary charge because the open pocket knife, which originally supported the greater offense, could not be linked-up with Dauzat.

⁵ Dauzat does not challenge his conviction for violating the protective order.

unreasonable for the fact finder to find guilt. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983).

"A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." KRS 511.030(1).

Upon viewing the evidence in the light most favorable to the Commonwealth, a reasonable jury could have determined that Dauzat had abandoned the Ashley Court mobile home as his residence and, as such, was no longer privileged to enter the dwelling without the permission of its resident, Robin. Dauzat had vacated the residence over two years previously, and he cites us to no authority that an estranged husband, during the pendency of a divorce, retains an indefinite privilege to enter into the former marital residence. No evidence was presented that Robin had given Dauzat permission to enter the residence, and, in consideration that Robin had obtained a DVO requiring him to remain at least 500 feet from her or any member of her household, a reasonable jury could conclude that Dauzat had no such permission.

Dauzat rests his defense upon the fact that the DVO did not specifically require him to vacate or stay away from the residence. However, as noted above, such was not necessary to extinguish his privilege to enter into the marital residence. By Dauzat having vacated and abandoned the residence two years

prior, a reasonable jury could conclude that that privilege was extinguished and that Dausat knew it. If Dausat had any lingering notions that he retained such a privilege of entry, the obtaining of the DVO should have dispelled it. Under these circumstances, any reasonable person should have known that he was not invited into the dwelling.

Finally, a reasonable jury could have concluded that Dausat entered into the dwelling with the intent to commit a crime, i.e., to vandalize Robin's property, a violation of the third-degree criminal mischief statute, KRS 512.040.⁶ Such intent may be inferred by the fact that he did same.

For the foregoing reasons the judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Angela Johnson
Assistant Public Defender
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

David W. Barr
Assistant Attorney General

⁶ (1) A person is guilty of criminal mischief in the third degree when:
(a) Having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property. KRS 512.040(1)(a).