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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001572-MR

HARVEY BRUMMETT — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 04-CR-00255

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Harvey Brummett appeals from a final judgment of the Bell Circuit Court sentencing him to five years for Theft by Failure to Make Required Disposition of Property over $300.00, enhanced to ten years as a Persistent Felony Offender in the Second Degree. Having considered the briefs of counsel, as well as the trial record, we affirm.

On April 1, 2004, the Appellant contracted with Zion Rental in Middlesborough, Bell County, Kentucky, to rent, with the agreement to purchase, a big screen TV. The TV was valued at $2,028.60. In addition to the value of the TV and various fees, Brummett also agreed to pay a damage waiver fee. If the TV was

destroyed by fire, lightning, wind storm, flood or smoke, he would not be liable for any remaining payments. He was required to cooperate with investigating authorities and to report the loss to Zion within ten days of the event causing the loss. Although required to pay $157.89 by the fifth of each subsequent month, the Appellant paid late in May, then was timely in June and July.

On August 3, 2004, Appellant's rental cabin caught fire. The Bell County Volunteer Fire Department responded and, after extinguishing the fire, completed a report. This report listed the real property damage as $3,000.00 and damage to contents of the property as $1,000.00. No specific items were noted on the report. Brummett submitted this report to Zion on August 6. On August 9, Gary Bryant, the regional manager for Zion, examined the rubble. He was unable to find any evidence of a destroyed big screen TV.

Members of Zion's management spoke with Carlos "Cork" Johnson, the landlord who owned the cabin Appellant rented. Johnson advised that in late July, Appellant asked him to help move a big screen TV to the home of Doug Smith. When contacted on or about August 12, 2004, Smith confirmed that the Appellant had sold him a big screen TV in late July. Smith said he traded a 1989 Cavalier, valued at $500.00, and paid an additional $75.00 for the TV.

Both Johnson and Smith testified at trial in June 2006, that the Appellant told them he owned the TV and had recently purchased it from Wal-Mart using a recent award of social security money. Smith further testified that he resold the TV only three weeks after he purchased it (and presumably before August 12 when he was interviewed by Zion's representative) for only $400.00. He could not remember the

name of the family who purchased the TV. In addition to Smith and Johnson, representatives of Zion testified at trial and several documents, including the application to rent, the rental/purchase agreement and the waiver of liability agreement, were introduced. While the rental agreement included a serial number of the big screen TV, there was no description as to the manufacturer or brand name.

At the close of the Commonwealth's case, the Appellant moved for a directed verdict of acquittal citing a failure to identify the TV sold by him to Smith as the same TV he rented from Zion. After deciding to present no additional evidence, the Appellant renewed his motion for a directed verdict. Both motions were denied by the trial court. Subsequently, the jury found the Appellant guilty of the charged offense. Following the sentencing phase, they recommended a punishment of five years, to be enhanced to ten years as a Persistent Felony Offender in the Second Degree. On July 17, 2006, the trial court sentenced the Appellant to serve the ten-year sentence in accordance with the jury's recommendation. This appeal followed.

The only issue preserved for this Court's consideration is Appellant's claim the court failed to direct a verdict of acquittal based on the insufficiency of the evidence.

> 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Circumstantial evidence alone and reasonable inferences to be drawn therefrom may be sufficient to support a conviction for theft. *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). While it is true that no witness identified the TV sold by the Appellant to Smith as being the same one the Appellant rented from Zion, there were other circumstances for the jury to consider.

The Appellant timely notified Zion that there had been a fire at his cabin and the TV had been damaged or destroyed. The only reason he would have done so was to take advantage of the waiver of liability provision of the rental agreement. The jury could then consider the unlikelihood some third party would come onto the property to remove a big screen TV that had been damaged or destroyed by fire. Further, the report of the fire department makes no mention of what would likely appear as a substantial item to be found in the rubble – the shell of a big screen TV. Likewise, the value of the contents listed in the house was less than one-half of the value of the TV. There was no evidence of the Appellant owning or renting two separate big screen TV's which would support the Appellant's theory that perhaps a different big screen TV was sold to Smith. The Appellant demonstrated no bias on the part of either Johnson or Smith to suggest their story he sold the big screen TV to Smith, just prior to the due date of the next payment, as well as just before the fire, was false.

Given the evidence as a whole, it was not clearly unreasonable for the jury to find Brummett guilty of Theft by Failure to Make Required Disposition of Property over $300.00. Accordingly, we affirm the judgment of the Bell Circuit Court.

ALL CONCUR.

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