

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001954-MR

LAURA ELIZABETH DAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CR-00049

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, TAYLOR AND WINE, JUDGES.

TAYLOR, JUDGE: Laura Elizabeth Day brings this appeal from an August 15, 2006, judgment of the Fayette Circuit Court upon a jury verdict finding her guilty of receiving stolen property over \$300.00, theft of a controlled substance, and second-degree criminal mischief. We affirm.

This case stemmed from a domestic dispute between Day and Phillip O'Connell. On July 31, 2005, the couple met at Day's home, and O'Connell left his vehicle and keys there. The couple then traveled to Herrington Lake in Day's vehicle. An argument ensued between the two, and O'Connell started walking back to Lexington. Day picked up O'Connell a short time later, and the two continued toward Lexington. The argument soon resumed, and O'Connell again exited the car and walked to Lexington. When he arrived at Day's home the next day, O'Connell discovered his vehicle had four flat tires. He then approached the door of Day's home, and an argument erupted again. While at the door of the residence, O'Connell noticed a "pile" of his personal property setting upon the floor in the home.¹ O'Connell recognized that these items had previously been stored in his vehicle. Apparently, Day had removed those items from O'Connell's vehicle. O'Connell testified that Day said he could enter the residence to retrieve his personal property. O'Connell refused and stated he feared Day's vindictiveness. O'Connell expressly told Day he wanted his personal property returned.

O'Connell attempted unsuccessfully to reinflate his tires using a product known as "fix-a-flat." When he realized there were multiple holes in each tire, he left to get help from a friend. Upon his return, Day taunted him, asking if he needed more "fix-

¹ Phillip O'Connell testified that even though more had been taken from his vehicle, he saw the following items of personal property in Day's living room: a leather jacket, shoes, sunglasses, 3 phone chargers, "scanner bag," clothes, prescription bottle(s), and a UK floor mat. O'Connell could also see his car keys inside her house.

a-flat.” O’Connell realized that she had removed the unused cans of “fix-a-flat” from his vehicle.

The Fayette County Grand Jury indicted Day upon receiving stolen property, theft of a controlled substance, and second-degree criminal mischief. A jury trial ensued. After the Commonwealth’s presentation of its case-in-chief, Day made a motion for directed verdict of acquittal. Ky. R. Civ. P. 50.01. The circuit court denied the motion. Day elected not to present evidence in her defense. The jury ultimately found Day guilty of receiving stolen property over \$300.00, theft of a controlled substance, and criminal mischief in the second degree. The circuit court sentenced Day to two and one-half years in prison for each of the felony charges, to be served consecutively and six months for the criminal mischief charge, to run concurrently. The sentence was probated for five years. This appeal follows.

Day contends the circuit court erred by denying her motion for directed verdict of acquittal upon the offense of receiving stolen property. A directed verdict of acquittal is proper when, drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, the evidence is insufficient to induce a reasonable juror to find the defendant guilty beyond a reasonable doubt. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991). Our standard of review on appeal of the denial of a motion for directed verdict of acquittal is upon consideration of the evidence as a whole, it would be clearly

unreasonable for the jury to find the defendant guilty of the indicated offense. *Com. v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

It is incumbent upon the Commonwealth to prove every element of an offense beyond a reasonable doubt to secure a conviction. Receiving stolen property is codified in Kentucky Revised Statutes (KRS) 514.110 and reads in relevant part:

- (1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

Day argues the Commonwealth failed to prove beyond a reasonable doubt that she did not retain the property with intent to restore it to the rightful owner. To resolve this issue, we must review the evidence presented at trial.

At trial, O'Connell testified that he observed several items of his personal property in Day's home. Previously, these items were stored in O'Connell's vehicle. O'Connell testified that he requested the property returned. Instead of returning the property when requested, Day refused and conditioned the items return upon O'Connell's entry into her home. Further, Steven Michael Billiter testified Day told him she was holding O'Connell's property, hoping to force a reconciliation. Finally, although she had promised to return the property, once she learned O'Connell had a new girlfriend, Day told him he would never see his property again. From this evidence alone, we believe the

jury could reasonably find that Day did not possess an intent to return the property to O'Connell. As such, we hold the circuit court properly denied Day's motion for directed verdict of acquittal upon the offense of receiving stolen property.

Day next argues the circuit court erred by denying her motion for directed verdict of acquittal upon the offense of theft of a controlled substance. Theft of a controlled substance is codified in KRS 218A.1418 and reads, in part:

- (1) A person is guilty of theft of a controlled substance when he unlawfully takes or exercises control over a controlled substance belonging to another person with the intent to deprive him thereof.

Day maintains the Commonwealth failed to prove that O'Connell's prescription bottle(s) that were in his possession actually contained "pills." In particular, she argues:

O'Connell never saw any prescription bottle in appellant's residence. He only said that two prescription bottles were missing.

He never said there were any pills in the bottles. He said he had prescriptions for Loritab and Zanaflex. He never said that any pills were actually in the bottles.

When Billiter testified, he said that he saw a prescription bottle in appellant's residence, on the mantle. The Commonwealth asked him a very leading question, without objection, to the effect of did he see some prescription bottles in O'Connell's name. The follow-up question was whether he was certain O'Connell's name was on them.

Billiter's response was very significant. He said that he was certain of the name that he saw on it, because appellant handed *it* to him. The word "*it*" is singular. That is the word Billiter used. When the Commonwealth asked him how many bottles he saw, he said he didn't remember. But he was the one who used the singular word, "it."

In addition, he only saw a *bottle*. He never said that he saw any pills. The Commonwealth only asked him about bottles, and not pills. The crime here is stealing pills, not bottles. (Emphasis by appellant's counsel).

In this Commonwealth, it is well-established that the jury is permitted to draw reasonable inferences from the evidence. *Robinson v. Com.*, ___ S.W.3d ___ (Ky.App. 2007). In the case *sub judice*, there was direct testimony that O'Connell's prescription bottle(s) were missing, that when O'Connell last possessed them in his vehicle, there were some pills in each bottle, that Day possessed at least one prescription bottle bearing O'Connell's name and that Day handed a prescription bottle bearing O'Connell's name to Billiter within a few days of the theft.² Based upon this evidence, we conclude a jury could reasonably infer that the prescription bottle contained controlled substances. Accordingly, we hold the circuit court did not err by denying Day's motion for directed verdict of acquittal upon the offense of theft of a controlled substance.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

² The record reveals that Steven Michael Billiter was an acquaintance of both Day and O'Connell and assisted O'Connell in retrieving his vehicle.

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