

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-002501-MR

FRED W. FISHBACK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 06-CR-00302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Fred W. Fishback brings this appeal from a November 7, 2006, judgment of the Fayette Circuit Court upon a jury verdict finding Fishback guilty of first-degree burglary. We affirm.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On the afternoon of January 26, 2006, Jennifer Arntzen was in her apartment in Lexington, Kentucky, and heard a “commotion” emanating from outside the apartment. Thereupon, she observed three men with guns. The men were taking personal property from a home next door and depositing the property in a blue Ford Escort parked behind the home. Arntzen called 911 and gave a description of the three men. Arntzen claimed that one of the men was wearing a black jacket and gray shirt. The police arrived some five minutes later.

Lexington Police Officer Bart Morse was the first officer to arrive on the scene. He drove to the rear of the home and observed an Escort parked behind the house. Fishback, David W. Shanks, and Stanley Smothers were standing next to the Escort. Officer Morse then saw Fishback place a rifle inside the parked Escort and a liquor bottle on the ground. Upon approaching the Escort, Officer Morse observed a circular saw, a guitar, and two rifles therein. It appears that the Escort was registered to a niece of Shanks.

Later, it was discovered that the back door of the home had been forcibly opened, and the owner of the home identified the personal property in the Escort as his and as previously being inside his home. The three men were then arrested, which resulted in Fishback’s person being searched. The search yielded a pair of gloves, utility knife, and pocket watches, which were later identified as belonging to the owner of the home.

Fishback, Shanks, and Smothers were indicted by the Fayette County Grand Jury upon the offense of first-degree burglary. Pursuant to an agreement with the Commonwealth, the indictment against Smothers was dismissed in exchange for his

testimony at trial. Fishback and Shanks were tried jointly. The jury ultimately found Fishback guilty of first-degree burglary but acquitted Shanks. By judgment entered November 7, 2006, the circuit court sentenced Fishback to a total of fifteen years' imprisonment. This appeal follows.

Fishback contends that the circuit court committed error by denying his motion for a directed verdict of acquittal upon the charge of first-degree burglary. A directed verdict is proper only when drawing all reasonable inferences from the evidence in favor of the Commonwealth, a reasonable juror could not believe beyond a reasonable doubt that defendant was guilty of the charged crime. *Com. v. Benham*, 816 S.W.2d 186 (Ky. 1991).

The offense of first-degree burglary is codified in Kentucky Revised Statutes 511.020 and reads:

- (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
 - (a) Is armed with explosives or a deadly weapon; or
 - (b) Causes physical injury to any person who is not a participant in the crime; or
 - (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

Relevant to this appeal, to commit the crime of first-degree burglary, a defendant must (1) intend to commit a crime, (2) knowingly enter or remain in a building, and (3) while entering the building or fleeing therefrom, defendant or other participant is armed with a deadly weapon.

Fishback argues that there was never a “positive identification” that he was one of the men going into the home and points out that there was also no physical evidence to prove that he entered the home. In particular, Fishback maintains:

In the motion for directed verdict, Fishback’s counsel noted that there was no positive identification of Fred Fishback being one of the persons apparently going into [James] Butler’s residence. While there was an identification of a subject with a black jacket and a gray shirt, there was a variance in the age of Fishback, 52, from the description of the subject in black and gray described as in his 30’s. Counsel further noted Stanley Smothers never said Fishback went into Butler’s residence and at most only saw him with a rifle in his hands. (TAPE A-2, 16:26-16:28).

....

First, it is apparent that the general descriptions of the 2 men she [Jennifer Arntzen] saw apparently going in and out of the house, and the man that remained outside, was not sufficient to prove beyond a reasonable doubt that Fishback was one of those men. Men in Lexington wearing blue UK jackets or black jackets would not be unusual. Arntzen acknowledged she could not see the door to Butler’s house. Arntzen admitted she had a “bad memory” and was only “90 per cent” [sic] sure the men detained by police were the subjects she observed when she first looked out the window. She never was able to say Fred Fishback was one of the men she saw involved in the burglary.

....

Strangely, although the Commonwealth argues the jury could believe Fishback was involved based on Arntzen’s description, they elected to dismiss the burglary charge against Stanley Smothers, one of the 3 subjects detained who matched the general description given by Arntzen. Smothers really stood in no different position than Fishback under the evidence, other than Fishback being apparently seen holding one of the rifles. Essentially, both Smothers and Fishback testified they happened upon the scene when they went to the alley in response to a statement of another person.

Also, no physical evidence was introduced showing who went into the house. No fingerprints were recovered. Just as Jennifer Arntzen could not say Fred Fishback went into Butler's house, Stanley Smothers also did not say he saw Fishback enter or leave the house.

Fishback's Brief at 10-12.

Considering the evidence in a light most favorable to the Commonwealth, we believe there was more than sufficient evidence to support a conviction for first-degree burglary. There was evidence that Fishback was observed standing by the Escort and placing a rifle into the Escort just minutes after police received the 911 call. Moreover, Fishback was wearing a black jacket, and at trial, an officer testified that Arntzen identified Fishback as one of the two men she saw leaving the home with stolen property. An officer also observed Fishback place a liquor bottle on the ground, and the liquor bottle was later determined to have been taken from the home. Moreover, upon searching Fishback, pocket watches from the home were seized from Fishback's pocket.

Considering the evidence in a light most favorable to the Commonwealth, we believe a reasonable juror could have found Fishback guilty of first-degree burglary. *See Benham*, 816 S.W.2d 186. Although Fishback testified at trial and offered an alternative explanation for his behavior, it is within the sole province of the jury to judge the weight and credibility of evidence. *See Com. v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). As such, we are of the opinion that the court did not err by denying Fishback's motion for directed verdict of acquittal.

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

ALL CONCUR.

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