

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

COMMONWEALTH OF PA,	:	
Plaintiff	:	
	:	
v.	:	CR 370-2004
	:	
JOHN CONFER,	:	
Defendant	:	

OPINION
Issued Pursuant to Pa. R.A.P. 1925(a)

The defendant has appealed the judgment of sentence issued on August 31, 2006. After a jury trial held on May 17, 2005, the defendant was convicted of Theft by Unlawful Taking or Disposition and Receiving Stolen Property.

The defendant asserts there was insufficient evidence to sustain his convictions. The test for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, the evidence is sufficient to prove guilt beyond a reasonable doubt. A court may not weigh the evidence, nor substitute our judgment for that of the fact-finder. The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. Finally, the trier of fact is free to believe all, part, or none of the evidence. Commonwealth v. O'Black, 897 A.2d 1234, 1238-39 (Pa. Super. 2006); Commonwealth v. Bullick, 830 A.2d 998, 1000 (Pa. Super. 2003); Commonwealth v. Lewis, 438 A.2d 985, 986 (Pa. Super 1981).

Theft by Unlawful Taking, 18 Pa.C.S.A. §3921(a), states, "A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." Receiving Stolen Property, 18 Pa.C.S.A. §3925(a), states,

A person is guilty of theft if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.

“Receives” is defined as “acquiring possession, control or title, or lending on the security of the property.” §3925(b).

At trial, Gary McWilliams, owner of Hurwitz Batteries, testified that on August 8, 2003, he had prepared a deposit containing \$320.00 in cash. He was certain of this amount, as he had counted it several times. The cash was in an unzipped bank bag. The bag was in plain view, on a desk in a back office that was accessible from the showroom. The door to the back office was closed but not locked. Mr. McWilliams intended to go to the bank immediately, and called his son, Brian McWilliams, to fill in for him while he went to the bank. Before his son arrived a customer came, and Mr. McWilliams waited on that customer. In the meantime, a Fiamingo moving truck pulled in, and Brian McWilliams arrived shortly after that. The truck contained the defendant and another individual, Rick Rafter. Brian Williams worked on the moving truck, while Gary Williams was called next door to help his tenant who was locked out. When Gary Williams returned for the bank bag and went to the bank, the bank counted the money and told him there was only \$180.00 in cash; \$140.00 was missing. Gary McWilliams checked everywhere for the missing money, but could not locate it.

Later, Gary McWilliams received a phone call from Mike Fiamingo, who told him the money had been stolen by the defendant. Mr. McWilliams called the police, which resulted in the charges being filed against the defendant.

Brian McWilliams testified that when he arrived at the business, the Fiamingo truck was parked outside. No one was in the truck, but he saw two individuals in the showroom, through a window. He parked his car and entered the warehouse and showroom, but no one was in either place. The two individuals then re-entered the showroom, and told Brian McWilliams they wanted him to check the battery in the

truck. All three men then went out to the truck. While Brian McWilliams was checking the truck, the defendant went back into the showroom while Rick Rafter remained with Brian McWilliams. No one else was in the showroom at that time. The defendant later came back out. Brian McWilliams told them the truck needed a new alternator, after which Rick Rafter and the defendant left in the truck. At that point, Gary McWilliams returned from helping his tenant, took the bank bag, and went to the bank.

The preliminary hearing testimony of Rick Rafter, who was unavailable for trial, was read into the record. Mr. Rafter testified that when he and the defendant initially walked into the shop, there was no one around. He then saw "Mr. Hoover" and his son walking into the garage, and followed them. He stood in the doorway asking about checking the batteries in the truck, and was told by Brian McWilliams that he would be right with them. The defendant then came up behind Rick Rafter and told him there was money on the desk inside a room. All three men then went out to the truck and remained there until Brian McWilliams told them the problem was with the alternator. At that point, Rick Rafter and the defendant left in the truck. Shortly afterward, the defendant lifted the top of the ceiling in the truck and pulled twenty dollar bills out of it. Mr. Rafter asked where the money came from and the defendant told him from the shop. The defendant then pulled out a ten dollar bill from his own pocket and told Mr. Rafter that was his half. Mr. Rafter refused the money, but the defendant asked him twice more to take it, and requested that Mr. Rafter not tell anyone about the incident. Upon returning to Fiamingo's, Mr. Rafter notified the owner, Mike Fiamingo about the theft.

The testimony presented by the Commonwealth is sufficient to establish that the defendant unlawfully took \$140.00 in cash from Hurwitz Batteries, with the intent to deprive Hurwitz Batteries of the money. It is also sufficient to establish that he intentionally received the money knowing that it was stolen, with no intention of restoring it to Hurwitz Batteries. The testimony of Gary McWilliams, if believed,

establishes that \$140.00 was missing from the deposit. Although there was some discrepancy between the testimony of Brian McWilliams and Rick Rafter regarding whether or not the defendant went back into the building while Brian McWilliams was checking the truck, both testified that Mr. Rafter and the defendant were alone in the showroom before the truck was being serviced. Clearly, the defendant had the opportunity to take the money. The testimony of Mr. Rafter, if believed, establishes that the defendant told him he took the money, and that half the amount stolen was \$70.00. The testimony of Mr. Fiamingo established that Mr. Rafter reported the theft to him upon returning. The jury clearly believed these witnesses, which it was perfectly free to do.

The defendant next alleges the verdict was against the weight of the evidence. A challenge to the weight of the evidence concedes there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence. A new trial will not be awarded based upon conflicting testimony, but only when the verdict is so contrary to the weight of the evidence as to shock one's sense of justice. Commonwealth v. Bennett, 827 A.2d 469, 481 (Pa. Super. 2003).

As recounted above, the Commonwealth presented a strong case against the defendant and viewing all the evidence presented, the convictions arrived at by the jury do not shock one's sense of justice.

The defendant next contends the court erred in denying the defendant's motion to exclude the preliminary hearing testimony of Rick Rafter in lieu of live testimony, due to the court's determination that the witness was unavailable. Under Pa.R.E. 804(b)(1), a court may admit prior testimony of an unavailable witness "if the party against whom the testimony is now offered . . . had an adequate opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Under §804(a), unavailability as a witness includes situations in which the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the

declarant's attendance . . . by process or other reasonable means." The proponent of the witness must present evidence sufficient to demonstrate a good faith effort to locate the witness and have him present at the hearing.

The court found Rick Rafter to be unavailable because he serving in the military in Iraq, and therefore was physically unable to attend the hearing. Furthermore, defense counsel had an adequate and similar motive to examine Mr. Rafter at the preliminary hearing, as well as a full and fair opportunity to do so.

Finally, the defendant contends the court abused its discretion by imposing a sentence in the aggravated range, based in part upon the defendant's lack of remorse. Sentencing is a matter vested in the sound discretion of the sentencing judge. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. Commonwealth v. Gaddis, 639 A.2d 462, 469 (Pa. Super. 1995). In fashioning a sentence, a judge must "follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa.C.S. §9721(b).

When imposing sentence, this court stated that we had considered the statement of the victim, the defendant's history, and the defendant's lack of remorse. Sentencing order of August 31, 2006. Lack of remorse on the part of the defendant is a valid consideration when imposing sentence. *See* Commonwealth v. Lewis, 911 A.2d 558 (Pa. Super. 2006). At the sentencing hearing, the defendant showed no remorse whatsoever for the theft.

Also of note are the two bench warrants which had to be executed to secure the defendant's presence in court. In one of those instances, the defendant had to be extradited from New York state, and as the defendant did not agree to a waiver of

extradition, a Governor's Warrant had to be obtained. This behavior shows total disregard for the justice system, as well as lack of remorse for his acts.

Regarding the defendant's history, the defendant had a prior record score of five, consisting primarily of a string of thefts dating back to 1996. The defendant had served time in county prison as well as state prison for the thefts. This court believes that the rehabilitative needs of the defendant, who is a habitual criminal offender, are best served by confinement in a state prison. A state sentence in the aggravated range also best serves the community's need to be protected from the defendant.

BY THE COURT,

Date:

Richard A. Gray, J.

cc: District Attorney
Public Defender
Dana Jacques, Esq., Law Clerk
Gary Weber, Esq.