RENDERED: FEBRUARY 20, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002395-MR

TRICHELL CHAPMAN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 02-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON AND VANMETER, JUDGES.

GUIDUGLI, JUDGE. Trichell Chapman ("Chapman") appeals from a judgment of the Pike Circuit Court reflecting a jury verdict of guilty on one count each of third-degree burglary and theft by unlawful taking over $300, and/or acting in complicity with one who committed those offenses. Chapman maintains that the trial court improperly failed to instruct the jury on criminal attempt and that he is entitled to a new trial. We affirm.

On April 10, 2002, the Pike County Grand Jury indicted Chapman and his nephew Mitchell Chapman ("Mitchell") on one count each of third-degree burglary and theft by unlawful taking over $300. The charges arose from an incident occurring on March 31, 2002, at the South Akers Mine No. 4 in Pike County, Kentucky. An employee of the mine, Charles Blankenship ("Blankenship"), would later testify that Chapman came to the mine's office on March 31, 2002 seeking employment. Shortly thereafter, a motion detector activated an alarm and video camera positioned at an outside area of the mine. Blankenship observed the video screen and observed Mitchell carrying three buckets of mining bits owned by the mine. Blankenship confronted Mitchell, took the buckets from him, and told him to get in Chapman's truck. Blankenship then retrieved Chapman from the office and made both parties leave the premises.

Blankenship called the Pike County Sheriff's department, and it was later determined that five buckets of drill bits also had been taken from a separate location near the mine's entrance. An investigation followed, during which Mitchell stated that he was present at the mine and did move three buckets from the door of a trailer to let a dog out, but denied stealing anything. Mitchell apparently later maintained that Blankenship had asked him to move the bits.

The matter proceeded to trial on August 21, 2002, and Chapman and Mitchell each were found guilty of one count of third-degree burglary (and/or complicity) and one count of theft by unlawful taking over $300 (and/or complicity).[1] They were sentenced to four years and six months on each count, to be served consecutively for a total sentence of nine years. Sometime thereafter, Mitchell died. Chapman appeals from the judgment reflecting the jury verdict and sentence.

Chapman now argues that the trial court committed reversible error in failing to instruct the jury on the offense of criminal attempt. He maintains that no evidence was adduced at trial supportive of the charge that he stole any mining bits, and claims that the law requires an instruction on lesser included offenses where proof exists upon which the jury may infer guilt on the lesser offense. Though admitting that the argument is not preserved for appellate review, he argues that the failure to properly instruct the jury constitutes palpable error and he seeks an order reversing his conviction and remanding the matter for a new trial.

We have closely studied the facts, the law, and the arguments, and find no basis for tampering with the judgment on appeal. Chapman readily admits that his argument is not

[1] The instructions were worded in such a way that the jury could find that the defendants either committed the charged offenses, or acted in complicity with one who committed the offenses.

preserved for appellate review as no objection was made at trial to the tendered instructions. As such, the error in not subject to appellate review unless it rises to the level of palpable error. RCr 10.26.

Palpable error requires a showing of error affecting the substantial rights of a party to such a degree that manifest injustice has resulted. Id. This has been interpreted to mean that one must show that a substantial possibility exists that the result of the trial would have been different but for the alleged error. Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

Having examined the trial record, we cannot conclude that a substantial possibility exists that but for the alleged error Chapman would have been found not guilty of burglary or theft by unlawful taking, and/or complicity. By offering evidence at trial that Mitchell unlawfully entered a building and removed drill bits, the Commonwealth presented proof upon which the jury could have reasonably concluded that he committed the crimes of burglary and theft by unlawful taking. Similarly, testimony was given that Chapman acted in complicity with Mitchell by bringing Mitchell to the mine and attempting to distract Blankenship while Mitchell committed the crimes. Since the record contains evidence sufficient to support the jury's guilty verdict, we cannot conclude that a substantial

possibility exists that the outcome of the trial would have been different if the jury had been instructed on the charge of attempt.

Arguendo, even if the alleged error were reviewable, we would not find that it forms a basis for reversing the judgment on appeal. Again, sufficient evidence was tendered at trial to reasonably support the jury's verdict of guilty on the charges of third-degree burglary and theft by unlawful taking, and/or complicity to commit those crimes. Thus, even if the trial judge should have instructed the jury on criminal attempt, we would not find that the error supports the relief sought as the outcome of the proceeding would have been no different absent the error.

For the foregoing reasons, we affirm the final judgment of the Pike Circuit Court.

ALL CONCUR.

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