

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001779-MR

ALLAN D. FERGUSON, JR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 02-CR-00655

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER AND VANMETER, JUDGES.

BARBER, JUDGE: Appellant, Allan D. Ferguson, Jr., (Ferguson), appeals from his conviction of second-degree burglary. The jury recommended five years incarceration and the court imposed sentence accordingly. The sole issue on appeal is whether the court erred by failing to give an instruction on theft by unlawful taking in addition to an instruction on second-degree burglary. We reject Ferguson's contention and affirm the judgment of conviction.

The evidence introduced at trial was that in May 2002 Thomas Woods and his family's home was burglarized. The

perpetrator took Mr. Woods' cellular telephone, wallet, palm pilot, and also took some raffle tickets and cash all laying on an island in the kitchen. Mr. Woods notified the police. Subsequent investigation conducted by calling numbers that appeared on Mr. Woods' cell phone bill, but that Mr. Woods did not make, led to Ferguson.

Ferguson told several people that he had either received the cell phone from another individual or that he took the cell phone during the commission of a burglary. Other witnesses testified that they received calls from Ferguson made with the cell phone. There is no doubt that the cell phone Ferguson used belonged to Thomas Woods. In addition, there was testimony that Ferguson admitted committing the burglary.

Although the case against Ferguson is largely circumstantial, the jury is permitted to draw reasonable inferences from those circumstances. It has also been held that where there is a breaking and entering and taking of property that is subsequently found in the possession of the defendant, the case is submissible to the jury on a charge of burglary. Dillingham v. Commonwealth, Ky., 995 S.W.2d 377, 380 (1999) (quoting Jackson v. Commonwealth, Ky., 670 S.W.2d 828, 830, *cert denied*, 469 U.S. 1111, 105 S.Ct. 791, 83 L. Ed. 2d 784 (1985)).

Based on the evidence outlined above, Ferguson's counsel requested the court give an instruction to the jury not

only on second-degree burglary but also on theft by unlawful taking. Ferguson's theory below and on appeal is that the jury could believe that Ferguson took or received this property but did not commit the burglary. Thus, the request by counsel for the instruction was made in terms of instructing the jury on a lesser-included offense.

The general rule in Kentucky is that a defendant is entitled to have the jury instructed on his theory of the case. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 549 (1988). A lesser-included offense, while not a defense in technical terms, is considered a defense against the higher charge. Slaven v. Commonwealth, Ky., 962 S.W.2d 845, 856 (1997). A lesser-included offense is one that is proven by showing the same or less than all of the elements required to establish the greater charged offense. Colwell v. Commonwealth, Ky., 37 S.W.3d 721, 726 (2000).

The problem for Ferguson is that the Kentucky Supreme Court has definitively held that the crime of theft by unlawful taking is a separate and distinct offense from second-degree burglary. Campbell v. Commonwealth, Ky., 732 S.W.2d 878, 880 (1987). See also Phillips v. Commonwealth, Ky., 679 S.W.2d 235, 236 (1984). Thus, theft by unlawful taking is not a lesser-included offense of second-degree burglary, and the circuit court properly refused to tender the instruction.

Therefore, the judgment of conviction is affirmed.

ALL CONCUR.

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