

RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002125-MR

CARMELO JOSE MARTINEZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 03-CR-00663

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: JOHNSON AND TAYLOR, JUDGES; MILLER, SENIOR JUDGE.¹

TAYLOR, JUDGE: Carmelo Jose Martinez brings this appeal from a September 16, 2003, judgment of the Fayette Circuit Court. We affirm.

On April 20, 2003, Lexington police officer Jamie Johnson responded to a security alarm at Roger's Restaurant. Upon arriving at the restaurant, Officer Johnson heard breaking glass and observed Martinez throwing cases of beer through a

¹ Senior Judge Miller 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.

rooftop skylight. Officer Johnson confronted Martinez, who then exited the restaurant through the skylight, jumped from the roof, and fled. Following a brief foot pursuit, Martinez was arrested and charged with third-degree burglary. He was later charged with the additional crime of theft by unlawful taking, under \$300.

Martinez testified that he was a binge drinker, and was drunk at the time he was arrested. He stated he did not remember much of the day's events, though he did remember being pursued by the police. However, Officer Johnson testified at trial that in his opinion, Martinez was not under the influence of alcohol. A second police officer at the scene, Officer Risen, also testified that Martinez had not been under the influence of alcohol at the time of the arrest. He stated Martinez's speech was not slurred, nor was Martinez staggering or swaying.

At trial, the jury was instructed on the elements of third-degree burglary, as well as the lesser offense of second-degree criminal trespass. The jury was also instructed on the elements of theft by unlawful taking, under \$300, and the elements of criminal attempt to commit a theft by unlawful taking, under \$300. Furthermore, the jury was instructed that Martinez could not be found guilty of third-degree burglary or theft by unlawful taking, under \$300, if the jury found he was

too intoxicated at the time he committed the offense to form the requisite intent.

The jury found Martinez guilty of both third-degree burglary and theft by unlawful taking under \$300. Martinez was sentenced to one year and seven months in prison, with the terms to run concurrently. This appeal follows.

Martinez first argues that he was too intoxicated to form the requisite intent to commit burglary and was entitled to a directed verdict of acquittal. A directed verdict is proper if, under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

Kentucky Revised Statutes (KRS) 511.040(1) states, "[a] person is guilty of burglary in the third degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building." In Hedges v. Commonwealth, Ky., 937 S.W.2d 703, 706 (1996), the Kentucky Supreme Court held that, "[t]o constitute burglary, the requisite specific intent must exist at the time of the breaking and entry" (quoting 12A C.J.S. Burglary §41 (1980)). Moreover, it is well established that, "[i]ntoxication, whether voluntary or involuntary, is a defense to an intentional crime if the effect of the intoxication is to completely negate the element of

intent" McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 934 (1994).

In this case, Martinez was in Roger's Restaurant on a day when it was not open to the public. He was not an employee of the restaurant, nor did he have permission from the restaurant's owners to be on the premises. He was discovered by a police officer removing cases of beer through a broken sunlight on the restaurant's roof after a security alarm at the restaurant sounded. Based on these facts, it is clear the jury had ample evidence to find that Martinez broke into and unlawfully entered Roger's Restaurant.

Thus, our task is to determine whether the evidence properly established that Martinez had the requisite intent to commit a crime while in the restaurant. Officer Johnson and Officer Risen both testified that Martinez was not under the influence of alcohol at the time of his arrest. Martinez countered that he was in fact under the influence of alcohol, and as a result was unable to form the intent to commit a crime.

The jury was instructed that Martinez could not be found guilty for burglary third-degree if he was intoxicated at the time the incidents occurred. After listening to the conflicting testimony of the witnesses, the jury found Martinez guilty of third-degree burglary; thus, Martinez's intoxication defense was implicitly rejected. As the evidence was

conflicting, the jury could have reasonably found that Martinez possessed the requisite intent. Therefore, we reject Martinez's argument that he lacked the requisite intent to commit third-degree burglary.

Martinez's second argument is that he could not have been found guilty of attempt to commit theft by unlawful taking under §300 because the owner of the beer was not deprived of the property. We disagree.

KRS 514.030(1) states, "a person is guilty of theft by unlawful taking or disposition when he unlawfully: (a) Takes or exercises control over movable property of another with intent to deprive him thereof" The owner's deprivation need not be permanent, nor for an extended period. In Commonwealth v. Day, Ky., 599 S.W.2d 166, 169 (1980), the Kentucky Supreme Court stated:

Where a person is shown to have exercised control over the property of another with the intent to deprive him of that property, and no statutory defense under KRS 514.020 such as a claim of right to the property or a right to acquire the property creates at least a reasonable doubt in the mind of the jury, that person may be convicted of the crime of theft by unlawful taking.

In a later case, the Supreme Court further held that the "taking and carrying away" element of theft "may be established by merely showing that the thief had control of the stolen property

for a second." Smallwood v. Commonwealth, Ky., 438 S.W.2d 334, 335-336 (1969).

The record indicates that the beer Martinez threw onto the roof of Roger's Restaurant was recovered in full. Thus, Martinez argues that the owner of the restaurant was not "deprived" of the beer in the sense that he was able to reclaim all of his property. However, when Martinez broke into Roger's Restaurant and removed the cases of beer onto the roof, he exercised control over the property, impliedly with the intent to deprive the owners of possession. Although Martinez's control over the beer was short-lived, the fact that he took the beer out of the restaurant and exercised control over it is sufficient to establish guilt pursuant to KRS 514.030. Therefore, the jury properly found Martinez guilty of theft by unlawful taking, under \$300.

Finally, Martinez argues that the trial court erred by failing to instruct the jury on the definition of "voluntary intoxication." The court did instruct the jury upon "intoxication" and gave the definition of intoxication as found in KRS 501.010(2). We point out that that this issue was not preserved for appellate review. As such, we are unable to conclude that palpable error resulted. Ky. R. Crim. P. 10.26. Simply put, we think the court's definition of intoxication fairly instructed the jury upon the law.

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

ALL CONCUR.

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