

RENDERED: JANUARY 28, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002369-MR

MICHAEL JOSEPH TRUGLIA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00250

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Michael Joseph Truglia brings this appeal from an October 22, 2003, final judgment on a jury verdict in the Fayette Circuit Court convicting him of theft by unlawful taking and of being a persistent felony offender. We affirm.

In March of 2003, the Fayette County Grand Jury indicted appellant for theft by unlawful taking over \$300.00 (Kentucky Revised Statutes (KRS) 514.030) and with being a first-degree persistent felony offender (KRS 532.080). These

charges stemmed from appellant placing a DVD player into a shopping cart at a K-mart store in Lexington and then attempting to leave the store with the DVD player in the cart. A jury trial ensued, and appellant was found guilty of both charges. By judgment entered October 22, 2003, the circuit court sentenced appellant to a total term of fifteen years' imprisonment. This appeal follows.

Appellant initially contends the circuit court committed error by denying his motion for directed verdict of acquittal upon the charge of theft of unlawful taking over \$300.00. On appellate review, the test of directed verdict is if under the evidence as a whole it would be clearly unreasonable for a jury to have found guilt. Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991).

Theft by unlawful taking is codified in KRS 514.030 and reads, in relevant part, as follows:

[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

Appellant specifically asserts the Commonwealth failed to offer any evidence to demonstrate that he exercised control over the DVD player as required by KRS 514.030. The Commonwealth presented K-Mart's loss prevention associate, Michael Moore, as a witness. Moore testified that he observed appellant walk into

K-Mart's electronic department with a shopping cart and place a DVD player into his shopping cart. He went to the front of the store with the DVD player and approached the service desk to ask for a cash refund for the DVD player. When his request was denied, appellant then pushed the cart, with the DVD player in it, out the front door. Moore stopped appellant in the entryway of the store and told him to go back into the store.

We believe the above evidence is sufficient to demonstrate appellant exercised control over the DVD player with intent to deprive K-Mart of its property. Indeed, appellant picked up the DVD player and placed it into his cart. This evidence alone is sufficient to establish that appellant exercised control over the DVD player. As to whether he did so with the intention to deprive K-Mart of its property, the evidence that he attempted to leave K-Mart store with the DVD player in his cart is sufficient for a jury to have reasonably concluded that he did so with the intent to deprive K-Mart of the DVD player. Upon the whole, we are of the opinion that it was reasonable for the jury to have found appellant guilty of theft by unlawful taking under KRS 514.030; thus, appellant was not entitled to a directed verdict of acquittal.

Alternatively, appellant argues the circuit court should have instructed the jury upon criminal attempt to commit theft by unlawful taking. Appellant contends the circuit court

should have "preemptively" instructed the jury upon criminal attempt and that criminal attempt constituted a lesser-included offense. In Neal v. Commonwealth, 95 S.W.3d 843 (Ky. 2003), the Supreme Court held that "[a]n instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." Id. at 850 (citation omitted).

Appellant contends he was entitled to the attempt instruction because he was unsuccessful in attempting to leave K-Mart with the DVD player. According to K-Mart employee Moore's testimony, appellant was stopped in the entryway between the doors leading into the store and the doors leading outside of the store. From this testimony, a reasonable juror could believe that appellant intended to leave the store with the DVD player. Moreover, it is unnecessary that appellant leave the store. KRS 514.030 only requires appellant exercise control over the property of another with intent to deprive him thereof. Here, the evidence overwhelmingly demonstrates that appellant exercised control over the DVD player with the intent to deprive K-Mart thereof. Accordingly, we reject appellant's contention that he was entitled to a jury instruction upon attempt to commit theft by unlawful taking.

Appellant lastly maintains the circuit court committed error by allowing "[t]wo witnesses . . . to testify about the *written* price-tag value of the subject DVD player without producing the written price tag" Appellant, thus, argues that the Commonwealth failed to prove a felony offense was committed. This Court notes that appellant's argument upon this issue comprised a total of two sentences. Additionally, appellant cites no case law or statute to this Court to support his bare allegation on this issue. We, therefore, summarily, reject same.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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