

RENDERED: MARCH 31, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000164-MR

DARRYL KEITH BAKER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 04-CR-01056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Darryl Keith Baker brings this appeal from a December 28, 2004, judgment of the Fayette Circuit Court upon a jury verdict finding him guilty of theft by unlawful taking over \$300.00 and with being a persistent felony offender in the second degree. We affirm.

In July 2004, appellant went to Bluegrass Auto Sales in Lexington, Kentucky, and inquired about a 1994 Cadillac Sedan Deville. Leo Linam was a sales agent and met with appellant. Linam and appellant took the car for a test drive and returned to the dealership. Appellant then requested to take the car for

another test drive, but Linam refused to do so. Thereupon, appellant asked for the keys, and Linam complied with the request. Appellant instructed Linam to get out of the car, and a scuffle ensued. Eventually, Linam exited the car, and appellant absconded with the car. Linam contacted the police and reported the car stolen.

The next morning, Officer S. Perrine noticed a stalled car on Man-O-War Boulevard. It was the 1994 Cadillac Sedan Deville, and appellant indicated that he had run out of gas. The officer took appellant to a gas station. At this time, the officer was informed by dispatch that the Cadillac was a stolen vehicle. Officer Perrine placed appellant under arrest.

Appellant was indicted by the Fayette County Grand Jury upon one count of second-degree robbery and for being a persistent felony offender in the second degree. A jury trial ensued, and appellant was found guilty of the lesser included offense of theft by unlawful taking over \$300.00 and was adjudged to be a second-degree felony offender. On December 28, 2004, the circuit court sentenced appellant to a total of ten years' imprisonment. This appeal follows.

Appellant contends the circuit court committed error by denying his motion for a directed verdict of acquittal upon the charge of theft by unlawful taking over \$300.00. A directed verdict is proper if under the evidence as a whole it would have

been 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 Kentucky Revised Statutes (KRS) 514.030 and states, in relevant part, as follows:

(1) . . . 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; or

(b) Obtains immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

"Deprive" is defined as meaning:

(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation; or

(b) To dispose of the property so as to make it unlikely that the owner will recover it.

KRS 514.010(1).

Appellant argues that the Commonwealth failed to prove that appellant intended to deprive Bluegrass of the Cadillac permanently or for an extended amount of time so as to eliminate a major portion of its economic value. Appellant alleges that he never intended to keep the car permanently and that he was returning the car to Bluegrass when it ran out of gas.

We think it axiomatic that intent to deprive may be proved by circumstantial evidence. See Davis v. Commonwealth, 147 S.W.3d 709 (Ky. 2004). In this case, the uncontroverted evidence demonstrated that appellant took the car by force and never indicated to Bluegrass his alleged intention of returning the car. Linam reported the car stolen and the car was only returned after appellant was arrested. Based upon this evidence, we are of the opinion that it was not clearly unreasonable for the jury to have found that appellant intended to deprive Bluegrass of the Cadillac permanently. Thus, we reject appellant's contention that the circuit court erred by denying his motion for a directed verdict upon the offense of theft by unlawful taking over \$300.00.

Appellant next alleges the circuit court erroneously excluded certain testimony of Officer Perrine. Appellant points out that trial counsel asked the officer if appellant's actions indicated that he had the intention of taking the car back to Bluegrass. The Commonwealth objected, and the circuit court sustained the objection. Then, appellant's counsel asked the officer if in his experience when an individual borrows something, he takes it back. Again, the Commonwealth objected, and the circuit court sustained the objection. Appellant contends the circuit court erroneously excluded this testimony.

It is well-established that an avowal is required to preserve for appellate review a ruling excluding testimony of a witness. Commonwealth v. Ferrell, 17 S.W.3d 520 (Ky. 2000). Absent an avowal of the excluded testimony, the appellate court has no basis for determining whether the exclusion of such testimony was prejudicial. Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996). In this case, appellant has not indicated that the excluded testimony of Officer Perrine was preserved through an avowal and has failed to present the excluded testimony to this Court by an avowal. Accordingly, we must conclude this issue was not properly preserved for our review.

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

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Samuel N. Potter
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Kristin N. Logan
Assistant Attorney General of
Kentucky
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Kristin N. Logan
Assistant Attorney General of
Kentucky
Frankfort, Kentucky