

RENDERED: MARCH 9, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000566-MR

JOHN DAVID LUTTRELL

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 04-CR-00042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: John David Luttrell was convicted of theft by unlawful taking under \$300.00 and third-degree burglary following a jury trial in Casey Circuit Court. He was sentenced to a total of five years' imprisonment. On appeal, Luttrell argues that he was entitled to a directed verdict of acquittal. We affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On November 1, 2003, Luttrell entered the Hickory Hills Market in Liberty, Kentucky. Two clerks, Jessica Noe and Jessie Reid, were present at the time. Noe testified that she noticed Luttrell coming out of the store office which was located down a hallway near the restrooms. Luttrell explained to Noe that he was so drunk that he confused the office door with the restroom. Noe then pretended to mop the floor and went back to the office to investigate. Noe found all the desk drawers open and then checked the filing cabinet where the change for the store was kept. The coins were still there, but empty money bags were in the drawer. Noe notified the store owner, Shelton Bailey, who then came to the scene and told Noe to contact the police.

Bailey testified that earlier in the day he had emptied a Kentucky Lottery vending machine and placed the proceeds in the filing cabinet in the office. He estimated that between \$600.00 and \$700.00 was missing. Luttrell was located by police at a nearby restaurant and voluntarily accompanied them to the sheriff's office for questioning. Luttrell denied being at the Hickory Hills Market that day. At trial, Luttrell testified that he was present at the store and admitted being evasive to police about his whereabouts, but claimed not to have denied his presence at the store. Luttrell was identified on a surveillance tape from the store, although the tape did not contain any footage of the office area. One of the officers detected the smell of alcohol on Luttrell and administered a breathalyzer test. Luttrell registered a .107 and was arrested for alcohol intoxication. When Luttrell emptied his pockets, there was a total of \$313.00 divided into three separate wads of money; 168 one-dollar bills, 23 five-dollar bills, and 3 ten-dollar bills.

Luttrell was charged with third-degree burglary and theft by unlawful taking over \$300.00. The trial court found that Luttrell was entitled to an instruction on theft by unlawful taking under \$300.00 because the Commonwealth could not establish a more definite amount that had been taken. Luttrell was ultimately convicted of third-degree burglary and theft by unlawful taking under \$300.00. This appeal follows.

Luttrell argues that he is entitled to a directed verdict of acquittal based on insufficiency of the evidence. The trial court noted that but for the cash found on Luttrell's person, it would have been inclined to grant a directed verdict. Luttrell argues that the mere possession of cash is insufficient to sustain the conviction. We disagree.

The standard for determining whether a defendant is entitled to a directed verdict is well established:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

The evidence in this case demonstrated that Luttrell was present at the scene of the crime. Although Luttrell denied to the jury that he had been in the office, he stated to Noe that he had been in the office confusing it for the restroom. Luttrell's

testimony before the jury conflicted with the testimony of other witnesses and with the statements he had made to police. Luttrell twice denied he was present at the Hickory Hills Market on the day in question. Luttrell originally told police he had won the 168 one-dollar bills in a poker game with Ronnie Crawley. Crawley testified that it was a nickel-ante game and that Luttrell could have won five dollars at most. Luttrell explained this discrepancy by stating that he was acting as the “bank” for the game. At trial, Luttrell presented an alternate scenario to account for the presence of the money. He stated that he exchanged larger bills with a man named Jimmy Johnson because Johnson needed larger denominations to pay his drug dealer. Johnson died before trial. When police were examining the separate wads of money in Luttrell’s pockets, he told police to keep the one-dollar bills “separate from my money.”

This case presents a close question because the evidence in this case is primarily circumstantial. However, circumstantial evidence alone and reasonable inferences to be drawn therefrom may be sufficient to support a conviction. *Blades v. Commonwealth*, 957 S.W.2d 246 (Ky.1997). Viewing the evidence and inferences in the light most favorable to the Commonwealth and leaving questions of credibility and weight to the jury, we conclude that it was not clearly unreasonable to find guilt.

Accordingly, the judgment of the Casey Circuit Court is affirmed.

ALL CONCUR.

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