

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001690-MR

JOSEPH HOLDREN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY MORRIS, JUDGE
ACTION NO. 96-CR-00996

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: EMBERTON, KNOFF AND SCHRODER, JUDGES.

EMBERTON, JUDGE: The appellant, Joseph Holdren, was convicted of theft by failure to make required disposition of property of \$300 or more in violation of Kentucky Revised Statute (KRS) 514.070. On appeal, he alleges that he was given inadequate notice of the crime charged; error in the jury instructions; and, that the evidence was insufficient to submit the case to the jury. We reverse and remand.

The appellant was the president of Elaine's Fine Foods, Inc., a retail grocery store business which included two stores located in Jefferson County. His primary duties included handling the financial affairs of the grocery stores. From

January 1995, to May 1995, Douglas Holdren, appellant's son, served as general manager of Elaine's grocery stores and during the course of his employment served as general manager for a group of stores acquired by Elaine's known as "Markwell's Supermarts."

Douglas approached KIT Federal Credit Union about Elaine's stores selling KIT money orders and entered into a money order trust agreement pursuant to which Elaine's would sell the money order, accept cash from the buyers, and deposit the money at KIT by the close of the following business day.

Accounts were opened on March 20, 1995, for two stores to sell the money orders; a store on Breckinridge Lane and another on Cane Run Road. On June 16, 1995, two other stores began selling money orders. Initially, Elaine's store managers took the deposits to KIT; approximately three weeks after the sales began, however, appellant ordered that he would control the money. The money order deposits were picked up, taken to the Elaine's store on Breckinridge Lane, and Douglas testified, were taken from their sealed bags and deposited into accounts to cover outstanding debts. Eventually, there were more money orders sold than being deposited at KIT resulting in overdraft and losses to KIT of \$23,750.10.

Appellant was indicted on April 29, 1996, and arraigned on May 6, 1996. Count 32 listed "Lee Markwell and/or Markwell's Supermarkets, Inc.," as the alleged victim; after conducting discovery, however, it was discovered that KIT was the victim. On June 7, 1996, the Commonwealth moved to amend Count 32 to

change the name of the victim which motion was served on appellant's counsel and granted by the trial court. On September 6, 1996, a hearing on appellant's motion for a Bill of Particulars was held at which time the Commonwealth set forth its intent to prove that appellant unlawfully deprived KIT of its property. As a further indication of appellant's knowledge that he was charged with a crime against KIT, he noted in his motion for a continuance that he was charged with defrauding KIT.

On the first day of trial Michael Eyckmans testified concerning the sale of money orders from the Breckinridge Lane store. It was not until the second day of trial, when the manager of the Cane Run Road store was asked if he had sold money orders, that appellant objected on the basis that Count 32 referred only to Markwell's money orders and alleged that he was unaware of the amended indictment.

The Commonwealth can amend an indictment at any time prior to trial. Ky. R. Crim. P. (RCR) 6.16. Appellant was given notice of the amendment and acknowledged that he was alleged to have defrauded KIT in his motion for continuance. Appellant had actual notice of the charges, thus, we find no error. Thomas v. Commonwealth, Ky., 931 S.W.2d 446, 448-450 (1996).

Appellant's second contention is that the trial court was required to instruct the jury to find that he acted with a single continuous criminal intent that was part of a general larcenous scheme. Although there was testimony that from March 20, 1995, to June 28, 1995, Elaine's sold \$23,750.10 worth of money orders that were not properly paid to KIT, there was no

evidence as to the date or amount of any single money order claimed to have been sold by Elaine's but not paid to KIT. In the absence of an amount indicating that the amount of any single money order equaled or exceeded \$300, the Commonwealth had to aggregate the thefts to establish a violation of KRS 514.070. Citing Weaver v. Commonwealth, 27 Ky. L. Rptr. 743, 86 S.W. 551 (1905), we stated in Commonwealth v. Caudill, Ky., 812 S.W.2d 158, 159 (1991) that:

If the taking was at one time, then the value of all articles taken at that time could be added together in estimating the degree of the offense. Or if the articles were taken by appellant [defendant] as the result of a single purpose of impulse, though the asportation was at intervals to better suit his convenience, the degree of the offense will not be lessened by the fact that he could not or did not carry away all articles at one load.

The court further stated:

The nature of the transaction must determine whether the offense was one, or whether it was a series of offenses.

If the multiple takings are part single occurrences unrelated to a general larcenous scheme and motivated by separate criminal intent, then the offenses are separate, and if under \$300, constitute a series of misdemeanors. The amount is clearly an element of the offense. The fact finder, therefore, must determine whether the thefts are part of a single scheme or a course of conduct. The trial court was required to instruct the jury to make such a finding.

Appellant also requested that the trial court require the jury to find that he acted with fraudulent intent. The

instruction required the jury to find that appellant intentionally failed to make the required disposition of the money and dealt with it as his own. We find no error in that part of the instruction.

Appellant's final contention is that he was entitled to a directed verdict of acquittal. After reviewing the record, we find that the trial court properly denied the motion for directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Appellant controlled the financial aspects of Elaine's and caused the money orders to be brought to the main office. KIT notified appellant on several occasions regarding the deficiency in the money order account and appellant's son testified that he witnessed appellant take the money order deposits so they could be placed in other accounts. KIT established that the total amount lost was \$23,750.10.

For the reasons stated, we find the jury instructions to be erroneous. This judgment is reversed and the case remanded for a new trial.

SCHRODER, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS.

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