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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001015-MR

JERRY FRITTS — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 08-CR-00198

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Jerry Fritts brings this appeal from a May 27, 2009, final judgment of the Whitley Circuit Court sentencing him to ten-years'

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

imprisonment upon conviction of theft by unlawful taking over $300 and being a persistent felony offender in the first degree. We reverse and remand.

On the morning of November 14, 2008, Gerald Taylor arrived at the construction site of a house he was building for Shawn Manning. Upon his arrival, Taylor heard a vehicle behind the house. Taylor then noticed a truck leaving the property with his scaffolding in the back of the truck. Taylor stopped the truck, grabbed the driver, Jerry Fritts, by the shirt, and pulled the keys from the ignition.[2] Taylor then instructed his son, Tim Taylor, to call 911.

Fritts informed Taylor that Taylor's son, Jason Taylor, gave him permission to borrow the scaffolding. Taylor did not believe Fritts. Taylor detained Fritts until police arrived. The police noticed the back door of the house had been kicked open. Manning later identified copper tubing found in Fritts' truck as being taken from inside the house.[3] Fritts denied entering the home or taking the copper tubing. Fritts testified the copper tubing belonged to him.

Fritts was indicted by a Whitley County Grand Jury upon one count of theft by unlawful taking over $300 as to the scaffolding, one count of theft by unlawful taking under $300 as to the copper tubing, one count of burglary in the second degree, and with being a persistent felony offender in the first degree.

[2] Gerald Taylor and Jerry Fritts had known each other for approximately ten years. In fact, Gerald's son, Jason Taylor, was married to Jerry Fritts' niece.

[3] Fritts was indicted and tried upon theft by unlawful taking (over $300) for theft of the scaffolding and theft by unlawful taking (under $300) for theft of the copper tubing.

Following a jury trial, Fritts was found guilty of theft by unlawful taking over $300 in connection with the scaffolding. Fritts was acquitted of theft by unlawful taking under $300 in connection with the copper tubing and was also acquitted of burglary in the second degree. Thereafter, the Commonwealth offered Fritts a ten-year sentence of imprisonment in exchange for a guilty plea upon the persistent felony offender charge. Fritts agreed and was sentenced to ten-year's imprisonment. This appeal follows.

Fritts initially contends he was entitled to a directed verdict of acquittal upon the charge of theft by unlawful taking over $300 for theft of the scaffolding. In particular, Fritts maintains the Commonwealth failed to demonstrate that the scaffolding was worth over $300.

Upon appellate review of a motion for directed verdict, the standard is whether under the evidence as a whole it would be clearly unreasonable for the jury to find defendant guilty beyond a reasonable doubt. *Com. v. Sawhill*, 660 S.W.2d 3 (Ky. 1983). If so, he is entitled to a directed verdict. *Id.*

In this case, the evidence was conflicting upon the value of the scaffolding. Fritts testified that he had four pieces of scaffolding in his truck and that the total value of the scaffolding was $269. Taylor, on the other hand, testified there were five pieces of scaffolding in Fritts' truck and that the value of the scaffolding was about $300 per set. Taylor estimated the total value of the scaffolding in Fritts' truck to be around $700 – $800. Considering the evidence as a whole, we believe reasonable men could differ upon the value of the scaffolding.

As such, Fritts' contention that he was entitled to a directed verdict of acquittal on the theft by unlawful taking charge over $300 is without merit.

Fritts next contends the trial court erred by failing to tender an instruction to the jury upon the offense of theft by unlawful taking under $300 regarding the scaffolding. Fritts points out that he directly testified that the value of the scaffolding was only $269. According to Fritts, this testimony created a factual issue as to the value of the scaffolding; thus, mandating a jury instruction on the lesser included offense of theft by unlawful taking under $300. Without such instruction, the jury was not given the option of finding Fritts guilty of theft by unlawful taking under $300, as concerns the scaffolding.

Theft by unlawful taking is codified in KRS 514.030 and states, in relevant part, as follows:[4]

> (1) Except as otherwise provided in KRS 217.181 or 218A.1418, 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.
>
> (2) Theft by unlawful taking or disposition is a Class A misdemeanor unless the value of the property is three hundred dollars ($300) or more, in which case it is a Class D felony . . . .

[4] KRS 514.030 was amended to increase the value of property to $500 for a misdemeanor violation effective June 25, 2009. The version relevant to the case *sub judice* is stated above.

The essential and obvious difference between theft by unlawful taking under $300 and theft by unlawful taking over $300 is the dollar amount of the property involved. The trial court only tendered a jury instruction upon theft by unlawful taking over $300. With this in mind, we shall review the relevant evidence introduced at trial regarding the value of the scaffolding.

At trial, Fritts specifically testified that the value of the scaffolding was only $269. Fritts testified as to his qualification to render such an opinion. He stated that he had been employed in the construction business for thirty years and was familiar with the cost of scaffolding. There was, of course, testimony to the contrary. In particular, Gerald Taylor testified that his scaffolding was worth around $700 – $800.

It is the trial court's duty to instruct the jury upon the law of the case. Kentucky Rules of Criminal Procedure (RCr) 9.54; *Webb v. Com.*, 904 S.W.2d 226 (Ky. 1995). A jury instruction upon a lesser included offense should be given where "the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged, but conclude that he is guilty of the lesser included offense." *Id.* at 229 (citing *Luttrell v. Com.*, 554 S.W.2d 75 (Ky. 1977)). Here, Fritts clearly expressed an opinion that the scaffolding was worth less than $300 – only $269. He also appeared to be qualified to express such an opinion. From his testimony, we believe a reasonable juror could find Fritts guilty of theft by unlawful taking under $300. Simply stated, we think the trial court erred by failing to submit an instruction on the lesser included offense. As Fritts neither objected

before the trial court nor preserved this error for appellate review, we must review this error under the substantial or palpable error rule of RCr 10.26. RCr 9.54. Thereunder, an error is reversible only if the substantial rights of the defendant were affected resulting in manifest injustice. RCr 10.26.

Under the facts of this case, we believe the trial court's failure to tender an instruction upon theft by unlawful taking under $300 resulted in palpable error under RCr 10.26. In particular, the only evidence offered at trial regarding the value of the scaffolding came from Fritts and Taylor. Both were in the construction business and were familiar with the costs of scaffolding. Both were qualified to give an opinion as to the value of the scaffolding. Fritts testified the total value was $269 while Taylor claimed it was $700 – $800. Also, as the jury acquitted Fritts upon two of the indicted offenses, it is reasonable to conclude the jury may have believed his testimony as to the scaffolding's value.

Upon the whole, a reasonable juror could certainly find that the value of the scaffolding was under $300. The decision regarding whether to believe the testimony of Fritts or Taylor was an issue of credibility for the jury to decide. *See Webb*, 904 S.W.2d 226. Consequently, we are of the opinion that the trial court's failure to tender an instruction upon theft by unlawful taking under $300 constituted palpable error that affected the substantial rights of Fritts resulting in manifest injustice.

As Fritts was only convicted of theft by unlawful taking over $300, the other issues raised relative to conduct of the trial are rendered moot. In sum,

we reverse Fritts' conviction upon the offense of theft by unlawful taking over $300 and remand for a new trial per the Commonwealth's discretion.

For the foregoing reasons, the final judgment of the Whitley Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

LAMBERT, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING: I respectfully dissent. Kentucky Rules of Criminal Procedure (RCr) 9.54 prohibits raising the issue of error in giving instructions unless there has been a proper objection or unless a proposed instruction has been tendered to the trial court. The rule is not harsh or unfair. Unlike evidentiary objections which must be made on the spur of the moment and in the heat of trial, instructions are considered out of the arena of trial, after counsel has had an opportunity to reflect upon all of the evidence that has been presented and upon the probable interpretation of that evidence by the jury. Counsel has more time to think about getting instructions right and should have fewer excuses if mistakes are made.

If it is palpable error to fail to give an unrequested instruction on a lesser-included offense, in a case where the Commonwealth's proof is weak a defendant's trial counsel may "roll the dice" by giving the jury the choice of either acquitting or felonizing a defendant in a criminal case and then, if the gamble fails,

appellate counsel can claim that the trial court committed palpable error by failing to give the unrequested instruction. Indeed, that exact scenario may have occurred here. Such tactics could conceivably be one reason why our Supreme Court has "recently been beset by numerous cases posing questions concerning erroneous or defective jury instructions." *Stewart v. Com.,* 306 S.W.3d 502, 508 (Ky. 2010).

Eleven years ago our Supreme Court stated that it was "unaware of any authority holding it to be palpable error to fail to instruct on a lesser included offense of that charged in the indictment." *Clifford v. Com.,* 7 S.W.3d 371, 376 (Ky. 1999). According to an unpublished decision, that was apparently still the state of the law as recently as last year. *See Jackson v. Com.,* No. 2008-SC-000063-MR, 2009 WL 3526660, at *3 (Ky. Oct. 29, 2009). I do not agree that this is the case in which justice requires us to create such authority, and accordingly, I respectfully dissent.

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