RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001851-MR

JAKE EMBRY, JR. APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
INDICTMENT NO. 06-CR-00132

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Jake Embry, Jr. appeals the Grayson Circuit Court's judgment convicting him of theft by unlawful taking over $300.00 and of being a persistent felony offender in the first degree. On appeal, Jake argues that the trial court erred in finding his intent to commit the theft of a radiator. Jake also argues that the trial court erred in finding the value of the radiator to be over $300.00. After a careful review of the record, we affirm the judgment of conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

A Grayson County Grand Jury indicted and charged Jake with theft by unlawful taking over $300.00, a Class D felony under Kentucky Revised Statute (KRS) 514.030. Jake was also charged with being a first-degree persistent felony offender under KRS 532.080.

The case was tried before a jury, and the following pertinent facts were adduced at trial. Thomas Glasscock is the co-owner of Lowe's Concrete in Leitchfield, Kentucky. The business is located on a large commercial lot and Glasscock owns several buildings in the surrounding area, including a shop from which he runs a trucking company and a closed-down Ready-Mix plant about 40 feet from his shop. In addition to the buildings, Glasscock owns and keeps some heavy equipment, trucks, and forklifts on the property. A gravel driveway connects two public roads on his lot.

Glasscock testified that parts and metals were scattered on his property, most of which he stated was equipment that could not fit in the shop. He acknowledged that the area in front of the Ready-Mix plant was littered with trash and junk. Glasscock testified the items on his lot may or may not be of any use to him, but all items were his property. Further, he indicated he does not permit anyone to come onto his property and remove metal for scrap, as scrap has value and he has at times sold it himself. Two dumpsters were on the lot, but he does not allow the general public to dump trash anywhere on his property.

Glasscock also testified that some time before the theft in question, the motor in one of his forklifts blew up. The forklift radiator was removed for repair. Glasscock's mechanics placed the radiator outside of his shop approximately ten feet from its door. While it was near other junk, Glasscock stated that the radiator was in good, working order.

Jake and Christina Embry were collecting scrap metal and machinery on Glasscock's property near the old Ready-Mix building. Glasscock was driving past his property when he noticed the Embrys standing on his gravel driveway with their car trunk and all four car doors open. Glasscock drove onto his property and confronted Jake. Jake stated he was there collecting scrap metal and junk. Glasscock saw his forklift radiator in Jake's trunk. Glasscock told Jake that the property was Glasscock's, that Jake was trespassing, and that Jake could not take the radiator or any other pieces of scrap metal from Glasscock's property. Jake apologized, removed the radiator from his car, and left the premises.

Glasscock wrote down Jake's license plate number and identified Jake through vehicle records. Glasscock then swore out a criminal complaint, and a Grand Jury was assembled regarding the complaint. Glasscock testified to the Grand Jury which indicted Jake. Trial consisted only of Glasscock's testimony for the Commonwealth and Christina Embry's testimony for the defense.

After the close of the trial evidence, Jake moved for a directed verdict of acquittal. Specifically, Jake alleged that the evidence was insufficient as to his intent to steal the radiator and that the evidence instead suggested that the radiator

was abandoned. Jake argued that because the Commonwealth did not prove his *mens rea* to commit a crime, he was entitled to a directed verdict.

The circuit court denied Jake's motion. The jury then convicted him on both charges. The circuit court sentenced Jake to a total term of ten years' imprisonment. This appeal followed.

On appeal, Jake additionally contends that there was no reliable testimony or evidence concerning valuation of the radiator. Consequently, Jake argues that the Commonwealth failed to prove an element of the offense charged. Jake concedes that this argument was not preserved in his motion for a directed verdict.[1] Therefore, we must review the resolution of this issue for palpable error.

II. ANALYSIS

A. FAILURE TO GRANT APPELLANT'S MOTION FOR DIRECTED VERDICT

1. STANDARD OF REVIEW

One of the leading cases addressing the sufficiency of the evidence and directed verdicts in criminal cases is *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). According to *Benham*, when a trial court considers a motion for directed verdict, it must draw from the evidence all fair and reasonable inferences

[1] Jake requests that this Court review this issue of valuation because his attorney stated in closing argument that the jury had no way to value the radiator. Claims must be presented to the trial court in order to be preserved for appellate review. *See Hilsmeier v. Chapman*, 192 S.W.3d 340, 345 (Ky. 2006). Jake's failure to address valuation in his motion for a directed verdict means that it may only be reviewed on appeal for palpable error under RCr 10.26.

in favor of the Commonwealth. *Id.* at 187. Furthermore, a trial court is prohibited from granting a directed verdict if the evidence is sufficient to persuade a reasonable juror to believe that the defendant is guilty beyond a reasonable doubt. *Id.* In addition, the trial court must accept the Commonwealth's evidence as true; however, it must reserve questions of credibility and weight for the jury. *Id.* When we review the trial court's decision, we must determine, given the totality of the evidence, whether it would be clearly unreasonable for a jury to find guilt. *Id.* A defendant is entitled to a directed verdict of acquittal on appeal only if a jury finding of guilt is "clearly unreasonable." *Id.*

2. SUFFICIENCY OF THE EVIDENCE REGARDING DEFENDANT'S INTENT TO COMMIT THEFT

In his first claim on appeal, Jake alleges that the trial court erred in not granting him a directed verdict of acquittal. Jake contends that the evidence presented by the Commonwealth failed to demonstrate his specific intent to commit theft, as it was reasonable for him to believe that the radiator was abandoned.

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

> (1) ... a person is guilty of theft by unlawful taking when he unlawfully:
> (a) Takes or exercises control over movable property of another with intent to deprive him thereof...
> (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...

Thus, intent is an element of the crime as codified in KRS 514.030(1)(a). Nevertheless, upon review of the evidence supporting a judgment entered upon a jury verdict, the role of this Court is limited to determining whether the trial court erred in failing to grant a motion for a directed verdict. That is, this Court may only overturn the trial court if, taking the Commonwealth's evidence as true, a finding of guilt is "clearly unreasonable." *Id.*

Glasscock testified that, on the date in question, the radiator was located on his private commercial property about ten feet from the door of his shop. There were two dumpsters on the lot, but the radiator was not in or near the dumpsters. Glasscock stated that he did have "No trespassing" signs up on his lot, but it was difficult to keep them up and he was not sure if they were still up.[2]

Christina Embry testified that she and Jake knew they were on private property when they came upon the radiator. She additionally stated that she knew that the gravel driveway they used to reach the radiator was a private road. She testified that the radiator was loaded into the trunk of their vehicle; they intended to take the radiator; and they intended to sell it for scrap.

It is without question that a person charged with a crime may be convicted solely upon circumstantial evidence. *Newton v. Commonwealth*, 2 S.W.2d 661 (Ky. 1928). When considering Jake's motion for a directed verdict,

[2] Christina Embry testified that she did not see any "No trespassing" signs, that there was no fence to block access, and that there was junk scattered around the area.

the trial court was required to accept the Commonwealth's evidence as true, leaving issues of witness credibility for the jury.[3]

Glasscock's testimony, taken as true, provided circumstantial evidence that Jake intended to steal the radiator and that Jake had reason to know it was not abandoned. The jury could have reasonably concluded that two people, knowingly on private property, did not believe that items found on that property were abandoned. The jury could have also concluded that scrap metals, admittedly worth something to Jake and Glasscock both, could not be removed from private property without the property owner's permission. It was for the jury alone to determine Christina Embry's credibility.

Given the evidence presented, it was reasonable for the jury to have found Jake guilty of theft by unlawful taking under KRS 514.030. The trial court's decision to deny Jake's motion for a directed verdict is without error.

B. VALUATION EVIDENCE

1. STANDARD OF REVIEW

Appellant acknowledges that this claim was not properly preserved for appeal. We must therefore determine whether this claim rises to the level of a palpable error. Under RCr 10.26:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and

[3] Glasscock and Christina Embry provided virtually identical testimony, the key distinction being that Christina Embry denied that she and Jake possessed the intent to commit theft.

> appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"Manifest injustice" means that "a substantial possibility exists that the result of the trial would have been different." *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997). "[I]f upon a consideration of the whole case [the] court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial." *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003) (internal quotation marks and citation omitted). "An error must seriously affect the fairness, integrity, or public reputation of a judicial proceeding in order to be considered palpable under RCr 10.26." *Page v. Commonwealth*, 149 S.W.3d 416, 422 (Ky. 2004) (internal quotation marks and citation omitted).

2. SUFFICIENCY OF THE EVIDENCE OF THE VALUE OF THE STOLEN RADIATOR

Jake next asserts that the Commonwealth failed to prove that the value of the radiator was over $300.00. Thus, he contends that the trial court erred in finding the evidence sufficient to constitute a Class D felony under KRS 514.030(2). He requests that this Court consider whether, in the absence of what he deems sufficient proof as to valuation, the ten-year sentence he received based on this felony conviction constitutes palpable error under RCr 10.26.[4]

[4] Because the radiator was valued at over $300.00, Jake was charged with felony theft. This allowed the Commonwealth to include a first-degree persistent, felony offender charge under KRS 532.080. His sentence was thereby enhanced to ten years imprisonment. Had Jake been convicted of only misdemeanor theft here, the persistent felony offender charge would have been dropped and he would have received a shorter sentence. Jake argues that this difference in sentencing affects his "substantial rights" and constitutes a "manifest injustice" under RCr 10.26.

Relying on *Commonwealth v. Reed*, 57 S.W.3d 269, 270 (Ky. 2001), Jake argues that the Commonwealth was required to prove the market value of the stolen item at the time and place of the theft. It has been well-established that "the testimony of the owner of stolen property is competent evidence as to the value of the property." *Id.* at 270 (citing *Poteet v. Commonwealth*, 556 S.W.2d 893, 896 (Ky. 1977)). However, the owner's testimony "must have sufficient detail for the jury to make a value determination." *Reed* at 270.

In the present case, Glasscock testified regarding the value of the forklift radiator. Jake contends that Glasscock's testimony did not provide the jury with enough information to properly value the specific radiator in question.

Glasscock testified that the Allis Chalmer Company sells a new forklift radiator for $2,600. He further testified that the forklift radiator in question was in good, working order. He stated that it had been placed back into the repaired forklift and was currently being used. Jake did not offer any evidence to contradict Glasscock's testimony.

Jake argues that Glasscock did not directly place a monetary value on his specific radiator at the time of the theft. Jake notes that Glasscock did not state the age of the radiator or speak much to its condition at the time Jake came upon it. He reiterates that the radiator had been left outside for an unspecified period of time. He also takes issue with the fact that the jury was not provided with any pictures of the radiator which could have aided in its valuation.

Given the totality of the evidence, it was reasonable for the jury to conclude that the radiator was worth over $300.00 at the time of the theft. The owner's testimony that the radiator, originally priced at $2,600, was reinstalled and working was sufficient to support the jury's finding of value. Thus, the Commonwealth met its burden of proof regarding the value of the radiator. While additional testimony may have been helpful, its absence does not imply the "substantial possibility that the result would have been any different." *Schoenbachler* at 836. The trial court's sentencing decision does not constitute palpable error under RCr 10.26.

IV. CONCLUSION

Finding no merit to Jake's claims, the judgment of conviction entered by the Grayson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky