

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001434-MR

JOEY RHULE

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 10-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

DIXON, JUDGE: Appellant, Joey Rhule, was convicted in the Clinton Circuit Court of theft by unlawful taking, \$500 or more. He was sentenced to one year's imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

In July 2007, Appellant purchased a new Ford New Holland Tractor. However, by the following summer Appellant had defaulted on his payments and New Holland Credit, the financing company, hired an agent to repossess the tractor. However, when the agent attempted to take possession of the tractor in October 2008, Appellant claimed that it had been stolen. The local sheriff's department filed a report on stolen vehicle on October 17, 2008. Subsequently, Fireman's Fund Insurance Company, Appellant's insurer, paid proceeds of \$16,575 to the finance company for the remaining balance on the purchase price. As part of the insurance settlement, Appellant signed a bill of sale assigning all of his legal rights and title in the missing tractor to the insurance company.

Several months later, Michael Craig observed the tractor at the home of his cousin, Joey Craig, the co-defendant in the case. Michael, unaware that Joey was not the rightful owner of the tractor offered to buy it. After the two reached an agreement on purchase price, Michael drove the tractor to his mother's house where he left it while he went to Florida to do some work.

In February 2010, Michael's mother, Dean Craig, observed a red pickup truck repeatedly driving by her home. When she returned from running an errand later in the day, she noticed the tractor was gone and reported such to the police. Meanwhile, several witnesses, including a police officer, observed Appellant driving a red truck with the lettering "Rhule Farms" and pulling a New Holland tractor. When police officers located Appellant, the lettering had been removed from his truck. Eventually, Appellant took police to another piece of property

were the tractor was located. Appellant claimed the tractor was the one stolen from him and he had gone to retrieve it after seeing it parked at the Craig home.

On March 15, 2010, Appellant was indicted by a Clinton County Grand Jury for theft by unlawful taking or distribution of property over \$10,000. Following a jury trial in June 2011, Appellant was convicted of theft by unlawful taking over \$500. The trial court sentenced Appellant to one year imprisonment and this appeal ensued. Additional facts are set forth as necessary.

Appellant first argues that he was entitled to a directed verdict because the Commonwealth did not prove the market value of the tractor at the time of its alleged theft from the Craig home in 2011. Appellant contends that although the value of the tractor was known at the time of its purchase, as well as when it was stolen from Appellant in 2008, the Commonwealth failed in its burden of establishing that it was worth over \$500 at the time Appellant took it in 2011. We disagree.

The standard for determining whether a directed verdict should be granted is well-settled:

On motion for a 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). “This standard applies whether the evidence is direct or circumstantial.” *Brewer v.*

Commonwealth, 206 S.W.3d 313, 318 (Ky. 2006). “The rule is that if from the totality of the evidence the [court] can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go to the jury even though it is circumstantial.” *Commonwealth v. Sawhill*, 660 S.W.2d 3, 4 (Ky. 1983). *See also Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky.1977). “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.” *Benham*, 816 S.W.2d at 187 (citation omitted).

Appellant was initially indicted for theft of property over \$10,000. However, at the conclusion of the Commonwealth’s case-in-chief, Appellant moved for a directed verdict, arguing that the value of the tractor on the date of the February 2011 theft from Craig had not been proven. The trial court denied the motion, but did rule that the Commonwealth had not presented evidence that the tractor was worth over \$10,000. As a result, the Commonwealth amended the indictment to conform to the proof, and the jury was instructed on theft by unlawful taking over \$500.

We are of the opinion that there was sufficient descriptive testimony that would enable the jury to reach an informed conclusion that the tractor was worth more than \$500 in value. *See Phillips v. Commonwealth*, 679 S.W.2d 235 (Ky.

1984); *Lee v. Commonwealth*, 547 S.W.2d 792 (Ky. App. 1977). The original salesperson, a co-defendant, and the insurance investigator all testified concerning the tractor. The tractor was only two years old, and at the time of the insurance claim had a cash value of over \$16,000 dollars. Further, Michael Craig stated that when he agreed to purchase the tractor from his cousin, it was still worth eight or nine thousand dollars. In fact, the lowest value testified to was \$7,000. Clearly, the Commonwealth produced sufficient evidence that the tractor was over \$500 so as to withstand a motion for a directed verdict.

Next, Appellant claims that he was entitled to a directed verdict because he should have been charged under KRS 514.050 rather than KRS 514.030. We disagree.

Under KRS 514.030, 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.

On the other hand, under KRS 514.050, a person is guilty of theft of property lost, mislaid, or delivered by mistake when:

- (a) He comes into control of the property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient; and

(b) With intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

Under both statutes, the value of the property taken determines the severity of the offense. KRS 514.030(2); KRS 514.050(2).

The Commonwealth's general theory at trial was that the entire series of events beginning with the tractor's disappearance in 2008 was orchestrated by Appellant, with help from Joey Craig, to defraud the insurance company. In support thereof, the Commonwealth presented evidence that the tractor disappeared only after Appellant learned that it was going to be repossessed, and the ensuing insurance claim released Appellant from a debt that he had defaulted on. Thereafter, Appellant unlawfully entered the Craig property and took possession of the tractor that no longer belonged to him.

Appellant concedes that he did not have permission to do so. However, he defends that the tractor was "lost" in that the insurance company did not know where it was, and that he only took it so that he could return it to the rightful owner. Nevertheless, we conclude that viewing the evidence in the light most favorable to the Commonwealth, Appellant's actions of taking the tractor and hiding it on another piece of property, as well as his attempt to alter the appearance of his truck after doing so, support the charged offense under KRS 415.030. *See Ratliff v. Commonwealth*, 194 S.W.3d 258, 275 (Ky. 2006). Thus, Appellant was not entitled to a directed verdict.

Finally, Appellant claims that the Commonwealth engaged in prosecutorial misconduct during closing arguments. Specifically, the prosecutor commented that Michael Craig suffered severe economic loss as a result of Appellant and Joey Craig's actions. Appellant claims that such constituted evidence outside of the record and prejudiced the jury against him. We disagree.

Kentucky courts have consistently held that opening and closing arguments are not evidence and prosecutors are afforded wide latitude during both. In fact, "to justify reversal, the misconduct of the prosecutor must be so serious as to render the entire trial fundamentally unfair." *Stopher v. Commonwealth*, 57 S.W.3d 787, 805 (Ky. 2001), *cert. denied*, 535 U.S. 1059 (2002); *Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995). Michael Craig testified at trial and the jury was aware that he lost several thousand dollars as a result of the criminal actions of Appellant and Joey Craig. As such, we cannot conclude that the prosecutor's reference to Michael's economic loss rendered the trial fundamentally unfair.

For the reasons set forth herein, the conviction and sentence of the Clinton Circuit Court are affirmed.

ALL CONCUR.

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