RENDERED: JANUARY 25, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000651-MR
AND
NO. 2016-CA-001683-MR

ORLANDO J. SAXTON — APPELLANT

v.

APPEALS FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 15-CR-00087

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Orlando J. Saxton, appeals from a judgment of the Graves Circuit Court following a jury trial convicting him of theft by unlawful taking and for being a second-degree persistent felony offender, and sentencing him to a total of eight years' imprisonment. Finding no error, we affirm.

On October 7, 2014, Jason Dickey was headed to a friend's house around the corner from where he lived when he received a phone call from Appellant, who said that he was on his way to come meet Dickey. When Appellant arrived, he was with a group of approximately twelve other men. Dickey began to argue with one of the men in the group, Will Dunbar, and thought he was being set up because Appellant had not told him anyone else was coming with him. Dickey and Dunbar went into the street to fight. As the fight continued, Dickey was hit in the back of the head with something and fell to the ground. The group then surrounded Dickey and proceeded to stomp and kick him. Dickey got up to run to his Cadillac Escalade SUV and realized that it was gone. The group caught up with Dickey and continued to assault him. Around the same time, Dickey's girlfriend, Kayla Belcher, was driving down the street when Dickey's SUV passed her at a high rate of speed. Belcher recognized Appellant as the driver of the SUV. Belcher then drove back towards her and Dickey's home and found Dickey. The police were contacted, and Dickey was taken to the hospital for treatment of his injuries.

Mayfield Police Officer Trever Webb responded to the call regarding Dickey's assault and the theft of his SUV. Officer Webb issued an ATL (Attempt To Locate) on the vehicle as well as information that Appellant was possibly operating the vehicle. Subsequently, Tennessee Highway Patrol located the

vehicle and deployed spike strips to stop it. The SUV hit the spikes and then struck a tree. When officers reached the vehicle, the driver's door was open, and no one was inside it. Appellant was found hiding in an adjacent field a short time later and was arrested.

On June 11, 2015, Appellant was indicted for first-degree robbery and for being a second-degree persistent felony offender. However, shortly before his trial began on March 10, 2016, the Commonwealth moved to amend the indictment to theft by unlawful taking. At the close of trial, a jury found Appellant guilty of both charges and recommended an enhanced sentence of eight years' imprisonment. The trial court entered judgment accordingly. Following the denial of his CR 60.02 motion, Appellant appealed to this Court as a matter of right. Additional facts are set forth as necessary in the course of this opinion.

Appellant first argues that the jury instruction on theft by unlawful taking was erroneous in that it did not include the element pertaining to the value of the item taken. Appellant concedes that this error is unpreserved but requests review under the palpable error standard set forth in CR 10.26. However, the Commonwealth points out that the narrative statement in the supplemental record herein establishes that the Commonwealth and defense counsel, during a discussion at the close of trial, agreed that there was insufficient evidence that the value of Dickey's SUV exceeded $10,000, but overwhelming evidence that it

exceeded $500. As such, the Commonwealth and defense counsel submitted a jury instruction for the theft charge without a value element because such was not an issue.

Based upon the record herein, we conclude that a review for palpable error is not appropriate because Appellant waived his claim to cite this particular issue as error. As noted by our Supreme Court in *Quisenberry v. Commonwealth*, 336 S.W.3d 19 (Ky. 2011),

> Generally, a party is estopped from asserting an invited error on appeal. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky.2006). Noting the United States Supreme Court's distinction, in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), between forfeited errors, which are subject to plain error review, and waived errors, which are not, the Ninth Circuit Court of Appeals has held that invited errors that amount to a waiver, i.e., invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review. *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997). Applying that approach to a case very much like this one, in which the defendant requested a manslaughter instruction as a lesser offense, was convicted of manslaughter, and then appealed on the ground that the manslaughter evidence was insufficient, the Court of Appeals of Maryland held that the defendant's "specific request for a voluntary manslaughter instruction . . . constituted an intentional waiver of the right to argue on appeal that the evidence was insufficient to support the voluntary manslaughter conviction." *State v. Rich*, 415 Md. 567, 3 A.3d 1210, 1218 (2010). We agree.

Id. at 37-38.

In Appellant's case, defense counsel not only failed to object to the given instruction, but, in fact, specifically agreed that the value element was unnecessary in the instruction. The alleged error, therefore, was not merely unpreserved, but was invited, and not subject to palpable error review.

Appellant next challenges the final judgment herein because it states that Appellant was found guilty of theft by unlawful taking – auto. The record reveals that when the Commonwealth moved to amend the indictment, the trial court commented that it would be amended to theft by unlawful taking because theft by unlawful taking-auto does not exist in our statutes. Nevertheless, both the amendment and the final judgment include the word "auto."

Appellant did not preserve this issue and we do not believe it rises to the standard of a palpable error. The jury found Appellant guilty under a properly worded instruction for theft by unlawful taking. That the word "auto" was in the amended indictment and judgment does not affect the validity of either. Any clerical error in the judgment may be corrected. RCr 10.10.

Appellant next argues that he was entitled to a directed verdict on the theft by unlawful taking charge. Appellant contends that the Commonwealth failed to prove that he intended to permanently deprive Dickey of his SUV.

On a motion for a directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991). The standard for appellate review of a denial of a motion for a directed verdict based on insufficient evidence is if, under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, he is entitled to a directed verdict of acquittal. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

> KRS 514.030(1)(a) provides, in relevant part:
>
> Except as otherwise provided in KRS 217.181, 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[.]

Further, KRS 514.010(1) defines "deprive" as: "(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it." Appellant argues that no proof existed to show he had an intent to deprive Dickey of his SUV.

Our Supreme Court recently addressed this issue in *Hall v. Commonwealth*, 551 S.W.3d 7 (Ky. 2018). Therein, Hall was being pursued by police after a Wal-Mart store reported that he had left without paying for merchandise. After the officer pulled over Hall's vehicle, he emerged from it and ran. The officer then pursued Hall on foot. Shortly thereafter, a second officer

arrived on the scene and left her cruiser to join the pursuit. Hall then made his way back to the second officer's cruiser, got in, closed and locked the door. The officer broke the window of the cruiser and reached through in attempt to grab Hall, but he managed to free himself and sped away in the cruiser. A vehicle chase ensued that reached speeds of over 110 mph. Hall was seen turning onto a dirt road that led toward a strip mine before the officers lost sight of him. The cruiser was found abandoned down in a gully off the road. Hall had possessed the cruiser for less than 30 minutes. Three days later, police found and arrested him. He was subsequently convicted of numerous offenses and sentenced to twenty years' imprisonment.

On appeal, Hall argued that the trial court erred in denying his motion for directed verdict on the charge of first-degree theft by unlawful taking, over $500 but less than $10,000 because the Commonwealth failed to prove he intended to deprive the police department of its cruiser. In agreeing with Hall, the Kentucky Supreme Court explained,

> To start, KRS 514.010(1) provides four definitions of deprive: 1) to withhold property of another permanently; 2) to withhold property for so extended a period as to appropriate a major portion of its economic value; 3) to withhold property with intent to restore it only upon payment of reward or other compensation; or 4) to dispose of the property so as to make it unlikely that the owner will recover it. We must determine the applicability of each of these definitions to the facts of this case to determine the correct result in this case. As a

matter of clarification, per the statutory language, we are determining whether Hall had the intent to deprive, not simply whether Hall actually deprived the police of the cruiser.

We shall begin by addressing *intent to deprive* under the third definition of *deprive*, because it clearly does not apply in this case. No evidence exists that Hall intended to withhold the cruiser from the police until he received some sort of payment of reward or other compensation. The same is true of *intent to deprive* under the second definition of *deprive*: No evidence exists that Hall intended to withhold property for so extended a period as to appropriate a major portion of its economic value.

Intent to deprive under the fourth definition of *deprive* warrants some discussion. Recall that Hall disposed of the police cruiser in the middle of a road, albeit on a dirt road off the beaten path, while being chased by officers. Absent any evidence of irrational thinking or incapacitation, Hall had to have known that the police were following close behind. And, recall that Hall took a *police cruiser*, not a random civilian vehicle. No rational or reasonable jury could say that, based on the facts of this case, Hall had the intent to dispose of the police cruiser so as to make it unlikely that the police would ever find it.

Intent to deprive under the first definition of *deprive* provides the source of most debate in this case: Did Hall have the intent to withhold the police cruiser permanently? At first glance, one could say that, by abandoning the police cruiser, Hall relinquished possession of the police cruiser, and therefore did not withhold the property of Hall [sic] *permanently*. But this reading of this first definition of *deprive* mischaracterizes *withhold*. While previous cases have dealt with this issue, a review of those cases exposes this Court's lack of clarity on the meaning of *intent to withhold the property*

of another permanently. We shall attempt to provide that clarity today.

To interpret correctly *intent to withhold property of another permanently* is to say that the defendant intends that the property never be restored to its rightful owner, where intent can be inferred from facts and circumstances. A defendant does not need to maintain actual possession over the taken properly at all times after taking the property—a defendant can possess the *intent to withhold property of another permanently* if evidence exists showing that the defendant intended that the rightful owner never exert actual possession over the property again. In other words, as long as evidence exists supporting the assertion that the defendant intended that the property never be restored to its rightful owner, the defendant need not maintain constant actual possession of the property to be said to have the *intent to withhold property of another permanently*.

A defendant can have the *intent to withhold property of another permanently* even if the defendant abandons the property. The abandonment of property, rather than the restoration of the property to its rightful owner, means that the defendant is still preventing the owner from exerting actual possession over the property, i.e. the defendant is *withholding* the property from the rightful owner. But abandonment does not always mean that the defendant possesses the *intent to withhold property of another permanently*, because evidence could show that the defendant abandoned property with the intent that the property be restored to the rightful owner.

The question we must answer is whether, based on the evidence presented in this case, Hall intended that the police cruiser never be restored to its rightful owner. We think that no rational or reasonable jury can find this to be true.

> It is true that, based on the rules of law espoused in [*Waddell v. Commonwealth*, 2014 WL 2810080 (Ky. 2014)], [*Byrd v. Commonwealth*, 2008 WL 5051612 (Ky. 2008], and [*Caldwell v. Commonwealth*, 133 S.W.3d 445 (Ky. 2004)], this Court should uphold the trial court's denial of Hall's motion for directed verdict and refusal to give the jury a lesser-included jury instruction of unauthorized use of an automobile. But absent a claim by the Commonwealth, with evidence to support that claim, that the defendant truly intended to prevent police from ever recovering the police cruiser, we cannot say that Hall intended that the police cruiser never be restored to the police. No rational person would think that an individual who uses a police cruiser as a getaway car and who abandons that police cruiser in the middle of a road, knowing that police are following close behind, intends that the police Cruiser never again be restored to the police. Instead, we think that Hall was simply trying to evade the police.

Id. at 12-14. (Footnotes omitted) (emphasis in original).

Herein, Appellant testified, and Dickey did not dispute, that he had been given permission to use Dickey's SUV in the past. Appellant's defense was that he only intended to drive the SUV to a safe place and then call the police; however, a man referred to as "Little Mike" jumped in the passenger seat, put a gun to his head and told him to drive. Appellant claimed that "Little Mike" threatened to shoot him if he stopped for the police. However, no evidence was ever produced to corroborate Appellant's story or even identify "Little Mike," and, in fact, Dickey's girlfriend testified that when she passed Appellant in the SUV shortly after he took it, there was no one in the vehicle with him.

We find it significant that unlike in *Hall*, Appellant was initially not being pursued by police but rather simply drove off in Dickey's SUV, which was a private vehicle, not a marked police cruiser. Further, he was apprehended in Tennessee, evincing an intent to clearly leave the state. And although Appellant did eventually abandon the vehicle and flee, he did so only after being forcibly stopped by the spike strips. Based on the facts presented herein, we believe that the Commonwealth produced sufficient evidence that Appellant intended to deprive Dickey of the SUV to withstand a directed verdict and send the matter to the jury. The jury was given the definition of "deprive" and found that Appellant had the requisite intent to be found guilty of theft by unlawful taking. We find that no error occurred.

Finally, Appellant argues that the trial court erred in allowing the Commonwealth to introduce a photograph depicting Dickey's injuries, as well as introduce a gun found in the SUV upon Appellant's arrest. Appellant contends that both were irrelevant and prejudicial, and further that the photograph was improper rebuttal evidence. Appellant concedes that there was no objection to the introduction of the gun but requests palpable error review under RCr 10.26.

A trial court's rulings regarding the relevance of evidence will not be disturbed absent an abuse of discretion. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). The test for abuse of discretion is whether the trial court's

decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Woodward v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

During Dickey's testimony, the Commonwealth had him identify a photograph depicting the lacerations to his head he received during the assault by the group of individuals on the day in question. Defense counsel objected, arguing that Dickey's injuries were irrelevant to the theft by unlawful taking charge, but the Commonwealth maintained that if "there was a discrepancy down the road" it was "significant for the jury to hear" that Dickey was "foggy" because of his injuries. The trial court ruled that the jury could use the photograph to explain why Dickey had trouble identifying any of the perpetrators.

We agree with Appellant that the photograph was not relevant to the theft charge. Dickey acknowledged that he never actually saw Appellant drive off in the SUV, so it was unnecessary to use his injuries as an explanation for his failure to identify any of the perpetrators. Nor are we persuaded by the Commonwealth's citation to *Adkins v. Commonwealth*, 96 S.W.3d 779, 793 (Ky. 2003), for the proposition that the photograph was relevant to "present a complete, unfragmented picture of the crime and investigation."

Nevertheless, we conclude that the introduction of the photograph was harmless error. Appellant admitted to driving away in the SUV and there was no

evidence that he played any part in inflicting the injuries on Dickey. We do not believe that the photograph in any manner contributed to Appellant's conviction for theft by unlawful taking. If Appellant was not prejudiced by the erroneous introduction of the gun, we cannot reverse his conviction for harmless error. *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005); RCr 9.24. Rather, "[o]ur harmless error standard requires 'that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial.'" *Id.* (quoting *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky.1969)[1]).

We likewise find no merit in Appellant's claim that the photograph was improper rebuttal evidence. Appellant argues that at the point the Commonwealth introduced the photograph, Dickey had already testified to his injuries and, thus, there was no testimony or evidence to rebut. Again, Appellant failed to preserve this issue as the only objection raised during trial pertained to the photograph's relevancy. Notwithstanding the procedural deficiency, the record reveals that the photograph was admitted during Dickey's testimony when he was asked if the photograph accurately depicted his injuries. While, as previously noted, we do not believe the photograph was relevant, it was not improper rebuttal evidence.

[1] Overruled on other grounds by *Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983).

Finally, with respect to the Commonwealth's introduction of the gun, our Supreme Court has held that "weapons, which have no relation to the crime, are inadmissible." *Major v. Commonwealth*, 177 S.W.3d 700, 710–11 (Ky. 2005) (citing *Gerlaugh v. Commonwealth*, 156 S.W.3d 747, 756 (Ky.2005)). While the gun would have been relevant had the Commonwealth pursued the original first-degree robbery charge, use or even possession of a weapon is not an element of theft by unlawful taking. Thus, it was an abuse of discretion for the trial court to allow admission of the gun for which no connection to the theft charge was shown.

Notwithstanding, we conclude that any error in this circumstance did not rise to the level of palpable error and was, in fact, harmless. RCr 9.24. There is no reasonable possibility that the gun contributed to Appellant's theft by unlawful taking conviction.

For the reasons set forth herein, we affirm the judgment and sentence of the Graves Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia K. Pearson
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky