

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002385-MR

FLOYD VANCE EVANS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 03-CR-00268

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: Floyd Vance Evans has appealed from the judgment of the Hardin Circuit Court convicting him of Theft by Unlawful Taking over \$300 pursuant to KRS 514.030 and for being a Persistent Felony Offender in the second degree pursuant to KRS 532.080, for which he received an eight-year prison sentence. On appeal, Evans challenges the trial court's denial of his motion for a directed verdict of acquittal. We affirm.

The Hardin County grand jury indicted Evans on one count of theft in relation to an April 7, 2003, incident at the local Wal-Mart store. The grand jury charged that Evans “unlawfully took or exercised control over property valued in excess of \$300.00, belonging to Wal-Mart, Elizabethtown, Kentucky, with the intent to deprive the owner of this property.” He was also charged with being a second-degree persistent felony offender based on a prior felony conviction.

The matter proceeded to trial on August 4, 2005. The Commonwealth presented testimony from Wal-Mart's loss prevention employee, Teresa Skaggs. Skaggs testified that she saw Evans enter the store holding a small item. The standard procedure used when a customer brings in an item to be returned is that the greeter places a pink sticker on the item, the customer walks to the customer service desk, and the customer service employee processes the return and places the pink sticker on the refund receipt when the transaction is concluded. Evans obtained a pink sticker from a door greeter that he placed on the item. Evans began walking toward the customer service desk; however, he abruptly turned and walked through a checkout aisle and into the store. Having been alerted by the door greeter and noticing the activity herself, Skaggs followed Evans through the store, and watched him proceed to the automotive department, where he obtained help from another employee in placing a power washer in a shopping cart. Skaggs then saw Evans place the pink sticker he had obtained from the door greeter onto the power washer, and followed him as he returned to the customer service counter with the power washer. After providing his driver's license for identification purposes, Evans obtained a refund for the purchase price of the power washer in the form of a gift card in

the amount of \$317.96 (the retail price of the power washer at \$299.96 plus \$18.00 in sales tax). Once the transaction was concluded and Evans began to leave the customer service desk, Skaggs approached him and told him that there was a problem with his return. Evans accompanied Skaggs to the back of the store, where Skaggs told him what she saw him do. Skaggs filled out the necessary incident report and had Evans sign a Notification of Restriction from Property form barring him from entering any Wal-Mart or Sam's Club store in the future. Skaggs also called the police. Elizabethtown Police Officer Marty Baker responded to the call, arrested Evans, and took him to the police department for processing before he was transported to the Hardin County Detention Center. A surveillance video from the Elizabethtown Wal-Mart shows Evans entering the store as well as two views of the transaction at the customer service desk.

Evans testified in his own defense and stated that he and his girlfriend, Iesha Billingsley, went to Wal-Mart to obtain a written price quote on a power washer that they and Billingsley's siblings were going to purchase for her father's birthday. Evans further testified that he had never returned any item to Wal-Mart before that date, and did not question the customer service employee's request for his identification and signature on the receipt. Billingsley also testified for the defense, and her version of the events matched Evans' testimony. On rebuttal, the Commonwealth offered evidence that Evans had returned an item to Wal-Mart without a receipt less than two weeks before the April 2003 incident.

The trial court instructed the jury on Theft by Unlawful Taking over \$300, as well as on the lesser misdemeanor charge of Theft by Unlawful Taking under \$300. In

less than thirty minutes, the jury returned a guilty verdict on the felony theft charge. Following the penalty stage, the jury recommended a sentence of eight years. At the sentencing hearing, the trial court noted that Evans had committed the crime while he had been on probation for less than one year from a previous felony conviction. The trial court then sentenced Evans to an eight-year prison term, to run consecutively with the sentence from his prior felony conviction.¹ This appeal followed.

On appeal, Evans argues that the Commonwealth failed to prove that he intended to deprive Wal-Mart of its property, because he did not hide the gift card on his person, leave the store, or attempt to redeem the gift card, and only had the gift card in his possession for a short time before being apprehended. Therefore, he argues that the trial court should have granted his motion for a directed verdict of acquittal as insufficient evidence existed to support the Commonwealth's case. The Commonwealth, on the other hand, maintains that it presented sufficient evidence of Evans' intention to deprive Wal-Mart of its property (the \$317.96 gift card) to allow the matter to proceed to the jury.

Our standard of review in such matters is well-settled in the Commonwealth. In *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), the Supreme Court of Kentucky restated the rule on a motion for directed verdict as follows:

On motion for 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

¹ Evans has also prosecuted a separate appeal from the revocation of his probation, which case has been assigned No. 2006-CA-000072-MR.

reserving to the jury questions as to the credibility and weight to be given to such testimony.

The standard of appellate review 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.” *Id.* citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

Continuing to cite *Sawhill*, the *Benham* court stated, “there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.” *Benham*, 816 S.W.2d at 187-88. With this standard in mind, we shall review the single issue raised in the present appeal.

The General Assembly codified the crime of theft by unlawful taking in KRS 514.030 of the Kentucky Penal Code as follows:

- (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[.]

The Code provides a possible defense to a theft charge in cases where the accused actor can establish that he or she “[w]as unaware that the property or service was that of another[.]” KRS 514.020(1)(a).

In this case, the Commonwealth prosecuted Evans under the first prong of the statute, namely, that he took or exercised control over the \$317.96 gift card he received when he obtained a refund of the power washer with the intent to deprive Wal-Mart of that property. Evans' defense was that the Commonwealth failed to prove the intent element of the crime. He asserts here, as he did below, that he only intended to obtain a price quote for the power washer. Therefore, he was unaware that the gift card he received from the customer service employee was the property of Wal-Mart and for this reason lacked the requisite intent. But as the Commonwealth pointed out in its brief, “[i]ntent can be inferred from the actions of an accused and the surrounding circumstances.” *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988). And the jury is permitted “wide latitude in inferring intent from the evidence.” *Id.* See also *Rayburn v. Commonwealth*, 476 S.W.2d 187 (Ky. 1972).

In reviewing the evidence presented at trial in a light most favorable to the Commonwealth, the trial court clearly had before it sufficient evidence of substance to deny Evans' motion for a directed verdict and allow the case to go to the jury. The testimony of Wal-Mart's loss prevention officer, Teresa Skaggs, established that Evans placed a pink return sticker on an item from the sales floor that he had clearly not purchased, and for which he then obtained a refund in the form of a \$317.96 gift card. To accomplish this, Evans produced his identification and signed the refund receipt, both at

the request of the customer service employee. He then accepted the gift card and started to leave the customer service area when he was apprehended. That he was stopped quickly by Wal-Mart loss prevention does nothing to rebut the fact that he intended to deprive Wal-Mart of its property. Evans' actions as described by Skaggs and as captured on the surveillance videotape establish that he certainly intended to obtain a refund on an item he had not purchased. Based upon the evidence as a whole, it would not be clearly unreasonable for a jury to find Evans guilty as charged in the indictment, as it ultimately did in less than thirty minutes. The trial court did not commit any error in denying Evans' motion and renewed motion for a directed verdict of acquittal.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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