

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-001152-MR

STEPHAWN LEONARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 97-CR-000041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI and SCHRODER, Judges.

GUIDUGLI, JUDGE. Stephawn Leonard (Leonard) appeals from the final judgment of the Jefferson Circuit Court sentencing him to eleven years imprisonment for two counts of first-degree robbery. We affirm.

On November 24, 1996, Hugh Elkin (Hugh) was helping his cousin, Nikola Alford (Nikola), move some items of personal property out of Nikola's mother's home located at 117 East Orsmy in Louisville. They had brought many of the items out into the front yard and front porch to organize them before loading them

onto several trucks. Around 7:00 p.m. they noticed Nikola's keys were missing. Believing the keys had been misplaced, they obtained flashlights to look in the yard and around the porch.

When Hugh walked up the steps to the porch, appellant emerged wearing a black leather jacket and ski mask. Leonard pointed a gun at Hugh's head and said, "Give me your wallet or I will shoot you." Hugh yelled to Nikola to run, but Nikola did not realize what was happening and approached the porch. When Leonard turned the gun onto Nikola, Hugh ran into the house and yelled to his aunt to call the police. Outside, Leonard held the gun on Nikola saying, "I'm not playing with you bitch. Give me your fucking money, bitch. I'll shoot you. Give me your money." Leonard then smacked Nikola with the gun. As Nikola's hand rose to her face to protect herself, she inadvertently pulled on the ski mask Leonard was wearing. Nikola was able to view Leonard's facial features clearly before her attacker shoved her into some bushes and ran away.

Shortly thereafter, the police arrived and began searching the neighborhood for Leonard from the description give by Nikola. Within minutes, police apprehended Leonard who was identified by both Hugh and Nikola. Nikola's keys were in Leonard's possession when he was arrested. The gun Leonard brandished was found in the yard of an abandoned house across the street. The gun turned out to be an inoperable BB gun.

Leonard was indicted on January 18, 1997, for two counts of robbery, first degree. The Commonwealth filed an in

limine motion requesting the trial court declare the gun used by Leonard to be a deadly weapon as a matter of law, but the court reserved ruling until after the Commonwealth presented its proof at trial. Trial was held March 27, 28 and 31, 1997. At the conclusion of proof, the court ruled the gun used by Leonard was a deadly weapon as a matter of law, and instructed the jury accordingly. The jury returned a verdict of guilty on both counts of robbery in the first degree. Leonard waived jury sentencing and accepted the Commonwealth's offer of eleven years. Leonard then filed a motion for judgment n.o.v. and for a new trial which were denied. On May 2, 1997, the trial court entered the final judgment of conviction and sentence from which Leonard brings this appeal.

Leonard claims three separate assignments of error by the trial court. First, he claims the trial court erred in ruling the inoperable BB gun was a deadly weapon, arguing the jury should have been allowed to determine whether or not it was a deadly weapon. Second, Leonard argues he was entitled to jury instructions on lesser included offenses. Third, Leonard asserts the trial judge "coerced" a jury verdict when he instructed the jury pursuant to Kentucky Rule of Criminal Procedure (RCr) 9.57.

Clearly, under the facts presented, the trial court was correct in holding as a matter of law that the inoperable BB gun was a deadly weapon. It has long been the rule that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him is one."

Merritt v. Commonwealth, Ky., 386 S.W.2d 727, 729 (1965). This rule applies even if the weapon is possibly a toy as in Merritt, supra, or inoperable as was the case in Commonwealth v. Sanders, Ky., 736 S.W.2d 338, 340 (1987). This rule was recently reiterated by the Kentucky Supreme Court in Swain v. Commonwealth, Ky., 887 S.W.2d 346 (1994). The rule requires determining the subjective perception of the victim of the crime. We believe as long as that perception is reasonable under the circumstances, as here, the rule applies.

Leonard's second assignment of error is that he was entitled to jury instructions on the lesser included offenses of robbery second degree, menacing, terroristic threatening, wanton endangerment second degree, or theft of mislaid or lost property. We disagree. Because the gun had been determined to be a deadly weapon, an instruction on robbery second degree would not have been appropriate. Mishler v. Commonwealth, Ky., 556 S.W.2d 676, 680 (1977). To be entitled to instructions on the other lesser included offenses asserted by Leonard, the evidence as a whole would have had to create a reasonable doubt whether Leonard was guilty of the higher degree. Luttrell v. Commonwealth, Ky., 554 S.W.2d 75 (1977). Here, the testimony of the victims was that Leonard had pointed a gun at both of them, demanded money and threatened to shoot. The testimony supported an instruction on first-degree robbery only.

Leonard's claim that he was entitled to an instruction for theft of lost or mislaid property for taking Nikola's keys is

not supported by law. The trial court correctly pointed out that Leonard was not entitled to an instruction for additional offenses which the Commonwealth could have charged, but in its discretion did not charge against Leonard. The trial court properly declined to instruct the jury on any offense other than first-degree robbery.

Leonard's final claim of error is that the trial court "coerced" the jury into a verdict. After the jury in this case had been deliberating for four hours, a note was sent to the judge which read: "Judge Morris, we are unable to reach a decision." When the jurors were brought before the court, the judge questioned the foreman whether further deliberations might result in a verdict or whether they would be unable to reach any decision. The foreman indicated continued deliberations might be useful. Thereafter the trial court charged the jury as required by RCr 9.57, almost word for word out of the rule. This is the procedure required by RCr 9.57 and the Kentucky Supreme Court. Commonwealth v. Mitchell, Ky., 943 S.W.2d 625, 628 (1997). The fact that the jury in this case returned a verdict 30 minutes after being instructed to resume deliberations is not, in our minds, so short a time as to indicate the jury did anything other than their civic duty.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

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