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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000329-MR

JESSE FEGLEY — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
NO. 04-CR-001065-001

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

For his role in robbing a string of convenience stores, Jesse Fegley was convicted of six counts of robbery in the first degree and sentenced to a total of sixty years' imprisonment. Fegley filed this appeal as a matter of right,[1] raising only two issues. First, Fegley contends that the jury instructions were fatally flawed because they did not require the jury to find that the BB gun used to commit the robberies was a deadly weapon. Second, Fegley contends that his conviction must be vacated because a probation and parole officer testified incorrectly about Fegley's maximum possible punishment. We agree with Fegley that under the current state of our law, the trial court erred by not submitting to the jury the question of whether the BB gun was a deadly weapon. But we do not find that error to rise to the level of a palpable error

[1] *See* Ky. Const. §110(2)(b).

necessitating vacating Fegley's convictions. We also agree with Fegley that the probation and parole officer's testimony was incorrect. We, likewise, find that error not to rise to the level of a palpable error necessitating vacating Fegley's sentences. Thus, we affirm.

I. THE DEADLY WEAPON ISSUE.

During Fegley's trial, the Commonwealth presented evidence that the object used by Fegley and his alleged accomplice to perpetrate the robberies was a BB gun, which someone had colored to make it look more like an actual firearm. The trial court ruled as a matter of law that the BB gun possessed by Fegley was a deadly weapon.[2] So the jury was only asked to find that Fegley or his accomplice stole money and that in the course of those thefts, Fegley or his accomplice threatened the immediate use of physical force upon various people while armed with a BB gun. Fegley contends that the trial court's failure to submit the issue of whether the BB gun was a deadly weapon to the jury constitutes reversible error.

In Thacker v. Commonwealth, we held that the question of whether an object used in a robbery was a deadly weapon must be submitted to the jury.[3] Fegley's trial, however, occurred before we issued our opinion in Thacker. So Fegley's counsel understandably did not make a Thacker-related objection to the instructions. Consequently, the Commonwealth contends that this issue is unpreserved for appellate review. We agree.

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2 A person commits first-degree robbery "when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft [while] . . . armed with a deadly weapon . . . ." KRS 515.020(1)(b).

3 194 S.W.3d 287, 290-91 (Ky. 2006).

Before we issued our opinion in Thacker, we had held that the issue of whether an object is a deadly weapon was an issue for the trial court to decide as a matter of law.[4] Although Thacker obviously overruled our earlier holding on this point, the controlling law at the time of Fegley's trial was that the question of whether an object was a deadly weapon was a matter for the court alone to determine. However, SCR 3.130(3.1) expressly permits attorneys to make good faith arguments for reversal of existing law. In order properly to preserve this issue for our review, therefore, Fegley was required to make a timely objection to the trial court's preemptive finding that the BB gun was a deadly weapon. The lack of a contemporaneous objection means that we must analyze this issue under the strict palpable error rubric of Kentucky Rules of Criminal Procedure (RCr) 10.26.[5]

The instructions at issue clearly do not follow our holding in Thacker. The question then becomes whether the trial court's preemptive finding that the BB gun was a deadly weapon as a matter of law is a palpable error. Under our somewhat confusing precedent on what may constitute a deadly weapon, we must find that the error is not a palpable one.

Our longstanding precedent on this point holds 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

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[4] Hicks v. Commonwealth, 550 S.W.2d 480, 481 (Ky. 1977) ("Whether the particular instrument is or is not a deadly weapon should be determined by the court as a matter of law.").

[5] RCr 10.26 provides that "[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 appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

convince him *is* one."[6] Since the victims were apparently convinced that the BB gun was a deadly weapon, the Commonwealth argues that the error must not be palpable because the jury, inevitably, would have found the BB gun to be a deadly weapon under the principle announced in Merritt. We agree with the Commonwealth that the application of Merritt inevitably would have led the jury to this conclusion. So we find that the erroneous instruction at issue was not of sufficient magnitude to rise to the level of palpable error.

We recognize that our continuing reliance upon Merritt[7] has been criticized by some legal scholars[8] and has led to some strained results.[9] Indeed, Merritt's continuing viability warrants further analysis. But because the issue was not properly preserved, this case is not the vehicle for us to explore fully whether we should depart from the holding in Merritt.

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6 Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965).

7 *See, e.g.,* Kennedy v. Commonwealth, 544 S.W.2d 219, 221 (Ky. 1976); Shegog v. Commonwealth, 142 S.W.3d 101, 109-10 (Ky. 2004); Thacker, 194 S.W.3d at 291 n.2.

8 *See* Robert G. Lawson & William H. Fortune, Kentucky Criminal Law § 13-7(c)(3) (1998) (opining that when we continued to rely upon Merritt in Kennedy, *supra*, we ignored the plain language of the defining statute [KRS 500.080(4)] and ruled that any object (even one that is harmless in fact) can be a deadly weapon if it was intended by its user to convince a victim that it was deadly and if the victim was in fact convinced.)

9 *See* Whalen v. Commonwealth, 205 S.W.3d 238, 242-43 (Ky.App. 2006) ("Again, we note that there is no indication that Whalen actually possessed a firearm or any other object that one would normally deem a deadly weapon or dangerous instrument. But Whalen did possess a glove, which he pointed at Newman while threatening to shoot her in the head. Newman further testified that she was frightened and believed that the glove may have been a weapon. Thus, though it is contrary to the normal usage of the term, the glove may constitute a deadly weapon under the theory 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.") (internal quotation marks omitted)

II. PROBATION AND PAROLE OFFICER'S ERRONEOUS TESTIMONY.

During the sentencing phase, a probation and parole officer erroneously testified that Fegley's maximum possible sentence was 120 years' imprisonment. In fact, under KRS 532.110(1)(c), Fegley's maximum sentence could be only 70 years. But Fegley did not lodge a timely objection to this erroneous testimony. Fegley now contends that the officer's erroneous testimony is a palpable error under RCr 10.26. We disagree. Fegley's sentence falls well below the legally prescribed maxiumum set forth in KRS 532.110(1)(c). Thus, Fegley cannot show that the officer's erroneous testimony caused him to suffer such severe prejudice as to necessitate palpable error relief.

III. CONCLUSION.

For the foregoing reasons, Jesse Fegley's convictions and sentence are affirmed.

All sitting. Lambert, C.J.; Abramson, Cunningham, Minton, and Noble, JJ., concur. Schroder, J., concurs in result only. Scott, J., concurs in result only by separate opinion.

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CONCURRING OPINION BY JUSTICE SCOTT

While I concur in result with this opinion, I do not agree with the suggestion that Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965) needs to be reexamined; otherwise every armed robber will simply pull the cylinder pin from the weapon and throw it away as he exits the robbery site. Such a change in the law would present immense difficulties for the prosecution to prove the weapon used was a "deadly weapon," i.e., operable and capable of firing a bullet. As it is now, anyone can avoid the application of Merritt - don't rob people with a gun or in any manner such as to convince them you really have one!