

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000627-MR

DARRYL WAYNE CROOKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 01-CR-01122

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Darryl Wayne Crooks appeals from a jury verdict finding him guilty of assault in the fourth degree and criminal attempt to commit theft by unlawful taking, value less than \$300. We affirm.

On October 1, 2001, Crooks attempted to steal the purse of Mary Casey at the Eastland Shopping Center in Lexington, Kentucky. In doing so, he grabbed the purse from the elderly Mrs. Casey's arm and she fell to ground, hitting her face on the pavement. There was conflicting testimony as to whether Mrs. Casey refused to let go of the purse, or whether Crooks got the

purse and then dropped it and ran from the scene. In any event, he was stopped and questioned by a shopping center security guard who then called police. When police arrived, Crooks was informed of his Miranda rights and confessed to the officer that he had attempted to steal the purse. Crooks was indicted on November 13, 2001, for robbery in the first degree and persistent felony offender in the second degree. The case proceeded to trial on February 4, 2002. Instructions were submitted to the jury for robbery in the first degree, robbery in the second degree, assault in the fourth degree and/or criminal attempt to commit theft by unlawful taking, value less than \$300.

Crooks was ultimately convicted of the misdemeanor offenses of assault in the fourth degree and criminal attempt to commit theft by unlawful taking, value less than \$300. He was sentenced to 12 months and a \$500 fine for the assault and 90 days and a \$250 fine for the theft.

Crooks argues on appeal that 1) the trial court erred in allowing an instruction for assault in the fourth degree, as the evidence was insufficient to support the instruction; and 2) that he is entitled to a new trial as a result of misconduct by the prosecutor.¹ We determine that Crooks failed to preserve both arguments for appellate review.

At the close of the Commonwealth's case, Crooks moved for a directed verdict. He argued that Mrs. Casey's injuries were insufficient to prove robbery in the first degree. The

¹Crooks claims that the misconduct occurred during the penalty phase closing. However, because Crooks was convicted of misdemeanors, there was no penalty phase.

court overruled the motion. At the close of all of the evidence Crooks renewed his motion for a directed verdict. Crooks made no argument that he could not be found guilty of any lesser-included offenses.

The Commonwealth argues that, because Crooks only requested a directed verdict on robbery in the first degree, and failed to object to the lesser included offense, he did not preserve the question for appellate review. To preserve a question of sufficiency of the evidence as to lesser included offenses requires that the defendant object to the jury instructions as to those offenses. Campbell v. Commonwealth, Ky., 564 S.W.2d 528, 530 (1978). However, a motion for directed verdict does apply to lesser included offenses, if the defendant makes the motion on the basis that there is no theory under which he could be found guilty of the crime charged, not on the basis of acquittal. Hedges v. Commonwealth, Ky., 937 S.W.2d 703, 707 (1996). Crooks argued to the court that Mrs. Casey's injuries were not serious enough to warrant submitting the charge of robbery in the first degree to the jury. He admitted to stealing the purse and therefore was not seeking acquittal. As such it would appear that this issue was preserved. Be that as it may, Crooks still failed to preserve this issue in that, not only did he agree to the instructions for assault in the 4th degree and criminal attempt of theft by unlawful taking, but counsel argued to the jury that the evidence showed that Crooks was guilty of the assault and the attempted theft, not the more serious crimes of robbery in the first or second degree. Crooks cannot now be

heard to say that the evidence was insufficient to support those convictions. RCr² 9.54(2).

Crooks also failed to preserve his argument regarding prosecutor misconduct. During closing arguments, the prosecutor began to argue that both Mr. & Mrs. Casey were victims of the crime. Crooks objected and the prosecutor indicated that she would clear up any misstatement. The defense responded, "I ask that she clear it up." The prosecutor then explained to the jury that there was only one victim in this case and that Mr. Casey had taken care of Mrs. Casey while she was recovering from her injuries. The defense made no further objection and did not ask the court for an admonition. On appeal Crooks claims that the court abused its discretion by failing to admonish the jury to disregard the remarks. A defendant who wants the trial court to admonish the jury must ask for such relief. RCr 9.22.

Regardless, in order to justify reversal, a claim of prosecutor misconduct must be so serious as to render the trial fundamentally unfair. Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 805 (2001). Crooks received a fair trial. The evidence against him was overwhelming. Crooks admitted that he attempted to take Mrs. Casey's purse, hoping there was money in it. The evidence showed that in the attempt to take the purse from Mrs. Casey's shoulder, Crooks knocked her to the ground and Mrs. Casey hit her face on the pavement, resulting in a busted lip and bruising around her eyes. The following day Mrs. Casey went to the hospital because of the pain. There was also evidence that

²Kentucky Rules of Criminal Procedure

Mrs. Casey suffered from pain in her shoulder immediately following the accident, which eventually required pain medication and ultimately a diagnosis of a tear in her rotator cuff. Even given the overwhelming evidence against him, Crooks was not found guilty of the more serious felonies but rather the misdemeanors for which counsel argued. As such, the comments by the prosecutor were not so prejudicial as to warrant reversal.

Crooks also argues that the prosecutor alluded to the illnesses and conditions of Mr. Casey, improperly playing to the passions of the jury. Our review of the record reveals no such statements in the closing argument.

The judgment of the Fayette Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT.

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