

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001167-MR

CECIL A. HARRIS

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 04-CR-00080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

KELLER, JUDGE: Cecil Harris has directly appealed from the final judgment of the Lincoln Circuit Court convicting him of First-Degree Robbery, First-Degree Wanton Endangerment, and First-Degree Unlawful Imprisonment, and sentencing him to a total of twelve years' imprisonment. We affirm.

In early July 2004, Harris, a resident of Illinois, was hired by Harold Baker to work for Freeway Express, a trucking company in Stanford, Kentucky. Shortly into his employment, Harris wrecked the Freeway Express truck he was driving. Baker terminated Harris's employment on July 14, 2004. It is undisputed that Baker never paid Harris for the work he performed. On August 10, 2004, Harris appeared at Baker's

Garage, the offices of Freeway Express, holding a revolver<sup>1</sup> wrapped in a black garbage bag. Harris's stated purpose for coming to the office was to obtain his paycheck. To this end, Harris approached Jan Hahn, the office secretary, and demanded that she write him a check. Several people in the office, including Baker's teenaged children, saw Harris pointing the gun at various people. Baker's fourteen-year-old son obtained a shotgun from his brother's room at the office. Harris saw him with the shotgun, pointed his gun at the boy, and told him to give him the shotgun, which he did. Ultimately, no one was injured and Harris left the office with the gun and shotgun, but without obtaining his paycheck.

After leaving the premises, Harris made his way to his sister and brother-in-law's house and waited for the authorities to arrive. According to Trooper Bill Collins's testimony, Harris became combative during the arrest. After the arrest, Sheriff Lakes recovered a revolver from a truck belonging to Dave Cochran, Harris's brother-in-law, which Cochran claimed as his own. The shotgun was never recovered.

The Lincoln County grand jury indicted Harris on four counts of kidnapping for unlawfully restraining Hahn and the three Baker children; one count of first-degree robbery for threatening the use of physical force while committing a theft (the shotgun); two counts of first-degree wanton endangerment for pointing a firearm in the direction of two employees; and two counts of third-degree assault for causing physical injury to two state troopers during his arrest. At trial, the circuit court instructed the jury on one count of third-degree assault (Trooper Collins); one count of first-degree wanton endangerment; four counts of kidnapping, along with the lesser included charge of first-degree unlawful imprisonment; and one count of first-degree robbery. The jury returned a verdict of guilty on three charges: first-degree wanton endangerment, first-degree

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<sup>1</sup> Harris contended that he was carrying a toy cap pistol, not an actual revolver.

unlawful imprisonment as related to Hahn, and first-degree robbery. The jury returned not guilty verdicts on the remaining charges.

Following the penalty phase of the trial, the jury recommended one-year sentences on the wanton endangerment and unlawful imprisonment convictions, and a ten-year sentence on the robbery conviction, to be served concurrently for a total of ten years. In its final judgment, the circuit court opted to order consecutive sentences for a total of twelve years' imprisonment. It is from the final judgment that Harris has perfected this direct appeal.

On appeal, Harris raises two issues: 1) whether the circuit court should have instructed the jury on Theft by Unlawful Taking and Terroristic Threatening, as he claimed to have requested; and 2) whether the prosecutor improperly commented on his criminal record during the penalty phase. The Commonwealth, after noting that Harris failed to include a record of either issue in the appellate record, maintains that the jury was properly instructed and that any improper comment the prosecutor might have made was harmless.

We shall first address the Commonwealth's contention that Harris failed to include anything in the record regarding either his jury instruction or penalty phase arguments. For this reason, the Commonwealth argues that we must assume that the silent record supports the circuit court's decision. We agree.

It is a longstanding rule that "an appellant has the obligation and burden to establish trial error upon appellate review." *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 604 (Ky. 1967). Likewise, "[i]t is the appellant's duty to present a complete record on appeal. Failure to show preservation of claims prohibits this Court's review of those claims." *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). "When a record is incomplete and partially incomprehensible, we

may indulge the presumption of correctness of the judgment upon review.” *Richardson*, 424 S.W.2d at 604. Our Supreme Court has

consistently and repeatedly held that it is an appellant’s responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the issues raised. And we are required to assume that any portion of the record not supplied to us supports the decision of the trial court.

*Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky. 2007)(citations in footnotes omitted).

See also *Moody v. Commonwealth*, 170 S.W.3d 393 (Ky. 2005); *Copley v.*

*Commonwealth*, 854 S.W.2d 748, 750 (Ky. 1993)(“A claim which is unsupported by the record cannot be considered on appellate review.”); *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)(“We will not engage in gratuitous speculation . . . based upon a silent record.”).

The record before this Court is comprised of the documentary record, including the indictment, the completed instructions as presented to the jury for both the guilt and penalty phases, as well as the trial verdict and final judgment. As the Lincoln Circuit Court is not equipped to videotape its proceedings, the actual record of the trial is contained within a written transcript. We note that Harris designated the transcript of the trial, excluding *voir dire*, opening statements, and closing arguments. However, the partial transcript contains only witness testimony from the guilt phase. The court reporter who prepared the transcript specifically noted that it did not contain any bench conferences, in addition to the items excluded by Harris. Furthermore, the transcript did not include any part of the penalty phase. We note that Harris could have, but did not, request that the court reporter transcribe any other portions of the trial once the transcript was received, or submit a narrative statement to supplement the missing portion of the record pursuant to CR 75.13. See *Steel Technologies*, 234 S.W.3d at 926. Although such actions would necessarily have delayed the matter even further

than it had already been, due to delays in obtaining the partial transcript, we would have had an adequate record to review. Consequently, there is absolutely nothing in the record for this Court to review concerning Harris's contention that he requested, but did not receive, instructions on theft by unlawful taking or terroristic threatening, or to support his accusation that the prosecutor improperly referenced his criminal history. Therefore, we must assume that the missing record supports the circuit court's decision and affirm the judgment.

Even if we were to review the merits of this appeal, we would nonetheless affirm, as the issues raised are without merit. Looking first to the penalty phase issue, the Commonwealth aptly stated in its brief that Harris himself raised his criminal history when he was testifying. In support of his assertion that the gun he had with him was a toy, Harris stated that he had "[a] cap pistol, because I'm not allowed to have a gun. I was convicted of a felony in 1994." Assuming that the prosecutor mentioned Harris's criminal history during the penalty phase, there is no evidence that Harris was in any way prejudiced. The jury recommended the lowest sentence it could, based upon its guilt phase verdict. Therefore, even if the prosecutor acted improperly, any error was clearly harmless.

Turning now to the jury instructions issue, we recognize that "[a] court is required to instruct a jury on all offenses that are supported by the evidence." *Clark*, 223 S.W.3d at 93. In *Mack v. Commonwealth*, 136 S.W.3d 434 (Ky. 2004), the Supreme Court addressed the inclusion of instructions on lesser-included offenses, stating:

Although TBUT is a lesser-included offense of Robbery, it is well-settled that "an instruction on a lesser included offense is required *only if*, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that the defendant is guilty of the

lesser offense.” (Emphasis in original, citations in footnotes omitted.)

See also *Fields v. Commonwealth*, 219 S.W.3d 742, 749 (Ky. 2007).

As in *Mack*, Harris asserts that he was entitled to an instruction on theft by unlawful taking as a lesser-included offense of first-degree robbery. Pursuant to KRS 514.030(1), “a person is guilty of theft by unlawful taking or disposition when he unlawfully: (a) Takes or exercises control over moveable property of another with intent to deprive him thereof[.]” To be guilty of first-degree robbery, the jury must find that, “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 and when he: . . . (b) Is armed with a deadly weapon[.]” KRS 515.020(1). The evidence, however, supports only an instruction on first-degree robbery, not theft by unlawful taking.<sup>2</sup>

Harris admitted that he took the shotgun from the Baker son, and the teenager testified that Harris pointed his gun in his direction and told him to give the shotgun to him. Harris also admitted that he left the building with the shotgun. Based upon the testimony elicited at trial, including that Harris had a gun with him and was pointing it toward people on the premises, the jury could not have had reasonable doubt about his guilt on the robbery offense, but believe that he could have been guilty of the lesser charge of theft. Under Instruction No. 35, regarding first-degree robbery, the circuit court properly instructed the jury that it could find Harris guilty of first-degree robbery if it found from the evidence that Harris stole a shotgun, that he used or threatened to use force to accomplish the theft, and that he was armed with a revolver at that time. Harris’s use of the gun to effect the theft in this case played an integral role in the offense and clearly elevated his theft of the shotgun to robbery.

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<sup>2</sup> Harris only mentions that he requested an instruction on terroristic threatening in passing, but does not explain how he was entitled to such an instruction. Therefore, we shall not address that particular offense.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jude A. Hagan  
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Todd D. Ferguson  
Assistant Attorney General  
Frankfort, Kentucky