

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001869-MR

CHRISTOPHER SHILOH GAMBLE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 07-CR-00370

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Christopher Gamble appeals as a matter of right his conviction for first-degree robbery. After careful review, we affirm.

On February 8, 2007, employees Natalie Lindgren and Lynn Dowdy were working behind the teller line at the Alexandria Drive Chase Bank branch in Lexington, Kentucky. At approximately 11:30 a.m., Ms. Lindgren observed a man

with his head and face covered enter the bank and immediately pushed her silent alarm. She believed the man was about to rob the bank. Ms. Dowdy was standing behind Ms. Lindgren at her station and was also suspicious when she saw the masked man.

The man approached Ms. Lindgren's teller station and placed a note and plastic bag in front of her. The note was introduced into evidence and read, "This is a robbery. I have a gun. Quietly empty your drawer fast." The man then verbally told Ms. Lindgren not to move, that he had a gun, and then demanded money from her teller drawer. Ms. Lindgren opened her drawer and began to give the man small bills from the front and the man demanded that she also include bigger bills. After filling the bag with money and a dye pack, Ms. Lindgren gave the bag to the man. According to Ms. Lindgren and Ms. Dowdy, the man then said, "You just saved your life," and walked out of the bank. Neither Ms. Lindgren nor Ms. Dowdy saw a gun in the man's possession at any time.

Police responded after being alerted by Chase Bank's headquarters that the alarm had been tripped. Dispatch advised that the suspect was a young white man, approximately six feet tall, wearing a brown plaid jacket, dark pants, with a mask over his face. Detective Kevin Duane (hereinafter "Det. Duane") was among the first to respond. As he entered the vicinity of the bank, he saw a young man wearing a black hoodie rather than the reported brown plaid jacket. Nonetheless, he pulled up to the man and asked him where he was coming from. The man stated that he was coming from the post office and that he had seen a

young person wearing a brown plaid jacket fleeing behind the post office with pink smoke trailing behind him. Det. Duane radioed dispatch to have someone else come and speak with this man and then proceeded behind the post office to investigate the fleeing man.

After determining that the report of the fleeing man was not valid, Det. Duane went back to the bank. He then radioed to make sure someone else was with the young man he'd previously stopped; however, no other officer had made contact with the young man. Det. Duane then attempted to find the man and found tracks in the snow leading from where he had spoken with the man directly to apartments across the street. He then went over to the apartment and sat waiting. A couple of minutes later, he observed the man come out of a building wearing different clothing. Det. Duane approached the man and asked him why he'd changed. The man told him that his clothing had gotten wet from the snow. Suspicious, Det. Duane asked the man, now identified as appellant Christopher Gamble, if they could step into his apartment and Gamble agreed.

Upon entering the apartment, Det. Duane observed a bag of clothes, a headband, gloves, and a toboggan. Det. Duane then determined that the clothes in the bag were dry, which negated Gamble's statements that the clothes were wet. Det. Duane then took Gamble back to the bank, suspecting him of being the robber. Det. Duane was able to look at surveillance photos of the robbery and recognized the headband on the robber as the one in Gamble's apartment. The

brown plaid jacket was then found in a trashcan, along with the dye pack and some of the cash.

Police returned to Gamble's apartment, where his aunt consented to a search of the apartment. This searched revealed \$3516 under the living room couch. Gamble was then arrested and charged with first-degree robbery. Gamble was interviewed by police and confessed to having been the man that had taken money from Chase Bank that morning. However, he told officers that he never had a gun. Officers did not recover a gun at the bank, the surrounding area, or at Gamble's apartment.

At trial, Gamble moved for directed verdict, arguing that the Commonwealth had offered no evidence that Gamble had been in possession of a deadly weapon or dangerous instrument during the commission of the robbery. The trial court denied Gamble's motions following the close of the Commonwealth's case and Gamble's defense. The trial court then instructed the jury that based upon the evidence, they could find appellant not guilty, guilty of first-degree robbery, or guilty of second-degree robbery. The jury found Gamble guilty of first-degree robbery and recommended that he be sentenced to twelve years. On August 14, 2007, the trial court entered its final judgment and sentenced Gamble in accordance with the jury's verdict. Gamble now appeals as a matter of right.

Gamble argues that the trial court erred by overruling his motion for a directed verdict as to the charge of first-degree robbery because the

Commonwealth failed to prove he was in possession of a deadly weapon or dangerous instrument at the time he committed the robbery. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983); *see also Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

KRS 515.030 defines robbery in the second degree as when, in the course of committing a theft, one threatens the use of, or uses, force upon the victim in order to effectuate the theft. Robbery in the first degree occurs when theft is committed with either physical injury caused to the victim, the robber is armed with a deadly weapon, or the robber uses or threatens the immediate use of a dangerous instrument upon a victim.

Gamble argues that the evidence was insufficient to support a finding that he was armed with a deadly weapon during the robbery of Chase Bank and that accordingly, he was not guilty of first-degree robbery. In so arguing, Gamble asks this Court to overrule *Mitchell v. Commonwealth*, 231 S.W.3d 809 (Ky.App. 2007), wherein this Court held that a reference to a gun and a demand for money were sufficient evidence to support a first-degree robbery conviction. Gamble argues that the law requires evidence that there was an object referred to in addition to a demand for money to support a conviction for first-degree robbery

and therefore that *Mitchell* was wrongly decided. We find Gamble's statements and interpretation of the law to be misguided.

In *Swain v. Commonwealth*, 887 S.W.2d 346 (Ky. 1994), the defendant was convicted of five counts of first-degree robbery and argued that he was entitled to directed verdicts on the charges because the Commonwealth failed to establish that he was armed with a deadly weapon. The Supreme Court stated as follows:

[i]n the case at bar, in one of the robberies there was direct proof that appellant was in possession of a deadly weapon or dangerous instrument. That single instance involved a pistol and we affirm that conviction.

In one other instance appellant referred to a gun and demanded money. We believe these acts are sufficient to come within the reasoning of Merritt v. Commonwealth, 286 S.W.2d 727 (Ky. 1965), and the motion for directed verdict on the first degree robbery charge was properly overruled.

As to the three remaining first degree robbery convictions, there was no evidence to prove anything more than menacing gestures by the appellant and assumptions by the victims that appellant may have been in possession of an object which was a deadly weapon or dangerous instrument. . . . A directed verdict should have been granted as to first degree robbery on these three counts.

887 S.W.2d 346, 348 (emphasis added). The Supreme Court clearly articulated that evidence showing that a defendant referenced a gun and made a demand for money is sufficient to withstand a motion for directed verdict as to a first-degree robbery charge. In *Merritt v. Commonwealth*, 386 S.W.2d 727 (Ky. 1965), the

robber used a toy gun which was seen by the victim. The Supreme Court in *Swain* quoted *Merritt*, stating 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.” *Swain*, 887 S.W.2d at 348 (internal citation omitted). In *Swain*, the court held that a reference to a gun and demand for money were sufficient to fall within *Merritt*’s convincing requirement. Accordingly, in the case at bar, Gamble’s reference to a gun and demand for money also fall within *Merritt*. Thus, a directed verdict on the first-degree robbery issue was properly denied.

Furthermore, following *Swain*, the Kentucky Supreme Court again found that reference to a gun was sufficient to support a conviction for first-degree robbery in *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999) and *Shegog v. Commonwealth*, 142 S.W.3d 101 (Ky. 2004). In neither of those cases was the Commonwealth able to prove that the defendant actually had a gun, and a reference to a gun coupled with a demand for money was sufficient. In summation, we find the case law on the issue of first-degree robbery to be very clear. Because Gamble stated that he had a gun and demanded money, a first-degree robbery instruction was proper and the Fayette Circuit Court’s denial of a directed verdict was correct. Accordingly, the judgment is affirmed.

ALL CONCUR.

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