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# Commonwealth of Kentucky

# Court of Appeals

NO. 2010-CA-000774-MR

TOMMY GERALD CORBIN — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NO. 07-CR-00242

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Tommy Corbin directly appeals from a criminal conviction related to the May 2007 robbery of a four-wheeler and a handgun. Following a jury trial, the Harlan Circuit Court convicted Tommy on one count of robbery first-

[1] Chief Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

degree. He received a sentence of ten years of imprisonment. Tommy argues that the trial court erred when it denied his motion for a directed verdict and when it failed to instruct the jury on the lesser-included offense of felony theft by unlawful taking. We affirm.

On May 19, 2007, Kelly Hall, Ivan Robinson, Peggy Garrett, and Garrret's fourteen-year-old daughter, A.E., were riding four-wheel vehicles in the mountains of Harlan County. Hall was on his four-wheeler, Garrett and Robinson were on the same four-wheeler, and A.E. was riding her grandmother's four-wheeler. They were riding the four-wheelers in an area on which David Corbin, Tommy's brother, has a logging operation. During the afternoon, they came upon a steep decline and Hall went ahead to make sure that A.E. could negotiate the terrain. When he did not return after approximately thirty minutes, the others continued on and proceeded down the hill.

Upon making it down the hill, they came upon Hall standing next to his four-wheel vehicle and talking with Tommy, who was holding a shotgun, which was pointed at Hall. Hall's handgun, which he kept on the four-wheel vehicle, was lying on the ground in its holster. As Robinson, Garrett, and A.E. approached them, Corbin pointed his shotgun at them and told them to get off the four-wheelers. According to the four, Corbin told them that he was a U.S. Marshall and asked for proof of ownership of the four-wheel vehicles. Hall had proof of ownership for his vehicle but Robinson and A.E. did not have the vehicles' proof of ownership with them.

Tommy took Robinson and A.E.'s four-wheel vehicles, for which they had no proof of ownership. He had his shotgun pointed at them the entire time. Eventually, Tommy yelled that Robinson could have his vehicle back. He kept the four-wheel vehicle that A.E. had been riding and Hall's handgun. Tommy then told the group to leave and that they could retrieve their property at the Abington, Virginia, police station the next day.

Next, upon reaching a trailer approximately three miles from the incident, they contacted the Harlan County Sheriff's Department, which dispatched Officer Kenneth Sargent to the scene. The owner of the trailer informed them that David Corbin ran a logging operation on the property where they had been riding. Garrett called David Corbin, too, since she knew him to be the proprietor of a convenience store in nearby Virginia.

Officer Sargent arrived at the trailer to investigate. In addition, David Corbin and his son Jason arrived. Jason then went to the worksite and retrieved the four-wheel vehicle and the handgun from Tommy Corbin. On May 24, 2007, Hall initiated an arrest warrant against Tommy. He was arrested on charges of robbery first-degree, impersonating a police officer, theft by unlawful taking (hereinafter "TBUT") over $300,[2] and three counts of possession of a firearm by a convicted felon.

Following plea negotiations and the appointment of a special prosecutor, Tommy faced trial on a robbery charge and a charge of impersonating

[2] At that time the threshold for TBUT had not been raised to $500. The amendment was effective on June 25, 2009.

a peace officer. During the trial, Tommy moved for a directed verdict at the close of the Commonwealth's case, and again following David and his testimony for the defense. The jury found him not guilty on the impersonation charge but guilty on the first-degree robbery charge and recommended a ten-year sentence. He was so sentenced on May 25, 2010. He now appeals from this conviction.

First, we address the issue as to whether the trial court erred when it denied Tommy's motions for a directed verdict. He maintains that there was insufficient evidence to establish guilt of first-degree robbery. In particular, Tommy proposes that since he told the four victims that they could pick up their belongings the next day at a nearby police station, he never intended to permanently deprive them of their property. Hence, Tommy contends that without any theft, no robbery could have been committed.

When a trial court rules on a motion for directed verdict, it "is under a duty to consider the evidence in the strongest possible light in favor of the nonmoving party and must give the nonmoving party every favorable and reasonable inference which can be drawn from the evidence." *Reece v. Nationwide Mutual Ins. Co.*, 217 S.W.3d 226, 231 (Ky. 2007). Moreover, the trial court is prohibited from directing a verdict unless there is a complete absence of proof on a material issue or no disputed issue of fact exists on which reasonable men could differ. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985).

On appellate review, a motion for directed verdict is evaluated under the standard set forth in *Com. v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving [sic] to the jury questions as to the credibility and weight to be given to such testimony.

Therefore, in the instant case we must ascertain whether the trial court drew all fair and reasonable inferences from the evidence in favor of the nonmoving party, that is, the Commonwealth, and whether the evidence was sufficient to allow a juror to believe beyond a reasonable doubt that the defendant was guilty.

The Kentucky Penal Code defines First-Degree Robbery as follows:

> (1) A person is guilty of robbery in the first degree 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 and when he:
>
> > (a) Causes physical injury to any person who is not a participant in the crime; or
> >
> > (b) Is armed with a deadly weapon; or
> >
> > (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

KRS 515.020(1). Further elucidation is provided by the Kentucky Supreme Court, which has weighed in on the definition of first-degree robbery by noting that a person is guilty of first-degree robbery when the elements of second-degree robbery are met and the prosecution proves one of the three aggravating

conditions: causes physical injury to a victim, is armed with a deadly weapon or uses or threatens the use of a dangerous weapon upon a victim. See *Johnson v. Com.*, 327 S.W.3d 501 (Ky. 2010); *Gamble v. Com.*, 319 S.W.3d 375 (Ky. 2010).

Here, we believe that the evidence provided by the Commonwealth was sufficient for a reasonable juror to find Tommy guilty of first-degree robbery. Four people, while riding four-wheel vehicles, were stopped at gunpoint by Tommy. He, initially, took two four-wheel vehicles and a gun from them. Later, he kept one vehicle and the gun. All four persons testified that Tommy pointed a gun at them and later pointed the shotgun at their backs as they walked away. Thus, the parties were deprived of property by a person "armed with a deadly weapon," which actions meet the elements of first-degree robbery.

Furthermore, we are not persuaded by Tommy's argument that in order to establish the elements of robbery first-degree, the Commonwealth must prove that he intended to permanently deprive the four persons of their property. In fact, a defendant who uses physical force with the requisite intent is guilty of robbery whether any of the property intended to be taken is in fact taken. See *Kirkland v. Com.*, 53 S.W.3d 71, 76 (Ky. 2001). Hence, one can be found guilty of first-degree robbery without successfully taking any property.

As explained in *Travis v. Com.*, 327 S.W.3d 456, 461 (Ky. 2010), the "in the course of committing theft" portion of the statute is satisfied by stealing property or attempting to steal property. Tommy, armed with a dangerous weapon, took the four-wheel vehicle and the gun from the victims. His actions met the "in

the course of committing a theft" requisite of the statute. Accordingly, the trial court did not err when it did not direct the verdict. Sufficient evidence existed for a reasonable juror to determine that Tommy committed robbery first-degree.

Next, we address Tommy's claim that the trial court erred when it failed to also instruct the jury on the lesser-included offense, felony theft by unlawful taking. Since both robbery and TBUT require the same proof of theft, Tommy maintains that he was entitled to the TBUT instruction as a lesser-included offense.

Regarding jury instructions, "[a] court is required to instruct a jury on all offenses that are supported by the evidence." *Clark v. Com.*, 223 S.W.3d 90, 93 (Ky. 2007). TBUT, as noted in *Roark v. Com.,* 90 S.W.3d 24, 38 (Ky. 2002), is a lesser-included offense of robbery. The Kentucky Supreme Court discussed the inclusion of instructions on lesser-included offenses in *Mack v. Com.*, 136 S.W.3d 434, 436 (Ky. 2004), noting that:

> 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." (quoting *Caudill v. Com.*, 120 S.W.3d 635, 668 (Ky. 2003)).

Tommy argues that evidence existed here which supported the giving of the TBUT instruction. He observes that the defense was willing to stipulate to a dollar value of the property in order to allow for a TBUT instruction, but the trial court did not allow it to do so. In contrast, the Commonwealth highlights that a

trial court is only required to instruct the jury on lesser-included offenses if the proffered evidence would permit a juror to reasonably decide that a defendant is not guilty of the charged offense but is guilty of the lesser offense. *Lawless v. Com.*, 323 S.W.3d 676 (Ky. 2010).

A person is guilty of TBUT "when he unlawfully: (a) [t]akes or exercises control over movable property of another with intent to deprive him thereof[.]" KRS 514.030(1)(a). The statutory elements do not list any aggravating factors including the use of a dangerous weapon. Consequently, the only way the jury could have been convinced that Tommy was guilty of TBUT is if he had not been armed with a dangerous weapon. Here, even without testimony as to the value of the stolen items, all four victims of the crime and Tommy himself testified that he was armed with a dangerous weapon when he confiscated the four-wheel vehicle and the gun. Given that Tommy was armed with a deadly weapon, the jury could not have decided that Tommy was guilty of robbery but not TBUT. We hold that the trial court correctly denied the motion for an instruction on TBUT.

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

ALL CONCUR.

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