

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000094-MR

JEFFREY HOLBROOK

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 12-CR-00154

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

MOORE, JUDGE: Jeffrey¹ Holbrook appeals the Pike Circuit Court's judgment convicting him of first-degree robbery, receiving stolen property, and possession of a firearm by a convicted felon (pistol or revolver or other firearm originally designed to be fired by the use of a single hand). After a careful review of the

¹ We spell Holbrook's first name "Jeffrey" because that was the spelling used on his notice of appeal. However, we note that in his appellate brief, his name is spelled "Jeffery."

record, we affirm because Holbrook was not entitled to a jury instruction on attempted robbery.

Holbrook was indicted on the following charges: (Count 1) first-degree robbery; (Count 2) receiving stolen property; (Count 3) theft by unlawful taking; and (Count 4) possession of a firearm by a convicted felon. A jury trial was held, during which the victim testified that on the day in question, she deposited money at a bank through the drive-through lane, and she then proceeded across the street to a Super Dollar Gas Station. She began pumping gas into her car and noticed a vehicle pull up behind her. She saw a man whom she later identified as Holbrook get out of the vehicle and come up behind her. Holbrook told her to look over her left shoulder, not to scream, and to give him the money in her wallet. The victim attested that she looked over her shoulder and Holbrook lifted up his shirt to reveal the handle of a gun sticking out of his waistband. She testified that she told Holbrook that she did not have any money. Holbrook told her that he just watched her come from the bank, so she should give him the money in her wallet. The victim again told him that she did not have any money in her wallet because she had deposited her money at the bank. Holbrook told the victim that he would give her three seconds to finish pumping gas. She finished pumping, got her receipt, then turned around and asked him what he wanted from her because she did not have any money. He told her to get in her car because he was leaving. She climbed back into her car, and Holbrook returned to his vehicle and drove away. The victim attempted to view Holbrook's license plate number as he

drove away, but she was unable to see it. She then went up to the gas station attendant's window. The attendant told her to go up to the main office and wait for law enforcement, which she did. The police came, and the victim subsequently identified Holbrook in a line-up.

The jury convicted Holbrook of first-degree robbery, receiving stolen property, and possession of a firearm by a convicted felon. Furthermore, regarding count four, the jury found that "the firearm possessed by [Holbrook] on June 20, 2012, was a pistol or revolver, or other firearm originally designed to be fired by the use of a single hand."

The jury fixed Holbrook's punishment for first-degree robbery at ten years of imprisonment; for receiving stolen property at one year of imprisonment; and for possession of a handgun by a convicted felon at five years of imprisonment. Upon the Commonwealth's motion, count three was dismissed. The circuit court sentenced Holbrook to ten years of imprisonment for count one; one year of imprisonment for count two; and five years of imprisonment for count four, with all sentences ordered to be served concurrently.

Holbrook now appeals, contending that the circuit court erred in failing to instruct the jury on criminal attempt pursuant to KRS² 506.010, despite defense counsel's request. Specifically, he alleges that the victim testified there was no taking of property because when Holbrook demanded she give him her money, the victim advised Holbrook that she had no money, so Holbrook walked

² Kentucky Revised Statute(s).

away without ever obtaining any money or other property from the victim. Thus, Holbrook argues that the crime of first-degree robbery could not have occurred without the taking of property, and the court should have instructed the jury on attempted robbery instead.

“A trial court’s rulings on [jury] instructions are reviewed under an abuse of discretion standard.” *Tunstall v. Commonwealth*, 337 S.W.3d 576, 583 (Ky. 2011). Criminal attempt, as Holbrook contends the jury should have been instructed, is defined at KRS 506.010, in pertinent part, as follows:

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant’s intention to commit the crime which he is charged with attempting.

However, Holbrook’s jury was instructed on first-degree robbery, which is defined at KRS 515.020 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.

“[T]o support a conviction for first-degree robbery, the entire [weapon or dangerous instrument] need not be observed.” *Lambert v. Commonwealth*, 835 S.W.2d 299, 300 (Ky. App. 1992) (finding that victim’s observation of the butt of a handgun in the defendant’s waistband was sufficient to support jury instruction for first-degree robbery). Because Holbrook’s victim saw the butt of a gun in his waistband, this is therefore sufficient to support his first-degree robbery conviction.

Holbrook alleges nonetheless that because no property or money was taken in this case, the elements of first-degree robbery were not met; the jury therefore should have been instructed on attempted robbery. Contrary to Holbrook’s argument, Kentucky’s appellate courts have held that a taking of property is not required for a crime to qualify as first-degree robbery. In *Lamb v. Commonwealth*, 599 S.W.2d 462 (Ky. App. 1979), Lamb

placed a knife against [the victim’s] throat and demanded “what you have in your pocket.” [The victim] said he didn’t have anything and Lamb threatened to cut his throat. The victim freed himself from [Lamb’s] grasp

and returned to the sidewalk with Lamb following, still making threats to cut his throat. Thereupon, [the victim] managed to get to a grocery store from whence the police were summoned and a short time later, Lamb was apprehended a few blocks away. The crucial fact raised by [Lamb was] that nothing was taken from [the victim].

Lamb, 599 S.W.2d at 462-63. In *Lamb*, this Court found, upon reviewing the commentary to the Kentucky Penal Code, that the first-degree robbery statute was intended to act “as a deterrent to assaulting an individual, while armed, with the intention of unlawfully obtaining his property whether any of that property is actually taken or not.” *Lamb*, 599 S.W.2d at 464. Thus, in *Lamb*, this Court held that Lamb’s actions qualified as first-degree robbery, even though Lamb did not take any property from the victim.

Further, in *Wade v. Commonwealth*, 724 S.W.2d 207 (Ky. 1986), Wade contended there was “insufficient evidence to withstand a motion for a directed verdict on the [first-degree] robbery charge” because “there was no direct testimony that any witness had seen [Wade] remove any money” from the victim. *Wade*, 724 S.W.2d at 208. The Kentucky Supreme Court found that “[t]he robbery statute requires only the use of force ‘in the course of committing theft’ and ‘with intent to accomplish the theft.’” *Wade*, 724 S.W.2d at 208 (quoting KRS 515.020(1)). The Court cited *Lamb* and the Commentary to KRS 515.020 in holding that the robbery statute “does not require a *completed* theft.” *Wade*, 724 S.W.2d at 208.

Finally, in *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001), Kirkland was convicted of first-degree robbery, but he argued on appeal that the trial court should have instructed the jury on attempted robbery because no money or property was actually taken. The Kentucky Supreme Court found that

[a]ll the evidence indicate[d] that [Kirkland and his co-defendant] entered the store with a gun in order to steal money from the victim. The robbery was accomplished at that point. There was no evidence of any “attempt.” Under the totality of the evidence, there was no basis for an attempt instruction.

Kirkland, 53 S.W.3d at 76.

Consequently, pursuant to the *Lamb*, *Wade*, and *Kirkland* cases, Holbrook’s act of showing the victim the butt of a handgun and demanding money from her was enough to satisfy the elements of first-degree robbery, even though no money was actually taken. Because the robbery was accomplished, there was no evidence of an “attempt,” so there was no need to instruct the jury on attempted robbery.

Accordingly, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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