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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000835-MR

JEFFREY STINE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 15-CR-000823-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** * * * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from a judgment of the Jefferson Circuit Court convicting the Appellant, Jeffrey Stine, of first-degree robbery and theft by unlawful taking over \$500. As the record shows, the trial court correctly denied defense counsel's request to include the jury instruction of second-degree robbery. Furthermore, we find no palpable error resulted from the trial court's combining of

the first-degree robbery instructions. However, we must conclude that Stine's convictions for robbery and theft arising from the same single incident violate his rights against double jeopardy. Hence, we affirm on his conviction for first-degree robbery, but reverse his conviction for theft by unlawful taking over \$500.

Facts and Procedural History

Some facts concerning how the robbery occurred are contested between Stine, his co-defendants, and the victim. However, it is agreed that, on January 11, 2015, Stine, Robert Morris, and Courtney Pound traveled to a restaurant on Dixie Highway in Jefferson County to meet Jesus Arrieta, Jr. Pound stated that she was going there to buy marijuana, but Stine and Morris stated that the plan was to rob Arrieta.

In accordance with their plan, Pound drove Stine and Morris to the restaurant. Stine and Morris got out of the car and hid behind a dumpster. Pound backed the car into a parking space near the dumpster and waited. When Arrieta arrived at the restaurant, he approached Pound's car and tried to open the door. While the details of the robbery are contested, Arrieta was choked, struck on the back of the head, and stabbed in the thigh. Arrieta was left at the scene, but his wallet, cell phone, personal items, and vehicle were stolen. Arrieta was hospitalized for several days after the incident. Arrieta required blood

transfusions, physical therapy, and at least one major surgery to correct an embolism that occurred as a result of the stab wound.

Subsequently, a Jefferson County grand jury indicted Stine on counts of complicity to first-degree robbery, first-degree assault, and theft by unlawful taking over \$500. The grand jury charged Pound with complicity to first-degree robbery in the same indictment. Pound later entered a guilty plea to her charge. Morris was separately indicted for complicity to first-degree robbery and complicity to first-degree assault, to which he later pleaded guilty.

At trial, Morris confessed to holding Arrieta from behind and demanding that he turn over his possessions. However, Morris and Stine each blamed the other for the stabbing. Arrieta testified that “the man with the face tattoos” (Stine) could have been the one who hit him, but he did not see who it was. Arrieta then testified that he heard Stine say, “I got everything, just stab him . . . [,]” just before he was stabbed and the assailants fled the scene.

Before jury deliberations at the trial, defense counsel requested the inclusion of a second-degree robbery instruction. The trial court denied the request, only providing the jury with an instruction for first-degree robbery, and theft by unlawful taking over \$500. The jury convicted Stine of both first-degree robbery and theft by unlawful taking over \$500, but acquitted him of assault. The jury recommended a sentence of fourteen years for the first-degree robbery, and

five years for the theft by unlawful taking over \$500, to run concurrently for a total of fourteen years. The trial court sentenced Stine in accord with the jury's recommendation.

On appeal, Stine raises three arguments. First, he argues that the trial court erred by denying his request to instruct the jury on second-degree robbery. Second, he contends that the trial court erred on the first-degree robbery instruction by combining two jury findings into a single element. And third, he argues that his conviction for both first-degree robbery and theft by unlawful taking over \$500 violates his rights against double jeopardy.

Standard of Review

A trial court's decision not to provide a requested jury instruction is reviewed under the "reasonable juror" standard. *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013). We typically do not characterize our review under this standard as either *de novo* or for abuse of discretion. *Id.* Rather, "[c]onstruing the evidence favorably to the proponent of the instruction, we ask whether the evidence would permit a reasonable juror to make the finding the instruction authorizes." *Id.* (quoting *Allen v. Commonwealth*, 338 S.W.3d 252, 255 n.1 (Ky. 2011)). However, the content of jury instructions is an issue of law that remains subject to *de novo* review by this Court. *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015). Finally, a double jeopardy violation, once established,

constitutes palpable error and requires reversal even when unpreserved. *Cardine v. Commonwealth*, 283 S.W.3d 641, 651 (Ky. 2009).

Analysis

1. The trial court did not err when it refused to instruct the jury of the offense of second-degree robbery.

First, Stine contends that by denying his request to include a second-degree robbery instruction, the trial court denied his right to due process. It is uncontested that Stine participated in the planned robbery of Arrieta. It is, however, contested whether Stine intended to harm Arrieta during the robbery. Stine testified that he did not plan to “injure,” “stab,” “punch,” or “assault” Arrieta. Therefore, Stine argues a reasonable jury could find that he was not guilty of first-degree robbery by complicity, and instead only guilty of second-degree robbery.

Since Stine requested an instruction on second-degree robbery, this issue is properly preserved for review. “A trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence.”

Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing *Manning v. Commonwealth*, 23 S.W.3d 610, 614 (Ky. 2000)). However, the fact that the evidence would support a guilty verdict on a lesser uncharged offense does not establish that it is a lesser-included offense of the charged offense. *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). An instruction on a lesser-included offense should be given if the evidence is such that a reasonable juror

could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser-included offense. *Roberts v. Commonwealth*, 410 S.W.3d 606, 610 (Ky. 2013). Lesser-included offenses are also covered under KRS¹ 505.020(2).

KRS 515.020 sets out the following elements for first-degree robbery:

- (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.

Second-degree robbery, as defined in KRS 515.030, includes the same elements as first-degree robbery but without the aggravating factors of physical injury, possession of a deadly weapon, or use of a dangerous instrument. Thus, it is a lesser-included offense of first-degree robbery.

However, the Kentucky Supreme Court has held that “if the commission of the offense of robbery was intended, the lack of intent of an aggravating circumstance, such as the use of a gun, will not act to lessen criminal

¹ Kentucky Revised Statutes.

liability for the higher degree of the same offense.” *Commonwealth v. Yeager*, 599 S.W.2d 458, 459-60 (Ky. 1980). *See also Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999); *Ray v. Commonwealth*, 550 S.W.2d 482, 484-85 (Ky. 1977).

While Stine testified that he did not plan to injure Arrieta, he admitted that he planned and participated in the robbery. Thus, Stine’s lack of intent to injure would not have formed the basis for a reasonable doubt as to his guilt on the greater offense. Stine’s conviction for first-degree robbery must, therefore, be affirmed.

2. No palpable error resulted in the trial court’s combining of the first-degree robbery instruction.

Second, Stine contends the trial court erred when it combined two required jury findings into one element in the first-degree robbery jury instruction. He argues this combined finding violated his right to have a reasonable jury find him guilty of every element beyond a reasonable doubt.

This contention was not properly preserved. Therefore, Stine has requested the issue be reviewed for palpable error. Stine’s counsel submitted jury instructions with separate elements worded as followed:

C. Robert Morris was armed with a knife while committing the theft;

AND

D. Robert Morris’ knife was a deadly weapon as defined in Instruction No. 15[.]

The trial court rejected this instruction and instead combined the elements into the following instruction:

(2) Used or threatened the immediate us [sic] of physical force upon Jesus Arrieta with a knife and the knife was a dangerous instrument as defined in Instruction No. 4.

Instruction No. 4 defined “dangerous instrument” as set out in KRS 500.080(3).

Defense counsel did not object to the combining of these elements.

While a timely objection in the trial court is usually necessary to preserve the right to appellate review of a defectively phrased instruction, review under RCr² 10.26 is appropriate when an unpreserved error is palpable and when relief is necessary to avoid manifest injustice resulting from a defective instruction. *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). An instruction that fails to accurately state the law for the jury, by definition, affects the substantial rights of the defendant. *Miller v. Commonwealth*, 283 S.W.3d 690, 695-96 (Ky. 2009).

Here, the trial court’s instruction did not cause manifest injustice because it required the jury to find every element of first-degree robbery beyond a reasonable doubt. Although the court did not give a jury the opportunity to determine whether a knife was a dangerous instrument, the Kentucky Supreme

² Kentucky Rules of Criminal Procedure.

Court has held that a knife covered in the victim's blood left little doubt that it was a dangerous instrument. *Kelly v. Commonwealth*, No. 2004-SC-000786-MR, 2006 WL 3386636, at *11 (Ky. Nov. 22, 2006). Therefore, the combining of these instructions did not fail to accurately state the law for the jury.

3. Stine's convictions for both first-degree robbery and theft by unlawful taking over \$500 violate double jeopardy.

Third, Stine argues his convictions for first-degree robbery and theft by unlawful taking over \$500 violate his rights under the double jeopardy clause of the Fifth Amendment. He concedes this issue was not properly preserved, but requests we review the issue for palpable error. We agree, and grant relief from the lesser conviction.

Kentucky has adopted the *Blockburger* test to evaluate double jeopardy. KRS 505.020; *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). On this question, the Kentucky Supreme Court has held that convictions for robbery and theft by unlawful taking over \$500 violate double jeopardy when based on the same incident of theft.

We believe that commentary, which, of course, may be used as an aid in construing the statutes of the penal code, represents an unmistakable expression of intent for theft by unlawful taking to be subsumed into robbery. It would be a clear violation of legislative intent, therefore, for a person . . . to be convicted of both theft by unlawful taking and robbery based upon the same incident of theft.

Lloyd v. Commonwealth, 324 S.W.3d 384, 390 (Ky. 2010) (footnote omitted).

The Commonwealth argues that the conviction of theft by unlawful taking over \$500 should stand because that conviction was for the theft of Arrieta's car, and not the other stolen items. The Commonwealth contends that the other items were covered by the robbery conviction alone. We conclude that the single larceny rule precludes separating the thefts in this manner.

That rule provides, that the taking of different items of property at the same time and same place constitutes one larceny. *Nichols v. Commonwealth*, 78 Ky. 180, 182 (1879). The single larceny rule has been broadly interpreted. *See generally Fair v. Commonwealth*, 652 S.W.2d 864, 867 (Ky. 1983) (applying to multiple items stolen from one building in the span of one night); *Jacobs v. Commonwealth*, 260 Ky. 142, 84 S.W.2d 1, 2 (1935) (applying to items stolen in multiple places over multiple days). Since the theft of Arrieta's car and his other possessions all arise from the same act of larceny, Stine's convictions for first-degree robbery and theft by unlawful taking are based on the same incident of theft, and therefore, violate his rights against double jeopardy. Consequently, we must set aside his conviction for theft by unlawful taking over \$500.

Conclusion

For the reasons herein, this Court affirms the conviction of first-degree robbery. However, we reverse Stine's conviction of theft by unlawful taking over \$500.

ALL CONCUR.

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