IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky FINAL

2002-SC-1052-MR

DATE 4-8-04 ELIA Grown, D.C.

MANYELL REED APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM McDONALD, JUDGE
NO. 02-CR-0353

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Manyell Reed, was convicted by the Jefferson Circuit Court of two counts of first-degree robbery and two counts of intimidating a witness. He was sentenced to twenty (20) years in prison. Appellant appeals to this Court as a matter of right.[1]

On September 14, 2001, D'Nisha Wright, an assistant manager at the Blockbuster Video store located at 26th and Broadway in Louisville, arrived at work to find that her district manager was questioning employees about some missing money. After questioning Appellant, who was at the time a customer service representative, the district manager fired him.

On the same evening at approximately 11:30 p.m., as Wright and Teddy Davis, another customer service representative, were preparing to close the store, a

[1] Ky. Const. § 110(2)(b).

man in a yellow hooded sweatshirt, dark pants, and with a dark cloth over his face, entered the store yelling "Get the f___ down." Davis, who was in the rear of the store, could see the robber waiving a gun and pointing it at Wright's head. The seven or eight customers in the store fell to the ground as instructed. As the registers were opened, the robber asked "Ted, Ted, where are you?" The robber then made Davis get up and lock the doors. The masked robber yelled, "Open up the registers," and then ordered that "Denise, open up the registers."

At trial, Davis testified that the robber was Appellant based upon the robber's voice, the way he carried himself, and his size. He testified that he and Appellant had trained and worked together at the store for four months and that he had no doubt that Appellant was the robber.

Assistant Manager Wright testified that Appellant was fired and left the store at about 6:00 p.m. She stated that Appellant returned to the store a couple of times and also called on the phone. After the robber had entered the store and had ordered her to open the register, she recognized the robber as Appellant. She said that under the robber's black pants she could see khaki pants like those worn by Blockbuster employees. She stated that the robber was wearing the same "pretty brown shoes" that Appellant had worn to work and that she had complimented him on his shoes. She testified that the sound of the ring of Appellant's cell phone was the same as the robber's when it rang during the robbery. She testified that Appellant initially ordered her to open the registers, but became impatient and opened them himself, using a wand and bar code designed to be used by employees for quick access to the registers during a robbery. She stated that Appellant ordered her to open the safe, which operated on a fifteen minute opening delay. Appellant waited and then

removed three to four thousand dollars, along with the money from the registers and fled before the police arrived. When the police arrived Wright and Davis were the only witnesses remaining. They informed the police that they believed Appellant was the robber.

Davis testified that about two weeks after the robbery Appellant pulled up in his car and questioned him concerning his statements to the police. Appellant stated to Davis that he had been locked up for the Blockbuster robbery but had been released. Appellant also informed Davis that he was out of town on the night of the robbery and stated to Davis that "I'll be watching you all." Around the same time, Wright testified that she received the following:

> [A] weird phone call from someone who said he was Manyell Reed. He asked why she had told people; that there was a break in at his house; the police were in the house. Later, the caller said, "Okay, I'll be watching you."

Appellant and Natoniya Norton, his girlfriend and mother of his daughter, testified in his defense. Appellant testified that he was not the person who robbed the store because after he was fired, he angrily left the store and went home. He testified that during the same evening, an individual named Leroy picked him up and that they went to a club and played pool. He also said that he called Blockbuster a few times and stopped by at about 6:00 p.m. to inquire if he could rent movies one last time on his employee account. He recounted that later that evening he and Leroy picked up Norton and proceeded to her mother's house to pick up clothes. They later returned Norton to the Complex where her grandmother resided. Appellant testified that he and Leroy left for Atlanta in order to help choreograph a local rap group the next day. Appellant also denied threatening either Wright or Davis.

Norton testified that she received a call from Appellant the day he was fired. She testified that Reed and Leroy picked her up at about 10 p.m. and that they spoke for 30 to 35 minutes, traveled to her mother's house, and got something to eat. Appellant then dropped her off at her complex where she signed in between 12:00 to 12:15 p.m., and Appellant was required to show his ID to enter.

At trial, the circuit court denied Appellant's motions for directed verdicts of acquittal on the intimidating a witness charges. The court also denied Appellant's request that the jury only be instructed on the "deadly weapon" theory of liability charge, and that the jury not be given the option of convicting on the use of a "dangerous instrument" theory. Appellant requests that this Court reverse and remand this case to the circuit court for dismissal of the intimidation of a witness counts and for a new trial on the robbery counts.

Appellant's first claim is that the trial court erred when it denied his motion for a directed verdict on the two counts of intimidating a witness. The Commonwealth argues that the statements to Wright and Davis that "I'll be watching you" could be interpreted as a threat, and that Appellant's statement to Davis that he was out of town the night of the robbery was an attempt to influence Davis' testimony. Appellant responds that the evidence simply did not show that he threatened Davis or Wright under KRS 524.040.

As Appellant's acts occurred in 2001, we apply the pre-2002 version of KRS 524.040. The then prevailing version of KRS 524.040 defines the offense of intimidating a witness as follows:

> (1) A person is guilty of intimidating a witness when, by use of physical force or a threat directed to a witness or a person he believes may be called as a witness in any official proceeding, he:

(a) Influences, or attempts to influence, the testimony of that person;
(b) Induces, or attempts to induce, that person to avoid legal process summoning him to testify;
(c) Induces, or attempts to induce, that person to absent himself from an official proceeding to which he has been legally summoned;
(d) Induces, or attempts to induce, that person to withhold a record, document, or other object from an official proceeding;
(e) Induces, or attempts to induce, that person to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; or
(f) Hinders, delays, or prevents the communication to a law enforcement officer or judge of information relating to the possible commission of an offense or of a violation of conditions of probation, parole or release pending judicial proceedings.

(2) For purposes of this section:
(a) An official proceeding need not be pending or about to be instituted at the time of the offense; and
(b) The testimony, record, document or other object need not be admissible in evidence or free of a claim of privilege.

(3) "Threat" as used in this section means any threat proscribed in KRS 514.080.

(4) Intimidating a witness is a Class D felony.[2]

Threat is defined in KRS 524.040(3) as "any threat proscribed in KRS 514.080."

KRS 514.080 defines the means by which a threat may be made as follows:

(1) A person is guilty of theft by extortion when he intentionally obtains property of another by threatening to:
(a) Inflict bodily injury on anyone or commit any other criminal offense; or
(b) Accuse anyone of a criminal offense; or
(c) Expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair his credit or business repute; or
(d) Use wrongfully his position as a public officer or servant or employee by performing some act within or related to his official duties, either expressed or implied, or by refusing or omitting

[2] KRS 524.040 (1986), *amended by* KRS 524.040 (Supp. I 2002).

to perform an official duty, either expressed or implied, in a manner affecting some person adversely; or

(e) Bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(f) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

Appellant alleges that the Commonwealth was required and failed to establish that he had committed one of the acts enumerated in KRS 514.080(1)(a) through (f), which defines "threat."

This Court's frequently repeated directed verdict standard is a follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inference 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 the ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. 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.[3]

It was not clearly unreasonable for the jury to find Appellant guilty of the requisite threat under KRS 514.080(1)(a). Appellant was aware that Wright and Davis intended to testify against him and the jury could have believed in such circumstances that his statements "I'll be watching you" were intended as a threat of bodily injury or an act of stalking and harassment. While the statements, standing alone, may appear

[3] Jordan v. Commonwealth, Ky., 74 S.W.3d 263, 266 (2002) (*quoting* Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

insufficient in the existing context, and allowing the Commonwealth all reasonable inferences, the trial court did not err in overruling the directed verdict motion.

Appellant claims several errors in the jury instructions on the robbery charges. Jury instructions No. 1 and 2 on the two robbery charges are as follows:

> You will find the Defendant, Manyell D. Reed, guilty of Robbery in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in Jefferson County, Kentucky, on or about the 14th day of September, 2001, the Defendant stole cash from Blockbuster Video;
>
> B. That in so doing and with the intent to accomplish the theft, he threatened the immediate use of physical force upon D'Nisha Wright;
>
> AND
>
> C. That when he did so:
>
> i. He was armed with a handgun,
>
> OR
>
> ii. He threatened the immediate use of a dangerous instrument upon D'Nisha Wright.

The same instruction was also given on the robbery count against Davis, except that Davis' name was used. Instruction No. 5 defined "Dangerous Instrument" as follows:

> [A]ny instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury; or, any object that is intended to convince the victim that it is a pistol or other deadly weapon, and which does so convince the victim.

Appellant first argues that there was no evidence to support a "dangerous instrument" theory of guilt. Specifically, Appellant contends that the instruction should not include theories of guilt based on both the robber being armed with a handgun and with the robber using a dangerous instrument. Appellant attempts to show that the language in instructions number 1, 2 and 5 contained the term "dangerous instrument" and that he never possessed an "instrument, article or substance," but rather he

possessed a handgun. As a result, Appellant claims that the jury instructions and verdict were inconsistent with Burnett v. Commonwealth[4] and Commonwealth v. Whitmore,[5] and violated the unanimity requirement the Kentucky Constitution and the due process requirement of the Kentucky and United States Constitutions.

As reflected in Burnett and Whitmore, presenting the jury with alternate theories of guilty in the instructions is reversible error if there was not sufficient evidence to support both theories. This Court held:

> Any instruction which permits a conviction on the basis of alternative theories that are not supported by the evidence runs afoul of the due process requirement that each juror's verdict be based on a theory of guilt in which the Commonwealth has proven each and every element beyond a reasonable doubt. Here, there was insufficient evidence that Whitmore possessed the cocaine with intent to manufacture or dispense it, and thus the trafficking instruction violated the unanimity requirement.[6]

In the present case, there was ample evidence to support the "handgun" instruction. The "dangerous instrument" instruction was not improper albeit perhaps unnecessary. As the Commonwealth was unable to produce the handgun, the jury could have questioned whether the witnesses saw an actual operative handgun or merely a facsimile thereof. Moreover, juror unanimity is not in issue because the broad definition of "dangerous instrument" provided in the instructions encompasses deadly weapons, including a handgun. "Although not every 'dangerous instrument' is a 'deadly weapon,' a 'deadly weapon' ordinarily is a dangerous instrument."[7] Consequently, there was no error.

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[4] Ky., 31 S.W.3d 878, 882 (2000).
[5] Ky., 92 S.W.3d 76, 81 (2002).
[6] Id.
[7] Whorton v. Commonwealth, Ky., 570 S.W.2d 627, 631 (1978) (*overruled on other grounds by* Polk v. Commonwealth, 679 S.W.2d 231, 234 (1984)).

Appellant's second claim is that the Commonwealth abandoned the "dangerous instrument" theory of guilt when it filed a bill of particulars prior to trial. The bill of particulars stated that Appellant was only "armed with a handgun" not a dangerous instrument. This court has noted the policy behind a bill of particulars in criminal cases is to provide information fairly necessary to enable the accused to understand and prepare his defense against charges without prejudicial surprise at trial.[8] This argument is without merit as the conduct for which Appellant was charged was clearly revealed in the bill of particulars. As a result, there was no prejudice, surprise, or error caused by the bill of particulars.

Appellant's third argument is that the instructions given by the trial court left out an essential element of the offense, i.e., that the threat must not be against a participant in the crime. Appellant claims that whether Davis or Wright were participants in the crime is an essential element of robbery to be determined by the jury. Appellant claims that the harm caused by the jury instruction on the alternative "dangerous instrument" theory of guilt allowed a conviction without a finding beyond a reasonable doubt that each essential element of the offense had been proven.

We reject Appellant's argument as there was no evidence suggesting that Wright or Davis were participants in the crime. Although Wright and Davis may have been coerced at gunpoint to perform specific tasks, such is not participation in the crime and did not warrant such an instruction. If any error was committed here, it was undoubtedly harmless.

Appellant's final argument is that the definition of "dangerous instrument" was itself defective because the Court had added language that was not contained in

[8] Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 419 (1992).

the statute that defines "dangerous instrument."[9] Appellant contests the following language as applying only to deadly weapons not dangerous instruments: ". . . . or, any object that is intended to convince the victim that it is a pistol or other deadly weapon, and which does so convince the victim." Appellant claims that this is the test in Merritt v. Commonwealth[10] (Merritt test), which is to be applied only by the trial court to determine as a matter of law whether an object is a deadly weapon. In Lambert v. Commonwealth,[11] the Court of Appeals held that there was no reversible error where the jury instructions included the Merritt language. Appellant attempts to distinguish Lambert by noting that the Merritt language was used in the definition of "gun."[12] The Court of Appeals noted the following in a footnote:

> We note that the trial court may have been better advised in its jury instructions to have followed the language in KRS 515.020 as to a deadly weapon; and by applying Merritt to have defined "deadly weapon" in a manner similar to its definition of "gun." (Citations omitted).[13]

The language added to the dangerous instrument instruction is consistent with our holding in Merritt.[14] As previously noted, this Court has held that a pistol or deadly weapon can be considered a part of the more inclusive category of dangerous instruments. Appellant does not dispute that he was in possession of a handgun, but he contends that the court must determine as a matter of law whether that handgun is a "deadly weapon." Appellant's brief even admits that he was "armed with a deadly

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[9] KRS 500.080(3).
[10] Ky., 386 S.W.2d 727, 729 (1965).
[11] Ky. App., 835 S.W.2d 299, 300-01 (1992).
[12] Id.
[13] Id. at 301, FN5.
[14] Supra.

weapon" as a matter of law. As such, the instructions given were extremely similar to the model instructions, and any error would have to have been harmless. [15]

Accordingly, the judgment of conviction is affirmed.

All concur.

[15] 1 Cooper, Kentucky Instructions to Juries (Criminal) § 6.03 (4th ed. Anderson 1993).

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