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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 12-22-05 E.W.A.Graw.t.p.c.

2003-SC-0336-MR

CHARLES CRUMES — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
02-CR-727

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A Kenton Circuit Court jury convicted Appellant, Charles Crumes, of first-degree robbery and of being a persistent felony offender in the first degree. He was sentenced to twenty years in prison and appeals to this court as a matter of right. Ky. Const. § 110(2)(b). He asserts three claims of reversible error, viz: (1) failure to direct a verdict of acquittal on the charge of robbery in the first degree; (2) erroneous jury instruction on robbery in the first degree; and (3) failure to instruct the jury on lesser included offenses. The trial court's failure to instruct the jury on the lesser included offenses of robbery in the second degree and menacing requires reversal for a new trial. No other errors occurred.

On August 29, 2002, Ronnie Singleton and his co-worker, Eddie (whose last name Singleton could not recall), were constructing a building at the corner of 9th and

Madison Streets in Covington, Kentucky. At approximately 5:00 p.m., they took a break and walked across the street to buy cigarettes at a grocery store known as Tienda Morales. As they were returning to work, they encountered an African-American male in a black leather coat, walking toward them while pushing a little girl's bicycle. When the man was about ten to twelve feet away, he displayed a knife and demanded of Singleton: "Give me your money or I'll cut your f---ing heart out."

Singleton testified that he could not see the handle of the knife, only the blade. He did not comply with the assailant's demands but instead moved toward his truck to find something with which to protect himself. The assailant then made a similar demand of Eddie: "Give me your money, too, or I'll cut yours out." Eddie, as well, did not comply; instead, he began arguing with the assailant. Shortly thereafter, the man abandoned his efforts, turned, crossed the street, and walked toward Tienda Morales. The assailant remained ten to twelve feet away from Singleton and Eddie during the entire confrontation.

Singleton and Eddie proceeded to a nearby building from which Eddie called the police. Mario Morales, the owner of Tienda Morales, testified that a man of the same description entered his store at approximately 5:00 p.m. that same day. After being there only a few minutes, the man struck a customer who was standing in line. Morales's father-in-law immediately ordered the assailant to leave and the man threatened, "Oh, okay, you want some of this?" and brandished a knife. Morales called emergency services ("911") and the man immediately left the store. He was in the store a total of one to two minutes.

A few minutes later a female voice was heard screaming outside the store. Morales, along with others in the store, ran outside and saw a woman, Tammy Ross,

running toward the store. The same man who had left the store just moments before was standing a short distance behind Ross. The man then ran down West 10th Street into an apartment building.

At approximately 5:15 p.m., Detective Robert Auton, of the Covington Police Department, arrived at the apartment building and found Appellant standing in the doorway to one of the apartments. Auton arrested Appellant, placed him in handcuffs, and performed a pat-down search. He discovered an open pocket knife in the right back pocket of Appellant's pants.

Appellant was indicted on charges of robbery in the first degree for the attack on the two construction workers, wanton endangerment in the second degree for the attack on Tammy Ross (Ross did not appear at trial and the jury acquitted Appellant of the latter charge), and being a persistent felony offender in the first degree. Appellant testified at trial and claimed that he was not the person involved in the robbery charge or in the incident that occurred inside Tienda Morales. Instead, he asserted that around 4:49 p.m. on August 29, 2002, he got off a bus at 8th and Madison in Covington. He began walking down the street in the direction of 1010 W. 10th Street, the location of his uncle's apartment building. Before he arrived, he encountered Tammy Ross, a woman with whom he had argued about a month before. He testified that Ross immediately started calling him offensive names. He kept walking, entering his uncle's apartment building, where the Covington police arrested him shortly thereafter.

I. SUFFICIENCY OF EVIDENCE.

Appellant asserts that the Commonwealth failed to establish the elements of robbery in the first degree, thus entitling him to a directed verdict of acquittal. He specifically argues that the Commonwealth's evidence showed only that "someone

approached Singleton, held up a knife, made a request for money, and then proceeded on his way;" it did not show that any money was taken from Singleton or Eddie or that there was even an attempt to do so. Appellant asserts that this could not reasonably be considered robbery, let alone first-degree robbery.

KRS 515.030 provides, "[a] person is guilty of robbery in the second 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." (Emphasis added.) Robbery in the first degree, KRS 515.020, requires proof of those identical elements and, additionally, requires proof of one of three aggravating factors, i.e., the robber must (a) cause physical injury to any person who is not a participant in the crime; (b) be armed with a deadly weapon; or (c) use or threaten to use a dangerous instrument upon any person who is not a participant in the crime. KRS 515.010(1).

Singleton's testimony that he saw the assailant display the blade of a knife clearly satisfied the Commonwealth's burden of proof with respect to the aggravating factor necessary to enhance the offense to robbery in the first degree. In Dillingham v. Commonwealth, 995 S.W.2d 377 (Ky. 1999), mere "[r]eference to a deadly weapon coupled with a contemporaneous demand for money" was sufficient to withstand a motion for directed verdict of acquittal on a charge of first-degree robbery. Id. at 380. Here, the weapon was not merely referenced; it was displayed.

Appellant contends, however, that the Commonwealth's evidence was insufficient to support the first part of KRS 515.020, the part that mirrors the elements of second-degree robbery. The law is well established that robbery does not require a completed theft. KRS 515.020 (1974 cmt.) ("[T]he language, 'in the course of committing theft,' . . . is intended to expand the scope of robbery to permit a conviction even though the theft

was incomplete."); Wade v. Commonwealth, 724 S.W.2d 207, 208 (Ky. 1986) ("Whether the appellant completed the theft or aborted the theft is not critical."); Lamb v. Commonwealth, 599 S.W.2d 462, 463-64 (Ky. App. 1979) ("[W]e view the first-degree robbery provision 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."). Appellant contends that the assailant did not even attempt a theft. As the 1974 Commentary to KRS 515.020 points out, "[t]o be convicted under KRS 515.030, an offender must have intended, with his use or threatened use of physical force, to accomplish a theft." KRS 515.020 (1974 cmt.). Therefore, the evidence must show that Appellant at least attempted to commit a theft against Singleton or Eddie by the use or threatened use of force.

For purposes of ruling on a motion for directed verdict, a trial court "must assume that the evidence for the Commonwealth is true, but [reserve] to the jury questions as to the credibility and weight to be given to such testimony." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). A defendant is entitled to a directed verdict of acquittal only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt . . . ." Id. The Commonwealth's evidence, assuming it to be true, showed that Appellant made a demand for money, displayed the blade of a knife, and threatened to "cut [Singleton's and Eddie's] f---ing heart[s] out." A jury could reasonably believe from this evidence alone that Appellant intended to steal their money by the threatened use of immediate physical force. The trial court correctly overruled Appellant's motion for a directed verdict of acquittal.

II. INSTRUCTION ON ROBBERY IN THE FIRST DEGREE.

Appellant next asserts that the trial court erroneously instructed the jury on the offense of robbery in the first degree. He admits that he did not preserve this objection for appellate review, but urges this court to review the issue for palpable error pursuant to RCr 10.26. We find no error, much less palpable error, in the instruction as given.

The trial court instructed on robbery in the first degree as follows:

> You will find the defendant guilty of First-Degree Robbery under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> > A. That in this County on or about August 29, 2002, the Defendant attempted to steal property from another person; AND
> >
> > B. That in the course of so doing, and with intent to accomplish the theft, he threatened the immediate use of physical force upon the victim with a dangerous instrument or deadly weapon.

(Emphasis added.) The instructions also included the statutory definitions of "deadly weapon," KRS 500.080(4), and "dangerous instrument," KRS 500.080(3).

Appellant argues that the trial court, by giving these instructions, erroneously determined as a matter of law that a pocket knife was either a deadly weapon or a dangerous instrument, thus denying the defendant his right to have every element of the offense proven to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 2356, 147 L.Ed.2d 435 (2000). We disagree.

KRS 500.080(4)(c) specifically excludes a pocket knife and a hunting knife from the definition of "deadly weapon." Appellant asserts that the trial court should not have instructed the jury that it could find Appellant guilty if it believed the pocket knife was a deadly weapon. He correctly concludes that where an assailant used a pocket knife in the commission of a theft, a conviction of robbery in the first degree is obtainable only if the jury finds that the pocket knife was a "dangerous instrument," i.e., an "instrument . . .

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." KRS 500.080(3). Whether any instrument is a dangerous instrument is a question of fact for the jury to determine. Kennedy v. Commonwealth, 544 S.W.2d 219, 221 (Ky. 1976); Owens v. Commonwealth, 187 Ky. 207, 218 S.W. 719, 720 (1920) (pre-penal code case, cited with approval in Meadows v. Commonwealth, 551 S.W.2d 253, 256 (Ky. 1977)).

The flaw in Appellant's reasoning is that Singleton did not identify the knife that was displayed to him as being a pocket knife. Singleton testified that he only saw the blade of a knife and that he did not see the handle. That evidence was sufficient for the jury to find either that Appellant used the pocket knife found on his person at the time of his arrest and that such a knife constituted a dangerous instrument, or, alternatively, that a different knife was displayed to Singleton that was not a pocket knife or hunting knife, and thus would have been a deadly weapon as defined in KRS 500.080(4)(c).

The jury instructions also included the definitions of "deadly weapon," including that portion of the definition that specifically excludes a pocket knife or hunting knife, and "dangerous instrument." Therefore, the instruction properly allowed the jury to determine the type of instrument used and then to apply the law accordingly. The instruction properly stated the law.

III. LESSER INCLUDED OFFENSES.

Appellant requested instructions on lesser included offenses of robbery in the second degree, menacing, wanton endangerment in the second degree, and criminal attempt to commit robbery in the first and second degrees, with the defense of

renunciation. We agree that the jury should have been instructed on robbery in the second degree and menacing.

It is the duty of the trial court in a criminal case to instruct the jury on the whole law of the case. RCr 9.54(1). This rule requires instructions applicable to every state of the case deducible from or supported to any extent by the testimony. Webb v. Commonwealth, 904 S.W.2d 226, 228 (Ky. 1995); Reed v. Commonwealth, 738 S.W.2d 818, 822 (Ky. 1987). A defendant has the right to have every issue of fact raised by the evidence and material to the defense submitted to the jury on proper instructions. Hayes v. Commonwealth, 870 S.W.2d 786, 788 (Ky. 1993). He is entitled to an instruction on any lawful defense that he has, Slaven v. Commonwealth, 962 S.W.2d 845, 856 (Ky. 1997); Sanborn v. Commonwealth, 754 S.W.2d 534, 550 (Ky. 1988), including the defense that he is guilty of a lesser included offense of the crime charged. Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge. Slaven, 962 S.W.2d at 856; Gall v. Commonwealth, 607 S.W.2d 97, 108 (Ky. 1980), overruled on other grounds, Payne v. Commonwealth, 623 S.W.2d 867, 870 (Ky. 1981); Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977). An instruction on a lesser included offense is required if the evidence would permit the jury to rationally find the defendant not guilty of the primary offense, but guilty of the lesser offense. Commonwealth v. Wolford, 4 S.W.3d 534, 539 (Ky. 1999); Commonwealth v. Day, 983 S.W.2d 505, 508 (Ky. 1999); Smith v. Commonwealth, 737 S.W.2d 683, 687 (Ky. 1987). See also Hopper v. Evans, 456 U.S. 605, 611-12, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367 (1982).

A lesser included offense is one that includes the same or fewer elements than the primary offense. KRS 505.020(2)(a); Luttrell v. Commonwealth, 554 S.W.2d 75, 78 (Ky. 1977); 1 William S. Cooper, Kentucky Instructions to Juries § 1.04, at 12-13 (4th ed. 1999). But if the lesser offense requires proof of an element that the greater offense does not, it is not a lesser included offense but a separate, uncharged offense. Colwell v. Commonwealth, 37 S.W.3d 721, 726 (Ky. 2000).

A. Robbery in the second degree.

As previously noted, the elements of robbery in the first and second degrees are the same, except that robbery in the first degree requires proof of one of three additional aggravating factors. The potential aggravating factors here were that Appellant was either armed with a deadly weapon or used or threatened the immediate use of a dangerous instrument upon Singleton and/or Eddie. If the jury had found that the knife displayed to Singleton was a pocket knife, then it could not have found that it was a deadly weapon. KRS 500.080(4)(c). And if the jury further found that the pocket knife was not a "dangerous instrument" as defined in KRS 500.080(3), Appellant could only have been guilty of robbery in the second degree, an offense with less than all of, but none additional to, the elements required for the offense of robbery in the first degree. The jury in this case heard testimony that the assailant of Singleton and Eddie remained at a distance from the two at all times during their confrontation, and that a pocket knife was found on Appellant's person at the time of his arrest. Given the state of this evidence, the jury could have reasonably concluded that Appellant wielded a pocket knife during the confrontation with Singleton and Eddie, and yet never brandished it in a way that posed an actual threat of use within the meaning of KRS 500.080(3). Under the instructions as given, however, if the jury had reached this conclusion, it would have

been forced to acquit Appellant altogether in the face of evidence reasonably supporting a finding that Appellant had committed each element of robbery in the second degree. Thus, it was error not to instruct the jury on the lesser included offense of robbery in the second degree.

B. Menacing.

"A person is guilty of menacing when he intentionally places another person in reasonable apprehension of imminent physical injury." KRS 508.050. Menacing is a form of assault and replaced the common law offense of "simple assault," which was defined as "an unlawful act which places another in reasonable apprehension of receiving an immediate battery." KRS 508.050 (1974 cmt.) (quoting Perkins, Criminal Law 117 (2d ed. 1967)). Robbery combines the offenses of assault and theft, Cooper, supra, § 6.14, at 310, and assault is generally a lesser included offense of robbery. O'Hara v. Commonwealth, 781 S.W.2d 514, 515 (Ky. 1989); Commonwealth v. Varney, 690 S.W.2d 758, 759 (Ky. 1985); Sherley v. Commonwealth, 558 S.W.2d 615, 617 (Ky. 1977). That does not mean that a defendant is always entitled to an instruction on assault as a lesser included offense of robbery. In Mack v. Commonwealth, 136 S.W.3d 434 (Ky. 2004), we held that a defendant was not entitled to an instruction on assault in the fourth degree as a lesser included offense of robbery where he admitted to stealing the property, thus proving the theft aspect of the robbery offense beyond a reasonable doubt. Id. at 439-40.

Here, however, Appellant did not steal any property, nor did he admit to an intent to accomplish a theft. In fact, he took no other steps against Singleton and Eddie after they essentially ignored his threat to "cut [their] f---ing heart[s] out." In light of Appellant's seeming indifference toward the response to his threat, a jury could

reasonably have believed that he never intended to rob them but only to frighten them, in which case he would be guilty of menacing. The jury should have been instructed on menacing as a lesser included offense of robbery. Cooper, supra, § 6.14, at 310.

The Commonwealth argues that there was no evidence to support this theory because Appellant completely denied the charge; thus, it was either "all-or-nothing." Not so. A defendant is entitled to an instruction on a lesser included offense if there is any evidence to support it, even if the defendant completely denies the charge. Reed, 738 S.W.2d at 822-23. In Trimble v. Commonwealth, 447 S.W.2d 348 (Ky. 1969), our predecessor court held that "[w]hen the prosecution adduces evidence warranting an inference of a finding of a lesser degree of the charged offense, the court should instruct on the lesser degree even though the defendant presents the defense of alibi." Id. at 350. Appellant was entitled to an instruction on menacing; his denial of the charges was inconsequential.

C. Wanton Endangerment.

KRS 508.070 provides that "[a] person is guilty of wanton endangerment in the second degree when he wantonly engages in conduct that creates a substantial danger of physical injury to another person." Though wanton endangerment could be a lesser included offense of first-degree robbery with a dangerous instrument under some circumstances, Cooper, supra, § 6.15, at 313, it could not be such with regard to the particular facts of this case. Here, Appellant remained at all times ten to twelve feet away from Singleton and Eddie and did not brandish or thrust the knife toward them. Neither Singleton nor Eddie was ever in substantial danger of physical injury. If Appellant had attempted to carry out his threats, such would have been an intentional

act, not a wanton one. Therefore, there was no basis for an instruction on wanton endangerment.

D. Criminal Attempt.

As previously noted, robbery does not require a completed theft. The act of displaying and threatening physical violence with a knife, and with an intent to accomplish a theft, is a completed robbery. Kirkland v. Commonwealth, 53 S.W.3d 71, 76 (Ky. 2001); Dillingham, 995 S.W.2d at 380; Wade, 724 S.W.2d at 208. The trial court properly denied Appellant's request for a criminal attempt instruction.

Accordingly, the Appellant's conviction and the sentence imposed therefor are reversed and this case is remanded to the Kenton Circuit Court for a new trial in accordance with the content of this opinion.

Cooper, Graves, Johnstone, Roach, and Scott, JJ., concur. Wintersheimer, J., dissents by separate opinion, with Lambert, C.J., joining that dissenting opinion.

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because the failure to instruct on the lesser-included offense of robbery in the second degree and menacing does not require reversal for a new trial.

Although it is elementary that a trial judge is required to instruct on the whole law of the case, including any lesser-included offenses, the judge does not have the duty to instruct on a theory with no evidentiary foundation. Gabow v. Commonwealth, 34 S.W.3d 63 (Ky. 2000). An instruction on a lesser-included offense is proper only if on considering the evidence presented a reasonable juror could entertain reasonable doubt as to the guilt on the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser charge. Cf. Thompkins v. Commonwealth, 54 S.W.3d 147 (Ky. 2001). When the evidence does not require a finding of guilt on the

instructions, the trial judge does not have a duty to instruct on a lesser-included offense.

Here, Crumes was not entitled to a second-degree robbery instruction as a lesser-included offense. The entire theory of his defense was denial. He argued that he never saw one of the male robbery victims, or robbed, or confronted him. He denied having a bicycle, or accosting any men on the street. Under such a circumstance, he is not entitled to an instruction on second-degree robbery as a lesser-included offense. Cf. Hicks v. Commonwealth, 550 S.W.2d 480 (Ky. 1977). Here, the evidence was that one of the male robbery victims saw the blade of the knife flourished by Crumes and thus the defendant was not entitled to the requested instruction. Two individuals testified that Crumes had a knife in his hand.

Crumes was also not entitled to a lesser-included instruction as to menacing. Crumes denied ever seeing either of the two male robbery victims. However, one of those victims testified that Crumes demanded from him and his companion all of their money or he was going to cut them with his knife. Here, there was clear evidence that the defendant used a knife, demanded money and threatened to cut the victims. The jury was properly instructed by the trial judge and Crumes was not entitled to any lesser-included offense instructions.

I would affirm the conviction in all respects.

Lambert, C.J., joins this dissenting opinion.