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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000234-MR

JOEL LEE NUTTER — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 05-CR-00850

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Joel Lee Nutter appeals his conviction for first-degree robbery for which he received a ten-year sentence enhanced to twenty years for being a first-degree persistent felony offender. We affirm.

On May 11, 2005, two plain clothes loss prevention employees at a Meijer store in Lexington, observed Appellant, in the shoe department, take off his own shoes, put on a pair of new K-Swiss tennis shoes, and remove the tags. When Appellant left the aisle, one of the employees, Terry Tipton, checked the K-Swiss shoe box and discovered Appellant's old shoes in the box and the new ones missing. The other employee, Christopher Pittaluga, followed Appellant as he walked out the front of the store. Tipton caught back up, and he and Pittaluga confronted Appellant in the parking lot in front of the store. Pittaluga got behind Appellant and Tipton in front. Tipton identified himself as loss prevention and told Appellant to follow Pittaluga back into the

store. Appellant did not respond and kept walking away. Tipton again told him to turn around and follow Pittaluga back into the store. Appellant continued to ignore Tipton. Tipton then grabbed Appellant's arm in an attempt to escort him back into the store, but Appellant retracted his arm and spun around, breaking Tipton's grasp. Tipton tried to grab his arm again, while Pittaluga tried to grab the other arm. In the process, Tipton accidentally stepped on Appellant's shoe, causing one of the K-Swiss shoes to come off as Appellant spun around and broke away again.

Tipton and Pittaluga chased Appellant through the parking lot. Pittaluga was right behind Appellant trying to grab him. Tipton saw Appellant place his right hand in his pocket and pull it out, at which time Tipton saw the blade of a knife about three-and-one-half to four inches long. Tipton yelled for Pittaluga. As Pittaluga heard Tipton call his name, he had just got a hold of Appellant's left shoulder. Pittaluga noticed Appellant was doing something with his right arm, and tried to disengage from him and begin to back away. Appellant then swung around with his right arm extended. Pittaluga felt something hit him across his right shoulder and face. Pittaluga fell to the ground. Tipton continued to chase Appellant for a short distance, while calling the police, but stopped chasing when a motorist said they would follow Appellant. The other K-Swiss shoe fell off while Appellant was running. Police officers located Appellant a short time later hiding in some bushes. Pittaluga had received a cut on his shoulder requiring nine stitches, and a small nick on his face that did not require stitches.

Appellant was charged with first-degree robbery and being a first-degree persistent felony offender. At trial, the defense conceded that Appellant had stolen the shoes and that Pittaluga suffered a physical injury. The defense's theory, however, was that Appellant's actions constituted a theft and a separate assault, not a robbery,

because the theft was already complete (in that Appellant had taken the shoes, left the store, and was well into the parking lot) when he was approached by the security guards and the use of physical force occurred. The trial court denied the defense's request for instructions on theft by unlawful taking under $300,[1] and second-degree assault as lesser included offenses.[2] The jury was instructed on the offense of first-degree robbery only. Appellant was found guilty of first-degree robbery and found to be a first-degree persistent felony offender (PFO I). Appellant was sentenced to ten years imprisonment for the robbery, enhanced to twenty years for the PFO I.

Appellant raises two arguments on appeal. First, Appellant contends that the trial court erred in denying his motion for directed verdict. KRS 515.020 provides:

> (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.

Appellant argues that the evidence did not establish the element of first-degree robbery which requires that the physical force be used "with intent to accomplish the theft." Appellant contends that the force he allegedly used against Pittaluga could not have been done "with intent to accomplish the theft," because the evidence conclusively

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[1] The K-Swiss shoes were priced at $49.99.

[2] Robbery is a combination of theft and assault. Morgan v. Commonwealth, 730 S.W.2d 935, 937 (Ky. 1987).

proved he had already abandoned half the pair of shoes before any force was used, and then subsequently abandoned the other shoe.

We disagree. In Mack v. Commonwealth, this Court recognized that a use or threat of force during escape from a completed or attempted theft will satisfy the "in the course of committing theft" requirement of KRS 515.020. 136 S.W.3d 434, 437 (Ky. 2004) (citing Robert G. Lawson & William H. Fortune, Kentucky Criminal Law §13-7(b)(2) (1998)). "Escape" encompasses "all steps or events in the process of escape which would fall within the active or continuous pursuit of the criminal actor." Id. at n.10 (quoting Williams v. Commonwealth, 639 S.W.2d 786, 788 (Ky.App. 1982)). As to that portion of the statute which states "with intent to accomplish the theft," we conclude the "theft" would similarly include the escape stage of a theft or attempted theft as defined above.

In the present case, it was undisputed that Appellant took the shoes from Meijer and that Pittaluga received a physical injury while attempting to stop Appellant's escape from the theft he and Tipton had just witnessed. Tipton testified that he saw the blade of a knife in Appellant's hand just before Appellant swung around and Pittaluga received the injury. Under this evidence, it would not be clearly unreasonable for a jury to find appellant guilty of first-degree robbery. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). Accordingly, the trial court did not err in denying Appellant's motion for directed verdict.

Appellant's second argument is that the trial court erred in denying his request for instructions on theft by unlawful taking under $300 and second-degree assault. "An instruction on a lesser-included offense is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt on

the greater charge, but believe beyond a reasonable doubt that the defendant is guilty of the lesser offense." Skinner v. Commonwealth, 864 S.W.2d 290, 298 (Ky. 1993). "[T]he distinguishing element between theft and robbery is the additional element of the use or the threat of immediate use of physical force against a person." Morgan v. Commonwealth, 730 S.W.2d 935, 937 (Ky. 1987). The uncontroverted evidence in this case was that Pittaluga was assaulted by Appellant during the escape stage of a theft/attempted theft. The law dictates that an assault combined in such a way with a theft is a robbery. KRS 515.020; Mack, 136 S.W.3d 434; Williams, 639 S.W.2d 786. Therefore, we do not believe that a reasonable juror could have a reasonable doubt as to Appellant's guilt as to the robbery charge, but believe beyond a reasonable doubt that Appellant was guilty of separate offenses of theft and/or assault. Accordingly, we conclude the trial court did not err in denying these instructions.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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