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RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000616-MR

DATE 4/8/10 Kelly Klaber D.C

BRYAN RICHARD HAMM — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
NO. 06-CR-00398

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On the evening of February 7, 2006, Dr. Thomas Dale left his home in Lexington, Kentucky and was walking towards Rupp Arena when he was robbed at gunpoint by Appellant, Bryan Richard Hamm. Appellant stood approximately ten feet from Dale, pointed a handgun at him, and demanded his money. After complying with the request, Dale continued to walk down the street and Appellant fled. Dale then called the police, who arrived within five minutes, and he was interviewed.

After robbing Dale, Appellant walked to a nearby street and approached a vehicle occupied by Rachel Bruce and Chad Raynes. According to Rachel, she noticed Appellant walking towards the car while holding a gun. Appellant then tapped on the window, pointed his handgun at her, and demanded her purse and Chad's wallet. After receiving the items, Appellant fled, dropping and

picking up items as he left. The couple immediately called police and were interviewed moments later.

After the police were notified of the two robberies, Appellant was observed in the area and stopped for questioning. The arresting officer testified that Appellant was a white male with long hair, wearing a short sleeve t-shirt and distinctive glasses. The officer also found a brown coat, ski mask, and gloves. These items matched a substantially similar description given by all three victims of the clothing worn by the man who had robbed them at gunpoint. A handgun was later found stuffed inside a coat pocket in a yard near where the robberies had occurred. When Appellant was arrested and searched, officers found $73 on his person. All three victims were then taken to a "show-up" that occurred approximately ninety minutes after the robberies. Each of the victims remembered Appellant's glasses and each identified him as the robber.

The day after the robberies, Thomas Clancy, the owner of the handgun brandished by Appellant, alerted police that it was missing. Clancy told police that Appellant was a friend of his son, Christopher, and that Appellant had been staying at his home. He also indicated that Appellant knew of the gun, but he did not personally see anyone take it and did not know when it had actually been stolen. Christopher Clancy testified that he saw Appellant walking towards the University of Kentucky campus from Lynagh's Irish Pub at the time of the robberies, and that Appellant was wearing a brown jacket, blue

jeans, and a blue toboggan.

Based on this evidence, Appellant was convicted of three counts of robbery, one count of tampering with physical evidence, and of being a persistent felony offender in the second degree. The jury recommended that Appellant be sentenced to 25 years for each of the robberies (enhanced from 12.5 years) and 5 years for the tampering charge (enhanced from one year). The jury also recommended that the sentences for the three robbery counts run concurrently, but consecutive to the sentence for the tampering charge, for a total of 30 years imprisonment. At final sentencing, however, the trial court deviated from the jury's recommendation and sentenced Appellant to a total of 50 years imprisonment. He now appeals the final judgment as a matter of right, Ky. Const. § 110(2)(b).

Appellant raises multiple issues on appeal: (1) the trial court committed reversible error by failing to instruct the jury on second-degree robbery; (2) the trial court provided an erroneous definition of "deadly weapon" in the jury instruction for first-degree robbery; (3) the Kentucky State Police Crime Laboratory DNA tester was not qualified as a statistical expert; (4) the "show-up" identifications were unduly suggestive and should have been suppressed; and (5) the trial court failed to hold a competency hearing. Each shall be addressed in turn.

FAILURE TO INSTRUCT ON SECOND-DEGREE ROBBERY AND DEFINITION OF DEADLY WEAPON IN INSTRUCTION FOR FIRST-DEGREE ROBBERY

Appellant's first two arguments raise the same issues, so both will be discussed together. The crux of Appellant's argument is that the handgun used in the robberies was a World War II relic that had been damaged by a bullet. The gun's owner, Thomas Clancy, had no ammunition or magazine for the gun, and no evidence was introduced that Appellant supplied these missing components. Moreover, even with a chambered bullet, the gun could not be fired under normal circumstances without a magazine because the hammer would not fall. Officer Clayton Roberts was, however, able to fire the handgun by using a screwdriver to simulate a magazine in the weapon.

Because the handgun was not capable of firing on its own without manipulation, Appellant contends that he was not carrying a deadly weapon as defined under KRS 500.080(4)(b). Accordingly, Appellant argues that he was entitled to a jury instruction on robbery in the second degree. We disagree.

"Our law requires the court to give instructions 'applicable to every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony.'" *Reed v. Commonwealth*, 738 S.W.2d 818, 822 (Ky. 1987) (citing *Lee v. Commonwealth*, 329 S.W.2d 57, 60 (Ky. 1959)). *See also* RCr 9.54(1). A defendant is entitled to an instruction on any lawful defense that he has, *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997), 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." *Id.* at 856. 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).

The trial court used an overly broad definition of "deadly weapon" and added language not found in the relevant statute. The jury instruction in question provided the following:

> You will find the Defendant guilty of Robbery 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 this county on or about February 7, 2006, and before the finding of the Indictment herein, he stole money from Thomas Dale;
>
> AND
>
> B. That in the course of so doing and with intent to accomplish the theft, he used or threatened the immediate use of physical force upon Thomas Dale;
>
> AND
>
> C. That when he did so, he was armed with a deadly weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged *regardless of whether it was operable on the occasion in question* (emphasis added).

This instruction is similar to the model instruction outlined in *Thacker v. Commonwealth*, 194 S.W.3d 287, 291 (Ky. 2006). Moreover, the instruction "ensures that the jury ultimately determines the essential elements of the

offense, and acts in accordance with the law." *Id.* KRS 500.080(4)(b) provides that a "deadly weapon" is any weapon "from which a shot, readily capable of producing death or other serious physical injury, may be discharged." Appellant's argument that the gun was not readily capable of firing during the commission of the robberies is without merit.

In *Kennedy v. Commonwealth*, 544 S.W.2d 219, 220 (Ky. 1977) and *Helpenstine v. Commonwealth*, 566 S.W.2d 415, 416 (Ky. 1978), this Court followed the pre-penal code case of *Merritt v. Commonwealth*, 386 S.W.2d 727, 729 (Ky. 1965), in holding that the operability of a firearm used in a robbery is not an essential element to a charge of first-degree robbery under KRS 515.020(b). Dissatisfied with the rationale upon which those decisions were based, we recently re-examined the question in the case of *Wilburn v. Commonwealth*, 08-SC-787-MR, rendered contemporaneously with the instant case on March 18, 2010. As stated in *Wilburn*, we construe KRS 500.080(4)(b)'s definition of "deadly weapon" as a reference generally to the class of weapons which may discharge a shot that is readily capable of producing death or serious physical injury, and not to the specific object employed by the defendant in a particular robbery. Wilburn used an unloaded .38 caliber revolver, which without ammunition was not capable of discharging a "shot, readily capable of producing death or other serious physical injury." Nonetheless, operable or not, a revolver is among the class of things from which such a shot "may be discharged." Therefore, Wilburn was armed with a

deadly weapon within the meaning of 515.020(1)(b).

We view the damaged pistol that Hamm brandished in the same light. It was not a toy gun; nor, was it a non-firing replica or facsimile of a gun. It was a real weapon of the sort which discharges a shot, readily capable of causing death or serious physical injury. The damage which made it difficult or perhaps impossible to fire did not remove it from the class of items generally known to discharge such a shot. With reference to *Wilburn* for a more detailed discussion, we do not believe there was any evidence to support a finding that the gun employed by Hamm was not a deadly weapon as defined in KRS 500.080(4)(b), and therefore he was not entitled to an instruction on the lesser offense of second-degree robbery.

The addition of the phrase "regardless of whether it was operable on the occasion in question" does not render the instruction defective. KRS 500.080(4)(b), by its plain language, imposes no time requirement for when the gun must be capable of firing a shot. The jury determined, after testimony from Officer Roberts, that the gun was capable of discharging a shot that could produce death or other serious injury, even though to do so would require light manipulation. Though the instruction did not use the exact language of the statute, it "is not a ground for reversal provided the instruction as given embraced and conveyed the meaning of the statute." *Caldwell v. Commonwealth*, 265 Ky. 402, 96 S.W.2d 1041, 1043 (1936).

Additionally, a jury instruction on second-degree robbery was not

warranted because a defendant is not entitled to that instruction when a weapon has been brandished. *Swain v. Commonwealth*, 887 S.W.2d 346, 348 (Ky. 1994). Taken in this light, we see no error.

QUALIFICATION OF STEVE BARRETT AS A STATISTICAL EXPERT

Appellant next argues that the forensic biologist, Steve Barrett, was not qualified to give expert testimony concerning DNA frequency statistics. Appellant concedes, however, that Barrett was qualified to conduct the DNA tests themselves. In this case, Barrett examined a toboggan found at the crime scene for DNA and compared that to a DNA standard from Appellant. After conducting the test, Barrett noted that the "male profile" from the toboggan matched Appellant's standard "at all locations" with an estimated frequency of such profile being one person in 590 trillion based on relevant United States populations.

"The decision as to the qualifications of an expert rests in the sound discretion of the trial court and we will not disturb such ruling absent an abuse of discretion." *Fugate v. Commonwealth*, 993 S.W.2d 931, 935 (Ky. 1999). KRE 702 provides that an expert may be qualified if he or she has the requisite "knowledge, skill, experience, training, or education" to assist the trier of fact in determining a fact in issue. Barrett testified that he is a certified DNA analyst, and that he had been working at the Kentucky State Police Crime Laboratory for three years. During this time, he had attended in-house training, annual seminars, and various workshops. Some of his training also

included calculating DNA frequency statistics, and he was able to calculate them manually, though his usual practice was to enter the data into a computer program developed by the FBI and SWGDAM (Scientific Working Group on DNA Analysis Methods), which would do the calculations automatically.

Though Barrett does not have a degree in statistics, this is not fatal. See *Fugate*, 993 S.W.2d at 935 ("[A]n individual can be qualified as an expert without possessing a particular academic degree."). As part of his training, Barrett went through several statistics classes and workshops. Additionally, during his training he was required to prepare the statistics of multiple DNA samples by hand. Barrett's expertise stems from the fact that he has sufficient experience, knowledge, skill, and training in DNA frequency statistical calculation. We do not believe that the trial court abused its discretion in allowing Barrett to testify regarding DNA frequency statistics.

FAILURE TO SUPPRESS SHOW-UP IDENTIFICATION EVIDENCE

Appellant's next assignment of error is that the trial court erred in allowing the introduction of "show-up" identification evidence. In this case, a single-person show-up was used and, prior to trial, Appellant filed a motion to suppress this evidence, arguing that the identification was "highly prejudicial" and "unduly suggestive." An evidentiary hearing was conducted on June 29, 2006, and the trial court provided findings of fact on the record. Also, through a subsequent written order, the court deemed the evidence admissible.

Our standard of review of a decision of the trial court on a suppression motion following a hearing is two-fold. First, the factual findings of the trial court are conclusive if they are supported by substantial evidence. RCr 9.78; *Canler v. Commonwealth*, 870 S.W.2d 219, 221 (Ky. 1994). Second, when the findings of fact are supported by substantial evidence, the question then becomes whether the rule of law as applied to the established facts is violated. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Thus, we conduct a *de novo* review to determine whether the trial court's decision was correct as a matter of law. *Roberson v. Commonwealth*, 185 S.W.3d 634, 637 (Ky. 2006).

The determination of whether identification testimony violates a defendant's due process rights involves a two-step process. *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky. 1999) (internal citations omitted). "First, the court examines the pre-identification encounters to determine whether they were unduly suggestive." *Id.* If they were not, the analysis ends and the identification testimony is allowed. If the pretrial identification procedure is suggestive, "the identification may still be admissible if 'under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.'" *Id.* (quoting *Stewart v. Duckworth*, 93 F.3d 262, 265 (7th Cir.1996) and *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). Determining whether, under the totality of the circumstances, the identification was reliable requires consideration of five factors enumerated by the United States Supreme Court in *Biggers*. The five factors are: (1) the opportunity of

the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and confrontation. This Court adopted these factors in *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995).

A single-person show-up identification, like the one used in this case, has been deemed inherently suggestive. *Merriweather v. Commonwealth*, 99 S.W.3d 448, 451 (Ky. 2003). This, therefore, requires the court to assess the totality of the circumstances and the *Biggers* factors surrounding the identification to consider the likelihood of an "irreparable misidentification" by the witness. *Id.* Applying these factors to the case at bar, we conclude that the victims' identifications of Appellant were sufficiently reliable.

All three victims had adequate opportunity to see Appellant, and all three gave very similar accounts as to his physical stature and the clothing he was wearing on that evening. They were certain of their accounts because of their close proximity to Appellant at the time of the crimes. Thomas Dale was within ten feet of Appellant at the time he was robbed at gunpoint, and Appellant pointed his handgun at close range while Rachel Bruce and Chad Raynes were in their automobile. *See Rodriguez v. Commonwealth*, 107 S.W.3d 215, 218 (Ky. 2003) ("[Victims] were robbed at gunpoint, which focused their attention on the events and circumstances surrounding the robbery.") Additionally, each victim expressly remembered Appellant's distinct eyeglasses. All three victims

further testified about their high level of certainty in their identifications of Appellant as the robber. Finally, all three "show-ups" occurred within ninety minutes of the robberies, and thus, the victims' memories were still relatively fresh. Because all five of the *Biggers* factors weigh in favor of the reliability of the identifications, we hold that the trial court did not err in denying Appellant's motion to suppress the victims' identifications of him.

FAILURE TO HOLD A COMPETENCY HEARING

Appellant's final argument on appeal is that the trial court failed to hold a mandatory competency hearing. This issue is unpreserved. Nevertheless, Appellant requests this Court to conduct palpable error review. The basic palpable error review, where an unpreserved error requires reversal, is "if a manifest injustice has resulted from the error," which means there "is [a] probability of a different result or [the] error [is] so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006). The alleged error must be "so improper, prejudicial, and egregious as to have undermined the overall fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

KRS 504.100(1) states that if a trial court has reasonable grounds to believe that a defendant is incompetent to stand trial, the court must appoint a psychologist or psychiatrist to evaluate the defendant and report on his mental condition. After the filing of the report, KRS 504.100(3) requires the court to hold a hearing "to determine whether or not the defendant is competent to

stand trial." Section 3 of KRS 504.100 is mandatory and cannot be waived by a defendant. *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999). However, formal evidentiary hearings are not always required to satisfy the due process requirements established by Section 3 of KRS 504.100. *Quarels v. Commonwealth*, 142 S.W.3d 73, 83 n.3 (Ky. 2004). The standard of review in such a case is, "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Mills*, 996 S.W.2d at 486 (quoting *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983)).

At the request of Appellant's trial counsel, Appellant underwent a competency evaluation to determine his fitness to stand trial. Trial counsel indicated to the court that this request was based on a "history of some mental problems that . . . are of a rather serious nature that were really never treated when he was a child." The Commonwealth offered no objections. The trial court entered an order which required a competency evaluation to determine whether Appellant was: (1) incompetent to stand trial as defined by KRS 504.060(4); and (2) insane as defined by KRS 504.060(5). Appellant was examined by Dr. Martin Smith, a psychiatrist at the Kentucky Correctional Psychiatric Center, who determined that Appellant was indeed competent to stand trial. At a status hearing on December 22, 2006, the trial judge inquired if defense counsel had received a copy of the competency evaluation. Defense

counsel was unsure and no further mention of the report or any hearing was made. The case ultimately went to trial on June 7, 2007.

Appellant contends that the trial court's refusal to hold a formal evidentiary hearing, as required by KRS 504.100(3), violated his due process rights. While the trial court was required to hold a competency hearing, its failure to do so does not rise to the level of palpable error. In *Thompson v. Commonwealth,* 56 S.W.3d 406 (Ky. 2001), the trial court ordered the defendant to be evaluated to determine his competency to stand trial, but the court did not hold a competency hearing following the mental evaluation. In ordering a retrospective competency hearing, this Court held that "the trial court's *own order* establishes the sufficiency of the trial judge's level of doubt as to Thompson's competence to plead guilty." *Id.* at 408 (emphasis added). That order stated that the court expressed concern about mental illnesses and neurological problems which might affect Thompson's ability to perceive and interpret information provided by counsel. Such is not the case here. Indeed, the trial court's order made no reference to defense counsel's allegations of "mental problems," but was merely a blanket form ordering Appellant to undergo an evaluation.

The record is absent of any evidence that would show any "level of doubt" by the trial court as to Appellant's competency to stand trial. "Evidence of a defendant's irrational behavior, his demeanor in court, and any prior medical opinion on competence to stand trial are all relevant facts for a court to

consider." *Mills,* 996 S.W.2d at 486. Upon review of the record, we conclude that Appellant introduced no evidence, such as his behavior or other information external to the proceedings, which should have caused the trial court to experience reasonable doubt as to Appellant's competence to stand trial. The competency evaluation expressly indicated that Appellant was fit to stand trial. It appears that Appellant's initial motion requesting evaluation was based more on conjecture than on any clear facts. As such, the trial court's failure to hold a formal evidentiary hearing was error, but not palpable.

For the reasons set forth herein, the judgment of the Fayette Circuit Court is hereby affirmed.

All sitting. Abramson, Cunningham, Schroder, Scott and Venters, JJ., concur. Noble, J., dissents by separate opinion in which Minton, C.J., joins.

NOBLE, J., DISSENTING: Respectfully, I dissent.

KRS 500.080 defines "deadly weapon," in reference to weapons that fire projectiles, as "[a]ny weapon from which a shot, readily capable of producing death or other serious physical injury, *may* be discharged." KRS 500.080(4)(b) (emphasis added). All words in a statute have meaning and importance. Applied to this case, the "shot" would be a bullet, since the "weapon" was a pistol. There is no argument that a bullet, when fired, is "readily capable" of causing death or serious physical injury. But before that bullet can cause any kind of harm, it must be projected from the gun by firing. The question that is dispositive thus is "May a bullet be discharged from the gun in this case?"

To answer that question, we must first ask what "may be discharged" means. Does "may" mean whether there is any possibility that the gun will fire, no matter how remote or what has to be done to it to make it fire? Or does it mean that it could be fired in the state it was in at the time of the robbery? I favor the latter view, which comports with a common sense approach to the statute.

The legislature defined "deadly weapon" because it is often applied to elevate the degree of culpability for various crimes, as is demonstrated by its inclusion in KRS 515.020, robbery in the first degree, but not in KRS 515.030, robbery in the second degree. Robbery in the first degree clearly intends a stiffer punishment based on greater culpability, since it is a Class B felony, whereas robbery in the second degree is a Class C felony.

To commit robbery in the second degree the perpetrator need only use, or threaten immediate use of, physical force in order to accomplish the theft. Possession of a gun, or any other weapon, is immaterial for a charge of robbery in the second degree. However, if a defendant were armed with a gun, whether it is capable of firing is not dispositive of this charge because merely threatening to fire it is sufficient, as is using or threatening its use as a club (pistol-whipping). It is the threat of or use of physical force to accomplish the theft that is the element of the offense. Robbery in the first degree contains the same threat or use of physical force to accomplish a theft, but adds other elements, including at KRS 515.020 (1)(b) the additional element of being

armed with a deadly weapon, as defined in KRS 500.080. Possessing a deadly weapon during the crime is obviously the reason robbery in the first degree carries a higher range of sentencing.

As to whether this Court should add a term to the statute to say that the relic in this case is a deadly weapon if it fits into a "class"—which is "pistols"—as the majority now holds, see my dissent in *Wilburn v. Commonwealth*, No. 2008-SC-787-MR, also rendered today. This case is a good example of why the majority's theory only adds a layer of analysis and reaches a strange result here. In fact, the majority even admits that in *Wilburn*, the gun in question, because it had no ammunition, "was not capable of discharging a 'shot, readily capable of producing death or other serious physical injury,'" a requirement of a deadly weapon under KRS 500.080(4)(b). Yet, the majority then concludes that the gun was a "deadly weapon" under the statute. How can this be so if it fails to meet the statutory definition? Similarly, the majority admits that it may be "perhaps impossible" that the weapon in this case could fire a shot, but concludes it is still a deadly weapon, despite the statutory requirement that the weapon is one "from which a shot . . . may be discharged."

Essentially, the majority replaces the statutory definition with a "class," but never asks whether the gun in question meets the requirements of the class. It simply assumes that the gun meets the class because it, like most members of the class, can be colloquially described as a "pistol." But the decision to read the statute as creating a "class" of weapons cannot obviate the

necessity of determining whether the gun in fact meets the requirements of the class. While it is good that the majority is moving beyond the perception-of-the-victim test that for so long controlled over the clear language of the statute, it is no less illogical to now insist on employing classifications to make an object a deadly weapon when it simply is not.

A good test of this would be to ask random members of the public—a good proxy for what is in the majority's "commonly known" class—whether a broken gun, known to be incapable of firing, is a deadly weapon. I suspect that no one would say that such a weapon is deadly. Yet the majority has decided, through some form of judicial intuition, that this indeed is the common understanding of deadly weapon. Though the gun in this case neither walks nor quacks like a duck, the majority has nevertheless seen fit to call it a duck. We don't aid public perception of the reliability and justice of the law when we promote such incomprehensible results. This is another chance for the public to look at the court and snicker.

The record contains specific facts about this pistol. First, it dates back to World War II. During the war, the person carrying it was killed by a shot that went through the holster, hitting the body of the gun itself before hitting and killing the person. In its state as used in the robbery, it had no magazine to load with bullets, and in any event, the Appellant had no bullets for it. Even if Appellant had chambered a bullet, in normal operation the bullet could not be fired because the firing pin could not release without the magazine. The

gun expert who examined it could only get the hammer to fall if he manipulated it with a screwdriver, and he further opined that he did not know if it would fire even if it had a magazine.

To say that the phrase "may be fired" in the deadly weapon definition means that if a weapon "ever could be fired" or "could be made to fire by any means" it is a "deadly" weapon totally loses sight of why the deadly weapon element is present in first-degree robbery: to reflect a real and present greater risk of harm. Under this view, any piece of a gun would qualify as a deadly weapon, because at one point in time it was part of an operable gun, or it could later be added to other parts and become operable. As the majority frames it, it is part of the "class" of pistols. This could result in the absurdity of a gun's ivory handles alone being labeled a deadly weapon, since under the majority's approach, no amount of damage or stripping down of a gun removes it from the "class." Indeed, there were but a few more parts available here, and the pistol never was actually fired according to the record. To the contrary, the gun expert said he did not know if it could be, even after manipulating it with a screwdriver. Thus we have a robbery in the first degree conviction based on a mechanical contraption that no one can establish ever could fire a bullet. At best, the weapon in this case has only a *possible* ability to discharge a bullet, and appears to have had *none* at the time of the offense.

It is apparent that these facts present a question for the jury to determine if this gun may discharge a bullet. For the court to make the

determination that this gun is a deadly weapon, and thus deny the Appellant's request for an instruction on robbery in the second degree, *plus* adding improper limiting language in the instruction he did give, is tantamount to a directed verdict for the Commonwealth, at least as to robbery in the second degree.

It is a reasonable assumption that the first-degree robbery instruction that the trial court gave, defining a deadly weapon as one that "may be discharged regardless of whether it was operable on the occasion in question," could well direct a jury to think that if the gun could *ever* have been fired, regardless of when, how, or in what shape, they must conclude that it is a deadly weapon. I do not believe that is the legislature's intent, and such a reading is unreasonably narrow. The purpose of adding the deadly weapon element to the highest degree of robbery is to reflect the increased danger of a crime involving an operable firearm, and to impose a greater punishment to reduce the incentives for using an operable firearm in a robbery. The danger must be real and capable of occurring *during the theft* to effect these purposes. Otherwise, to define any gun as a deadly weapon regardless of its operability at the time in question is merely punitive and piling on, and has no logical nexus to the time and place of the criminal act, or the purposes of the statute.

In any event, whether a gun is a deadly weapon is a jury question, as this Court resolved in *Thacker v. Commonwealth*, 194 S.W.3d 287 (Ky. 2006), where we stated that the jury is entitled to decide every essential element of an

offense, including the application of law to fact. *Id.* at 290 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); *see also Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000) (citing same). While "deadly weapon" is a term of law, whether an object is a deadly weapon depends upon the facts, and that determination is the province of the jury. When the trial court in this case instructed the jury to the effect that the pistol did not have to actually be a "deadly weapon" at the time of the robbery, it forced the conclusion that the pistol was a deadly weapon even if reasonable jurors might have wanted to find otherwise. In essence, the jury did not get to determine an essential element of the offense.

As this is a jury question, the jury should be able to consider all charges that could reasonably fit the evidence. It appears from the record that a conviction for robbery in the second degree would have been sustainable, had the jury been allowed to consider it. If it had concluded that the pistol was not a deadly weapon at the time of its use, the jury could reasonably have considered a robbery in the second degree instruction.

This Court has in the past found that it was not necessary to include a lesser-included instruction because the facts were allegedly such that the lesser-included offense was impossible as a matter of law, despite the fact that such a finding requires evaluation and weighing of the evidence by the court. *See, e.g., Crane v. Commonwealth*, 833 S.W.2d 813, 817 (Ky. 1992). I fear that this is a dangerous trend that puts fact-finding in the hands of the trial court

rather than the jury. The question is not whether there is sufficient evidence to sustain a verdict, but whether the defendant was entitled to have the jury consider an alternative, and whether the jury could have acted differently had the lesser-included instruction been given. We must not stray too far down the path of being content with a result when fundamental rights of the defendant to a jury trial have been overlooked. I believe that is what the majority does here.

I would therefore reverse this judgment because the robbery in the first degree instruction was wrong and prejudicial as given, and because the Appellant was entitled to a robbery in the second degree instruction.

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

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