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NOT TO BE PUBLISHED OPINION

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RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000364-MR

GENE SMITH — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
NOS. 08-CR-002694-003 AND 09-CR-000542

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On September 8, 2008, Appellant, Gene Smith, and two accomplices, Brandon Hooten and Ray Easton, robbed a Cash Express store in Louisville. They were arrested and indicted on three counts of robbery in the first degree. Hooten and Easton both accepted plea agreements in exchange for their testimony against Appellant.

At trial, Hooten testified that he met Appellant three or four days before the robbery. Appellant proposed a scheme to rob the Cash Express, and Hooten agreed to drive to the store. After looking over the scene, the pair decided to find a third person to assist in the venture. They found Ray Easton, Appellant's cousin, who joined them. The three returned to the area of the Cash Express, where Hooten and Appellant changed into dark clothing.

Easton remained in the car while Hooten and Appellant covered their faces and entered the store. They ordered everyone to the ground and collected cash and cell phones from the Cash Express employees and two customers. Easton drove Hooten's car after they fled the building. Both characterized Appellant as the mastermind of the crime, though Hooten alone claimed that he participated in the crime only because he was afraid of Appellant, who possessed a gun.

Unbeknownst to any of them, George Givens, an off-duty firefighter, noticed Hooten and Appellant entering the store with their faces covered. Becoming concerned, Givens waited in his van until the men exited and drove away. He then followed the trio and called the police. Easton and Hooten testified that they realized they were being followed shortly after leaving the Cash Express parking lot. After following Hooten's car for several minutes, Givens observed a gun being thrown out the passenger-side window. Officers eventually arrived and arrested all three men. Givens directed police to the gun.

The gun underwent testing by the Kentucky State Police. Firearms and toolmark examiner, Leah Collier, performed the testing and testified that the gun was not functioning properly because the slide was jammed. She could not speculate as to how or when the slide had been damaged.

The jury found Appellant guilty of three counts of robbery in the first degree and of being a persistent felony offender in the second degree. He was

sentenced to imprisonment for twenty-five years on each count, to run concurrently. He now appeals as a matter of right. Ky. Const. §110(2)(b).

Appellant first argues that he was entitled to an instruction on robbery in the second degree, which is preserved for appellate review by his request and tendering of a proposed instruction. He bases this argument on the fact that the jury could have had reasonable doubt as to the functionality of the gun at the time of the robbery. Indeed, the Commonwealth's expert witness, Leah Collier, could not conclusively determine whether the gun was in operating condition at the time of the crime.

In the recent case of *Wilburn v. Commonwealth*, we re-examined the meaning of the term "deadly weapon," as defined in KRS 500.080(4)(b), and determined that it is "a reference generally to the class of weapons which may discharge a shot that is readily capable of producing death or serious physical injury." --- S.W.3d ----, 2010 WL 997164, at *8 (Ky. March 18, 2010) (No. 2008-SC-000787-MR). The gun used during this crime falls within that class of weapons, regardless of its actual operability at the time of the crime. Furthermore, the fact that Appellant used a handgun during the robbery was uncontroverted. As such, Appellant was not entitled to an instruction on second-degree robbery because a weapon had been brandished. *See Swain v. Commonwealth*, 887 S.W.2d 346, 348 (Ky. 1994).

Appellant next argues that the trial court improperly excluded a rap video recorded by Hooten and posted on the internet. The video features

Hooten performing a rap that generally glorifies a criminal lifestyle, but does not specifically reference the robbery of the Cash Express store. During cross-examination, defense counsel attempted to introduce the video in order to impeach Hooten's testimony that Appellant was the mastermind of the crime, and that he was scared into participating in the robbery because Appellant had threatened him. The trial court sustained the Commonwealth's objection to the video's admission and any reference to its contents.

Otherwise relevant evidence may be excluded if its probative value is outweighed by the danger of "undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. The trial court must exercise its sound discretion in conducting the balance required by KRE 403. *Baker v. Kammerer*, 187 S.W.3d 292, 296 (Ky. 2006). Assuming *arguendo* that Hooten's rap video was admissible pursuant to KRE 608 or KRE 613, as Appellant asserts, we do not believe the trial court abused its discretion in excluding the evidence, as it was cumulative of other evidence already presented.

The entire thrust of defense counsel's cross-examination of Hooten was to portray him as a willing participant in the crime, as opposed to Appellant's pawn. A central part of the cross-examination concerned another rap composed by Hooten. When Hooten was interviewed by police following his arrest, he was left alone in a room at the police station. He wrote rap lyrics on the dry-erase board in the interview room. These lyrics arguably referred to the

Cash Express robbery and included such boastful phrases as, "press that button and I'll blow out your brain" and "don't nobody move and won't nobody get hurt." Defense counsel read these lyrics aloud during Hooten's cross-examination and also displayed a picture of the lyrics on the dry-erase board.

Hooten's claim that he was an unwilling participant in the crime was further discredited throughout the trial. The jury was aware that Hooten admitted his participation in the crime and had entered a plea of guilty to facilitation to robbery in the first degree. Hooten admitted during cross-examination that, when he and Appellant drove by the Cash Express to "case" the scene, he was aware at that time of Appellant's intent to rob the store. Defense counsel successfully highlighted the fact that Hooten made no attempt to leave after becoming aware of Appellant's intentions, despite several opportunities to do so. Defense counsel also elicited Hooten's admission that he had lied in his statements to police in an effort to downplay his culpability. Ray Easton testified that Hooten expressed his own desire to rob the Cash Express, and that Hooten gave him instructions about how the robbery and getaway would be conducted. Two Cash Express customers testified that both men fully participated in the robbery, ordering everyone to get on the ground and taking cell phones and wallets from the victims. These two customers also testified that both Appellant and Hooten carried a gun during the robbery.

In light of the amount of evidence demonstrating Hooten's willing participation in the crime, particularly the extensive cross-examination

concerning the rap lyrics written at the police station, admission of the rap video would have been a "needless presentation of cumulative evidence." *See Hillard v. Commonwealth*, 158 S.W.3d 758, 762-63 (Ky. 2005) (evidence of victim's sexual history to prove sexual orientation was cumulative where testimony was already elicited concerning victim's prior sexual relationship with another witness). The trial court did not abuse its discretion.

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

Abramson, Cunningham, Schroder and Venters, JJ., concur. Scott, J., concurs in result only. Minton, C.J. and Noble, J. dissent for the reasons set forth in the dissent in *Wilburn v. Commonwealth*, --- S.W.3d ----, 2010 WL 997164, (Ky. March 18, 2010) (No. 2008-SC-000787-MR).

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