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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000610-MR

JAMES SPARKS — APPELLANT

V.

ON APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
NO. 08-CR-00208

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

James Sparks appeals as a matter of right from a Judgment of the Greenup Circuit Court convicting him of first-degree robbery, in violation of Kentucky Revised Statute (KRS) 515.020, and sentencing him as a second-degree persistent felony offender to twenty-three years in prison. The Commonwealth alleged and the jury found that on September 17, 2008 Sparks threatened the use of a gun against one of the clerks in the course of stealing $150.00 from the Subway restaurant in South Shore, Kentucky. Sparks contends that the evidence of the alleged gun threat was insufficient to justify a finding of first-degree robbery. We disagree and so affirm the Judgment.

RELEVANT FACTS

The Commonwealth's proof included the store's surveillance video, which provided a very clear picture of the alleged robber whom several people identified as Sparks, as well as the testimonies of the two clerks on duty at the time of the incident, both of whom identified Sparks as the robber. Sparks testified in his defense, and he conceded that he entered the store at the time alleged and that one of the clerks gave him $150.00 from the store's cash register. The dispute at trial concerned how the robbery took place, with the clerks testifying that Sparks made threats and Sparks claiming that one of the clerks owed him money and paid the debt from the store's cash register without any threats on Sparks's part.

More particularly, Sparks testified that he and one of the clerks, Michael (Jake) Shepher, had used drugs together on numerous occasions and that Shepher owed him $150.00 for five Oxycontin pills. According to Sparks, Shepher, one of whose paternal cousins is a maternal cousin of Sparks, arranged to meet Sparks outside the store that evening and repay him. They met as planned, and, Sparks testified, Shepher told him to follow him into the store. As they entered, to Sparks's surprise Shepher announced to his co-worker that they were being robbed and proceeded to give Sparks all the money in the register, coincidentally the exact amount of the purported debt. Notwithstanding his surprise at this turn of events, Sparks accepted the money and left the store.

Shepher testified, however, that he did not know Sparks, despite their mutual cousin, and had had no prior contact with him. According to Shepher, as he and his co-worker were closing the store that evening, he took some trash to a dumpster near the side of the building and was accosted by Sparks, who raised his arm as though pointing a gun but with his hand covered by the sleeve of his sweatshirt. Shepher testified that Sparks stated, "I have a gun," ordered Shepher not to look at him, and had Shepher lead him into the store. Inside, Shepher told his co-worker that they were being robbed. According to the co-worker, she feared Sparks might have a gun, because he kept one of his hands in the front pocket of his sweatshirt and told her not to do anything stupid. Shepher testified that at Sparks's command he gave him the money from the register, cleared the way for Sparks to leave through a back door, and then locked the doors and called 911.

The Commonwealth played a recording of the 911 call for the jury. On the recording, one of the first things an obviously shaken Shepher tells the dispatcher is, "He said he had a gun. I know he was lying because his hand was in his sleeve." A moment later, during a pause while the dispatcher relays the robbery report to the police, Shepher is heard saying, apparently to his co-worker, "I should have beat the f--- out of him; I know he didn't have a gun." Notwithstanding this bravura, however, Shepher remained afraid that the robber might return and asked the dispatcher how he would know that a knock on the door was really the police. She assured him that the police would arrive with their sirens on. When confronted on cross-examination with his "I

know there was no gun" remarks, Shepher testified that initially he had taken the robber at his word, but that as the robbery progressed and he did not see a gun, he became convinced that probably there was not one. He thought it best, though, not to take any chances.

On appeal, Sparks contends that a robber's mere claim that he has a gun, when there is no other evidence that he had one, does not suffice to elevate second-degree robbery to robbery in the first degree. He also contends that a threat that is not taken seriously cannot serve to aggravate what otherwise would be an unaggravated robbery. Neither contention persuades us that Sparks is entitled to relief.

ANALYSIS

KRS 515.030 provides that "[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." Second-degree robbery is a Class C felony punishable by imprisonment for five to ten years. The offense becomes first-degree robbery, a Class B felony, if, in the course of the theft by force, the person "(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." KRS 515.020.

In this case, the jury was instructed pursuant to KRS 515.020(c). The instructions defined "dangerous instrument" in accord with KRS 500.080(3) as

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." The instructions required the jury to determine whether Sparks had threatened the immediate use of a dangerous instrument in the course of a theft by force. The jury found that he had.

As Sparks correctly notes, an offense instruction not supported by the evidence should not be given, and in *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991), this Court adopted as the standard for determining the sufficiency of the evidence whether, construed favorably to the Commonwealth, the evidence as a whole would permit a rational juror to find each element of the alleged offense beyond a reasonable doubt.[1] Relying on *Swain v. Commonwealth,* 887 S.W.2d 346 (Ky. 1994), *Williams v. Commonwealth,* 721 S.W.2d 710 (Ky. 1986), and *Merritt v. Commonwealth,* 386 S.W.2d 727 (Ky. 1965) *overruled by Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010), Sparks contends that that standard was not met in this case and that to justify an instruction on the dangerous instrument sort of first-degree robbery there must be evidence beyond words or gestures, *i.e.,* evidence that the defendant employed a "tangible object" in the furtherance of the theft. Because neither

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[1] Sparks devotes a portion of his brief to distinguishing what he refers to as the quantitative and the qualitative sufficiency of the evidence. Although he does not explain what bearing he believes the distinction to have on this case, we may note that in *Potts v. Commonwealth,* 172 S.W.3d 345 (Ky. 2005), we held that due process concerns do not require courts to evaluate the "qualitative sufficiency" of the evidence. The "quality" of the evidence—its weight and credibility—is a matter generally left to the jury to assess.

clerk testified to having seen him wield any sort of object, Sparks maintains that the evidence did not support the KRS 515.020(c) robbery instruction.

We recently reviewed the cases upon which Sparks relies in *Gamble v. Commonwealth,* 319 S.W.3d 375 (Ky. 2010), a case much like this one, in which a bank robber told the teller that he had a gun, but did not display the gun or otherwise make threatening gestures. We held that unlike the evidence in *Williams,* where the robber pointed to a bulge in his pocket and asked, "Do you want your life?" the evidence that "Gamble specifically referenced a gun" in circumstances that made the reference a threat was sufficient to permit a finding under KRS 515.020(c) that he had threatened the immediate use of a dangerous instrument. 319 S.W.3d at 378. In *Swain,* too, we upheld a first-degree robbery conviction where the defendant had "referred to a gun and demanded money." *Swain,* 887 S.W.2d at 348. Although in *Swain* the Court relied on *Merritt* to reach its conclusion, a case overruled in *Wilburn v. Commonwealth, Gamble* has confirmed that result based solely on the plain language of KRS 515.020(c).

Sparks attempts to distinguish this case from *Gamble* by insisting that in *Gamble* the teller was convinced by the robber's threat that he had a gun, whereas in this case Shepher ultimately believed that Sparks was probably bluffing. Shepher's doubts after the robbery, however, do not compel a finding in Sparks's favor. While it may be true that a robber's gun reference that for some reason, under the circumstances, conveyed no threat would not justify a first-degree robbery instruction, we need not address that question. Here, the

evidence clearly permitted a rational juror to find that Sparks's gun reference together with his apparently pointing the gun at Shepher, his keeping his hand in his pocket during the theft, and his warning to the co-worker not to do anything stupid, were meant to convey the threat that Sparks would use a gun if the clerks resisted and succeeded in frightening them—as they both testified—and forestalling their resistance. The fact that after the robbery Shepher may have doubted that Sparks was armed did not preclude the jury from finding that when Sparks said he had a gun and threatened to use it, he meant it.

CONCLUSION

In sum, we held in *Gamble* that evidence that a robber specifically referred to a gun so as to threaten its use in conjunction with a theft, was sufficient to permit a finding of first-degree robbery under KRS 515.020(c). The evidence of Sparks's gun threat is indistinguishable from the evidence deemed sufficient in *Gamble,* and so here too the trial court did not err by instructing the jury to determine whether Sparks was guilty of robbery in the first degree. Accordingly, we affirm the Judgment of the Greenup Circuit Court.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Joseph Brandon Pigg
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Gregory C. Fuchs
Assistant Attorney General
Office of Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601-8204