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RENDERED: NOVEMBER 1, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000326-MR

ERIC T. NOE — APPELLANT

V.

ON APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
NO. 15-CR-00356

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Eric Thomas Noe, representing himself pro se with standby counsel, was convicted by a jury of first-degree robbery and sentenced to twenty years' imprisonment. He is represented by appointed counsel in this matter of right appeal.[1] On appeal, Noe requests reversal of his conviction due to the following alleged trial court errors: (1) denying his motion for directed verdict on the first-degree robbery charge, and overruling his objection to the jury instructions on first-degree robbery; (2) denying his motion to suppress evidence seized during the search of his apartment; (3) failing to conduct a suppression hearing on his objection to the recorded statement he made at the police station being played

[1] Ky. Const. § 110(2)(b).

for the jury; and (4) not ordering the Commonwealth to turn over body cam evidence showing Noe's initial detention. Finding none of Noe's claims have merit, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

On July 16, 2015, a male perpetrator wearing a mask, a black-hooded sweatshirt embroidered with a red dragon, gray EKU[2] sweatpants, and gloves entered the Chase Bank in downtown Richmond. He gave a small black and red backpack to the bank teller behind the counter and repeated the statements, "put the money in the f****** money in the bag b****!" and "hurry the f*** up!" During most of the encounter, the perpetrator kept his right hand in his sweatshirt pocket. At one point during the robbery, the offender, with his hand inside his sweatshirt pocket, leaned on the counter. A second bank teller testified that he thought the perpetrator might have a gun on him because of his stance and his hand on the counter. However, no gun or other weapon was seen during the robbery, no threat to use a gun or other weapon was ever made by the perpetrator, and only a grainy still frame of a bulge in the perpetrator's pocket on the bank's surveillance video was ever thought to have possibly been a weapon. The detective who reviewed the image from the bank's surveillance video testified on cross-examination that the bulge could have just been the hand of the offender which was in his pocket at the time.

Soon after the robbery, surveillance footage from directly above Noe's apartment, located less than two blocks from the bank, showed him entering

[2] Eastern Kentucky University.

the apartment in clothes matching those of the robbery suspect and leaving three minutes later. Richmond Police Department Officer, Chip Gray, was advised of an armed robbery at Chase Bank at 10:02 a.m. The suspect was described as a white male, with brown hair, in his 20's, in a white t-shirt, gray EKU sweatpants and a black and red backpack heading in the direction of the area where Noe was eventually stopped. At 10:04 a.m., Officer Gray made eye contact with Noe on the street and stated that Noe had a "change of behavior" upon this contact, immediately turning to ascend a narrow alleyway about one and a half blocks diagonally from Chase Bank. Noe made it all the way up the alley and almost into his apartment when Officer Gray called out to him. Noe then retreated to speak with Officer Gray. Officer Gray asked Noe why he was sweating, to which Noe responded that he had just finished a run. During this initial question, a radio dispatch updated Gray that the suspect's white t-shirt had red stripes. Noe was wearing a white t-shirt with a red "Avengers" symbol inside a red circle, khaki shorts, yellow shoes, and a different backpack.[3] After receiving this update, Officer Gray detained Noe while explaining to him that there had been a robbery. He handcuffed Noe, since he did not know at that time whether a weapon had been used in the robbery, and removed his backpack.

Officer Gray asked Noe where he was going: Noe stated that he was on his way to class at EKU but was returning home to retrieve his phone. Officer

[3] This backpack had black and red on it although it was different than the one discovered at Noe's apartment which he used in the robbery.

Gray then asked Noe several questions about his class attendance at EKU. Noe hesitated when answering what building he had class in and could not remember his professor's name. At 10:12 a.m., Noe stated that his class was at 9:30 a.m., to which Officer Gray noted he was going to be very late, since the school was about a mile away. One minute later, Officer Gray asked university police whether Noe was enrolled in a 9:30 a.m. class. Six minutes after that university police informed Officer Gray that Noe was an active student but was not enrolled in summer classes. After hearing this news, Officer Gray ran a track with his dog from the bank to Noe's apartment in an attempt to discover further evidence that Noe was the perpetrator.

During this time, Noe remained detained by other officers outside the alleyway leading to his apartment. Dispatch records indicated that Noe gave verbal consent to search his apartment at 10:43 a.m., but officers went to the wrong apartment. At 10:51 a.m., Noe again verbally consented to a search of his apartment, and officers entered the correct apartment. Once inside, officers found the backpack containing evidence of the robbery. Officer testimony revealed that the backpack's main compartment contained gray EKU sweatpants, a black-hooded sweatshirt with a dragon emblem, a black bandana, a left shoe, a single latex glove, a box cutter, almost all the cash taken from the bank, and nothing else. Officers then left the apartment, obtained a search warrant and arrested Noe.

At a suppression hearing in October 2016, testimony indicated that another officer at the scene of Noe's detention may have been wearing a body

cam, but nothing was made of this indication until Noe brought it up again three months later on the last day of trial. At the close of trial, the jury was instructed on both first and second-degree robbery, and Noe was convicted of first-degree robbery and sentenced to twenty years' imprisonment. This appeal followed.

II. ANALYSIS.

A. Motion for Directed Verdict and Jury Instructions.

At trial, Noe moved for a directed verdict on first-degree robbery, which the trial court denied. Noe then objected to the jury instructions on first-degree robbery, on grounds that the Commonwealth failed to prove he had a deadly weapon. The trial court overruled his objection. In Noe's original appellate brief, he challenges only the trial court's denial of his directed verdict; yet in his reply brief, in response to the Commonwealth pointing out the absence of any claimed instructional error in his appellate brief, Noe raises the jury instruction issue as well.

1. Standard of Review.

"Normally, assignments of error not argued in an appellant's brief are waived." *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987). However, since Noe preserved both issues below and both relate to the sufficiency of the evidence, we elect to review his claims together, despite Noe's failure to raise the instructional error theory until his reply brief. *See Commonwealth v. Pollini*, 437 S.W.3d 144, 148 (Ky. 2014) (appellate courts may review an issue

when it flows naturally under review of the issue raised and must review an issue not presented if necessary to avoid misleading application of the law).

Appellate review of a preserved sufficiency of the evidence challenge is the same whether the appellate court is reviewing a denial of a directed verdict motion or the requested exclusion of a jury instruction. *Commonwealth v. Hasch*, 421 S.W.3d 349, 357 (Ky. 2013). The standard is "'after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009)).

> A motion for directed verdict is appropriate "when the defendant is entitled to a complete acquittal[,] i.e., when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses." *Campbell v. Commonwealth*, 564 S.W.2d 528, 530–31 (Ky. 1978). A motion for directed verdict is not the proper means for relief "[w]hen the evidence is insufficient to sustain the burden of proof on one or more, but less than all, of the issues presented by the case." *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977) (*citing Columbia Gas of Kentucky, Inc. v. Maynard*, 532 S.W.2d 3, 7 (Ky. 1976)).

Noakes v. Commonwealth, 354 S.W.3d 116, 119 (Ky. 2011).

Noe maintains that because the evidence was insufficient to show he had a weapon, the trial court should have directed a verdict of acquittal on first-degree robbery or, alternatively, not instructed the jury on first-degree robbery. However, when the evidence is sufficient to sustain the burden of proof on some, but not all, elements of a count, the proper procedure for a criminal defendant is to object to the jury instruction and to request instruction on a

lesser-included offense, not to move for a directed verdict. *See Holland v. Commonwealth*, 466 S.W.3d 493, 498 (Ky. 2015); *see also Acosta v. Commonwealth*, 391 S.W.3d 809, 819 (Ky. 2013) (proper method for objecting to sufficiency of evidence when charges involve lesser-included offenses is to object to jury instructions, not to move for a directed verdict).

2. Analysis.

KRS[4] 515.020(1) defines the elements of first-degree robbery as follows:

> 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.

The jury instructions stated:

> 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 July 16, 2015, and before the finding of the Indictment herein, he stole a sum of United States currency from the Chase Bank;
> (b) That in the course of so doing and with intent to accomplish theft, he threatened immediate use of physical force upon [the bank teller].
> (c) That when he did so, he was armed with a box cutter, a utility knife; AND
> (d) That the box cutter was a deadly weapon as defined under [previous instruction].

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[4] Kentucky Revised Statutes.

Noe disputes whether the evidence was sufficient to prove he was armed with a deadly weapon. Noe does not – and did not – dispute that a box cutter is considered a "deadly weapon." Rather, he avers that the trial court should not have instructed the jury on first-degree robbery because the evidence was insufficient for the jury to find that he was armed with the box cutter during the robbery or that he made any threats with a weapon. However, in advancing the latter argument, Noe relies on cases that interpret KRS 515.020(1)(c), the provision in the statute dealing with use or threats with a dangerous instrument. If the jury had been instructed on KRS 515.020(1)(c), Noe might have a stronger argument. Our KRS 515.020(1)(c) precedent requires a clear threat of immediate harm from a dangerous instrument. *See Lawless v. Commonwealth*, 323 S.W.3d 676, 680 (Ky. 2010) (gesturing with hands in pocket not enough for first-degree robbery instruction under subsection (c) nor under subsection (b) where no deadly weapon was seen during crime nor discovered during investigation); *see also Williams v. Commonwealth*, 721 S.W.2d 710, 711–13 (Ky. 1986) (conviction overturned when defendant stated "Do you want your life?" during the course of robbery and had a bulge in pocket, but no direct threat). *But see Gamble v. Commonwealth*, 319 S.W.3d 375, 378–79 (Ky. 2010) (conviction affirmed when defendant stated orally and through a written note, "I have a gun").

Be that as it may, the jury was instructed under KRS 515.020(1)(b), requiring only that Noe be armed with a deadly weapon during the commission of a robbery. Video evidence from the bank and witness testimony showed that

Noe may have had something in his pocket during the robbery. Surveillance footage from directly above Noe's residence showed that Noe entered his apartment with the clothing and backpack from the robbery, and then left three minutes later. The Commonwealth theorized that during that time, Noe placed everything used in the robbery, except one shoe and one glove, in the main compartment of the backpack found in Noe's apartment, changed clothes and left the apartment before encountering police. This theory was corroborated by the absence of anything else in the main compartment of the backpack besides the clothing used in the robbery, the stolen cash, and the box cutter. Based on this evidence, the Commonwealth argued that a rational trier of fact could have determined that Noe had the box cutter on his person during the commission of the robbery.

While the evidence presented to show that Noe was armed with a deadly weapon was circumstantial, "[i]t is a well-settled rule in this Commonwealth that a conviction may be obtained on circumstantial evidence." *Baker v. Commonwealth*, 860 S.W.2d 760, 761 (Ky. 1993) (internal citations omitted). In *Baker*, the defendant was convicted of first-degree burglary after he was apprehended with a concealed gun, three-tenths of a mile away from a home he had entered illegally.[5] *Id.* The defendant claimed that he did not carry the weapon into the home and argued that because no one saw him with a gun inside the home, he could not be convicted of having been inside the home with

[5] KRS 511.020(1)(a) uses "deadly weapon" terminology similar to first-degree robbery under KRS 515.020(1)(b).

a deadly weapon. *Id.* However, this Court held that while the evidence was purely circumstantial, a "jury could infer from the above-listed facts that Baker had a gun while he was inside the home." *Id.*; *see also Pollini v. Commonwealth*, 172 S.W.3d 418, 432 (Ky. 2005) (evidence sufficient to convict defendant of first-degree burglary based on possession of a deadly weapon when he returned to the scene of the crime sixteen to thirty minutes later in possession of a handgun).

In *State v. Curry*, the Idaho Court of Appeals, under a fact pattern similar to this case, surveyed state courts and summarized the requisite showing to sustain a conviction based on circumstantial evidence that places a deadly weapon at the scene of the crime:

> To summarize, other case law shows a victim's belief that the defendant was in possession of a weapon at the time he or she committed the crime is not, *by itself*, sufficient to support a conviction where an element of the crime requires that the act was committed with a weapon. If there is a belief the defendant had a weapon, that belief must be accompanied with either circumstantial evidence closely connecting a weapon to the defendant at the time the crime was committed—for example, the . . . recovery of the weapon at a time and place correlating it to the crime scene[.]

283 P.3d 141, 149 (Idaho Ct. App. 2012).

In *Curry*, much like the present case, the victim thought the defendant might have had a gun. *Id.* at 150. Three days after the crime, police seized a gun from the defendant's mother's home, with whom he lived, but no evidence established that the defendant knew of the gun's existence and no fingerprints were obtained. *Id.* The Idaho Court of Appeals, following its summary of

applicable state court case law, held that the evidence was too tenuous to prove that the defendant "possessed a deadly weapon" during the alleged assault. *Id.* at 151.

Unlike the gun in *Curry*, Noe's box cutter was recovered at a time and place correlating it to the bank robbery. Without the discovery of the box cutter, the bank employee's subjective thoughts regarding Noe's possession of a weapon while Noe's hands were in his pocket, and the bulge in Noe's pocket, alone, were not enough to instruct the jury under KRS 515.020(1)(b). But that evidence, coupled with the fact that Noe returned home for only three minutes, and the only items discovered in the main compartment of the backpack were items used in the robbery and the box cutter, was sufficient for a jury to infer from the above-listed facts that Noe had a box cutter while he was inside the bank. Therefore, we affirm the trial court's decision to instruct the jury on first-degree robbery under KRS 515.020(1)(b), as well as its denial of Noe's motion for a directed verdict.

B. Motion to Suppress.

Noe asserts that he never consented for police to search his apartment or, alternatively, that his detention was unlawful, thereby rendering any alleged consent invalid and thus, any evidence seized from his apartment should have been suppressed.

1. Standard of Review.

Noe did not raise the issue of unlawful detention in his suppression motion below (he only claimed that he never gave consent for police to search

his apartment); in his reply brief, he seeks palpable error review under RCr[6] 10.26. In response, the Commonwealth asserts that Noe waived palpable error review by not requesting it in his original appellate brief. "Generally, an appellant is not obliged to anticipate that the Commonwealth will challenge preservation, and once it does he is free under the rule to reply to the Commonwealth's point by arguing that, even if unpreserved, the error is one that may be noticed as palpable." *Jones*, 283 S.W.3d at 670. Accordingly, we will review Noe's unlawful detention claim for palpable error.

Under palpable error review, "an unpreserved error may be noticed on appeal only if the error is 'palpable' and 'affects the substantial rights of a party,' and even then relief is appropriate only 'upon a determination that manifest injustice has resulted from the error.'" *Id.* at 668 (internal citations omitted). "An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Id.* (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

Regarding Noe's consent argument, which he preserved,

> In reviewing a trial court's ruling on a motion to suppress evidence, the reviewing court must first determine whether the trial court's findings of fact are supported by substantial evidence. If so, those findings are conclusive. The reviewing court then must conduct a *de novo* review of the trial court's application of the law

[6] Kentucky Rules of Criminal Procedure.

> to those facts. *Ornelas v. United States,* 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *United States v. Martin,* 289 F.3d 392, 396 (6th Cir. 2002); *Adcock v. Commonwealth,* 967 S.W.2d 6, 8 (Ky. 1998).

Epps v. Commonwealth, 295 S.W.3d 807, 809 (Ky. 2009), *overruled on other grounds by Davis v. Commonwealth,* 484 S.W.3d 288 (Ky. 2016).

2. Analysis.

At his suppression hearing, Noe cross-examined officers about whether he consented to the search; Noe did not testify on his own behalf. Thus, the record contains no testimony to controvert the officers' sworn testimony that he consented. Noe's claim that he did not consent, as set forth in his suppression motion, was not sworn evidence subject to cross-examination. The trial court ultimately concluded that substantial evidence showed that Noe had consented. Based on the uncontroverted officer testimony that Noe gave consent to search his apartment and clear evidence regarding the timing of this consent in the dispatch records, we affirm the trial court's ruling.

Turning to Noe's unlawful detention argument, since he failed to raise that argument below, the record contains no findings of fact regarding the propriety of his detention. Under the rule prescribed in *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer may conduct a brief investigatory stop if he has reasonable suspicion that criminal activity is afoot. *Id.* at 30, 88 S. Ct. at 1884–85. In *United States v. Hensley,* 469 U.S. 221, 229, 105 S. Ct. 675, 680, 83 L. Ed. 2d 604 (1985), the Supreme Court extended this rule to investigative stops for completed felonies.

Noe argues that he was "seized" illegally under *Terry*, and its progeny, because Officer Gray did not have reasonable suspicion to detain him. And further, that even if reasonable suspicion existed to detain him, the actual stop exceeded the scope authorized under *Terry* and, as a result, the consent he gave to search his apartment was invalidated.

The totality of the circumstances must be considered when determining whether law enforcement had reasonable suspicion to detain an individual. *Commonwealth v. Blake*, 540 S.W.3d 369, 373 (Ky. 2018). And "the length and manner of an investigative stop should be reasonably related to the basis for the initial intrusion." *Williams v. Commonwealth*, 147 S.W.3d 1, 6 (Ky. 2004). The evidence in this case showed that Noe turned abruptly into a small alleyway upon being seen by Officer Gray, within two blocks of the bank, less than five minutes after the robbery occurred. Albeit alone, Noe's evasive behavior is not enough for reasonable suspicion, it can still factor into the analysis. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000) ("nervous, evasive behavior is a pertinent factor in determining reasonable suspicion[]"). In addition to his evasive behavior, Noe also matched the race, gender, hair color, and general shirt description of the suspect, and was carrying a similarly-colored backpack. Altogether, this evidence is enough to create reasonable suspicion. Moreover, upon making contact with Noe, Officer Gray learned from dispatch that the suspect's white t-shirt had red stripes, matching the t-shirt Noe was wearing. This further justified Officer Gray placing Noe, a suspect in a violent felony, in handcuffs.

See Taylor v. Commonwealth, 182 S.W.3d 521, 524 (Ky. 2006) (use of handcuffs during a *Terry* stop is proper when circumstances warrant such precaution).

With respect to whether the length of time of the *Terry* stop created a de facto arrest, as Noe argues, thereby invalidating his consent to search, this Court, in *Commonwealth v. Bucalo*, 422 S.W.3d 253 (Ky. 2013), set forth the following test:

> Even if an officer has reasonable and articulable suspicion, there are still limits on the duration of the detention. The detention cannot extend beyond what is reasonable and necessary. *See U.S. v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985). The test is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly[.]"

Id. at 260.

Here, roughly 40 to 50 minutes of detention passed from the time of the robbery until Noe gave consent to search. Noe emphasizes that during this time, Officer Gray expressed doubt, several times, about whether Noe was the right man. However, the record shows that during those 40-50 minutes, Officer Gray was diligently pursuing his investigation and attempting to confirm or dispel his suspicions by phoning university police, walking to the bank to check surveillance and speak with other officers and witnesses, running a track from the bank to Noe's apartment with his K-9, and returning to Noe to compare him to surveillance pictures from the bank.[7] Therefore, under the totality of the

[7] Although the record is not precisely clear, about the same time other officers entered Noe's apartment, Officer Gray viewed security footage showing the front entrance to Noe's apartment. This footage showed Noe, in the distinct dragon

circumstances, the prolonging of Noe's detention was justified by at least a reasonable and articulable suspicion that Noe was engaged, or had engaged, in criminal activity, and by the diligent investigation of Officer Gray to confirm or dispel that suspicion. Accordingly, under palpable error review, we hold that Noe's detention was not unlawful, since it did not result in a manifest injustice, and thus the consent he gave was not invalidated. The evidence in Noe's apartment was lawfully obtained. Thus, the trial court properly denied Noe's motion to suppress.

C. Video-Recorded Statement.

1. Standard of Review.

At the end of the first day of trial, Noe made a KRE[8] 403 prejudice objection to his video-recorded statement from the police station being played at trial. The trial court released the jury for the day, so it could watch the video and decide. The next day, Noe made a host of other objections regarding the video-recorded statement, but never requested a suppression hearing. The

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sweatshirt and EKU sweatpants the suspect wore during the robbery, entering his apartment at 9:50 a.m., leaving a short while later with an empty backpack matching the description of the one used in the robbery, and returning one minute after the robbery occurred, running up the stairs wearing the white shirt with the "A" symbol, the matching backpack, and the EKU sweatpants. While we need not make a ruling on this issue today because we hold that the evidence was lawfully obtained, this damning evidence would have been more than enough to get a search warrant for the home and, due to its temporal relation to Noe's consent given to search the apartment, would raise strong arguments under the inevitable discovery doctrine. *See Hughes v. Commonwealth*, 87 S.W.3d 850, 853 (Ky. 2002) (citing *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377 (1984)) (permissible to admit "evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means").

[8] Kentucky Rules of Evidence.

trial court admitted the video and allowed it to be played to the jury with some redaction. Noe now complains that his general objection to the statement being played should have triggered a mandatory suppression hearing. Since Noe did not request a suppression hearing on this issue, we review his claim for palpable error under RCr 10.26.

2. Analysis.

Noe relies on the former RCr 9.78 for his contention that a trial court must hold a suppression hearing every time, and at any point, a suppression objection is made. RCr 9.78 contained a provision requiring an evidentiary hearing if a defendant made a timely objection to suppress a statement containing a confession during trial. However, RCr 9.78 was replaced by RCr 8.27 over two years before Noe's trial. RCr 8.27 states, in relevant part:

> (1) Motion. A motion to suppress evidence shall be filed by the deadline set by the court pursuant to Rule 8.20 for the filing of such motion. If the court has set no deadline under Rule 8.20, the motion shall be filed *within a reasonable time before trial.*
>
> (2) Hearing. The court shall conduct a hearing *on the record and before trial* on issues raised by a motion to suppress evidence. No jury and no prospective juror shall be present at any such hearing.

(emphasis added). Noe acknowledges that RCr 8.27 does not contain the same language regarding objections at trial as RCr 9.78 did. Instead, RCr 8.27 clearly states that a motion to suppress evidence must be made a reasonable time before trial. Noe had knowledge of his video-recorded statement well before trial and failed to make any motion regarding the suppression of the tape before trial, let alone a reasonable time before trial. RCr 8.27 is clear: a motion to suppress evidence must be filed "within a reasonable time before

trial" for there to be a mandatory hearing on the issue. Accordingly, the trial court had no mandatory duty to conduct a suppression hearing in the midst of trial, especially when none was requested.

D. Body Cam Evidence.

1. Standard of Review.

We review de novo "whether the conduct of the Commonwealth pertaining to the evidence at issue constitutes a *Brady* violation." *Commonwealth v. Parrish*, 471 S.W.3d 694, 697 (Ky. 2015) (internal citations omitted).

2. Analysis.

During the October 2016 suppression hearing, it came to light that an officer present at the scene when Noe gave consent to search his apartment may have been wearing a body cam. Noe stated, while cross-examining another officer, that he would like to see the body cam footage. The officer who allegedly had been wearing a body cam at the time of Noe's arrest, Officer Deaton, was not subpoenaed for the suppression hearing. The prosecutor told the court that it did not have a bodycam recording of Officer Deaton's to introduce into evidence. The trial court directed the questioning back to the issues raised in the suppression motion, and the body cam was not brought up again until the second day of trial, three months later. During the intervening time, Noe filed other pre-trial motions, none of which included a request for Officer Deaton's body cam footage.

On the first day of trial, Noe confirmed that he was ready to proceed. On the second (and last) day of trial, Noe moved for access to the "exculpatory evidence" contained in Officer Deaton's body cam footage. The Commonwealth informed the trial court that Officer Deaton was wearing a body cam at the time, but did not believe the footage was ever downloaded to the server or preserved. The Commonwealth reiterated that it did not have the body cam footage, and Noe had been provided with all videos that the Commonwealth had in its possession. The trial court characterized Noe's motion as a *Brady* motion, and denied it.

Under *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988), "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." When adopting *Youngblood*, this Court added that "negligence simply does not rise to the level of bad faith[.]" *Collins v. Commonwealth*, 951 S.W.2d 569, 573 (Ky. 1997).

> Additionally, "*Brady* only applies to 'the discovery, *after trial*, of information which had been known to the prosecution but *unknown to the defense*.'" *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002) (emphasis in original) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). . . . "*Brady* does not give a defendant a second chance after trial once he becomes dissatisfied with the outcome if he had a chance at trial to address the evidence complained of." [*Nunley v. Commonwealth*, 393 S.W.3d 9, 13 (Ky. 2013)].

Parrish, 471 S.W.3d at 698.

In the present case, Noe did not imply that the prosecution did anything wrong to destroy or misplace body cam evidence. No evidence suggests that

the footage was ever downloaded. During the suppression hearing, Noe did not request the body cam footage; instead he merely stated, while cross-examining another officer, that he would like to see the footage. Noe knew of the possibility of this video's existence roughly three months before trial. In the intervening time he filed other pre-trial motions, none of which contained a request for Officer Deaton's body cam footage. At trial, when Noe raised the issue again, the trial court characterized Noe's motion as a *Brady* motion. The Commonwealth responded that Noe had all the evidence it had. Noe did not, and does not, claim any specific bad faith on the part of the Commonwealth for not providing him the alleged footage. Consequently, no reversible error occurred when Noe, on the last day of trial, asked for a body cam video that he had known about for three months, and in which the trial court found no evidence of bad faith on the Commonwealth's part.

III. CONCLUSION.

This Court finds no reversible error in the issues brought before us. As a result, we affirm the judgment of the trial court.

All sitting. Minton, C.J.; Cunningham, Hughes, VanMeter and Wright, JJ., concur. Keller, J., concurs in part and dissents in part in which Venters, J., joins.

KELLER, J., CONCURRING IN PART AND DISSENTING IN PART: After careful review, I must dissent in part from the majority opinion. I also write separately to address the directed verdict issue raised by Noe, but in which I concur with the majority opinion.

Motion for Directed Verdict and Jury Instructions

I concur entirely in the majority opinion's discussion of the deadly weapon element in Kentucky Revised Statute (KRS) 515.020(1)(b). Here, the circumstantial evidence was sufficient, under *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991), to survive a motion for directed verdict of acquittal. However, I write separately to address what I perceive as a looming issue in our future robbery prosecutions. This issue was, arguably, raised by Noe's motion for directed verdict and in his appeal although it was less demonstrably argued than the issue related to his being "armed with a deadly weapon." This potential problematic issue is related to the requirement of threat or use of force.

The first requirement of both first-degree and second-degree robbery is that "in the course of committing a theft, [defendant] uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft[.]" KRS 515.020(1) and KRS 515.030(1). In *Lawless v. Commonwealth*, this Court held that the trial court's refusal to instruct on a lesser-included offense of theft, as Lawless requested, was not error. 323 S.W.3d 676, 681 (Ky. 2010). The trial court correctly determined that "no rational juror could have believed that Lawless demanded the bank's money but doubted that her demand was accompanied by a threat of physical force." *Id.* "Her hand-in-the-pocket demeanor was clearly intended to further the theft by creating the impression that she was armed, and the teller testified that it had its intended effect." *Id.* The Court continued this reasoning in *Tunstull v.*

Commonwealth by stating that "[a]n individual, particularly when masked or otherwise disguised, coming into a bank aggressively demanding money is a threat in and of itself—the implication clearly being that if the employees or customers do not comply, that physical force will follow." 337 S.W.3d 576, 583 (Ky. 2011) (citing *Lawless*, 323 S.W.3d 676). *Birdsong v. Commonwealth* presented a similar holding: when a disguised person enters a bank, causing "loud noise[s]" while entering the teller area, slamming a gate, giving loud orders, and pulling a printer to the floor, "we cannot say it was clearly unreasonable for the jury to find Birdsong threatened the use of physical force on another person." 347 S.W.3d 47, 50 (Ky. 2011). The majority of the Court emphasized that the tellers testified that they regarded Birdsong "as a possible danger." *Id.* In summarizing the evidence, the Court stated: "Birdsong demanded money and used aggression toward inanimate objects. The tellers believed Birdsong would harm them if they did not comply with his demand for money." *Id.* at 51. This was found sufficient to sustain a charge of second-degree robbery. *Id.*

In both *Tunstull* and *Birdsong*, Justice Venters provided a carefully detailed dissent, describing how this evaluation of evidence regarding the element of the "threat or use of force" under the statute has gone beyond the original intent of the General Assembly. Justice Venters stated that the majority's holding "conflates the objective act of making a threat to use physical force with the subjective effect that may be felt by others. An aggressive demand expressed under scary circumstances is not an objective

substitute for the actual expression, by words or gestures, of threat to use immediate physical force." *Birdsong*, 347 S.W.3d at 54 (Venters, J., dissenting). The majority holding ties a defendant's responsibility to "the subjective response of others" rather than "the conduct of the accused." *Id.* Justice Venters clearly stated:

> If the vagrant, by words or gestures, expresses or implies an intention to use physical force if his request is denied, then he is a robber. The conduct qualifying him as such can be ascertained from the clear, concrete and objective evidence, and is not dependent upon the degree of fear that one might infer from his presence.

Id. Birdsong and Tunstull made "aggressive demand[s] for money." *See id.* Noe, similarly, made an "aggressive demand for money." But "no amount of fear on the part of the victim can turn an aggressive demand for money into a specific threat of immediate force against a person." *Id.* The statutory language "requires an expressed or implied threat, communicated by gestures or words, of force upon another person." *Id.*

Here, I find it arguable that Noe's conduct was closer to the facts of *Lawless*. His language, stance, and hand in his pocket could all arguably point to the finding that a sufficient threat existed. However, the more flexible this standard becomes, the more possible it is that the difference between theft and robbery dissipates. "Where, along the sliding scale between a polite request for money to which one is not entitled and the aggressively hostile and frightening demand does theft or attempted theft become robbery?" *Tunstull*, 337 S.W.3d at 594 (Venters, J., dissenting). We also, as this scale subjectively changes from prosecution to prosecution, face an inherent unpredictability, as

"[p]rosecutors, judges, and juries, will differ in their respective views, and so we can have uneven or even discriminatory prosecution." *Id.* at 595. I must, under current precedent, concur with the majority and find that the Commonwealth met its burden under this standard for use or threat of force under KRS 515.020 and KRS 515.030. However, I would take this opportunity to caution prosecutors and trial courts of this evolving standard and to ensure that the statutes are enforced consistently and objectively.

As to preservation of this issue, I would make one further point. The majority states that "when the evidence is sufficient to sustain the burden of proof on some, but not all, elements of a count, the proper procedure for a criminal defendant is to object to the jury instruction, and to request instruction on a lesser-included offense, not to move for a directed verdict." I would clarify that, if the Commonwealth has failed to prove every *element* of the crime, then that defendant would be entitled to a directed verdict of acquittal. It is the Commonwealth's burden to prove, beyond a reasonable doubt, every element of the charged crime. *See Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002) ("It is now elementary that the burden is on the government in a criminal case to prove every element of the charged offense beyond a reasonable doubt ... "). However, directed verdict is only proper when "it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment or of any lesser included offenses." *Acosta v. Commonwealth*, 391 S.W.3d 809, 817 (Ky. 2013) (quoting *Campbell v. Commonwealth*, 564 S.W.2d 528, 530 (Ky. 1978)). Thus, by

conceding that the Commonwealth had proven some of the lesser-included offenses (namely, robbery, second degree), Noe conceded that a directed verdict of acquittal was improper. However, he further preserved this issue for review. He specifically proposed an instruction on another lesser-included offense, theft by unlawful taking over $500, and objected to the giving of an instruction on robbery, first degree. I would reiterate that Noe's actions, especially as a *pro se* defendant, were sufficient to adequately preserve this issue for our review.

Even if it was not adequately preserved, in the past, this Court has reviewed the failure to give an instruction on a lesser-included offense under palpable error. *See Acosta*, 391 S.W.3d at 820. In *Acosta*, the defendant appealed on the same issue as Noe, that she was entitled to a directed verdict on one of the charged crimes, but not all. *Id.* at 816. This was the only basis for her appeal; she did not raise the failure or error in instructing the jury. *Id.* This Court determined that, although the defendant was not entitled to a directed verdict, the error in instructing on a charge unsupported by the evidence was sufficient to reverse for palpable error. *Id.* at 820. Ultimately, I agree with the majority that Noe was not entitled to a directed verdict of acquittal here. Under our current case law, as previously discussed, the evidence was sufficient to reach a jury on robbery, first degree. However, I find the directed verdict and instruction issue so intertwined that it seems necessary to address the trial court's failure to give an instruction on Noe's proposed lesser-included offense, theft by unlawful taking over $500.

"An instruction on a lesser included offense is appropriate if, and only if, on the given evidence a reasonable juror could entertain a 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." *Osborne v. Commonwealth*, 43 S.W.3d 234, 244 (Ky. 2001) (citing *Skinner v. Commonwealth*, 864 S.W.2d 290, 298 (Ky. 1993) and *Luttrell v. Commonwealth*, 554 S.W.2d 75, 78 (Ky. 1977)). On appellate review, the reviewing court "ask[s] ... whether a reasonable juror could acquit of the greater charge but convict of the lesser." *Allen v. Commonwealth*, 338 S.W.3d 252, 255 (Ky. 2011) (citing *Thomas v. Commonwealth*, 170 S.W.3d 343 (Ky. 2005), *Osborne*, 43 S.W.3d 234, and *Commonwealth v. Wolford*, 4 S.W.3d 534 (Ky. 1999)). Under this standard, it is unfathomable to me how the theft instruction, proposed by Noe, would not be a lesser included offense of the robbery charge. The evidence before the jury was that Noe committed a theft, but that his actions were threatening to those involved. The money stolen was found in Noe's backpack. By proving the robbery, the Commonwealth, necessarily, proved a theft. The robbery statute specifically states that robbery occurs when a person uses or threatens physical force "in the course of committing theft[.]" KRS 515.020(1). Thus, by its very definition, proving robbery proves the elements of theft. It is reasonable that a jury could determine the evidence showed an insufficient threat to meet the definition of robbery, but clearly the evidence would be sufficient to meet the burden of theft. As Justice Venters noted in his dissent to *Tunstull*, "the facts here do not *compel* the finding that such a threat was

made." *Tunstull*, 337 S.W.3d at 592 (Venters, J., dissenting) (emphasis original). A denial of this instruction creates a conundrum for the jury:

> A reasonable juror could conclude that Appellant did not so threaten, in which case he should have been exposed to criminal culpability for theft. By denying that option, the trial court forced the jury to choose between acquitting a thief and convicting him of robbery despite the lack of a threat to use immediate physical force against another person.

Id.; *see also Swain v. Commonwealth*, 887 S.W.2d 346, 348 (Ky. 1994) ("[T]he facts presented here are sufficient to constitute a threat of immediate physical force if the jury believes from the evidence there was such, or theft by unlawful taking if it believes there was no threat of physical force.").

Yet, both the trial court and Commonwealth vehemently insisted that theft was not a lesser-included offense of robbery under the facts of this case. I find this statement implausible. *See Lloyd v. Commonwealth*, 324 S.W.3d 384, 393 (Ky. 2010) (Cunningham, J., concurring) ("Theft by unlawful taking is a lesser-included offense of robbery.") (citing *Roark v. Commonwealth*, 90 S.W.3d 24, 38 (Ky. 2002)). But, this issue is not before this Court, and was thus, correctly, not addressed by the majority opinion. Had appellate counsel raised the trial court's error in the appellate brief, it would be a validly-raised point and a strongly-contended argument for reversal, especially given Noe's entire closing argument which centered upon his admission of theft but denial of threat or use of force in the commission of that theft. But, this Court cannot argue Noe's case for him. Thus, I must ultimately concur with the majority on this issue, that there is nothing warranting reversal in the trial court's denial of directed verdict on robbery, first degree.

The Suppression Motion

I would also note that Noe never raised the issue of unlawful detention at the trial court level, as recognized by the majority opinion. Theoretically, I question the legal effect of any detainment upon Noe's alleged consent to search his apartment. But Noe never raised that aspect of the issue, either at the trial court level or on appeal to this Court. Thus, I would refrain from addressing any speculative errors. The trial court was never given an opportunity to address these issues and we have no relevant findings of fact to adequately review any alleged error.

Evidence pursuant to *Brady v. Maryland*

At a suppression hearing on October 28, 2016, the Commonwealth presented the testimony of Sgt. Brian Eaves with the Richmond Police Department to prove that Noe had consented to a search of his apartment. Sgt. Eaves admitted on cross-examination that Officer Deaton, who was present during the consent, had a body camera ("body cam") at the time. Noe brought this to the trial court's attention, to which the Commonwealth responded that it had no such body cam footage in its possession; Noe, however, emphasized that he felt such a video would be "relevant." The Commonwealth did not call Officer Deaton to testify at the hearing; Noe presented no evidence in response so the trial court correctly determined that the Commonwealth had met its burden in proving consent. Notably, the rest of Noe's entire interaction with officers was preserved in body cam footage through Det. Gray. However, Det. Gray left to go to the bank and conduct a dog search; it was during this time

that the conversation on consent took place, according to Sgt. Eaves, with him, Officer Deaton, and Noe. Thus, it is undisputed that any body cam footage from Officer Deaton would have conclusively established Noe's consent or lack thereof.

At trial, Sgt. Eaves again testified that Officer Deaton had a body cam at the time of the exchange with Noe. On the morning of January 18th, 2017, the second and last day of trial, Noe again raised this issue. He moved to have access to exculpatory evidence. The Commonwealth stated that all the evidence was turned over and that there was no proof that Officer Deaton's body cam was ever "downloaded to the server." The circuit court stated that Noe had everything there was and Noe could call those officers as witnesses if he wanted. Noe responded that he did not know about this evidence to search it out because he was "stuck in a cell without resources." The court denied his motion and the trial continued, ultimately leading to Noe's conviction.

Exculpatory evidence includes "evidence favorable to the accused and material to guilt or punishment, including impeachment evidence." *Dunn v. Commonwealth*, 360 S.W.3d 751, 767-68 (Ky. 2012) (quoting *Commonwealth v. Barroso*, 122 S.W.3d 554, 564 (Ky. 2003)). "Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Dunn*, 360 S.W.3d at 768 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[9]

[9] I also recognize that labeling this issue as a *Brady* violation would require extending *Brady*'s protections to pretrial issues, such as suppression, that would inevitably affect the outcome at trial. I believe this is an issue that must be addressed

Evidence held by law enforcement agencies is impugned to the Commonwealth for *Brady* and discovery purposes. *See Trigg v. Commonwealth*, 460 S.W.3d 322, 326 (Ky. 2015) ("[W]hen a testifying law enforcement officer knows of a significant statement that was made, that knowledge is properly imputed to the Commonwealth, regardless of whether the prosecuting attorney had actual knowledge of the statement."); *Anderson v. Commonwealth*, 864 S.W.2d 909, 912-13 (Ky. 1993) ("In such circumstances the knowledge of the detective is the knowledge of the Commonwealth.").

If evidence is disclosed prior to trial, *Brady v. Maryland* is inapplicable. *See Commonwealth v. Grider*, 390 S.W.3d 803, 820 (Ky. 2012). "[W]hen such information is disclosed at trial and the defense actively cross-examines on it, there is no *Brady* violation." *Commonwealth v. Parrish*, 471 S.W.3d 694, 697 (Ky. 2015) (quoting *Nunley v. Commonwealth*, 393 S.W.3d 9, 13 (Ky. 2013)).

This leads us to the question of how the Commonwealth meets its *Brady* obligations by "disclosing" exculpatory evidence. Does the mere mention of the evidence meet the responsibility? Can a prosecutor evade the requirements under *Brady* by simply letting the defense know that some potentially exculpatory evidence may exist somewhere in the world, yet refuse to act further in confirming or denying its existence? I believe this is an issue that this Court must address.

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at the proper time and in the proper circumstances. However, because we have insufficient information from the record on this issue, I would still remand and decline to address the extension of *Brady* at this time.

Unfortunately, from this record, it is unclear whether (1) this video ever existed; (2) the video was destroyed or unpreserved; or (3) what that video would have shown, if preserved. If the video was destroyed or unpreserved, we would reiterate that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Parrish*, 471 S.W.3d at 697 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). Thus, the distinction between *Brady* violations, in which "the Commonwealth withholds plainly exculpatory evidence" and "the mere[] fail[ure] to collect or preserve evidence" is "bad faith." *Parrish*, 471 S.W.3d at 697.

From the record at the trial court level, this Court cannot possibly determine which circumstance may exist here. It is incumbent upon the trial court to determine (1) whether this evidence existed; (2) whether it was preserved or not by the Commonwealth; (3) if unpreserved, whether there was bad faith; or (4) if preserved, whether it was exculpatory in nature. We do not have sufficient information to determine the merits of Noe's challenge on this issue. For these reasons, I dissent from the majority on this issue and would remand this back to the circuit court for further findings.

Venters, J., joins.

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