

RENDERED: January 7, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002264-MR

WILLIAM THOMAS ATHERTON

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 97-CR-00138

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, William Thomas Atherton (Atherton), appeals the Daviess Circuit Court's denial of his motion for relief pursuant to RCr 11.42. We affirm the denial.

Atherton was charged with second degree robbery, and with being a persistent felony offender in the first degree. The Commonwealth charged Atherton with robbing The Pantry in Owensboro, Kentucky, of \$13.85. No weapon was presented, and no force was used in the robbery. The clerk testified that the

robber told her to give him the money, and held one gloved hand in a fist against his waist. She testified that she did not see a weapon, but that she was afraid the man would hit her if she didn't comply. The man was five or more feet from her at all times, and she was behind the store counter. The police detained a suspect within 4 minutes of the receipt of the 911 call by The Pantry, and the suspect was brought in a police vehicle to the scene. The cashier at The Pantry identified Atherton as the individual who committed the robbery. The clerk did not approach the cruiser when making her identification. Atherton did not exit the cruiser, and the door to the cruiser was never opened during the identification process. Atherton's prior convictions were a 1985 conviction for trafficking in a controlled substance, and a 1990 conviction for possession of marijuana.

The denial of Atherton's initial motion under RCr 11.42 was affirmed by this Court. Upon review, the Kentucky Supreme Court remanded the case to this Court for reconsideration. The Court of Appeals again affirmed the denial. The Supreme Court then vacated the Court of Appeals opinion, and remanded the case to the trial court for an evidentiary hearing. Following the evidentiary hearing, the trial court again denied the motion.

In his post-conviction motion, Atherton argued that he was denied effective assistance of counsel when his attorney failed to object to alleged misstatements of law during closing arguments by the Commonwealth. During closing arguments, the defense argued that Atherton's conduct did not amount to a threat of physical force. The Commonwealth responded in its closing arguments by stating that the legal standard for determining threatened use of physical force is the subjective belief of the victim, and not the actions of the defendant. The prosecutor argued that all that was necessary for conviction was that the victim subjectively perceived a threat. During deliberations the jurors repeatedly raised questions about the difference between what they were told by the prosecution, and the written instructions.

While the jury deliberated following close of the case, the jurors requested that they be permitted to speak to the judge. The foreperson notified the judge that they were having trouble with the definition of physical force in Instruction 1(b). The jury asked whether they were correct in assuming that they should look at it from the perspective of the clerk, and whether she felt threatened. The judge informed them that he couldn't explain further, and told the jury to look at the instructions. The foreperson then stated that during closing arguments, they had been told something else by the

lawyers. The judge replied that he couldn't tell them any more. A second juror then asked whether it was sufficient, as the prosecutor had told them, that the clerk merely felt threatened. The judge told the jurors to use their collective recollection to remember what counsel and the witnesses had said, and use the jury instructions.

Atherton argues that the law does not state that it is the victim's subjective belief which determines whether the defendant threatened the victim. The law requires that the actions of the defendant be considered to determine if, in common experience, they were sufficient to be deemed a threat of immediate physical force. To hold otherwise "places [the defendant] virtually without defense at the caprice of a victim's subjective evaluation without regard to the actual course of events and could lead to convictions for crimes neither intended nor committed." Williams v. Commonwealth, Ky., 721 S.W.2d 710, 712 (1987).

Robbery is an offense which combines the actions of theft and assault. Roark v. Commonwealth, Ky., 90 S.W.3d 24, 38 (2002). Robbery is defined as "the use of force to facilitate theft" Morgan v. Commonwealth, Ky., 730 S.W.2d 935, 937 (1987). The Kentucky Supreme Court held, in Swain v. Commonwealth, Ky., 887 S.W.2d 346 (1994), that even where no weapon is seen or flourished, the threat of a weapon is

sufficient to meet the standard for robbery in the second degree. Id., at 347. The defining statute, KRS 515.030, holds, at subsection (1), that "a person is guilty of second degree robbery when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person." The Commonwealth has the burden of proving such conduct on the part of the defendant. Morgan v. Commonwealth, Ky., 730 S.W.2d 935 (1987).

While the testimony of the victim, regarding her fear of assault, is relevant, the law requires a showing that the defendant threatened immediate use of physical force. The jury found, in accordance with the instructions provided to them, that Atherton's gloved fist and demands for the money constituted a threat of immediate use of physical force upon the clerk. The jury is the finder of fact. Robinson v. Commonwealth, Ky. App., 572 S.W.2d 606, 609 (1978). The jury's determination in this case has not been shown to be reversible error.

During the evidentiary hearing before the trial court and during the closing argument the Commonwealth Attorney stated that it is his understanding that a subjective belief by the victim that she is being threatened is sufficient for conviction, even if that subjective belief was unreasonable. The trial court expressed the opinion that any misstatement of

law by the Commonwealth was surplusage, as the jury had the instructions before them. The court found that defense counsel's inaction did not prejudice Atherton. In its review of the case on direct appeal, the Kentucky Supreme Court recited the facts of the case, and cited Swain v. Commonwealth, Ky., 887 S.W.2d 346 (1994), in holding that Atherton's "menacing manner and appellant's gloved, clenched fist were sufficient to create a factual question for the jury to resolve. A threat need not be explicit, but may be implied from the circumstances and gestures."

In examining trial counsel's performance for deficiency, the first prong of the test outlined in Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2064, 80 L.Ed.2d 37 (1985), is to determine whether the alleged acts or omissions were outside the scope of prevailing professional norms based on an objective standard of reasonableness. Defense counsel chose not to object during his opponent's closing argument. We do not find that this determination was outside professional norms. The trial court ruled that counsel's inaction in failing to object was within the prevailing professional norms. We affirm that determination. The second prong of Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2064, 80 L.Ed.2d 37 (1985) is to determine whether the defendant's rights were prejudiced by counsel's action or inaction. As the jurors had

the instructions before them stating the plain language of the law as it related to the charged offense, we find that defense counsel's alleged inaction did not prejudice Atherton's rights such that reversal of the conviction is required. For the foregoing reasons, we affirm the trial court's denial of the RCr 11.42 motion.

ALL CONCUR.

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