

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000029-MR

RICHARD ALLEN MARSHALL, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 02-CR-01287

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, HENRY, AND JOHNSON, JUDGES.

HENRY, JUDGE: Richard Allen Marshall, Jr. appeals from a jury verdict and judgment finding him guilty of second degree manslaughter and complicity to robbery first degree and sentencing him to fifteen (15) years' imprisonment. Upon review, we affirm.

The facts of the case relevant to this appeal are as follows: On the evening of December 26, 2001, Wally Newstead was shot multiple times and killed in front of his home in a trailer park located at 1081 New Circle Road in Lexington, Kentucky.

Other residents at the trailer park reported hearing the gun shots and seeing a white car entering the area before the shooting and leaving immediately afterwards. A number of them also reported seeing three men wearing dark clothing and masks walking towards Newstead's trailer prior to the shooting. None of the residents, however, were able to identify at trial any of the three men involved.

One resident, April Perez, further testified that she saw Newstead running from his trailer with one man chasing after him before falling in the street following the gun shots. The three men apparently fled the scene in the white car following Newstead's collapse. Perez then went to Newstead to try to render assistance and found that he had been shot multiple times. Newstead made references to "my money" and told Perez that the three men wanted his money. When Perez asked him if he knew who the men were, Newstead told her that he did not know, and he then died as a result of the multiple gunshot wounds that he had sustained.

In October 2002, Appellant Marshall and his brother, Aaron "Worm" Marshall, were arrested and questioned in connection with the subject incident after their names were given to the police by an apparent eyewitness to the incident. Aaron Marshall indicated to the questioning police officers that Appellant Marshall had told him that he was planning to rob

Newstead, and that he had later told him that he was involved in Newstead's death. Appellant Marshall denied being the person who actually shot Newstead.

On October 4, 2002, Appellant Marshall was questioned by the police about his role in the subject incident. He admitted helping to plan an intended robbery of Newstead with two (2) other individuals—Richard Houpp and John Cavins, Jr.—and indicated that they sought to carry out the planned robbery on December 26, 2001. Marshall stated that Newstead was known to be a drug dealer who kept quantities of money and pills in his trailer, and that the plan was to rob him of both. Houpp would take the pills, while Marshall and Cavins would split the money that they obtained.

Appellant Marshall told the police that he drove his vehicle to the trailer park on the night of Newstead's death, intending to rob Newstead, and that he had brought a mask and gloves to wear. He further indicated that Cavins had brought along a handgun to be used to threaten Newstead, and that a two-liter soda bottle was taped to the gun to act as a makeshift silencer. Marshall claimed that he did not know that a gun was going to be involved in the robbery until the individuals were on their way to Newstead's trailer park, and he denied having a gun of his own. He also denied that the men intended to shoot Newstead. Upon arriving at the trailer park, the three men

walked to Newstead's trailer, and Houp asked Newstead to open the door. Upon opening the door, Newstead saw the men, apparently realized that something was afoot, pushed his way through them, and ran from the trailer. At this point, according to Marshall, Cavins began firing shots at Newstead that ultimately caused him to collapse and fall. Marshall, Houp, and Cavins then fled the scene in Marshall's vehicle without taking anything from Newstead's person or home.

On December 9, 2002, Appellant Marshall, along with Cavins, was indicted by the Fayette County Grand Jury on charges of murder and first degree robbery.¹ Marshall was also indicted on a felony count of tampering with physical evidence.² Both individuals pled not guilty to these charges and the matter proceeded to trial, which was conducted from November 3 to November 13, 2003.

At trial, Appellant Marshall testified relatively consistently with his statements to the police, again admitting to his part in the intended robbery with Houp and Cavins but denying that he was the person who shot Newstead. The jury found both Marshall and Cavins guilty of second degree

¹ Richard Houp was not indicted for the subject incident and was apparently the referenced "eyewitness" to the Newstead killing who had implicated the Marshall brothers and, eventually, John Cavins. Houp ultimately refused to testify at the trial of this matter, invoking his Fifth Amendment rights.

² Appellant Marshall was ultimately found by the jury to be not guilty of this offense.

manslaughter and complicity to first degree robbery and sentenced each man to fifteen (15) years' incarceration. Judgment was entered in accordance with this verdict. This appeal followed.

On appeal, Marshall raises two (2) general issues: (1) whether the trial court properly denied his motion for directed verdict as to the charge of first degree robbery; and (2) whether the trial court erred in refusing to give an "attempted robbery" instruction. We will address the issues in the order given.

Marshall first contends that he was entitled to a directed verdict as to the first degree robbery charge. His contention is divided into two (2) distinct, but ultimately related, parts: (1) his confession notwithstanding, there was insufficient corroborating evidence that a robbery occurred, as is required by RCr³ 9.60; and (2) the evidence was insufficient overall to establish that a robbery occurred.

We are obligated to review an argument that a party was entitled to a directed verdict at trial under the standard set forth in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991): "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to

³ Rules of Criminal Procedure.

a directed verdict of acquittal." Id. at 187 (citation omitted). "On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." Id. A defendant is entitled to a directed verdict if the Commonwealth produces no more than a "mere scintilla" of evidence of guilt. Id. at 187-88.

RCr 9.60 provides: "A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied by other proof that such an offense was committed." Marshall argues that, excluding his confession to the police and his testimony at trial, "there is not one single word of evidence in this case to establish that there was a robbery." Accordingly, his confession cannot be corroborated, as required by RCr 9.60, and a directed verdict should have therefore been granted.

RCr 9.60's requirement of corroboration "relates only to proof that a crime [i.e., the "corpus delicti"] was committed, not to whether the defendant committed it." Lofthouse v. Commonwealth, 13 S.W.3d 236, 242 (Ky. 2000) (citing Commonwealth v. Karnes, 849 S.W.2d 539 (Ky. 1993)); Slaughter v. Commonwealth, 744 S.W.2d 407, 410 (Ky. 1987), cert. denied, 490

U.S. 1113, 109 S.Ct. 3174, 104 L.Ed.2d 1036 (1989)). Corpus delicti "may be shown by circumstantial evidence but the circumstances must be more consistent with guilt than with innocence." Dolan v. Commonwealth, 468 S.W.2d 277, 282 (Ky. 1971) (citing Goodman v. Commonwealth, 285 S.W.2d 146 (Ky. 1955)). "Once the corpus delicti has been established, the fact that the defendant committed the crime can be proven entirely by his own confession." Lofthouse, 13 S.W.3d at 242 (citing Dolan, supra). "Finally, the corroborative evidence need not be such that, independent of the confession, would prove the corpus delicti beyond a reasonable doubt; and proof of the corpus delicti may be established by considering the confession as well as the corroborating evidence." Id. (citing Blades v. Commonwealth, 957 S.W.2d 246, 250 (Ky. 1997)).

Upon reviewing the record, we find that there was sufficient corroborating evidence outside of Marshall's confession to establish that a robbery occurred pursuant to KRS 515.020. Witnesses testified that three men in masks approached Wally Newstead's home and that he was shot and killed upon trying to flee from them. Another witness testified that Newstead made references to the men being after his money right before he died. We believe that this constitutes adequate corroborating evidence that a robbery occurred under RCr 9.60.

Moreover, in considering whether a directed verdict should have been granted, we are allowed to consider the fact that Marshall himself admitted to an intent to rob Newstead, and that Newstead fled when confronted and was immediately shot and killed. See Kirkland v. Commonwealth, 53 S.W.3d 71, 76 (Ky. 2001). Marshall appears to rely upon the fact that nothing was actually taken from Newstead's person in support of his contention that a "robbery" did not occur. However, it has been long established that a robbery conviction does not require a completed theft. See, e.g., Wade v. Commonwealth, 724 S.W.2d 207, 208 (Ky. 1986) (citations omitted); Lamb v. Commonwealth, 599 S.W.2d 462, 463-64 (Ky. 1980). The facts indicate that Marshall and two accomplices went to Newstead's home with an intent to rob him and then killed him when he attempted to flee. This is sufficient evidence to overcome a motion for directed verdict as to first degree robbery and, accordingly, we cannot conclude that it would be "clearly unreasonable" for a jury to find guilt here.

Marshall's final contention is that the trial court erred in failing to give an "attempted robbery" instruction. As grounds for its decision not to give such an instruction, the trial court relied upon the aforementioned case of Kirkland v. Commonwealth, supra, finding the facts of that case analogous to the situation at hand. The Commonwealth urges us to follow this

decision here. Marshall, however, contends that Kirkland is distinguishable.

In Kirkland, two men entered a liquor store intending to rob the owner. A surveillance camera in the store showed that as one man went to take money from the cash register, the other fired a shot that passed through the register and struck the owner. Both men then fled the scene without taking any money. The store owner died as a result of the gunshot.

Kirkland, 53 S.W.3d at 73. At trial, Kirkland testified in his own defense and admitted that he and his accomplice entered the store in order to take the money from the owner. Id. at 76. In finding that no "attempted robbery" instruction needed to be given under these facts, the Kentucky Supreme Court held: "All the evidence indicates that McKee and Kirkland entered the store with a gun in order to steal money from the victim. The robbery was accomplished at that point. There was no evidence of any 'attempt.' Under the totality of the evidence, there was no basis for an attempt instruction." Id. (citing Commonwealth v. Collins, 821 S.W.2d 488 (Ky. 1991)).

In addressing this issue, we again note that a conviction of first degree robbery does not require that something be taken from the alleged robbery victim; that is, it does not require a completed theft. See Wade, 724 S.W.2d at 208 (citations omitted); Lamb, 599 S.W.2d at 463-64 (citations

omitted). Accordingly, the fact that nothing was actually taken from Newstead in this case is of no consequence as to the instructions.

The testimony given by Marshall at trial indicated that he and two other individuals, whom he named as Cavins and Houp, went to Newstead's home with the intention of stealing money and pills from him. The evidence indicates that when Newstead saw the three men at his door, he clearly perceived a threat, attempted to flee, and was shot to death. He subsequently made a dying declaration that the men were after his money. We agree with the trial court that an "attempted robbery" instruction was unnecessary here for the same reasons given in Kirkland. There is nothing in the record to support an "attempt" to rob. If the robbery was not completed at the moment the three men confronted Newstead at his home dressed in masks and dark clothing while armed with a gun, it certainly was when Newstead was shot and killed only moments after this confrontation after attempting to flee. Accordingly, we do not believe that the trial court erred in failing to give an "attempted robbery" instruction.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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