

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000209-MR

MICHAEL BREARTON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 03-CR-00487

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

COMBS, CHIEF JUDGE: Michael Brearton appeals from a judgment of the Kenton Circuit Court convicting him of first-degree robbery. He argues that the evidence was insufficient to establish that he was armed with a deadly weapon -- an element of the crime (see KRS¹ 515.020) -- and that the trial court erred in failing to instruct the jury on theft by unlawful taking. Finding no error, we affirm.

¹ Kentucky Revised Statutes.

On May 29, 2003, just after midnight, an individual entered the Shell Gas Station at 610 West 5th Street in Covington. He approached the cashier, Peggy Adkins, and threatened to shoot her unless she gave him the contents of the cash register. He was carrying a black bag, which he pointed at the cashier. Adkins opened the cash register. As the robber pulled the money out of the register, his black bag fell onto the counter, making a noise. Adkins's co-employee, Jeremy Holtzclaw, entered the front area of the store, and the robber said, "You don't want to get shot over this do you?" The robber then took the money, stuffed it into his black bag, and left the store.

Adkins later identified Brearton as the robber from a photo lineup. On October 17, 2003, the grand jury returned an indictment charging Brearton of the offense of first-degree robbery. At trial, both Adkins and Holtzclaw testified that although they did not see a weapon, they believed that Brearton was holding a gun in the black bag.

Instructed on both first and second-degree robbery, the jury found Brearton guilty of the higher degree of the offense. He was sentenced to serve ten years in prison. This appeal followed.

Brearton first argues that the trial court erred in denying his motion for a directed verdict of acquittal. He

contends that the evidence was not sufficient to prove that he was guilty of first-degree robbery because no one saw him with a gun or any other deadly weapon. He relies on Swain v. Commonwealth, Ky., 887 S.W.2d 346 (1994), in support of his argument that his conviction for first-degree robbery was improper. However, Swain holds that when a defendant refers to a gun or other deadly weapon while making a demand for money, evidence of such conduct is sufficient to withstand a motion for directed verdict on a charge of first-degree robbery. See also Merritt v. Commonwealth, Ky., 386 S.W.2d 727 (1965), and Dillingham v. Commonwealth, Ky., 995 S.W.2d 377 (1999), cert. denied, 528 U.S. 1166, 120 S.Ct. 1186, 145 L.Ed.2d 1092 (2000), where a conviction for robbery was upheld under circumstances similar to those in this case.

The evidence at trial established that Brearton threatened to shoot both employees of the Shell station while simultaneously demanding the money from the cash register. He pointed a black bag at Adkins while making the threat. Additionally, the noise that Adkins heard when the bag fell on the counter convinced her that the bag contained a weapon. Therefore, regardless of whether Brearton was actually armed with a gun, he was not entitled to a directed verdict on the charge of first-degree robbery. Swain, supra; Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

Brearton also contends that the trial court erred in failing to instruct the jury on theft by unlawful taking. The Commonwealth argues that the issue has not been preserved for review. While the record does not contain details of the *in camera* discussion concerning the instructions, it nevertheless establishes that Brearton orally requested an instruction on theft by unlawful taking and that his motion was denied.

We agree with the Commonwealth's substantive argument that there was no evidence to support the instruction. "Robbery is a combination of the offenses of theft and assault." Morgan v. Commonwealth, Ky., 730 S.W.2d 935, 937 (1987). There was no evidence to contradict the testimony of Adkins and Holtzclaw that Brearton threatened to shoot them in the course of the robbery. Because there was no evidence from which the jury could have reasonably concluded that Brearton accomplished the theft without the threat of force, an instruction on mere theft was not warranted. Thus, the trial court did not err in denying the requested instruction.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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