

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000272-MR

DARRELL W. TREADWAY

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE ROBERT E. GILLUM, JUDGE  
ACTION NO. 03-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: DYCHE, KNOPF, AND TACKETT JUDGES.

TACKETT, JUDGE: Darrell Treadway (Treadway) appeals from the judgment of the Lincoln Circuit Court convicting him of first-degree robbery and sentencing him to ten years' imprisonment. He argues that the trial court improperly denied his request for a directed verdict, improperly instructed the jury, and excluded his rebuttal witness. In addition, he filed a post-trial motion challenging the competency of one of the Commonwealth's witnesses, and he now adds a complaint about a statement from

the Commonwealth's closing argument. We disagree that any of these issues raised on appeal provide a basis for granting him relief; thus, the trial court's judgment is affirmed.

Treadway, his brother, Earl Treadway (Earl), and their friend, Robbie Hines (Hines), were indicted for first-degree robbery after allegedly using force to steal a wallet and two cases of beer from Billy Adams (Adams). Prior to Treadway's trial his brother pled guilty, and the charge against Hines was dismissed in exchange for his testimony. The Commonwealth presented testimony from both the victim and Hines that Treadway struck Adams. Earl testified for the defense that he was the one who struck Adams, but claimed it was done in self-defense. Although Earl was the one who took the beer, Adams testified that Treadway was the one who stole his wallet. The jury convicted Treadway of first-degree robbery, and the trial court denied a post-trial motion to strike Hines' testimony alleging that he was incompetent. This appeal followed.

On appeal, Treadway claims that the trial court should have granted his motion for a directed verdict. The Commonwealth argues that the motion was too vague to preserve the issues and, further, that it was not renewed at the close of the defense case. Nevertheless, we will review the issue to determine whether a palpable error occurred pursuant to Kentucky Rule of Criminal Procedure 10.26. The standard of review for

failure to grant a directed verdict is whether, under the evidence as a whole, it would be unreasonable for a jury to find the defendant guilty. Benham v. Commonwealth, 816 S.W.2d 186 (Ky. 1991). Kentucky Revised Statute 515.020(1)(a) defines first-degree robbery as "when, in the course of committing theft, [a person] uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and . . . [c]auses physical injury to any person who is not a participant in the crime. . . ." In order to determine whether Treadway was entitled to a directed verdict, we must first examine the facts presented to the jury.

On the morning of Treadway's trial, the Commonwealth offered to dismiss the charge against Hines in exchange for his truthful testimony. He testified, under oath but outside the presence of the jury, that he was not in the room when Adams was struck and did not see who did it. The Commonwealth accused him of lying and declined to dismiss the charge. Adams testified that he was at home the night of the robbery when Treadway showed up with Earl and Hines wanting beer. Although he acknowledged having sold bootleg alcohol before, this particular evening he only had two cases of beer and they were for personal use. When Adams stated that he did not have any beer to sell them, Treadway started beating on him. After taking Adams' wallet from his back pocket and ripping it off his chain,

Treadway kicked Adams and hit him with both fists. The wallet had \$300.00 cash and his driver's license. Adams testified that the three men also took his beer. He said he did not recall whether the beating had left marks on him, but stated he "hurt like the devil" afterwards. Adams called the police and reported the robbery.

On cross-examination, Adams testified that he had been drinking, but was not drunk when he was robbed. Defense counsel asked whether Adams was angry at the three men for failing to provide him with drugs. Adams denied being a drug user, and further stated that he had given up bootlegging since the robbery.

Trooper Bill Collins (Collins) responded to the call and testified that he found Adams out of breath and bleeding from cuts on his nose and hands. Collins did say that he smelled alcohol on Adams and that Adams had red areas around his head that looked as though he was bleeding under the skin. Collins saw the broken wallet chain hanging from Adams' pocket. The Commonwealth introduced photos of Adams' injuries while Collins testified. Adams refused treatment for his injuries. Adams told Collins that he recognized Treadway and Earl, although he was not able to provide their names.

A description of the car and a partial license plate number led Collins to identify Treadway and his brother. When

he returned to see Adams two days later, Adams told Collins that he remembered the names of two of his assailants: Darrell Treadway and his brother; however, he denied knowing Hines. Collins obtained warrants for the three men. He testified that he remembered scratches on Hines' hands when he was arrested.

Treadway called his brother Earl as his only witness. Earl had already pled guilty to an amended charge and received a five-year sentence to be served concurrently with his sentence on another felony. Earl testified that he, his brother, and Hines had been at Adams' home earlier in the day and that he sold Adams some cocaine which all of the men smoked. Adams allegedly gave Earl \$150.00 to buy an "eight-ball" of cocaine, but Earl's dealer took the money and never brought back any cocaine. Earl said they told Adams what had happened and offered to get his money back in the morning when the banks opened, but Adams accused them of stealing from him and threatened to shoot them. Earl hit him once in self-defense, knocking him onto the sofa, and told him not to move. Earl then left with Treadway and Hines. No one else touched Adams and no one stole from him. On cross-examination, Earl claimed that Hines' hands were scratched during an earlier fight with a man in a store.

The Commonwealth renewed its offer to Hines to dismiss the charge against him in exchange for his testimony, and this

time he testified before the jury. Hines told the jury that the three men were riding around in a car getting drunk when they ran out of alcohol. They decided to try to buy some beer from Adams on credit, but he refused to sell them any. Hines was preparing to leave when he heard the table being overturned. He turned and saw Treadway strike Adams twice in the face. Hines intervened to stop Treadway from beating on Adams who was bleeding from cuts to his nose and lip. Although he denied seeing Treadway take Adams' wallet, Hines did tell the jury that Earl stole Adams' beer. Treadway made up the cover story about a drug deal gone wrong and told the others to use it if they were caught. Hines stated that the cuts on his hands came from working on a car and playing with a kitten.

On cross-examination, Hines admitted that his testimony was different from the story he had told earlier that morning. Hines stated that he had a child with Treadway's sister and considered himself a member of their family. On re-direct, Hines told the jury the contents of his previous statement. Also, he stated that he had lied in Treadway's favor because the mother of his child was threatening to charge him with flagrant nonsupport if Hines testified against her brother.

After being presented with all of this testimony, it was not clearly unreasonable for the jury to believe that Treadway had used force against Adams and injured him in order

to separate Adams from his property. Thus, the trial court's denial of Treadway's motion for a directed verdict was proper.

Next, we turn to Treadway's complaint about the jury instructions. Treadway complains that the jury instructions allow a finding of guilt for the theft of Adams' property without specifying whether the jury believes he stole the wallet or the beer. Since the testimony indicated that Earl took the beer, Treadway contends that he could not have been found guilty unless the jury believed he took the wallet. Thus, he complains that the jury instructions denied him a unanimous verdict because some jurors may have been convicting him of taking the beer while others may have believed he stole the wallet. An instruction presenting two alternate theories of guilt "does not deprive a defendant of his right to a unanimous verdict if there is evidence to support a conviction under either theory."

Miller v. Commonwealth, 77 S.W.3d 566, 574 (Ky. 2002) (citations omitted). The Kentucky Supreme Court, addressing the question of whether a participant, who does not actually take anything, can be guilty of first-degree robbery decided as follows:

Generally, all who are present at the commission of a robbery, rendering it countenance and encouragement, and ready to assist if needed, are liable as principal actors. *To be liable, the accused need not to have taken any money from the victim with his own hands, or actually participated in any other act of force or violence; it is sufficient that he came and went with the*

robbers, was present when the robbery was committed, and acquiesced therein.

Smith v. Commonwealth 5 S.W.3d 126, 129 (Ky. 1999) (citations omitted) (emphasis in original). Thus, we find Treadway's argument has no merit since he participated in the thefts of both the beer and the wallet by using physical force against Adams, even if he did not carry the beer out of the house himself.

Treadway's remaining complaints regarding his excluded rebuttal witness, Hines' competency to testify, and statements made during the Commonwealth's closing argument were not properly preserved. With regard to the excluded witness, Treadway failed to place her testimony into the record by avowal. He failed to object to Hines' testimony during trial or to cross-examine him regarding his competency to testify, and he chose, for reasons of trial strategy, not to object during the Commonwealth's closing argument. Thus, we decline to review any of these grounds for his appeal.

For the foregoing reason, the judgment of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Astrida L. Lemkins  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

James Havey  
Assistant Attorney General  
Frankfort, Kentucky