

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002657-MR

TONY F. BUTLER

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 03-CR-00373

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Tony Fostino Butler appeals from the Henderson Circuit Court's judgment sentencing him to ten years' imprisonment after a jury found him guilty of second-degree robbery¹ and of being a first-degree persistent felony offender² (PFO). Butler argues on appeal that the trial court erred in

¹ KRS 515.030.

² KRS 532.080.

failing to instruct the jury as to fourth-degree assault³ and theft by extortion⁴. For the following reasons, we affirm.

Butler testified at trial that on November 1, 2003, he went to visit his uncle, Nathan Butler, at James and Rhonda Bumpus' apartment, where Nathan and his girlfriend, Sherry Glass, were living. Nathan was not at home, but with Rhonda's approval Sherry invited Butler into the apartment to wait for Nathan. The three talked and drank alcohol until Nathan arrived and began arguing with Sherry. The argument awoke James, who had been sleeping, and he demanded that everyone leave his apartment. Nathan complied but Sherry insisted that she would not leave until James gave her Nathan's food stamp card. James attempted to push Sherry out of her chair, and Butler told him to stop. When James did not stop, Butler shoved James. Sherry then said she would leave if James gave her \$20. After James complied, Sherry left the apartment with the money and a case of beer.

James testified, by contrast, that prior to the incident he gave Nathan \$50 in exchange for the use of a food stamp card. On the evening of the incident, he went to sleep at about 8:30 p.m. After he was awakened by an argument between Sherry and Nathan, James told everyone to leave the apartment,

³ KRS 508.030.

⁴ KRS 514.080

which Nathan did. Sherry asked for the food stamp card, but James refused, because he had given Nathan money for it. Butler urged James to give Sherry the card and then got into bed with Rhonda. James told Butler to get out of bed with his wife, and James, Butler, and Sherry went outside to get Nathan's take on the food stamp card situation. James testified further that once outside, Nathan did not respond to the inquiry regarding the food stamp card. Sherry then took a case of beer and told James that she would leave if he gave her \$20. After James denied having any money on him, Butler grabbed him around the neck while Sherry searched his pockets. The three then went back into the apartment, where James gave Sherry the money and told Sherry and Butler to leave. Sherry left with the beer and money, but Butler choked James "to his knees" and said, "Old man, I could hurt you. Where's my \$20?" James gave Butler the money, and Sherry and Butler left the apartment.

Butler was indicted on charges of second-degree robbery and being a first-degree PFO. A jury found Butler guilty of second-degree robbery after being instructed on both that offense and the lesser-included⁵ offense of menacing⁶. The trial court subsequently adopted the jury's recommendation and

⁵ See *Commonwealth v. Varney*, 690 S.W.2d 758, 759 (Ky. 1985) (assault is a lesser-included offense of robbery).

⁶ KRS 508.050.

sentenced Butler to five years' imprisonment, enhanced to ten years by the PFO count. This appeal followed.

Butler's first argument is that the trial court erred in failing to instruct the jury as to fourth-degree assault. Butler maintains that such an instruction was warranted because the jury could have believed that he shoved but did not choke or demand money from James. We disagree.

KRS 508.030(1)(a) provides that a person is guilty of fourth-degree assault when he intentionally or wantonly causes "physical injury" to another person, which is defined as "substantial physical pain or any impairment of physical condition[.]"⁷ Here, there simply was no testimony regarding a physical injury sustained in connection with the alleged shove. In fact, the only testimony regarding any injuries James may have sustained was James's testimony that Butler choked him "to his knees" when demanding that he give Butler \$20. Accordingly, there was not any evidence that would warrant an instruction on fourth-degree assault based on Butler's theory of the case.

Next, Butler argues that the trial court erred in failing to instruct the jury as to theft by extortion. Butler concedes that this issue is unpreserved but urges us to review it for palpable error pursuant to RCr 10.26.

⁷ KRS 500.080(13).

The jury was instructed as to, and found Butler guilty of, second-degree robbery. That offense is defined in KRS 515.030(1) as follows:

A person is guilty of robbery in the second 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.

Butler argues on appeal that the jury also should have been instructed on theft by extortion, which is defined in pertinent part by KRS 514.080(1) as follows:

A person is guilty of theft by extortion when he intentionally obtains property of another by threatening to:

(a) Inflict bodily injury on anyone or commit any other criminal offense[.]

As set forth above, James testified that Butler demanded money from him by choking him "to his knees" and saying, "Old man, I could hurt you. Where's my \$20?" Thus, if the jury believed James's testimony, the elements of second-degree robbery were satisfied, as Butler used physical force in the course of committing theft from James.⁸ On the other hand, if the jury believed Butler's testimony that he only shoved James, then Butler was guilty of neither second-degree robbery nor theft by extortion. There simply was no evidence that Butler obtained James's property by threatening to inflict

⁸ "Physical force" is defined as "force used upon or directed toward the body of another person." KRS 515.010.

bodily injury, without the use or threat of the immediate use of physical force. As the Kentucky Supreme Court has explained,

[a]lthough a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation. An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.⁹

Thus no palpable error occurred as a result of the failure to instruct the jury as to theft by extortion.

The judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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⁹ *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998) (internal citations omitted).