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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001076-MR

JEFFREY STEWART

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 05-CR-00172

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Jeffery Stewart appeals his conviction for first-degree robbery.

Because we are unpersuaded by Stewart's claims of error, we affirm his conviction.

Facts

The record indicates that Stewart and his brother used a Jeep to rob two women of their purses. First, they drove their Jeep very close to Eura Dials and grabbed the shoulder strap of her purse, pulling the purse from Ms. Dials's person into the Jeep.

Then, they did the same thing to Veronica Slone. However, when they grabbed Ms. Slone's purse strap, they pulled her into the side of the Jeep and then onto the ground. Ms. Slone's arm and shoulder were injured in the fall, and her shoulder still bothered her 11 months after the robbery. Stewart and his brother were soon apprehended and tried for two counts of robbery. The jury found Stewart guilty of second-degree robbery with regard to Eura Dials and first degree robbery with regard to Veronica Slone.

Issue and Legal Standards

Stewart's sole claim of error properly preserved for review is that the evidence does not support a first-degree robbery verdict on the count involving Veronica Slone. When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to, and draw all reasonable inferences favorable to, the Commonwealth; and we reverse only when the evidence as a whole would not allow a reasonable juror to find guilt. *See Commonwealth v. Benham*, 816 S.W. 186, 187 (Ky. 1991). The crime of robbery is enhanced to first-degree robbery when the defendant inflicts physical injury on the victim or uses a dangerous instrument in the commission of the crime. *See* KRS 515.020. A “dangerous instrument” is any instrument that is readily capable of causing death or serious physical injury in the circumstance in which it is used. *See* KRS 500.080(3). A “physical injury” means substantial physical pain or any impairment of physical condition. *See* KRS 500.080(13).

Analysis

I.

In light of the manner in which Stewart employed a Jeep to snatch Veronica Slone's purse – that is by driving close to her and grabbing the shoulder strap of the purse while driving by and away – Ms. Slone could easily have been dragged under the wheels of the Jeep and killed. As it happened, she was only dragged against the Jeep and to the ground, causing injury to her arm and shoulder. Thus, as used by Stewart in the commission of the crime charged, a reasonable juror could have concluded from the evidence that the Jeep was a dangerous instrument used to commit robbery. *See Binion v. Commonwealth*, 891 S.W.2d 383, 387 (Ky. 1995) (glass ashtray thrown at victim); *Barth v. Commonwealth*, 80 S.W.3d 390, 400 (Ky. 2001) (wooden sticks struck against victim's head). Alternatively, a reasonable juror could have concluded from the evidence that Stewart inflicted injuries upon Ms. Slone's person by grabbing her purse strap and dragging her to the ground. *See Parson v. Commonwealth*, 144 S.W.3d 775, 787 (Ky. 2004) (question of the seriousness of injury for the jury). In either case, reasonable inferences from the evidence justify a verdict of robbery in the first-degree.

II.

Stewart's admittedly unpreserved claim of error is that the trial court's first-degree robbery instruction allowed the jurors to find alternative theories of guilt and therefore deprived Stewart of a unanimous verdict. We decline to review this unpreserved claim on the merits and hold that, in any event, the alleged instruction error

patently did not result in a manifest injustice, and therefore no relief under RCr 10.26 is warranted.

Conclusion

We hold that the trial court committed no error in submitting Stewart's purse snatching crime against Veronica Slone under instructions allowing a verdict of first-degree robbery, as reasonable inferences from the evidence support a conviction on that charge, either under the theory that Stewart employed a dangerous instrument or that he physically injured Ms. Slone. Consequently, we affirm Stewart's first-degree robbery conviction.

STUMBO, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY AND FILES
SEPARATE OPINION.

KELLER, JUDGE, CONCURRING IN RESULT ONLY: I concur with the majority in affirming the trial court. However, I believe that additional analysis is necessary regarding the jury instruction issue raised by Stewart. Stewart argues that the trial court's jury instruction on the charge of the robbery of Veronica Slone deprived him of a unanimous jury verdict. The instruction used by the trial court provided two alternative theories that would support a conviction of robbery: 1) Stewart used force in committing the theft; or 2) Stewart used a dangerous instrument in committing the theft. Stewart did not preserve this issue; therefore, we must review it under the palpable standard.

To determine if an error is palpable, “an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different.” *Commonwealth v. McIntosh*, 646 S.W.2d 43, 45 (Ky. 1983). To be palpable, an error must be “easily perceptible, plain, obvious and readily noticeable.” *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997), citing *Black's Law Dictionary* (6th ed. 1995). A palpable error must be so grave that, if uncorrected, it would seriously affect the fairness of the proceedings. *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005). As noted by the Commonwealth, the Supreme Court of Kentucky has held that “combination” jury instructions do not interfere with a defendant's right to a unanimous verdict so long as the evidence would support a conviction under either theory. *Miller v. Commonwealth*, 77 S.W.3d 566, 574 (Ky. 2002). Therefore, we must determine whether there was sufficient evidence to support a conviction under either theory.

As noted by the majority, the jury could have reasonably concluded that the jeep constituted a deadly instrument. Although it is unclear whether Stewart or his brother was driving, there is no doubt that the jeep was used to approach Ms. Slone from behind and as a getaway vehicle once the jeep's passenger grabbed Ms. Slone's purse, throwing her to the ground. Therefore, it is clear to me that the jeep was “readily capable of causing death or serious physical injury.” In fact, Ms. Slone did suffer serious physical injury as a result of being thrown to the ground by the force used by Stewart in taking her purse.

Finally, the jury could have concluded from the evidence that Stewart, by pulling Ms. Slone's purse from her and causing her to fall to the ground, used force in committing theft. Therefore, not only was there not palpable error with regard to the trial court's jury instructions, there was no error.

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