RENDERED: AUGUST 17, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000582-MR

TERRY GLENN HOBSON — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 05-CR-00241

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: Appellant, Terry Glenn Hobson (Hobson), was indicted in Boyd Circuit Court on charges of Robbery in the First Degree, Receiving Stolen Property under $300, and Giving a Peace Officer a False Name. Hobson pled guilty to Receiving Stolen Property under $300 and Giving a Peace Officer a False Name, and a jury convicted Hobson of Robbery in the First Degree, sentencing him to ten years' imprisonment. On

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11(5)(b) of the Kentucky Constitution and KRS 21.580.

appeal, Hobson asserts that: (1) the trial court erred when it denied his motion for directed verdict of acquittal, and (2) the trial court erred when it denied his proposed jury instructions on third-degree assault and fleeing and evading in the second degree. We affirm.

FACTUAL BACKGROUND

On July 11, 2005, Hobson entered an Ashland, Kentucky, Wal-Mart and attempted to purchase goods with credit cards that had earlier been reported stolen. The cashier, who had been put on notice of the reported stolen cards, told Hobson that her register was malfunctioning and went to notify management.

Officer J.R. Schoch (Officer Schoch), of the Ashland Police Department, who was already at the Wal-Mart for an unrelated criminal matter, accompanied a manager to the register. Officer Schoch approached Hobson and asked him his name. Hobson twice attempted to pass himself off as the owner of the credit cards and even showed Officer Schoch the driver's license of the cards' owner. Unconvinced, Officer Schoch informed Hobson that it was a crime to lie to a police officer. Hobson then changed his story, telling Officer Schoch that he was the cousin of the owner of the cards, but that he had permission to use them. Officer Schoch asked Hobson if the owner would approve of "his cousin" using the cards if they called him. Hobson replied affirmatively and Officer Schoch, along with the manager, escorted Hobson to the loss prevention office (the office) where they planned to make the call. All of the items Hobson had

attempted to purchase were left at the register and Hobson was no longer in possession of the stolen credit cards as they walked to the office.

After arriving at the office, they were delayed from entering because the room was occupied. At this point, Hobson fled from Officer Schoch by ducking and running through the "buggy" door located behind him. Officer Schoch followed, and in a matter of seconds caught up with Hobson. The record contains conflicting reports as to whether Officer Schoch tackled Hobson or Hobson threw himself back into Officer Schoch. Regardless of how it occurred, both men fell to the ground and a scuffle ensued. Hobson struggled to break free and Officer Schoch fought to restrain him. At some point, either in the course of the fall or the scuffle that followed, Officer Schoch severely fractured his left ankle in three places. Mall security was soon able to assist Officer Schoch and together they were able to cuff and contain Hobson.

ANALYSIS

A. Directed Verdict of Acquittal

On appeal, Hobson first argues that the trial court erred when it denied him a directed verdict of acquittal. More specifically, Hobson argues that his acts on July 11, 2005, did not meet the elements necessary for robbery in the first degree, because there was a lapse in time between the attempted theft and Officer Schoch's injury. "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 a directed verdict of acquittal." *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Kentucky Revised Statute 515.020 states in pertinent part:

> 1) A person is guilty of robbery in the first 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 and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime . . .

Hobson concedes that the escape stage is included in robbery but attempts to distinguish his actions as two separate crimes, an attempted theft, followed by fleeing and evading. However, Hobson's argument is flawed.

In *Williams v. Commonwealth*, 639 S.W.2d 786 (Ky.App. 1982), the defendant stole items from a cleaners and, while being chased, discarded the stolen items. A short time after he discarded the items, the defendant brandished a knife, threatening the pursuer. The Kentucky Court of Appeals concluded that the elements of robbery had been met, stating that:

> [t]he fact that force was used sometime after and some distance from the *taking* is only incidental. The force used was in the course of committing the theft because it happened during the escape stage. We construe the fair import of the term 'in the course of committing theft' to include the time, place and circumstances surrounding a theft or attempted theft. This encompasses the escape stage. We believe the fair import of the meaning of 'escape stage' to be all steps or events in the process of escape which would fall within the active or continuous pursuit of the criminal actor. (Emphasis in original).

Id. at 788.

In the case herein, Hobson attempted to commit theft by purchasing goods with stolen credit cards. He then agreed to follow Officer Schoch to the loss prevention room, while maintaining that he had permission to use the stolen credit cards and continuing to conceal his true identity. Just a few minutes later, Officer Schoch broke his ankle while apprehending Hobson. This brief period between the attempted theft and the injury to Officer Schoch cannot be construed as sufficient to constitute two separate events. As stated in *Williams*, "[t]he fact that force was used sometime after and some distance from the *taking* is only incidental. The force used was in the course of committing the theft because it happened during the escape stage." *Id.* (Emphasis in original).

Hobson tries to distinguish *Williams*, by claiming that when he started his escape, he was no longer in possession of any of the stolen objects. That may be true. However, Hobson's attempt to distinguish *Williams* is flawed. Hobson began his attempt to avoid apprehension when he lied to Officer Schoch about having permission to use the credit cards. Because of this, we agree with the Commonwealth that the escape stage for Hobson did not start when he ran through the "buggy" door, as he claims, but rather started when he attempted to avoid being detained, by claiming to have permission to use the stolen items.

Hobson also argues that he did not use aggressive force against Officer Schoch. Robbery in the first degree does not require one to be the aggressor, but only requires that force be used. KRS 515.020, in pertinent part, requires the use of force that

causes a physical injury. It does not require "aggressive" force and Hobson has not pointed to, and we have not identified, a case that supports his position.

Since the escape stage is included as part of the theft, and because the injury occurred while Hobson was attempting to escape, the injury occurred, "in the course of committing the theft." *Williams*, 639 S.W.2d at 787; KRS 515.020. Based on the evidence, it was not clearly unreasonable for the jury to conclude that Hobson met the elements of robbery in the first degree, and thus the trial court did not err when it denied Hobson's motion for a directed verdict of acquittal.

B. Jury Instructions of Lesser Included Offenses

Hobson's second argument is that the trial court erred when it denied Hobson's proposed jury instructions of third-degree assault and fleeing and evading in the second degree. Because Hobson failed to object on the record when the judge denied his proposed jury instructions, the Commonwealth argues that this issue was not properly preserved. However, because Hobson properly tendered the instructions and made his position clear when talking to the judge in chambers, we hold the issue was sufficiently preserved for review.[2] Accordingly, we will review the issue, using a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky.App. 2006).

The Supreme Court of Kentucky addressed the issue of including lesser included offenses in jury instructions in *Mack v. Commonwealth,* 136 S.W.3d 434 (Ky.

[2] It appeared at oral argument that counsel conceded the issue of preservation. However, for the reason stated in the opinion above, this court conducted review of the issue. It should be noted that counsel who argued the case was not counsel who tendered the written brief to the Court.

2004). In *Mack,* the defendant appealed his first-degree robbery conviction claiming that the circuit court erred when it did not allow the jury instruction of a lesser included offense of fourth-degree assault. The Supreme Court held that, "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 the defendant is guilty of the lesser offense." *Id*. at 436. (Emphasis in original). Like the court in *Mack*, we discern no reason why the jury herein might have had a reasonable doubt as to Hobson's guilt of robbery in the first degree, and yet believed beyond a reasonable doubt that he was guilty of lesser offenses. For this reason, the trial court did not err in refusing to include jury instructions on lesser included offenses.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Boyd Circuit Court.

ALL CONCUR.

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