COMMONWEALTH OF KENTUCKY

SUPREME COURT
2008-SC-000669

CHRISTOPHER GAMBLE — APPELLANT

v. APPEAL FROM THE FAYETTE CIRCUIT COURT

ACTION NO. 07-CR-00370
Honorable Sheila R. Isaac

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT

SUBMITTED BY:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class postage prepaid on July 13, 2009: Honorable Sheila Isaac, Fayette Circuit Court Judge, 120 North Limestone, Lexington, Kentucky 40507; Hon. Andrea L. Mattingly Williams, Assistant Commonwealth's Attorney, 116 North Upper Street, Lexington, Kentucky 40507; and by messenger to Hon. Jason B. Moore, Assistant Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

Linda Roberts Horsman (JBC)

LINDA ROBERTS HORSMAN

INTRODUCTION

Christopher Shiloh Gamble was tried by a jury on a charge of First-degree Robbery. He was found guilty and sentenced to a term of twelve years imprisonment. The Court of Appeals affirmed his conviction and he filed a Motion for Discretionary Review with this Court, which was granted.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant does desire oral argument in this case as it involves an issue that has proved problematic for the lower courts of the Commonwealth.

STATEMENT CONCERNING CITATION TO THE RECORD

The record in this matter consists of one volume of trial record and three compact discs. The volume of trial record will be referred to herein as "TR," followed by the page number where the document referred to herein might be found in that volume. The trial proceedings appear on two compact discs, with the beginning of the proceedings appearing on the CD marked CD 22/7/07/VCR-CD/51-1 and the rest of the proceedings appearing on the CD marked CD 22/7/07/VCR-CD/51-2. Pre-trial and post-trial proceedings appear on the CD labeled with multiple segments. The first trial CD will be referred to herein as "VR No.1" and the second trial CD will be referred to herein as "VR No. 2." The CD containing segments will be referred to herein as "VR No. 3."

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

On February 8, 2007, Chase Bank employees Natalie Lindgren and Lynn Dowdy were working behind the teller line at the Alexandria Drive branch in Lexington. (VR No. 1, 7/16/07, 10:42:30; 11:00:25). At approximately 11:30 that morning, Ms. Lindgren noticed a man, with his head and face covered, walk into the bank. She immediately pushed the silent alarm at her teller station, believing that the man was about to rob the bank. (VR No. 1, 7/16/07, 10:43:54; 10:44:23; 11:01:33). Ms. Dowdy was likewise suspicious when she noticed the man carrying a piece of notebook paper in one hand. (VR No. 1, 7/16/07, 11:01:55).

The man approached Ms. Lindgren's teller station and put the note in front of her, as well as a plastic bag, with one hand.[1] (VR No. 1, 7/16/07, 10:45:30; 11:00:25). Ms. Lindgren glanced at the note and saw the word "gun," and the man told her "I have a gun, give me all of your money." (VR No. 1, 7/16/07, 10:45:55; 11:02:10[2]). The man looked at Ms. Dowdy, who was standing next to Ms. Lindgren, and told her not to say anything and not to move. (VR No. 1, 7/16/07, 10:45:50; 11:02:05). The man told Ms. Lindgren to give him all the money in her drawer. (VR No. 1, 7/16/07, 10:46:02).

Ms. Lindgren began putting cash into the plastic shopping bag the man had placed on the teller counter. (VR No. 1, 7/16/07, 10:46:13; 11:02:20). The man told her to be sure to include "big bills," too. (VR No. 1, 7/16/07, 10:46:25; 11:02:54). After Ms. Lindgren had placed the money in the bag, along with bait money rigged with a dye pack, she handed the bag to the man. (VR No. 1, 7/16/07, 10:46:43; 11:00:25). According to

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[1] The note was introduced into evidence at trial and read, "This is a robbery. I have a gun. Quietly empty your drawer fast." (VR No. 1, 7/16/07, 10:50:04).

[2] The two bank employees offer different testimony about what the robber said to them. Ms. Lindgren testified that the man said "I have a gun. Give me all of your money." (VR No. 1, 7/16/07, 10:45:55). Ms. Dowdy testified that the man said, "This is a robbery and I have a gun." (VR No. 1, 7/16/07, 11:02:09).

the women, he said, "You just saved your life," and walked out of the bank. (VR No. 1, 7/16/07, 10:50:34; 11:03:11[3]). Neither Ms. Lindgren nor Ms. Dowdy saw a gun, or anything they suspected might be a gun, in the man's possession at any time. (VR No. 1, 7/16/07, 10:55:17; 11:04:22).

Police responded after being alerted by Chase Bank's headquarters that a silent alarm had been tripped at the Alexandria Drive branch. (VR No. 1, 7/16/07, 11:34:19). Det. Kevin Duane was among the first to respond. (VR No. 1, 7/16/07, 11:34:27). Dispatch advised that the robber was a young white man, approximately six feet tall, wearing a brown plaid jacket, dark pants, with a mask over his face. (VR No. 1, 7/16/07, 11:34:44). As Det. Duane entered the vicinity of the bank, he saw a young man walking along the road towards a nearby post office. (VR No. 1, 7/16/07, 11:35:18). Det. Duane did not suspect that the young man was the robber because he was not wearing the reported brown plaid jacket, but instead a black hoodie. (VR No. 1, 7/16/07, 11:35:54). Det. Duane pulled up to the young man and asked where he was coming from. (VR No. 1, 7/16/07, 11:36:24). The young man told Det. Duane he was coming from the post office and that he had seen a person wearing a brown plain jacket fleeing behind the post office, with pink smoke trailing behind him. (VR No. 1, 7/16/07, 11:36:38). Det. Duane radioed dispatch to have someone come speak with the young man and proceeded behind the post office in an attempt to track down the fleeing man. (VR No. 1, 7/16/07, 11:37:05).

Det. Duane, after investigating the young man's report that a man had been fleeing behind the post office and determining it was not valid, went to the bank. (VR

[3] Again, the testimony concerning what the robber said to the women differs. Ms. Lindgren testified that the man said, "You just saved your life." (VR No. 1, 7/16/07, 10:50:34). Ms. Dowdy testified that the man said, "You did good. You just saved your life." (VR No. 1, 7/16/07, 11:03:11).

No. 1, 7/16/07, 11:39:38). Det. Duane was beginning to suspect that the helpful young man he had met on the street might actually be the bank robber. (VR No. 1, 7/16/07, 11:40:10). He got on the radio to make sure that someone was still with the young man. (VR No. 1, 7/16/07, 11:40:09). However, no other officer had made contact with the young man.

Det. Duane decided to attempt to find the young man and left the bank building. (VR No. 1, 7/16/07, 11:40:28; 11:40:54). He got lucky and found tracks in the snow leading away from where he had spoken with the young man—the tracks led directly to some apartments across the street. (VR No. 1, 7/16/07, 11:41:37). Det. Duane went across the road and sat in the parking lot of the apartment complex and waited. (VR No. 1, 7/16/07, 11:42:05). In a couple of minutes, the young man came out of a building, wearing different clothing. (VR No. 1, 7/16/07, 11:42:14). Det. Duane approached the young man and asked why he had changed his clothes. (VR No. 1, 7/16/07, 11:43:47). The young man told the officer that his clothing had gotten wet from the snow. (VR No. 1, 7/16/07, 11:43:50). Det. Duane, suspicious, asked the young man, now identified as the Appellant Christopher Gamble, if they could step into his apartment and Mr. Gamble agreed. (VR No. 1, 7/16/07, 11:43:58).

Upon entering the apartment, Det. Duane observed a bag of clothes, a headband and gloves and a toboggan. (VR No. 1, 7/16/07, 11:44:22). Det. Duane determined that the clothes in the apartment were dry, negating Mr. Gamble's explanation for changing clothes. (VR No. 1, 7/16/07, 11:44:59). At that point, Det. Duane took Mr. Gamble back to the bank across the street, suspecting him of being the robber. (VR No. 1, 7/16/07, 11:45:23).

When at the bank, Det. Duane was able to look at surveillance photos of the robber and recognized the headband on the robber as the one he had seen at Mr. Gamble's apartment. (VR No. 1, 7/16/07, 11:46:06). Upon further investigation, the brown plaid jacket was found in a nearby trashcan, along with the dye pack and some of the cash. (VR No. 1, 7/16/07, 11:50:00).

Police officers returned to the apartment across the street and obtained the consent of Mr. Gamble's aunt, Marla Thulip, with whom he had been living, to search the apartment. (VR No. 1, 7/16/07, 1:16:28). Under the couch in the living room, $3,516 in cash was found. (VR No. 1, 7/16/07, 1:23:38; 1:24:37). Mr. Gamble was then arrested and charged with Robbery in the first-degree. (VR No. 1, 7/16/07, 1:25:55).

Mr. Gamble was interviewed by police and confessed to having been the man that had taken money from Chase Bank that morning. (VR No. 1, 7/16/07, 2:03:23). In that interview, Mr. Gamble told the officers he never had a gun. (VR No. 1, 7/16/07, 2:05:04). Officers did not recover a gun at the bank, the surrounding shopping center, or the apartment. (VR No. 1, 7/16/07, 1:34:34).

At trial, the defense moved for directed verdict, arguing that the Commonwealth had offered no evidence that Mr. Gamble had been in possession of a deadly weapon or dangerous instrument during the commission of the robbery. (VR No. 1, 7/16/7, 2:20:41; VR No. 2, 7/16/07, 2:53:42). The trial court denied the motion on both occasions. (VR No. 1, 7/16/07, 2:26:04; VR No. 2, 7/16/07, 2:54:00). The jury convicted Mr. Gamble of First-Degree Robbery and recommended a sentence of twelve years. (TR 96, 98).

On appeal to the Court of Appeals, Mr. Gamble maintained that the Commonwealth had not provided sufficient proof to justify a conviction on the charge of

First-degree Robbery as there was no evidence, apart from the note and Mr. Gamble's alleged statements to the tellers, that he was armed at all. The Court of Appeals ignored this Court's holding in *Williams v. Commonwealth,* 721 S.W.2d 710 (Ky. 1986), holding that the note and representations that one was armed during the commission of a theft was sufficient for a conviction of First-degree Robbery. (Slip Opinion at 7).

Mr. Gamble now asks this Court to overrule the Court of Appeals' Opinion in *Mitchell v. Commonwealth*, 231 S.W.3d 809 (Ky. App. 2007), wherein that Court determined that a reference to a gun in a note alone, with no menacing gestures to a pocket or other physical reference to a weapon, was sufficient for a finding of guilt of First-degree Robbery and affirm it's holding in *Williams* that the mere suggestion one is armed, without some manifestation of a weapon, is insufficient to support a conviction of First-degree Robbery and reverse his conviction.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT A MERE SUGGESTION ONE IS ARMED, COUPLED WITH A CONTEMPORANEOUS DEMAND FOR MONEY, IS SUFFICIENT TO FIND ONE GUILTY OF FIRST-DEGREE ROBBERY.

A. PRESERVATION

This issue was preserved by trial counsel's motion for a directed verdict made at the close of the Commonwealth's case and renewed after the presentation of the defendant's case. (VR No. 1, 7/16/7, 2:20:41; VR No. 2, 7/16/07, 2:53:42). The trial court overruled the motion each time it was made. (VR No. 1, 7/16/07, 2:26:04; VR No. 2, 7/16/07, 2:54:00).

At the close of the Commonwealth's case, defense counsel argued that the Commonwealth failed to provide any evidence that Mr. Gamble was in possession of a deadly weapon or dangerous instrument and that his suggestion in the note that he was armed was insufficient for a finding of guilty of first-degree Robbery. (VR No. 1, 7/16/07, 2:20:41-2:22:17). Trial counsel also cited *Williams v. Commonwealth,* 721 S.W.2d 710 (Ky. 1986), as supportive of his motion. (VR No. 1, 7/16/07, 2:22:40). The trial court overruled the motion. (VR No. 1, 7/16/07, 2:26:04). The jury was instructed on both first and second-degree Robbery. (TR 94-95).

Defense counsel renewed his motion after Mr. Gamble testified. (VR No. 2, 7/16/07, 2:53:42). The trial court again overruled the motion. (VR No. 2, 7/16/07, 2:54:00).

On appeal to the Court of Appeals, Mr. Gamble continued this argument, and the Court specifically addressed the argument in its Opinion affirming his conviction. (Slip

Op. *ibid*). This argument was the basis for Mr. Gamble's Motion for Discretionary Review to this Court. (MDR, *ibid*).

B. THE FACTS

The Court of Appeals' recitation of the pertinent facts was as follows:

> On February 8, 2007, employees Natalie Lindgren and Lynn Dowdy were working behind the teller line at the Alexandria Drive Chase Bank branch in Lexington, Kentucky. At approximately 11:30 a.m., Ms. Lindgren observed a man with his head and face covered enter the bank and immediately pushed her silent alarm. She believed the man was about to rob the bank. Ms. Dowdy was standing behind Ms. Lindgren at her station and was also suspicious when she saw the masked man.
>
> The man approached Ms. Lindgren's teller station and placed a note and plastic bag in front of her. The note was introduced into evidence and read, "This is a robbery. I have a gun. Quietly empty your drawer fast." The man then verbally told Ms. Lindgren not to move, that he had a gun, and then demanded money from her teller drawer. Ms. Lindgren opened her drawer and began to give the man small bills from the front and the man demanded that she also include bigger bills. After filling the bag with money and a dye pack, Ms. Lindgren gave the bag to the man. According to Ms. Lindgren and Ms. Dowdy, the man then said, "You just saved your life," and walked out of the bank. Neither Ms. Lindgren nor Ms. Dowdy saw a gun in the man's possession at any time.

Mr. Gamble does not dispute these facts, except to note that Ms. Lindgren testified that she never saw the robber's hands in his pockets and that he kept his hands on the counter while he was demanding money and she was collecting it, and took his hands off the counter only when she handed him the plastic bag of cash. (VR No. 1, 7/16/07, 10:53:44- 10:55:20). Neither Ms. Lindgren nor Ms. Dowdy testified that either

saw any bulge or other indication in Mr. Gamble's clothing, nor did he indicate one, that might have been a weapon.

C. THE LAW

On appellate review, the test for whether a directed verdict should have been granted is that under the evidence as a whole, the jury's verdict was clearly reasonable. *Commonwealth v. Benham*, 816 S.W. 2d 186, 187 (Ky. 1994). Additionally, a jury's verdict in a criminal case may only be sustained on appellate review if there is "substantial evidence to support it" when taking that evidence in the light most favorable to the Commonwealth. *Commonwealth v. Jones*, 880 S.W. 2d 544, 545 (Ky. 1994). The Commonwealth's evidence in the present case proved only that Mr. Gamble was guilty of second degree robbery because it produced no evidence that he was armed. Mr. Gamble admitted that he committed second degree robbery in comportment with the Commonwealth's evidence. (VR No. 2, 7/16/07, 2:51:19-2:53:30).

Per KRS 515.030, Robbery in the second-degree is committed when, in the course of committing a theft, one threatens the use of, or uses, force upon the victim in order to effectuate the theft. Robbery in the first-degree occurs when the theft is committed and either physical injury is caused to a victim, the robber is armed with a deadly weapon, or the robber uses or threatens the immediate use of a dangerous instrument upon a victim. Mr. Gamble was accused, it was agreed by the Commonwealth, of threatening the use of a dangerous instrument upon the tellers via his note, and according to the tellers, by spoken words. It was not disputed that Mr. Gamble was never actually in possession of a gun during the robbery.

As Mr. Gamble argued in his Motion for Discretionary Review, this Court in *Williams v. Commonwealth*, held that "[w]ithout something tangible backing up the threat, words do not reach beyond the status of threats and as such are insufficient to sustain submission under first-degree robbery." 721 S.W.2d 710, 713 (Ky. 1986). The Court of Appeals ignored this Court's holding in *Williams*, instead relying upon this Court's Opinion in *Swain v. Commonwealth*, wherein this Court held that when a person has been implicated in numerous robberies, for some of which there was testimony he was actually armed, a reference to a gun with a demand for money was sufficient for a conviction of first-degree robbery involving a count where the victim saw no weapon. 887 S.W.2d 346 (Ky. 1994).

In *Williams*, this Court stated:

> That which separates first and second-degree robbery is (physical injury or) the involvement of either a weapon which by its very nature is deadly or an instrument which can be so employed.
>
> The Commonwealth supports the conviction by asserting: "It is not fatal that Appellant threatened with an unseen weapon or instrument.... The culpability of the defendant's intent is manifested by his threat of physical harm and danger to the victim exists from the response to fear he perceives as reasonable." This, however, does not distinguish it from second-degree robbery in which the threat of physical force is the gravamen. A response of perceiving danger is quite real under threat; however, such cannot serve to convert something merely speculated upon (a weapon or instrument) into established existence.
>
> To do otherwise places defendant virtually without defense at the caprice of a victim's subjective evaluation without regard to the actual course of events and could lead to convictions for crimes neither intended nor enacted. Our heritage of justice applies the law to facts. Herein the fact is that although force was threatened, the presence of a weapon or instrument was illusory at best. Without an instrument's ever being seen, an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery conviction.

* * *

> The indictment specified that Mr. Williams committed the robbery while armed. Nothing was heard at trial to establish this other than the reference to Appellant's gesturing to his pocket. This cannot be said to have met the Commonwealth's burden. Without something tangible backing up the threat, words do not reach beyond the status of threats and as such are insufficient to sustain submission under first-degree robbery.

In deciding *Swain*, however, this Court had relied upon the holding in *Merritt v. Commonwealth*, wherein it was held that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one." 386 S.W.3d 727, 729 (Ky. 1965)(emphasis in original). The Court of Appeals' reliance on *Swain*, then, was misplaced as this Court has consistently held that the mere verbal or written suggestion that one is armed, without something to suggest to the victim that such is not an empty threat, does not constitute Robbery of the highest degree.

The law and the decisions of this Court make it clear that the presence or absence of a deadly weapon determines the degree of the robbery. The degree of robbery determines the penalty. Additionally, KRS 500.080 defines a deadly weapon as (b) "any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."

The three cases cited above—*Merritt, Swain,* and *Williams,* indicate that it has been the consistent holding of this Court that there must be some tangible object in the possession of the defendant contemporaneous with a demand for money or property, to support a conviction for Robbery in the First-degree. While a cursory reading of the *Swain* Opinion might seem to support a Robbery in the First-degree instruction in the

instant case, closer analysis of the Opinion demands the opposite conclusion and supports Mr. Gamble's argument.

The *Swain* Opinion held that a defendant who "referred to a gun" was properly convicted of First-degree Robbery, but the Opinion is unclear as to just how the defendant "referred" to this weapon. The *Swain* Court used the intransitive form of the verb "refer." "Refer" in this context is defined as "1 a: to have relation or connection: RELATE b: *to direct attention* usu. by clear and specific mention...2: to have recourse : glance briefly." Webster's New Collegiate Dictionary, 1976 (emphasis added). Thus, it is possible that Mr. Swain indicated to his victim by some bodily motion that he was, in fact, armed.

In addition, the *Swain* court clearly relied on *Merritt*'s "tangible object" reasoning, *supra*. It appears in light of all three decisions, then, that the reference to a weapon must unambiguously relate to some tangible object, either a weapon itself or some non-dangerous object displayed in such a manner as to induce the victim to believe it to be the weapon the robber claims to have in his possession. Indeed, other First-degree Robbery cases cited in these three decisions have all involved specific, tangible items. *See Lambert v. Commonwealth*, 835 S.W.2d 299 (Ky. App. 1992) (conviction for first-degree robbery sufficient where defendant displayed only the butt of a handgun); *Travis v. Commonwealth*, 457 S.W.2d 481 (Ky. 1970) (conviction for first-degree robbery sufficient where object was not seen, but rather felt by victim). Thus, in the case at bar the Commonwealth cannot seriously claim that a note written with the word "gun" and the oral message "I have a gun" tangibly refer to a weapon. Such allegation alone,

with no physical manifestation of a weapon, is simply insufficient to support a First-degree Robbery conviction.

Fear that there might be a weapon is not the gravamen of the aggravating factor under KRS 515.020(c). Rather, it is "whether in fact a deadly or dangerous weapon is involved." *Williams*, 721 S.W.2d at 713. If fear were the gravamen of the aggravating factor, then there would be no difference between Robbery in the First-degree and Robbery in the Second-degree. *Id.* at 712. It is axiomatic that the courts must not interpret a law so as to reach an absurd conclusion or to interpret a statute out of existence. "[T]he reviewing court must attempt to construe the statute in such a manner that " 'no part of it is meaningless or ineffectual.' " *Combs v. Hubb Coal Corp.*, 934 S.W.2d 250, 252 (Ky. 1996), *quoting Brooks v. Meyers*, Ky., 279 S.W.2d 764, 766 (1955). Thus, this Court must interpret KRS 515.020(c) as requiring more than a mere assertion that one is armed in order to bring effect to KRS 515.030, the Second-degree Robbery codification, which requires proof that the defendant used or threatened the use of physical force.

Combining the statute with the case law, it is clear that in order to sustain a conviction of Robbery in the First-degree the Commonwealth must prove that defendant 1) threatened the immediate use of 2) any object that is intended by its user to convince the victim that it is a dangerous instrument. In the instant case, words indicating that defendant had a gun did not clearly refer to a tangible object.

The Court of Appeals also cited this Court's holding in *Dillingham v. Commonwealth*, as supportive of its position that the mere allegation one is in possession of a deadly weapon, without some manifestation of that weapon, is sufficient for a

finding of first-degree robbery. 995 S.W.2d 377 (Ky. 1999). However, the Court of Appeals failed to appreciate that in the *Dillingham* Opinion, this Court clearly pointed out that sufficient proof was provided in that case as the robber *both* indicated in a note that he had a gun *and* kept his right hand in his pocket in a menacing gesture during the entire robbery. "[The victim] testified that Dillingham told him that he had a gun. Moreover, Dillingham kept his right hand in his pocket at all times as if the pocket contained a gun." Id. at 380. The teller in the present case clearly testified that Mr. Gamble kept both his hands visible to her at all times and she reported no bulge or other suspicious indication in his clothing that indicated to her he was, in fact, armed.

The other case of this Court that the Court of Appeals alleged to have relied upon in deciding this matter was *Shegog v. Commonwealth.* But again, in *Shegog*, this Court clearly relied upon the fact that the robber *grabbed* the victim and kept his right hand *in his pocket*:

> The evidence at trial established that Appellant entered the gas station, grabbed Powell and stated that he had a gun. Further, Powell's husband testified that he observed the robber grab his wife with one hand while keeping the other hand in his pocket. In fact, Steve Powell stated that he was in the process of entering the store until he realized the robber was armed with a weapon. 142 S.W.3d 101, 109 - 110 (Ky. 2004).

Other jurisdictions have held that the serious penalties appurtenant to a conviction for armed or aggravated robbery require that the robber actually have been armed at the time of the theft and that a threat to use deadly force is insufficient. The Supreme Court of Arizona, in *State v. Garza Rodriguez,* held that the mere threat to use a gun could not elevate simple robbery to a more serious offense. 791 P. 2d 633 (Ariz. 1990):

> Once force or a threat of imminent physical injury sufficient to overpower the party robbed is used, the crime becomes simple robbery. Something even more in the way of dangerousness is needed to elevate the crime from simple robbery to a greater felony. 2 W. LaFave and A. Scott, Substantive Criminal Law, § 8.11, at 456 (1986). For example, aggravated robbery, one committed with the aid of an accomplice, is deemed an intermediate offense because it 'reflects greater planning and a greater readiness for violence than appears in a solo performance.' R. Gerber, Criminal Law of Arizona 274 (1978).
>
> Within the armed robbery statute, several variable elements call for heightened punishment if the circumstances exist at the time of the robbery. The element of 'uses a deadly weapon or dangerous instrument' in A.R.S. § 13-1904(A)(2), for example, is self-defining and reflects the legislature's determination that those who use deadly weapons or dangerous instruments deserve a greater punishment.
> Id. at 637. (some citations omitted).

In *State v. Hutson*, the New Jersey Superior Court held that a statement one is armed during the commission of a robbery is insufficient for a finding of armed robbery. 510 A.2d 706 (N.J. Super. A.D. 1986). In this case, a taxi driver was robbed by passengers, one of whom had a folded newspaper in his hand, which he told the driver contained a gun. The Court held that evidence insufficient for a finding that an armed robbery had been committed and amended the conviction to second-degree Robbery. Id. at 709.

> The driver's belief that a gun was under the newspaper neither converted the paper into a weapon nor eliminated the need for the existence of some object. Construing the criminal statute narrowly, as we must, we find error in the trial judge's conclusion that a victim's subjective belief is enough to satisfy a showing of a deadly weapon. Had the Legislature intended a solely subjective standard, it could easily have said so. Id. at 708.

In *State v. Muldrow*, the South Carolina Supreme Court held that words alone, with no physical manifestation of a weapon or an object utilized to induce a victim to believe it a weapon, were insufficient for conviction of armed robbery. 559 S.E.2d 847 (S.C. 2002). Likewise, in *People v. Parker*, the Supreme Court of Michigan held that a threat of a deadly weapon was insufficient to find one guilty of armed robbery. 339 N.W.2d 455 (Mich. 1983).

> Unarmed robbery is a heinous felony, and the statute's fifteen-year maximum penalty shows how seriously the Legislature regards it. Michigan's ultimate punishment-life imprisonment-for armed robbery should not be cheapened by escalating a questionable charge to allow it. In the case at bar, the only proper evidence that the assailant was armed with a dangerous weapon at the time of the assault was the complainant's testimony that the assailant 'told me to shut up, otherwise he would use his knife and stab me.' Id. at 459-460.

The policy argument behind the decision of the Michigan Supreme Court speaks volumes. Serious designations and penalties should only be applied to the most heinous of crimes. A crime committed without injury and without a weapon should not be considered amongst the most heinous requiring aggravated penalties.

The Washington Court of Appeals has also held that mere words are insufficient to find one guilty of first-degree Robbery. In *State v. Scherz,* the Court held that a menacing act was required, along with words, to sustain such a conviction, holding that "[a]lthough the effect of fear on the victim may be the same, the defendant's verbal statement without more is insufficient for first degree robbery." 27 P.3d 252, 257 (Wash. App. 2001).

The State of New York defines Robbery in the First-degree in a similar manner to the Commonwealth, but adds a fourth aggravating factor, "[d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." N.Y. Penal Law § 160.15. This fourth aggravating factor simply codifies what the Kentucky Supreme Court held in *Merritt* in that it criminalizes possession of "something that could reasonably be perceived as a firearm." *People v. Baskerville*, 457 N.E.2d 752, 756 (N.Y. 1983). Importantly, the New York aggravating factor analogous to KRS 515.020(c) has been held to require a finding that the defendant "actually possessed a dangerous instrument at the time of the crime." *People v. Pena*, 50 N.Y.2d 400, 407 (N.Y. 1980); *see also People v Robare*, 109 A.D.2d 923, 924 (N.Y.A.D. 3d Dept. 1985); *People v. Moore*, 185 A.D.2d 825, 826 (N.Y.A.D. 2d Dept. 1992) (where a defendant's conviction for first-degree robbery was reversed due to insufficient evidence. The only evidence offered was that the defendant threatened the complainant with the words, "If you don't have any money, I am going to stab you.").

Connecticut's First-degree Robbery statute is much like New York's, except its fourth aggravating factor is worded as "displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." C.G.S.A. 53a-134. The Connecticut Supreme Court has held that the essential element of this fourth factor is the "[r]epresentation by a defendant that he has a firearm. Under this [factor], a defendant need not have an operable firearm; in fact, he need not even have a gun. He need only [r]epresent by his words or conduct that he is so armed." *State v. Hawthorne*, 402 A.2d 759, 761 (Conn. 1978).

Delaware's First-degree Robbery statute is also very similar to the Commonwealth's, but it, too, adds the aggravating factor of "[d]isplays what appears to be a deadly weapon or represents by word or conduct that the person is in possession or control of a deadly weapon." 11 Del. C. § 832. Prior to the 2003 legislative session, the aggravating factor did not include the element "represents by word or conduct that the person is in possession or control of a deadly weapon." In a case before this amendment, the Delaware Supreme Court held that in order to prove the "displays what appears to be a deadly weapon" element, the State had to withstand a two-part analysis. "First, the victim must subjectively believe the defendant has a weapon. Second, the defendant's threat must be accompanied by an *objective manifestation of a weapon.*" *Walton v. State*, 821 A.2d 871, 874 (Del. 2003)(emphasis added). In *Word v. State*, a defendant was convicted of first-degree robbery on the basis of a note that read, "This is a holdup. Give me all of the strapped money. No dye packs. I am armed." 801 A.2d 927, 928 (Del. 2002). The Court reversed the conviction because, although the teller believed the defendant had a weapon, the subjective belief was "unaccompanied by a physical manifestation of a weapon." *Id.* at 933. This case is strikingly similar to the case at bar and the same result must occur—reversal of this conviction.

Mr. Gamble cites these cases and statutes from other jurisdictions to illustrate that Kentucky's statute is distinct, primarily because it does not facially include "representation of a weapon by word" as an aggravating factor. While KRS 515.020 does not facially proscribe using simulated weapons during a robbery, the *Merritt* court reasonably read the statute to cover such behavior. However, the Kentucky Supreme Court has never held that representation by word alone that one is in possession of a

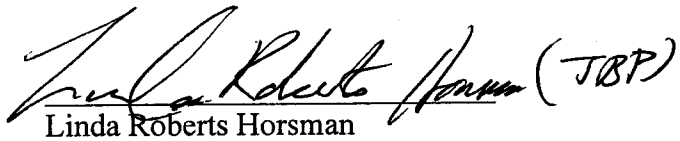
weapon, without some manifestation, can be held sufficient to support a Robbery in the First-degree conviction.

Robbery in the Second-degree carries a penalty of a maximum of 10 years in prison with parole eligibility at twenty percent. Robbery in the First-degree carries a maximum sentence of twenty years with parole eligibility at eighty-five percent. Mr. Gamble has never been previously convicted of any violent offense and clearly never intended to harm anyone, nor did he. Justice demands that this Court hold that a robbery committed while one is not armed with a dangerous instrument or deadly weapon and purports through words alone, without physical manifestation that he is in possession of a weapon or other dangerous instrument can only be a Robbery in the Second-degree.

D. CONCLUSION

The Court of Appeals completely ignored the precedent of this Court in holding that a representation one is armed, with no physical manifestation to support the contention, is sufficient to support a conviction of First-degree Robbery. Mr. Gamble was therefore found guilty of a crime even though the Commonwealth failed to provide sufficient evidence of his guilt and was thus denied due process of law as guaranteed by the 5th and 14th Amendment to the United States Constitution and §§ 2, 3, 10, 11 and 14 of the Kentucky Constitution. He requests this court to reverse his conviction and remand this matter to the Fayette Circuit Court for proper disposition.

Respectfully Submitted,



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