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COMMONWEALTH OF KENTUCKY

SUPREME COURT
2008-SC-000669

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CHRISTOPHER GAMBLE

APPELLANT

v.

APPEAL FROM THE FAYETTE CIRCUIT COURT

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

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY 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 December 17, 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.


for LINDA ROBERTS HORSMAN

PURPOSE OF THE REPLY BRIEF

The purpose of this reply brief is to address only those matters presented in the Appellee's brief that Appellant believes deserve further comment or citation of additional authorities beyond that presented in the previously filed Brief for Appellant. The failure to address a particular issue should not be taken as a reflection that Appellant believes the issue has no merit or less merit than issues that have been addressed in this reply brief, but is limited because of page limitations.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant does desire oral argument in this case as the Appellant believes that oral argument will be of assistance in properly resolving the issues presented in this case.

I. THE COMMONWEALTH'S ABSOLUTE RELIANCE ON *SWAIN*, *DILLINGHAM* AND *SHEGOG* IGNORES THE FACT THAT MR. GAMBLE OFFERED NO PHYSICAL MANIFESTATION OF ACTUALLY BEING ARMED WITH A DEADLY WEAPON OR DANGEROUS INSTRUMENT.

This case is about whether a defendant "threatens the immediate use of a dangerous instrument" during a robbery when there is no evidence, other than a defendant's statement, that he is in possession of a gun. Appellee relies on three Supreme Court decisions: *Swain v. Commonwealth*, 887 S.W.2d 346 (Ky. 1994), *Dillingham v. Commonwealth*, 995 S.W.2d 377 (Ky. 1999) and *Shegog v. Commonwealth*, 142 S.W.3d 101 (Ky. 2004). Appellee argues that in those three cases no object thought to be a weapon was either present or seen. That is not entirely accurate.

As stated in Appellant's Brief to this Court, all of the cases relied upon by the Commonwealth, and the Court of Appeals in its Opinion, required some outward manifestation of the physical presence of the weapon or instrument, even if just a "finger gun." Words are simply not enough to meet the statutory requirement that the accused have actually threatened or used the weapon to affect the robbery. This Court must ensure that a citizen is not charged with a more serious crime than the one he has committed; Mr. Gamble committed Second-degree Robbery, at best, when he passed the note that intimated he was armed.

The Commonwealth quantifies the Appellant's argument, one firmly based in the plain language of past Opinions of this Court, as requiring the state to "undisputably (sic) prove" that the robber is actually armed with an object that absolutely meets the statutory definition of a dangerous weapon or deadly instrument. (Commonwealth's Brief at 10). However, such is simply not so. The Appellant argues that without some outward physical manifestation that the alleged weapon actually was in the possession (even if

simply a “finger gun”) of the accused, there has not been sufficient evidence to find one guilty of the very serious charge of Robbery in the First-degree. It must be remembered that in *Swain* and *Dillingham*, both defendants kept one hand in a pocket as if they held a gun in that pocket. In *Shegog*, the defendant grabbed a bystander with one hand while keeping the other hand in his pocket as if he had a gun. As this Court has held, “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.” *Merritt v. Commonwealth*, 386 S.W.2d 727, 729 (Ky. 1965). In those cases a “finger pistol” was the weapon. In the present case, Mr. Gamble was not even armed with that.

The Commonwealth fails to point out that in *Swain*, two of the robbery convictions were affirmed *because* they met the standard that Mr. Gamble now seeks. In *Swain*, a witness actually saw a gun in one robbery and positively identified it at trial. In the other robber, Mr. Swain announced he was in possession of a gun while keeping his right hand in his jacket pocket to indicate that he had a gun. *Swain*, 887 S.W.2d at 349. The Commonwealth argues that this Court has “established that evidence showing a defendant referenced a gun and made a demand for money is sufficient” to establish guilt for First-degree Robbery, but such is simply untrue. (Commonwealth’s Brief at 12). This Court has always required some physical manifestation, and not words alone, that the accused was actually in possession of a deadly weapon or dangerous instrument. *See Shegog v. Commonwealth*, 142 S.W.3d 101, 109 -110 (Ky. 2004).

CONCLUSION

Appellant respectfully requests that this Court reverse the court below and remand this matter back to the trial court for a new trial, and this Court should award for any and all other relief that is just and proper under the circumstances.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Linda Roberts Horsman", is written over a horizontal line.

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