

**Commonwealth of Kentucky
Supreme Court of Kentucky**

CASE NO. 2008-SC-0669

FILED

DEC 03 2009

SUPREME COURT CLERK

CHRISTOPHER GAMBLE

APPELLANT

v.

Appeal from Fayette Circuit Court

Hon. Sheila R. Isaac, Judge

Indictment No. 07-CR-00370

COMMONWEALTH OF KENTUCKY

APPELLEE

Brief for Commonwealth

Submitted by,

JACK CONWAY

Attorney General of Kentucky

JASON B. MOORE

Assistant Attorney General

Office of Criminal Appeals

Office of the Attorney General

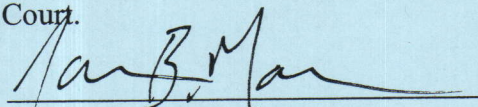
1024 Capital Center Drive

Frankfort, Ky. 40601

(502) 696-5342

CERTIFICATE OF SERVICE

I hereby certify that on November 13th, 2009, the foregoing Brief for the Commonwealth was served, first class, pre-paid mail to the following: Hon. Sheila R. Isaac, Judge, Fayette Circuit Court, 120 North Limestone, Lexington, Kentucky 40507; 1st class U. S. mail to: Hon. Linda Roberts Horsman, Assistant Public Advocate, Department for Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601; and Electronically mailed to: Hon. Andrea I. Mattingly Williams, Asst. Commonwealth's Attorney. I further certify that the record on appeal has not been withdrawn from the office of the Clerk of this Court.



Jason B. Moore

Assistant Attorney General

INTRODUCTION

Appellant, Christopher Shiloh Gamble, was convicted in the Fayette Circuit Court of one count of first-degree robbery and sentenced to twelve years in prison. The Kentucky Court of Appeals affirmed his conviction and sentence in case no. 2007-CA-001869-MR. This Court granted appellant's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe oral argument will be of assistance to the Court in considering this matter as the issue is fully addressed by the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

<u>INTRODUCTION</u>	i
<u>STATEMENT CONCERNING ORAL ARGUMENT</u>	ii
<u>COUNTERSTATEMENT OF POINTS AND AUTHORITIES</u>	iii
<u>COUNTERSTATEMENT OF THE CASE</u>	1
<u>Swain v. Commonwealth,</u> 887 S.W.2d 346, 348 (Ky. 1994)	5
<u>Dillingham v. Commonwealth,</u> 995 S.W.2d 377 (Ky. 1999)	5
<u>Shegog v. Commonwealth,</u> 142 S.W.3d 101 (Ky. 2004)	5
<u>Mitchell v. Commonwealth,</u> 231 S.W.3d 809 (Ky. App. 2007)	5
<u>ARGUMENT</u>	5
I. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A DIRECTED VERDICT	5
KRS 515.020	6
KRS 515.020(1)(c)	6
<u>Commonwealth v. Benham,</u> 816 S.W.2d 186, 187 (Ky. 1991)	7
<u>Commonwealth v. Sawhill,</u> 660 S.W.2d 3 (Ky. 1983)	7
<u>Jackson v. Virginia,</u> 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).	7
<u>Williams v. Commonwealth,</u> 721 S.W.2d 710 (Ky. 1987),	7

KRS 515.020(1)(c)	8
Kentucky Crime Commission/LRC Commentary, 1974, quoting the Michigan Revised Criminal Code § 3310, Commentary at 257 (1967)	9
<u>Morgan v. Commonwealth</u> , 730 S.W.2d 935, 937-38 (Ky. 1987)	9
<u>Smith v. Commonwealth</u> , 5 S.W.3d 126, 128 (Ky. 1999)	9
KRS 515.020(1)(c)	9
Kentucky Crime Commission/LRC Commentary to KRS 515.030	9
KRE 801A(b)	10
KRS 515.020(1)(b)	11
<u>Swain v. Commonwealth</u> , 887 S.W.2d 346 (Ky. 1994)	11
KRS 515.020(1)(b)	12
<u>Dillingham v. Commonwealth</u> , 995 S.W.2d 377 (Ky. 1999)	12
<u>Shegog v. Commonwealth</u> , 142 S.W.3d 101 (Ky. 2004)	13
KRS 515.020(1)(c)	13
KRS 515.020(1)(b)	13
<u>CONCLUSION</u>	15

COUNTERSTATEMENT OF THE CASE

Appellant was indicted by the Fayette County Grand Jury on one charge of first degree robbery on March 20, 2007 (TR 8). The indictment arose from the robbery of the Chase Bank branch on Alexandria Drive in Lexington, Kentucky on February 8, 2007 (TR 2). Appellant entered a plea of not guilty to the charge and the matter was tried before a jury on July 16, 2007 (TR 115-116).

At trial, Natalie Lindgren testified that she was working at the bank as a teller on February 8, 2007 (VR 1, 7/16/07, 10:42:35). At approximately 11:30 a.m., Ms. Lindgren saw the bank door open and a man walked in with his face and head covered (VR 1, 7/16/07, 10:43:35). Ms. Lindgren pushed the button under her teller window to activate the bank's silent alarm (Id.).

Ms. Lindgren testified that the man walked to her window and handed her a note and a plastic bag (VR 1, 7/16/07, 10:45:30). Ms. Lindgren saw the word "gun" in the note (Id.). She testified that her manager was standing behind her, and that the man told her not to move (Id.). The man then said that he had a gun and demanded that Lindgren give him the money from her teller drawer (Id.). The note then man handed to Ms. Lindgren was introduced into evidence and read "This is a robbery. I have a gun. Quietly empty your drawer fast." (VR 1, 7/16/07, 10:49:47).

Ms. Lindgren opened the drawer and began to give the man the small bills that were in the front of the drawer (VR 1, 7/16/07, 10:46:10). The man then asked Ms. Lindgren to give him the big bills, and she opened the drawer farther to access where the larger bills were kept (Id.). Ms. Lindgren then placed bait money - bills with recorded serial numbers and a dye pack - in the bag and gave it to the man (Id.). After giving the

man the money, the man stated "You just saved your life" to Ms. Lindgren and left the bank (VR 1, 7/16/07, 10:50:20). Ms. Lindgren testified that, based on the note and the man's comments, she believed the man had a gun (Id.).

Lynn Dowdy, the branch manager of the Chase Bank, testified that on February 8, 2007, she was standing in the teller window with Ms. Lindgren when the man entered the bank with his face covered (VR 1, 7/16/07, 11:01:00). She saw that the man was carrying a piece of notebook paper (VR 1, 7/16/07, 11:01:35). The man walked to the teller window where she and Ms. Lindgren were, laid the paper down, and stated "this is a robbery and I have a gun." (VR 1, 7/16/07, 11:02:00). The man told Ms. Dowdy not to move (VR 1, 7/16/07, 11:02:40). Ms. Dowdy stated that Ms. Lindgren started taking money out of her teller drawer and the man asked for big bills (VR 1, 7/16/07, 11:02:13-11:02:55). After Ms. Lindgren gave the man the money, he stated "You did good. You just saved your life." (VR 1, 7/16/07, 11:03:15). The man then left the bank (VR 1, 7/16/07, 11:04:02).

Lexington Police Detective Kevin Duane testified that he responded to the Chase Bank after the police were alerted to the silent alarm (VR 1, 7/16/07, 11:34:19-11:34:27). Det. Duane testified that dispatch advised the robbery suspect was a white male, approximately six feet tall, wearing a brown plaid jacket, dark pants and a mask over his face (VR 1, 7/16/07, 11:34:44). As he approached the bank, Det. Duane testified that he saw a man walking toward the post office near the bank (VR 1, 7/16/07, 11:35:18). The man was not wearing a brown plaid jacket, but Det. Duane pulled up to him and asked the man where he had been (VR 1, 7/16/07, 11:35:54-11:36:24). The man

told Det. Duane that he was coming from the post office and had seen a person in a brown plaid jacket run behind the post office with pink smoke trailing behind him (VR 1, 7/16/07, 11:36:38). Det. Duane asked dispatch to send someone to speak to the man near the post office and went behind the post office looking for the fleeing person (VR 1, 7/16/07, 11:37:05).

Det. Duane shortly thereafter determined that the man's account of someone fleeing behind the post office was not accurate and went to the bank (VR 1, 7/16/07, 11:39:38). He then radioed dispatch to make sure someone was with the man he had seen near the post office, but no other officer had been able to locate the man (VR 1, 7/16/07, 11:40:09). Det. Duane then left the bank to attempt to locate the man he had spoken to near the bank (VR 1, 7/16/07, 11:40:28). Det. Duane located footprints in the snow leading from the location he had spoken to the man near the post office to apartments located across the street (VR 1, 7/16/07, 11:41:37). Det. Duane then went over to the apartment complex and waited - looking for the man he had seen near the post office (VR 1, 7/16/07, 11:42:05). After a few minutes, Det. Duane saw the man come out of one of the buildings wearing different clothes (VR 1, 7/16/07, 11:42:14). Det. Duane again approached the man and asked why he had changed clothes, and the man said he had gotten wet from the snow (VR 1, 7/16/07, 11:43:47-11:43:50). Det. Duane then identified the man as the appellant and asked if they could go into the apartment to which appellant agreed (VR 1, 7/16/07, 11:43:58).

Inside the apartment, Det. Duane saw a bag of clothes, a headband, gloves and a toboggan (VR 1, 7/16/07, 11:44:22). The clothes in the apartment were dry, and

Det. Duane took appellant back to the bank, suspecting that appellant was the robber (VR 1, 7/16/07, 11:44:59-11:45:23). After going back to the bank, Det. Duane looked at surveillance photos and recognized the headband the robber wore as being the one he had seen in appellant's apartment (VR 1, 7/16/07, 11:46:06). The police then discovered the brown plaid jacket, the dye pack and some of the money taken from the bank in a trash can (VR 1, 7/16/07, 11:50:00).

Other police officers then went back to appellant's apartment and obtained the consent of appellant's aunt, whom appellant was living with, to search the apartment (VR 1, 7/16/07, 1:16:28). Under a couch in the living room, officers found \$3,516 in cash (VR 1, 7/16/07, 1:23:38). Appellant was then arrested and charged with first degree robbery (VR 1, 7/16/07, 1:25:55). In an interview with police following his arrest, appellant admitted to robbing the Chase Bank on February 8, 2007, but denied that he was armed with a gun during the robbery (VR 1, 7/16/07, 2:03:23; 2:05:04).

The trial court denied appellant's motion for a directed verdict following the close of the Commonwealth's case in chief (VR 1, 7/16/07, 2:26:04), and again following the appellant's defense case (VR 2, 7/16/07, 2:54:00). The trial court then instructed the jury that based upon the evidence they could find appellant not guilty, guilty of first degree robbery or guilty of second degree robbery (TR 91-96). The jury found appellant guilty of first degree robbery (TR 96). Following the penalty phase, the jury recommended that appellant be sentenced to twelve years in prison for his conviction (TR 98). On August 14, 2007, the trial court entered its final judgement/sentence of imprisonment and sentenced appellant, in accordance with the jury's verdict, to twelve years in prison (TR 123-25).

Appellant appealed his conviction and sentence to the Kentucky Court of Appeals arguing that the trial court erred in denying his motion for a directed verdict. The Court of Appeals affirmed appellant's conviction and sentence in an unanimous, not to be published, opinion. Specifically, the Court of Appeals held, based on this Court's precedent in Swain v. Commonwealth, 887 S.W.2d 346, 348 (Ky. 1994), Dillingham v. Commonwealth, 995 S.W.2d 377 (Ky. 1999), and Shegog v. Commonwealth, 142 S.W.3d 101 (Ky. 2004), as well as the Court of Appeal's decision in Mitchell v. Commonwealth, 231 S.W.3d 809 (Ky. App. 2007), that appellant's reference to a gun, both in the note and orally, coupled with his contemporaneous demand for money made a first-degree robbery instruction proper and the trial court's denial of appellant's directed verdict motion correct. Opinion Affirming, Page 7.

This Court granted appellant's motion for discretionary review of the opinion of the Court of Appeals.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR A DIRECTED VERDICT

Appellant contends that the Court of Appeals improperly affirmed the trial court's denial of his motion for a directed verdict as to the charge of first degree robbery. Specifically, appellant contends that the motion should have been granted because the Commonwealth failed to prove he was in possession of a deadly weapon or dangerous

instrument at the time he committed the robbery. As is clearly shown by the applicable Kentucky case law interpreting KRS 515.020, appellant's argument lacks merit.

KRS 515.020 provides as follows:

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens 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; or

(b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

(2) Robbery in the first degree is a Class B felony.

The indictment charged appellant with committing first-degree robbery pursuant to KRS 515.020(1)(c) by using and/or threatening the immediate use of a dangerous instrument, a gun, upon a person who was not a participant in the crime¹ (TR 8). At trial, appellant moved the trial court for a directed verdict as to the charge of first-degree robbery on the basis that there was insufficient evidence to support a finding that actually possessed the dangerous instrument he threatened to use, i.e. a gun. The trial court properly denied appellant's motion, and the Court of Appeals properly affirmed that denial, on the basis

¹ In Whorton v. Commonwealth, 570 S.W.2d 627, 631 (Ky. 1978) *overruled on other grounds by* Polk v. Commonwealth, 679 S.W.2d 231 (Ky. 1984), this Court stated: "Though not every 'dangerous instrument' is a 'deadly weapon,' a 'deadly weapon' ordinarily is a 'dangerous instrument' as well." Appellant makes no argument that he could not be found guilty under KRS 515.020(1)(c) because he threatened to use a gun.

that appellant's admission to having a gun during the robbery, even though later recanted, was sufficient evidence to submit the question to the jury.

The standard for determining whether a directed verdict should be granted under Kentucky law is well settled.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

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); Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983), see also, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Appellant argues that the evidence was insufficient to support a finding that he actually possessed the dangerous instrument he threatened to use, a gun, during the robbery of the Chase Bank. At trial and on appeal to the Court of Appeals and this Court, appellant relied upon Williams v. Commonwealth, 721 S.W.2d 710 (Ky. 1987), wherein this Court stated that "an intimidating threat albeit coupled with a menacing gesture cannot suffice to meet the standard necessary for a first-degree robbery

conviction.” Id. at 712. However, Williams is easily distinguishable from the case at bar in that the defendant in Williams never stated that he was, in fact, armed with a deadly weapon or possessed a dangerous instrument of any kind. Rather, the robber simply stated to the clerk “Do you want your life?” and gestured toward his back pocket but made no specific reference to a weapon or dangerous instrument whatsoever.

In the case at bar, appellant entered the Chase Bank with his identity concealed, handed the teller a note that explicitly stated he had a gun and demanded money. He also instructed the bank manager, who was standing behind the teller, not to move. Appellant then orally stated to the teller and the bank manager that he had a gun and demanded that they give him money. After appellant was given money by the teller, he told the teller and the manager that they had saved their lives by complying with his demand and fled from the bank. In his statement to the police and testimony at trial, appellant denied that he actually possessed a gun during the robbery. Thus, a jury question was presented as to whether appellant threatened the immediate use of a dangerous instrument based on his admission to possessing a gun during the robbery and his recantation of that admission to the police and during trial.

Appellant asks this Court to hold that there must be evidence to show a robber actually and indisputably possessed the dangerous instrument he threatened to immediately use against a person not involved in the robbery in order to sustain a conviction for first degree robbery under KRS 515.020(1)(c). Such a holding, however, would ignore the plain meaning of the aggravating circumstance set forth by KRS 515.020(1)(c) which elevates an offense to first-degree robbery when a person “uses or

threatens the immediate use of a dangerous instrument” upon a person not involved in the crime. As the official commentary points out, robbery is a crime against the person, more so than an offense against property, because with robbery offenses “one is primarily concerned about the physical danger *or appearances of physical danger to the citizen, and his inability to protect himself against sudden onslaughts against his person or property . . .*” Kentucky Crime Commission/LRC Commentary, 1974, quoting the Michigan Revised Criminal Code § 3310, Commentary at 257 (1967) (emphasis added). This Court has previously cited the official commentary with approval in interpreting the statute. See Morgan v. Commonwealth, 730 S.W.2d 935, 937-38 (Ky. 1987) and Smith v. Commonwealth, 5 S.W.3d 126, 128 (Ky. 1999).

The statute does not define the word “threatens” as used in KRS 515.020(1)(c). However, the Kentucky Crime Commission/LRC Commentary to KRS 515.030 states that “the requirement of ‘threatened immediate use’ of force is designed to preclude a conviction of robbery for theft accomplished by a threat of injury at some future date;....” Likewise, the dictionary defines the word “threaten” as follows:

1. To express a threat against.
2. To serve as a threat to : ENDANGER.
3. To give signs or warning of : PORTEND.
4. To announce as possible *<threatened* to move out of town.

Webster’s II New College Dictionary, 1149 (unabridged ed. 2001) (italics original).

In this case, appellant the evidence was clearly sufficient for a reasonable juror to believe beyond a reasonable doubt that appellant threatened the immediate use of a dangerous instrument, a gun, against a person who was not a participant in the crime

and was guilty of first-degree robbery. Appellant admitted, during the robbery, that he had a gun and the implication was clear that he would use the gun if the teller did not comply with his demand to be given money. Appellant reinforced this implication by stating that the teller and manger had "saved their lives" by complying with his demand for money.

KRE 801A(b) provides that "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is: (1) The party's own statement,...." Thus, appellant's statement during the course of the robbery that he did in fact have a gun is an admission and it is substantive evidence of the truth of the matter asserted because it is excluded from the hearsay prohibition. The fact that appellant recanted his admission when interviewed by the police after the robbery and during his trial testimony created a question for the jury to resolve: Was appellant lying during the robbery or was he lying in his post-robbery statement to the police and trial testimony. The credibility and weight to be given to the evidence are the exclusive province of the jury under Benham, *supra*. It was for the jury to determine if appellant threatened the immediate use of a dangerous instrument, a gun, during the robbery and was guilty of first-degree robbery or to determine if they believed appellant did not do so and was guilty of second-degree robbery. Such a determination is not, however, for the trial court to make on a motion for a directed verdict.

Rejecting appellant's contention that a person cannot threaten the immediate use of a dangerous instrument unless it is undisputably proven the person actually possessed the dangerous instrument he threatens to use would also be consistent

with this Court's precedent interpreting KRS 515.020(1)(b) which elevates robbery to first-degree when the perpetrator is "armed with a deadly weapon."

Following Williams, *supra*, this Court decided Swain v. Commonwealth, 887 S.W.2d 346 (Ky. 1994). In Swain, the defendant was convicted of five counts of first degree robbery and argued that he was entitled to directed verdicts on the charges because the Commonwealth failed to establish that he was armed with a deadly weapon. This Court stated as follows:

In the case at bar, in one of the robberies there was direct proof that appellant was in possession of a deadly weapon or dangerous instrument. That single instance involved a pistol and we affirm that conviction.

In one other instance appellant referred to a gun and demanded money. We believe these acts are sufficient to come within the reasoning of Merritt v. Commonwealth, [386 S.W.2d 727 (Ky. 1965)], and the motion for directed verdict on the first degree robbery charge was properly overruled.

As to the three remaining first degree robbery convictions, there was no evidence to prove anything more than menacing gestures by the appellant and assumptions by the victims that appellant may have been in possession of an object which was a deadly weapon or dangerous instrument. ... A directed verdict should have been granted as to first degree robbery on these three counts.

887 S.W.2d at 348 (emphasis added). The Court, therefore, established that evidence showing a defendant referenced a gun and made a demand for money is sufficient to

withstand a motion for directed verdict as to a first degree robbery charge under KRS 515.020(1)(b).²

In his brief, appellant attempts to read more into this Court's holding in Swain than is there by asserting that the opinion "is unclear as to just how the defendant 'referred' to this weapon." Appellant Brief at 11. He then provides a definition of "refer" as an intransitive verb which provides as follows: "'1 a: to have relation or connection: RELATE[.] b: to direct attention usu. by clear and specific mention...2: to have recourse : glance briefly.'" Id. quoting *Webster's New Collegiate Dictionary*, 1976. Appellant places emphasis on the part of definition 1b which states "to direct attention" but does not emphasize the ending of that definition which states "usu[ally] by clear and specific *mention*." (emphasis added) The definition supplied by appellant does nothing to support his argument that there may have been something more in Swain than a reference to the weapon alone.

Following the Swain decision, this Court again addressed the issue in Dillingham v. Commonwealth, 995 S.W.2d 377 (Ky. 1999). In Dillingham, the defendant was convicted of first degree robbery and the evidence established that a man had entered a bank and handed a note the clerk stating "This is a robbery. Don't push any buttons or call the police." The clerk further testified that the man stated that he had a

² This Court further held that an instruction should be given as to second-degree robbery when the evidence only shows a reference to a gun and a demand for money because it would not be unreasonable for the jury to believe there was no gun present, and if it did so believe, a conviction of second-degree robbery would be authorized. Id. Consistent with that holding, the jury in the case at bar was instructed as to both first-degree robbery and second-degree robbery a conviction for which would have been authorized had they reasonably believed he did not actually possess the gun he threatened to use.

gun although no witnesses testified that he or she saw a weapon. 995 S.W.2d at 380. Relying upon, and reaffirming, its holding in Swain, *supra*, this Court held the evidence was sufficient to support a conviction of first degree robbery. Id.

In Shegog v. Commonwealth, 142 S.W.3d 101 (Ky. 2004), this Court issued its most recent decision reaffirming its holdings in Swain and Dillingham. In Shegog, the defendant again argued that he was entitled to a directed verdict on a charge of first degree robbery because the Commonwealth failed to establish he was armed with a gun. 142 S.W.3d at 109. The evidence at trial showed the defendant entered a gas station, grabbed a customer, stated that he had a gun, ordered the customer behind the counter with the clerk, ordered both to lie down, took money from the register and fled. 142 S.W.3d at 103-04. Citing to its prior decisions in Swain and Dillingham, this Court rejected appellant's argument on the basis that reference to a deadly weapon coupled with a demand for money is sufficient to withstand a directed verdict motion as to a first degree robbery charge. 142 S.W.3d at 109.

Even though appellant was charged under KRS 515.020(1)(c) rather than KRS 515.020(1)(b) which was involved in Swain, Dillingham, and Shegog, those cases illustrate that a first-degree robbery conviction can be sustained, and a directed verdict is not proper, even though the robber does not physically show the deadly weapon (KRS 515.020(1)(b)) or the dangerous instrument (KRS 515.020(1)(c)) that he is either armed with or threatens the immediate use of. Such holdings make complete sense as well. The victims of a robbery should be allowed to take a perpetrator at his word when he threatens to use a gun or other dangerous instrument if they don't comply with his demands.

It makes little sense that a robber be able to escape conviction for first-degree robbery simply because they did not actually point a weapon in the victim's face or brandish about a dangerous instrument. The plain language of the statute does not permit such escape. All the statute requires is proof the defendant "threatened the immediate use of a dangerous instrument." As the definition set forth above shows, "threaten" means "to give signs or warning of" or "to announce as possible." Certainly, a warning or announcement can be made verbally without any other physical action.

In this case, appellant entered the Chase Bank branch with his identity concealed. He handed the bank teller a note stating that he had a gun and demanding she give him money. He told the bank manager not to move and then reiterated orally that he had a gun and for the teller to give him money. After the teller gave him money, appellant stated that she had saved her's and the manager's lives by doing so and fled. The teller testified that she was convinced appellant did have a gun during the robbery. From this evidence, a reasonable juror could believe beyond a reasonable doubt that appellant threatened the immediate use of a dangerous instrument, a gun, and was guilty of first-degree robbery.

Likewise, the jury could have believed appellant's statement to the police and testimony at trial that he did not have a gun during the robbery. If the jury had done so, it could not have found he threatened the immediate use of a dangerous instrument and would have been authorized to find him guilty of the lesser included offense of second-degree robbery. The determination of credibility and weight to be given the evidence was for the jury, however, and the trial court properly submitted that

determination to the jury by denying appellant's motion for a directed verdict. The Court of Appeals properly affirmed the trial court's denial of appellant's motion, and its opinion must be affirmed by this Court.

CONCLUSION

Based upon the foregoing, this Court must affirm the Court of Appeal's opinion affirming the trial court's denial of appellant's motion for a directed verdict and affirm the judgment of conviction and sentence imposed upon appellant by the Fayette Circuit Court.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky

A handwritten signature in black ink, appearing to read "J.B. Moore", written over the printed name of Jason B. Moore.

JASON B. MOORE
Assistant Attorney General
Attorney General's Office
Office of Criminal Appeals
1024 Capitol Center Drive
Frankfort, Kentucky 40601
(502) 696-5342

Counsel for Appellee