

Case Name:

R. v. Stewart

Between

**Her Majesty the Queen, Applicant, and
Germaine Arvil Stewart, Respondent**

[2010] O.J. No. 1790

2010 ONSC 2500

Court File No. P57/08

Ontario Superior Court of Justice

G.I. Pardu J.

Heard: April 26 and 27, 2010.

Judgment: April 29, 2010.

(19 paras.)

Criminal law -- Criminal Code offences -- Weapons offences -- Using firearm in commission of offence -- Offences against person and reputation -- Kidnapping, hostage taking and abduction -- Forcible confinement -- Offences against rights of property -- Robbery and extortion -- Robbery -- Breaking and entering -- Disguise with intent -- Trial of accused charged with robbery, unlawful confinement, having face masked with intent to commit indictable offence and use of imitation firearm while committing indictable offence -- Accused acquitted of robbery, but convicted of attempted robbery and all other offences -- Accused, while masked and carrying imitation gun, entered hotel, confined employees in office and demanded customer credit card information -- Evidence of gestures accused used not particular enough to conclude accused pointed gun to communicate threat to apply force -- As accused went to hotel with imitation gun and attempted to steal from hotel, guilty of attempted robbery.

Trial of an accused charged with robbery, unlawful confinement, having his face masked with intent to commit an indictable offence and use of an imitation firearm while committing an indictable offence. An individual, dressed in black, wearing gloves and with his face covered entered a hotel. He locked the employees who were working at the front desk on the office, told them that he had a gun and demanded that they give him credit card information for guests. When he was advised that the credit card information was inaccessible, he left the hotel without taking anything. After the indi-

vidual left, one of the employees called 9-1-1. Police officers who were in the area saw a male dressed in black run across the intersection. They then received a radio call that the hotel had just been the site of an attempted robbery. They lost sight of the individual for a few seconds, but later observed the individual throwing objects away. The individual identified himself as the accused.

HELD: Accused acquitted of robbery, but convicted of attempted robbery, unlawful confinement, having his face masked with the intent to commit an indictable offence and using an imitation firearm while committing an indictable offence. The accused was the person who committed the offences as he was seen running from the hotel, was found immediately after he was seen running in the same area and he matched the description given by the hotel employees. The evidence of the exact gestures used by the accused was not particular enough to conclude that the accused had pointed a gun to communicate a threat to apply force to another person and consequently he was acquitted of robbery. However, he was guilty of the lesser include offence of attempted robbery as he attended at the hotel with an imitation gun and attempted to steal from the hotel. The accused was also guilty of unlawful confinement as he intentionally confined the hotel employees by locking them in the office. As the accused was in possession of an imitation gun and told the hotel employees that he had a gun so that they would take him seriously, he was in possession of the imitation firearm to facilitate the commission of the offences of unlawful confinement and robbery. Finally, the accused was masked as he had his entire head and face covered except for the area around his eyes and his purpose in being masked was to conceal his identity while he attempted to steal from the hotel and confined the hotel employees.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 85(1), s. 265(1)(b), s. 343(c)

Counsel:

Jennifer Strasberg, for the Crown.

Raj Napal, for the Respondent.

1 G.I. PARDU J.:-- Germaine Arvil Stewart is charged with robbery, unlawful confinement, having his face masked with intent to commit an indictable offence, and use of an imitation firearm while committing an indictable offence.

2 Around 2:00 in the morning on November 12, 2006, two employees were working in the office behind the reception area of the Renaissance Hotel at 801 Dixon Road, on the airport strip. As they were working at their computers they heard someone come in and say hello. They responded in kind, without looking up, thinking that it was another person working in the hotel. The individual responded, "you guys are not taking me seriously" or words to that effect, and the employees looked up to see a man dressed all in black, with his face covered with a black scarf or shawl, wearing gloves. He had a baseball cap on and the hood of his black polar fleece jacket was raised over his head. He told Borges and Szczerba that he had a gun, and to put their hands on the table. According to Borges, the individual locked the entry door to the office. According to Szczerba, he closed the door and held it shut. He asked how many employees were working at the hotel. Borges explained

that besides himself and Szczerba, there was a bellman. Borges could hear customers at the reception area signalling for service. The masked individual asked for credit card information for guests. Borges explained that that information was not accessible to him, and printed out a report and showed it to the individual so that he could see that only the last 4 digits of the credit card numbers were revealed. The individual reviewed the report and became upset and threw it on the counter. He then looked at credit card slips for restaurant receipts and concluded that the information was not there either. He told them not to move. He asked how much cash they had, and Borges told him there was \$600.00 remaining of the float, and that it was at the reception area. The bellman came to the door, and tried to open it, the masked individual told them to tell him to go away, and Borges asked the bellman to go investigate a fictitious noise complaint on the 8th floor of the hotel. The individual then asked about the layout of the hotel and the locations of elevators and exits. He asked them to disconnect the telephone in the office, verified that they did not have cell phones, and after hearing the ring tone of the elevator which signified that the bellman had taken the elevator, the individual opened the door and ran out. He told them he would not harm them. Borges immediately called 911. Borges saw the man run out of the front door exit of the hotel, the only one open at that hour.

3 It just so happened that at 2:23 that morning, a police patrol car was approaching the intersection of Attwell Drive and Dixon Road, from the west. The Renaissance Hotel is on the southwest corner of that intersection. At that moment, the two officers in the car, Piche and Zeljokovic, saw a black male, dressed in black run quickly across Dixon Road, from the southwest corner to the northwest corner. Their suspicions were aroused by this conduct. This was an industrial area, deserted at this hour. These suspicions were heightened when they received a radio call that the Renaissance Hotel had just been the site of an attempted robbery.

4 The officers immediately turned around and headed for the parking lot on the northwest corner. Piche saw a man she said was the same person she had seen running across the street trying to light a cigarette. She said she had lost sight of him for perhaps 20 or 30 seconds as they turned around to go into the parking lot. There were bushes and an embankment surrounding the parking lot. Zeljokovic testified that he lost sight of the individual for only a few seconds, and that when he entered the parking lot, he turned on his roof top lights and observed the same individual throwing objects away. The individual identified himself as the accused.

5 I am satisfied beyond a reasonable doubt that the accused was the person seen running across the street. He was found immediately after he was seen running, in the same area. Piche put her hand on his chest when she approached him and felt that his heart was pounding so hard she could feel it through his jacket. Stewart was also sweaty. The hotel employees described the masked individual as a black male wearing black corduroy pants, a black polar fleece jacket, eyeglasses, and blue and white running shoes, and that he had had some rope hanging from his pocket. Borges described it as green and white string. Szczerba described it as fluorescent green rope, about the thickness perhaps of her middle finger, like clothesline, less than an inch in diameter. The accused matched this description exactly. When searched by police on arrest, he was found with green fluorescent rope in his pocket which had been fashioned into three pairs of home-made handcuffs. In addition, when police searched the area where the accused had been observed to be throwing objects, they also found a black baseball cap with the word "police" on the front, and black leather gloves with black stitching on them, objects also matching the description given moments before by the hotel employees. That the hotel employees may have miscalculated the height of the masked intruder by a couple of inches is of no moment, considering the circumstances of the intrusion. They

were both seated, working when the intruder entered. The accused was the only person observed in the area, which was otherwise deserted, and where one would not expect to see pedestrian traffic. The parking lot where he was found was a construction site.

6 The Crown alleges that the accused is guilty of robbery, pursuant to section 343(c) of the Criminal Code, which provides that a person commits robbery when he "assaults any person with intent to steal from him."

7 The accused did not physically apply force to either of the hotel employees. Accordingly, the issue becomes whether he committed an assault as defined by section 265(1)(b) of the Criminal Code, that is to say, has the Crown proven that:

- (a) He threatened to apply force to another person;
- (b) By an act or gesture; and
- (c) He caused that other person to believe on reasonable grounds that he had the present ability to carry out his purpose.

8 It is common ground that words alone cannot constitute an assault for the purposes of this section. (See *R. v. Byrne* [1968] 3 C.C.C. 179)

9 Thus while the accused's words that he had a gun could amount to a threat, there must be some act or gesture which amounts to a threat to apply force to another person. There is no doubt that pointing to a gun, or displaying a gun may amount to a threat. Here the Crown relies on the evidence of Szczerba that the accused had his hand in his front pocket, that it looked like he was pointing at something. Borges said the accused had his hand in his jacket, and that that area looked a bit bulky. The evidence of Szczerba is not particular enough about the exact gestures she observed for me to safely conclude beyond a reasonable doubt that the accused pointed at a gun to communicate a threat to apply force to another person. Borges did not observe this gesture.

10 Accordingly, the accused must be acquitted of robbery. I turn then to a consideration of whether the accused is guilty of the lesser included offence of attempted robbery. The accused is guilty of attempted robbery if the Crown proves beyond a reasonable doubt that he attempted to steal and either:

- (a) For the purpose of extorting whatever is stolen, or to prevent or overcome resistance to the stealing uses ... threats of violence to a person or property;

Or

- (b) Was armed with an imitation weapon while he attempted to steal.

11 The conclusion is inescapable that when the accused attended at the hotel, in the early morning hours, masked, with makeshift handcuffs in his pocket, and as I will later conclude, with an imitation gun in his pocket, uttering threats to hotel staff that he had a gun, and confining them in the office, that he was attempting to steal from the hotel. I reject the argument that he wanted only information, in which there can be no property. This case is nothing like *R. v. Stewart* [1988] 1 S.C.R. 963 in which the accused copied down information, but did not remove property from the owner. Here the accused wanted hotel documents that would provide him with credit card information. His actions in attending at the hotel, dressed and armed in the manner he was, go well beyond mere

preparation, and amount to an attempt. The fact that he ultimately abandoned his efforts and fled from the hotel does not alter this conclusion.

12 I am satisfied beyond a reasonable doubt that when the accused told Borges and Szczerba that he had a gun, when they did not appear to respond seriously to his appearance, amounted in the circumstances to a threat of violence upon them.

13 I am also satisfied beyond a reasonable doubt that the accused was in possession of an imitation gun at the time he attempted to steal from the hotel. I base this upon the following facts:

- (a) The accused told Borges and Szczerba that he had a gun; and
- (b) Police found an imitation gun around 9:30 in the morning the same day. It was a toy gun, found lying on lumber piled on a trailer in the same parking lot, and close to where the accused had been apprehended about 7 hours earlier. He discarded other objects just before apprehension. This was a construction site parking lot in an industrial area. It is unlikely as defence counsel suggests that a child may have left the toy there. This was an accurate replica of a gun. A person seeing it in another's hand could easily mistake it for a real gun. That the accused would use a toy gun is consistent with his use of makeshift homemade handcuffs, and a fake police hat.

14 Accordingly, I find that the accused is guilty of attempted robbery, in each of the ways defined above.

15 I am also satisfied that the accused intentionally confined Borges and Szczerba. He told them to stay seated and put their hands on the desk. He either locked or held shut the door into the office. He told them not to leave the office as he left. Both victims were deprived of their liberty to move about as they saw fit, and certainly could not leave the office. He told them to send the bellman away and would not allow them to respond to the bellman's inquiries.

16 I have concluded that the accused was in possession of the imitation firearm when he attended at the hotel. According to *R. v. Steele* [2007] S.C.J. No. 36, "an offender "uses" a firearm within the meaning of section 85(1), where, to facilitate the commission of an offence or for purposes of escape, the offender reveals by words or conduct the actual presence or immediate availability of a firearm. The weapon must then be in the physical possession of the offender or readily at hand." The accused told Borges and Szczerba that he had a gun. He told them that so that they would take his demands seriously, and to facilitate the commission of the offences of attempted robbery and unlawful confinement.

17 Finally, I am satisfied that the accused was masked. His entire head and face were covered, except for the area just around his eyes. His purpose in being masked was to conceal his identity, while he attempted to steal from the hotel, and unlawfully confined the two hotel employees.

18 Accordingly, the accused is acquitted of robbery in counts 1 and 3, but convicted of the lesser included offences of attempted robbery on those counts.

19 The accused is convicted of unlawful confinement in counts 2 and 4, and convicted of having had his face masked with intent to commit an indictable offence, as charged in count 5, and convicted of having used an imitation firearm while committing an indictable offence in count 6.

G.I. PARDU J.