



The appellant, Anthony Pulliam, was convicted of aggravated robbery, a Class B felony, by a jury of his peers. The trial court found the appellant was a multiple offender and imposed a Range II sentence consisting of confinement for fourteen (14) years in the Department of Correction. The appellant contends the trial court committed error of prejudicial dimensions by failing to instruct the jury on the lesser included offense of robbery. After a thorough review of the record, the briefs submitted by the parties, and the law which governs the issue presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

The appellant candidly admits in his brief trial counsel "neglected to request the trial court to charge the jury on this offense [of robbery] or to question the judge's failure to do so in the motion for [a] new trial." Thus, this issue has been waived for appellate review. Tenn. R. App. P. 36(a) and 3(e). Based upon the nature of the defaults and the evidence contained in the record, this Court will not exercise its discretion to consider this issue on the merits. See Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994).

This Court parenthetically notes the facts in this case did not warrant an instruction on robbery. The appellant became angry because the manager of a local store would not permit him to use the store's telephone. He went home, retrieved a shotgun, and returned to the store. He pointed the shotgun at the manager and forced him to the back of the store. The appellant opened the cash register and removed the money. He placed several packages of cigarettes in his pockets. He then left the store.

The appellant was arrested shortly after committing the crime. He did not deny he had committed the robbery. He denied using a shotgun. Instead, he claimed he had used a knife which was found in his jacket.

During the trial, the appellant admitted he became angry, went to the store, and stole the cigarettes. However, he denied that he used a shotgun, knife or other weapon when he stole the cigarettes. He testified he "jumped behind the counter and began taking the cigarettes."

It is obvious the trial strategy was to convince the jury to convict the appellant of

theft under \$500, a misdemeanor. An instruction on robbery would be counterproductive to his defense. The issue for the jury was: was the appellant guilty of aggravated robbery as the state contended or theft under \$500 as the appellant contended? In fact, there is no evidence contained in the record which would support an instruction on robbery.

The judgment of the trial court is affirmed.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOE G. RILEY, JUDGE