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2016 IL App (3d) 140162-U

Order filed January 25, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0162
JAMES THOMAS,)	Circuit No. 13-CF-541
Defendant-Appellant.)	Honorable Stephen A. Kouri, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Carter specially concurred.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* The evidence presented by the State was sufficient to prove beyond a reasonable doubt that defendant threatened the imminent use of force but was not sufficient to prove the victim reasonably perceived defendant was armed with a firearm or dangerous weapon at the time of the robbery.
- ¶ 2 A jury found defendant, James Thomas, guilty of theft (720 ILCS 5/16-1(a)(1) (West 2012)) and aggravated robbery (720 ILCS 5/18-1(b)(1) (West 2012)). The trial court sentenced defendant to a term of 4½ years' imprisonment for the offense of aggravated robbery. On appeal,

defendant argues the State failed to prove that he threatened the imminent use of force which the victim reasonably perceived was a firearm or dangerous weapon. We vacate defendant's conviction for aggravated robbery and remand the matter with instructions that the trial court resentence defendant for the offense of robbery (720 ILCS 5/18-1(a) (West 2012)).

¶ 3

FACTS

¶ 4

The State charged defendant by indictment with aggravated robbery. See 720 ILCS 5/18-1(b)(1) (West 2012). The indictment alleged defendant took property from the victim "by the use of force or by threatening the imminent use of force and while indicating verbally or by his actions that he was presently armed with a firearm or other dangerous weapon." The State subsequently added a charge of theft from a person, a Class A misdemeanor. See 720 ILCS 5/16-1(a)(1) (West 2012). At the conclusion of the evidence at trial, neither party requested the jury to be instructed on the lesser-included offense of robbery. 720 ILCS 5/18-1(a) (West 2012).

¶ 5

The jury trial began on October 8, 2013. The State's first witness testified she was working as a cashier at the Circle K gas station on North Knoxville Avenue in Peoria during the night shift on May 28, 2013. She testified that she was working in the cashier's booth when defendant entered at approximately 3 a.m. According to the cashier, she and defendant were the only people in the store when defendant approached the cashier's booth and said, "I've been suffering hard times. I need for you to give me the money. I don't want to hurt you, baby girl, but I got to do what I need to do." When the cashier told defendant she did not understand his request, defendant repeated: "I don't want to hurt you, baby girl, but I need to do what I got to do." The cashier testified that she asked defendant to reconsider, but once again he responded: "I need for you to give me what I want, because I don't want to hurt you, baby girl, but it's hard times." The cashier testified that defendant had his hands in his pockets when he addressed her.

She assumed he had a gun. Consequently, the cashier removed \$48 from the cash register, gave it to defendant, and defendant left the store. The cashier immediately called the police.

¶ 6 The cashier stated that even though she was protected by bulletproof glass in the cashier's booth, she gave defendant money because she feared defendant was armed with a firearm and had concerns that a bullet could ricochet through the cashier's slot and seriously injure her. During her testimony she explained her fear by stating,

"I thought he had a gun or whatever he had, because he was like moving in his pocket, and he didn't move towards me. So I'm not going to – I didn't want to see what he had, whether there was a gun. I didn't want to find out and then be dead, so I did as he suggested."

¶ 7 Defendant testified during the trial on his own behalf. He explained that on the night in question he used the restroom at the Circle K and then left the store to use the pay phone outside. After making a telephone call, defendant went back into the store to ask the cashier for money. Defendant testified that while he was asking the cashier for money he did not have his hand in his pockets or moving towards the waistband of his shorts. Defendant explained that he was wearing mesh shorts with no pockets. Since his mesh shorts had a tendency to fall down, he held his shorts with his right hand to keep his shorts from falling down.

¶ 8 When he left the store after receiving cash from the cashier, defendant walked to the home of a friend, called a cab, and returned to his own home around 6 a.m. Defendant denied robbing the victim, insisting that he only asked for some money.

¶ 9 The Circle K maintained security cameras that recorded the events on the night of the incident. The State published the security footage recorded from multiple cameras, which included video depicting 11 different viewpoints. Exterior angles of the security footage showed

defendant first enter the Circle K and then exit the store. Defendant can be seen using the pay phone before returning to the store. While outside, defendant occasionally held his right hand down in a fist-like position at his right side and occasionally hoisted his shorts while outside the store.

¶ 10 Once defendant entered the store for the second time, an interior camera captured the image of defendant first approaching the cashier area and placing his left hand on the counter. At this time, defendant's right hand was visible and in a fist-like position down at his right side. The security footage captured the image of defendant's right hand, which remained fully visible to the camera at all times throughout the encounter. The footage reveals defendant did not gesture or move his right hand until the cashier placed some cash in the cashier's slot. After the cashier placed money in the cashier's slot, defendant retrieved the money with his right hand before leaving the store.

¶ 11 The jury found defendant guilty of both aggravated robbery and theft from the person as charged. The trial court sentenced defendant to a term of 4½ years' imprisonment on the aggravated robbery charge, with the theft from a person count merging into the greater offense.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant contends the State failed to prove beyond a reasonable doubt two separate elements required to support his conviction for aggravated robbery. First, defendant contends the State did not prove beyond a reasonable doubt that he threatened the imminent use of force.¹ Second, defendant claims the State's evidence also failed to prove beyond a reasonable doubt that he was armed with a firearm or other dangerous weapon at the time of the robbery.

¹The parties agree that no evidence at trial showed that any actual force was employed by defendant in his encounter with the victim.

¶ 14 At the outset, the parties are in agreement that robbery is a lesser-included offense with respect to defendant's conviction for aggravated robbery. The case law recognizes this court has the authority to reduce the aggravated robbery conviction to simple robbery, an uncharged offense, under these circumstances. *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006).

¶ 15 However, the State opposes a reduction of defendant's conviction to simple robbery on the grounds that the evidence was sufficient to support the jury verdict finding defendant guilty of aggravated robbery. Consequently, the State opposes defendant's request to remand for sentencing for the offense of robbery on this basis.

¶ 16 When a challenge is made to the sufficiency of the evidence at trial concerning a charged offense, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31. All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 326 (2005).

¶ 17 In order to prove a charge of aggravated robbery, the State must initially prove that a robbery was committed. 720 ILCS 5/18-1(b)(1) (West 2012). The offense of robbery is committed where a person "knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2012). "A taking by the use of force or threat of force is proven where the fear of the victim was of such a nature that reason and common experience would induce a person to part with his property for the sake of his person." *People v. Cooksey*, 309 Ill. App. 3d 839, 849 (1999). Further, whether threat of force was used "is a question of fact for the jury to decide, and [a

reviewing court] will not disturb that decision unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of guilt." *Id.*

¶ 18 Defendant relies extensively on *People v. Warren*, 113 Ill. App. 3d 1 (1983) to support his argument that the evidence in this case did not prove he threatened the imminent use of force necessary to support his aggravated robbery conviction. In *Warren*, the Fifth District determined the State failed to prove the defendant threatened the use of force before sexually assaulting the complainant by telling her, "I don't want to hurt you." *Id.* at 4. The court concluded the defendant's comment was insufficient to prove a threat of force where the evidence was "devoid of any attendant circumstances which suggest that complainant was compelled to submit to defendant." *Id.* at 5. However, the court in *Warren* recognized these determinations are highly fact dependent, and will vary based on the attending circumstances. See *id.*

¶ 19 Unlike the statement at issue in *Warren*, in this case defendant explained, "I need for you to give me what I want, because I don't want to hurt you." The victim perceived this conditional statement as a communicated threat from defendant to hurt her if she refused to give him money. Based on this record, we conclude the evidence presented by the State would have allowed the jury to conclude, beyond a reasonable doubt, that the victim parted with the money for the purpose of avoiding the harm defendant threatened.

¶ 20 Next, we address defendant's contention that the State's evidence did not prove the elements of aggravated robbery. Aggravated robbery occurs when, during the course of a robbery, the offender indicates "verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon, including a knife, club, ax, or bludgeon." 720 ILCS 5/18-1(b)(1) (West 2012). A conviction for aggravated robbery will stand

even when "it is later determined that he or she had no firearm or other dangerous weapon *** in his or her possession when he or she committed the robbery." *Id.*

¶ 21 In the present case, the victim's account did not establish that defendant verbally claimed to be armed with a firearm. Consequently, we examine whether the State's evidence proved defendant's actions indicated he was presently armed with a gun at the time he stood at the counter. The cashier explained she assumed defendant had a gun because defendant's right hand was hidden in his pants pocket while he repeatedly asked for money. However, the existing case law requires the State introduce some objective proof of facts supporting each statutory element of aggravated robbery. *People v. Hall*, 352 Ill. App. 3d 537, 543 (2004).

¶ 22 One form of objective proof exists when the victim testifies that the robber stated he had a gun or threatened to shoot the victim. Yet, it is undisputed that this defendant did not verbally announce he had a firearm.

¶ 23 Objective proof also exists when the police recover a firearm or the victim sees an object that looks like a firearm in defendant's possession. Again, it is undisputed that the police did not recover any object resembling a firearm from defendant and the victim did not see any object in defendant's right hand. Importantly, the victim testified that she could not see defendant's right hand and surmised his hand was hidden in his pocket together with a firearm. The victim's subjective belief that this defendant was armed with a firearm may be considered by the trier of fact but is insufficient, standing alone, to prove the element of aggravated robbery pertaining to the presence of a firearm beyond a reasonable doubt. Our decision does not create new precedent, but rather, relies on existing case law. See *Hall*, 352 Ill. App. at 543 (2004); *People v. Brackett*, 288 Ill. App. 3d 12, 18 (1997).

¶ 24 The images recorded by the security cameras reveal defendant's right hand was not hidden in a pocket and concealed as the cashier perceived. Consequently, the videotape offered by the State contradicted the victim's perception and did not provide objective evidence that defendant indicated with his physical actions that he was holding a handgun. Moreover, it is undisputed that defendant did not verbally tell the cashier that he was carrying a firearm or other weapon as he demanded her to surrender cash to him.

¶ 25 Accordingly, we vacate defendant's aggravated robbery conviction and remand the matter with instructions for the trial court to enter a conviction and sentence on the lesser-included offense of robbery (720 ILCS 5/18-1(a) (West 2012)) as defendant requests.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Peoria County is vacated and the cause is remanded with instructions.

¶ 28 Vacated and remanded with instructions.

¶ 29 JUSTICE CARTER, specially concurring.

¶ 30 I concur with the majority decision, but write separately regarding whether there was sufficient evidence to support a conviction for aggravated robbery. The majority decision sets out the underlying evidence. I agree that the evidence in this case was not sufficient for an aggravated robbery conviction.

¶ 31 Here, defendant was convicted of aggravated robbery under section 18-1(b)(1) of the Code. 720 ILCS 5/18-1(b)(1) (West 2012). A person commits robbery when he knowingly takes property from the person or presence of another "by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2012); *People v. Gray*, 346 Ill. App. 3d 989, 994 (2004). Under section 18-1(b)(1) of the Code, a person commits aggravated robbery when

he or she commits a robbery "while indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon." 720 ILCS 5/18-1(b)(1) (West 2012). It is the added factor that the suspect indicated that he is armed with a firearm or dangerous weapon which enhances the crime. *People v. Hall*, 352 Ill. App. 3d 537, 542 (2004); see also 720 ILCS 5/18-1(c) (West 2012) (robbery is a Class 2 felony and aggravated robbery is a Class 1 felony).

¶ 32 The constitutionality of section 18-1(b)(1) of the Code has been challenged on vagueness and due process grounds. See *Hall*, 352 Ill. App. 3d at 540; *People v. Williams*, 329 Ill. App. 3d 846, 851-52 (2002); *People v. Brackett*, 288 Ill. App. 3d 12, 16 (1997). A vagueness challenge to a statute is a due process challenge. *People v. Greco*, 204 Ill. 2d 400, 415-16 (2003). A statute is unconstitutionally vague if its terms are so ill-defined that its meaning will be based upon the opinions and whims of the trier of fact rather than by any objective criteria or facts. *People v. Pembrock*, 62 Ill. 2d 317, 322 (1976). When considering a vagueness challenge to a statute, a court considers the language used and also the legislative objective and the evil the statute is designed to remedy. *Greco*, 204 Ill. 2d at 415-16.

¶ 33 A finding that a defendant had indicated that he was armed must be supported by objective criteria. *Hall*, 352 Ill. App. 3d at 543. However, none of the case law in this area sets out with precision the minimum conduct necessary to create the impression the defendant acted in a manner indicating that he was armed. But, the case law has provided examples of objective facts to support a finding that a defendant had indicated he was armed that withstands a constitutional challenge.

¶ 34 In *Hall*, defendant was convicted of aggravated robbery where he asked the victim if he had ever been shot, whether he was wearing a bullet proof vest, if he wanted to get shot, and

moved his hand to his waist in a grabbing motion to or three times while speaking to the victim. *Hall*, 352 Ill. App. 3d at 539. On appeal, defendant argued that the aggravated robbery statute was unconstitutionally vague because it rested solely on the subjective impression of the victim, even if the victim's belief was unreasonable. *Id.* at 540. Defendant contended that the statute failed to provide a sufficiently definite standard to avoid an arbitrary or discriminatory application. *Id.* The appellate court acknowledged that due process required that the statute provide explicit standards to police, judges, and juries who apply the statute to prevent arbitrary and discriminatory enforcement, but noted that the victim's belief that the offender is armed, which is not listed as an element to the crime, does not call for a completely subjective review of the events. *Id.* at 543. Rather, the *Hall* court held the statute was saved from a vagueness challenge because it contained objective elements that must be met prior to a conviction for aggravated robbery, which are "that the person took the property, that he used force or threatened the use thereof, and that he indicated verbally or by his actions that he was armed." *Id.*

¶ 35 In *Williams*, defendant was convicted of aggravated robbery where he robbed the victim with his hand under his shirt and said that he was going to kill someone. See *Williams*, 329 Ill. App. 3d 846. On appeal, defendant argued that by not specifying that a victim must "reasonably" believe the offender is armed, the statute was vague and violated due process because a conviction could rest entirely on the victim's subjective impression. *Id.* at 852. Defendant claimed the statute could lead to a conviction where a defendant simply had "his hand in his pocket, behind his back, in shirt sleeve, or as in [this case], under his [T]-shirt, as long as the victim also testified that the conduct caused him to believe defendant was armed, however unreasonable that belief may be." *Id.* at 851-52. The *Williams* court acknowledged that the statute permits a conviction based on the impression of the victim, but the danger of arbitrary and

discriminatory enforcement was minimal in that the statute required objective factors that the accused take property by force while indicating verbally or by actions that he is presently armed. *Id.* at 852.

¶ 36 In *Brackett*, defendant was found guilty of an aggravated robbery where she robbed a person working in a restaurant drive-through window with a coat draped over her arm and, under the coat, she had her finger pointed to give the impression that she had a gun. See *Brackett*, 288 Ill. App. 3d 12. On appeal, defendant argued the aggravated robbery statute was vague and would lead to arbitrary or discriminatory enforcement. *Id.* at 17. The appellate court affirmed the conviction, holding that the aggravated robbery statute provided sufficiently clear standards and the phrase "indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm" was not capable of precise definition but was for the fact-finder to determine. *Id.* at 18.

¶ 37 Reasonable objective facts that support a conviction for aggravated battery have been determined to include hand gestures in places where weapons could be kept, along with words announcing a robbery and suggesting harm may come by way of a firearm or dangerous weapon. See *id.* at 18 (defendant held coat draped over her arm and held her finger pointed like a gun under the coat); *Williams*, 329 Ill. App. 3d at 849 (defendant kept hand under his shirt, pushed victim's head when she tried to call police, demanded money, and stated in part "I'll kill somebody up in here"); *Hall*, 352 Ill. App. 3d at 544 (defendant asked store clerk if he was wearing a bullet proof vest or if he wanted to get shot while pointing to his waist and grabbing at his waist two or three times); *People v. Woods*, 373 Ill. App. 3d 171, 173 (2007) (defendant raised his hand with his index finger extended and gestured to his waist and cashier observed something wooden in his waistband while defendant was grabbing at the cash register). All the

above cases describe situations supporting reasonable objective findings that the defendants indicated that they were armed.

¶ 38 In this case, defendant argues in part that the State failed to prove he committed a robbery. He also argues in part that there was no evidence that he indicated verbally or by his actions that he was armed to support the aggravated robbery conviction. "In reviewing the sufficiency of the evidence in a criminal case our inquiry is whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *People v. Baskerville*, 2012 IL 111056, ¶ 31.

¶ 39 As the majority has indicated, the facts in this case support a conviction for robbery because of the threatened use of force, leaving no doubt of defendant's guilt of robbery. However, based on the facts and evidence presented in this case, defendant was not proven guilty beyond a reasonable doubt of aggravated robbery after viewing the evidence in the light most favorable to the prosecution. It was understandable for the victim to subjectively believe that "[defendant] had a gun or whatever he had" and she "didn't want to see what he had, whether there was gun" and "didn't want to find out and then be dead." Nonetheless, there was a lack of objective proof that defendant "indicated verbally or by his actions that he was armed." Taking the facts in this case in the light most favorable to the State, the evidence does not support a finding that defendant indicated he was armed with a firearm or other dangerous weapon, verbally or by his actions.

¶ 40 Conduct that indicates a defendant threatened the imminent use of force to support a conviction for robbery does not justify a conviction for aggravated robbery unless the enhancing conditions are present. See 720 ILCS 5/18-1(c) (West 2012). In other words, not every robbery,

which requires the threat of force, is an aggravated robbery. We cannot assume that a defendant's indication that he will use force is also indication that he is armed with a firearm or dangerous weapon. Thus, the facts in the instant case do not "clearly" show that the defendant both verbally and by his actions indicated that he was armed.

¶ 41 Therefore, for the foregoing reasons, I concur that the defendant was not proven guilty beyond a reasonable doubt of aggravated robbery.

¶ 42 JUSTICE SCHMIDT, dissenting.

¶ 43 I respectfully dissent. I watched the same surveillance video that the jury watched and disagree with the majority's reweighing of the evidence as set forth in paragraph 21. I should also note that this camera view upon which the majority relies is a much different view than the clerk would have had. The camera showing the front of the counter is taken from the side. It is apparent that the cashier would have been unable to see defendant's right hand until he used it to pick up the cash. Most of the time, it was below countertop level.

¶ 44 As defendant enters the store and as he stands and talks to the cashier, his left hand is on the counter and he is standing at an angle that placed his left hip closer to the counter and his right hip farther away. His stance and the position of his right hand were clearly suggestive of someone holding a weapon. He was wearing very baggy shorts and his tee-shirt was untucked, giving further support for the cashier's reasonable belief that he had a concealed weapon. While his hand was not hidden in a pocket, it was hidden from the cashier's view and in a position that would allow her to reasonably conclude that it was in a pocket. His stance at the counter and the position of his right hand would clearly give a reasonable person reason to believe that defendant was armed with a weapon, most likely a firearm. Couple this with the threat that "I don't want to

hurt you, baby girl, but I got to do what I need to do.” There would be no way to hurt the victim without a firearm. The threat implied the means to carry it out.

¶ 45 I also note that having carefully watched the surveillance video, frame by frame, at no time in the store did defendant ever use his right hand to pull up his shorts. His hand was well below the waistband of the shorts. One cannot see the waistband because of the untucked tee-shirt. Contrary to defendant’s argument on appeal, the surveillance video clearly shows that defendant was not using his right hand to hold his shorts up during the ordeal.

¶ 46 Viewing the evidence in the light most favorable to the prosecution, as the majority concedes we must, a rational trier of fact could find the elements of aggravated robbery proven beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274 2004). Again, I respectfully submit that the majority has reweighed the evidence and errs by taking advantage of a view that the cashier did not have. The defendant clearly indicated both verbally and by his actions that he was armed.

¶ 47 The majority acknowledges that “simple” robbery involves the threat of imminent force. It also concludes that the State proved defendant guilty of robbery, but not aggravated robbery. I submit that if the evidence is insufficient to prove aggravated robbery, it is likewise insufficient to prove robbery. The victim was locked behind the counter and surrounded by bulletproof glass. The only possible way for defendant to have harmed the victim was by sticking a handgun through the small opening in the glass. Otherwise, it was impossible for defendant to harm her. The majority does not explain what imminent threat the defendant conveyed to the victim. If one takes property from someone on the street by threatening to punch him or her in the nose that is robbery. However, if the intended victim of the nose punch is standing in a bulletproof cage, the threat is empty and poses no threat of the imminent use of force. The majority cannot have it

both ways. If defendant did not convey the message that he was armed with a handgun and the victim was in a bulletproof cage with only a small opening, defendant posed no imminent threat to the victim. Therefore, I respectfully submit that neither offering by the members of the majority makes any sense on the facts of this case. Neither member of the majority explains what threat of imminent force defendant made.

¶ 48 I also dissent from the majority's refusal to publish this decision as an opinion. It clearly qualifies under Supreme Court Rule 23 (Ill. S. Ct. R. 23 (eff. July 1, 2011)). I am aware of no case that says that a threat of force which the victim would obviously know that the perpetrator could not carry out satisfies the "threat of imminent force" requirement of robbery. That is clearly the majority's holding here today. If that is the law, then it should not apply to only this defendant. Where is the justice in that?

¶ 49 I would affirm.