2017 IL App (1st) 143289-U

No. 1-14-3289

Order filed November 17, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 C5 50478
	)	
ARTHUR CEDAR,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's armed robbery conviction is affirmed where the evidence established that he threatened a security officer with a knife in a Home Depot parking lot after taking merchandise from the store. In addition, the trial court did not apply an incorrect standard of proof.

¶ 2 Following a bench trial, defendant Arthur Cedar was convicted of armed robbery and sentenced to six years in prison. On appeal, defendant contends the State failed to prove his guilt

beyond a reasonable doubt and that the trial court applied an incorrect standard of proof in determining his guilt. We affirm.

¶ 3 Defendant was charged with one count of armed robbery with a dangerous weapon other than a firearm pursuant to section 18-2(a)(1) of the Criminal Code of 2012 (720 ILCS 5/18-2(a)(1) (West 2012)).

¶ 4 At trial, Robert Myers testified that on May 20, 2013, he was working on the floor as a loss prevention officer for a Home Depot store in Oak Lawn. On that day Myers first observed defendant in the hardware section taking three bolt cutters from the shelf and consulting a paper that Myers recognized as a Home Depot receipt. Myers previously had seen defendant in the store making "multiple returns" but not purchasing anything.

¶ 5 Defendant went to another aisle and put a butane torch in the front section of his shopping cart along with the three bolt cutters. Defendant wheeled his cart to the outdoor garden center, where he placed the torch into a plastic Home Depot bag, along with other items. Defendant pushed the cart out of the garden center beyond the last point of sale and took the bag out of the cart, leaving two sets of bolt cutters in the cart. He proceeded out to the parking lot carrying the bolt cutters and the bag containing the butane torch in his left hand.

¶ 6 Myers further testified as follows:

"Q. What did you do, at that point?

A. At that point, I went to go approach him.

Q. As you approached, what did you see the defendant do?

A. He was walking with the bolt cutters in the left hand. I thought he would use it as a weapon so I grabbed the bolt cutters."

¶ 7 Myers testified he identified himself as he proceeded to grab the bolt cutters out of defendant's hand. Defendant then "pulled a knife" on Myers, who was within one foot of defendant. The knife was in defendant's right hand and had a three- to four-inch blade.

¶ 8 Myers further testified:

"Q. Once you saw that knife, what did you do?

A. I backed off and that's when I stopped my pursuit.

Q. And at this time, had you -- what did the defendant do?

A. He stated you don't want to do this. I'll stab the sh-- out of you.

Q. Were there still items in his hand as he said this to you?

A. No, just the knife.

Q. What had happened to the items in his hand?

A. He dropped the items and I grabbed the bolt cutters. So I had the bolt cutters. The rest of the items dropped to the floor.

Q. Were those items still in the bag that you had seen him place the items into?

A. Correct."

¶ 9 Myers called 911 and followed defendant across the street through the parking lot of another store. Myers saw defendant put the knife in his right pocket. Myers located an identification number for defendant based on a return that defendant made at the store two days earlier. Myers recovered the Home Depot bag that contained the butane torch and defendant's personal items. Myers identified defendant in a photo lineup later that day.

¶ 10 On redirect examination, Myers affirmed that when he approached defendant he stated he "was a Home Depot Loss Prevention Officer" and grabbed defendant.

¶ 11 Oak Lawn police detective James Hunt testified that after Myers identified defendant in the lineup, police arrested defendant at his address. The State rested.

¶ 12 Defendant testified that on May 20, 2013, he was shopping at the Oak Lawn Home Depot for three pairs of bolt cutters and a torch. Defendant placed those items in his shopping cart. Defendant said he had brought other personal items into the store, including an "art book, two magazines and three pencils." Some of those items were in the Home Depot bag.

¶ 13 Defendant testified that he left the garden center carrying the bag containing his belongings, a set of bolt cutters and the torch. He admitted he did not pay for the merchandise. Defendant carried a mechanical pencil in his hand and denied having a knife.

¶ 14 Defendant testified Myers approached him from behind in the parking lot. Defendant denied that Myers "announced himself", but "assumed he was loss prevention." He told Myers "don't do this" and dropped the bag.

¶ 15 Defendant's testimony continued:

"Q. Did he ever grab the bolt cutters out of your hand?

A. No.

Q. Did he ever come within one feet of you or one foot should I say?

A. No, absolutely not, no.

Q. So you dropped everything?

A. Yes, ma'am.

Q. And did you still have your pen?

A. I had the pencil in my right hand.

Q. The pencil. Did you ever real back at him [*sic*]?

A. No."

¶ 16 Defendant denied telling Myers he would "stab the sh--" out of him. On cross-examination, defendant said he did not threaten Myers or point the pencil at him but rather held the pencil in his hand.

¶ 17 The defense also called Detective Hunt, who testified Myers told him he and defendant were "face-to-face" in the parking lot; however, he did not recall the distance Myers stated was between him and defendant. The detective acknowledged stating at a preliminary hearing that Myers had said they were 10 to 15 feet apart and that Myers never told him he took the bolt cutters out of defendant's hand.

¶ 18 The trial court found defendant guilty of armed robbery. Defendant filed a motion for a new trial, asserting that no armed robbery occurred because a threat of force did not occur in concert with a taking of property. Defendant argued he was no longer holding any store merchandise when confronted by Myers, pointing to Myers' testimony that he had taken the bolt cutters from defendant's hand at that point and defendant had dropped the bag. In response, the State argued that force need not be used before or during the taking of property, so long as force was displayed in the series of events in which the taking occurred.

¶ 19 In denying defendant's motion for a new trial, the court stated it found Myers to be credible and reviewed the pertinent parts of Myers' testimony. The court noted defendant was "effecting his escape" when he walked past the store's last point of purchase with the bolt cutters and the butane torch. The court stated that defendant was "still in possession of these items if not physical possession at least constructive possession; that's the point where he pulls out a knife." The court found that defendant's use of the knife and the taking of the merchandise were "all

part and parcel of the same event" and that defendant's "departure is accomplished by the use of force." The court concluded that defendant's dropping of the bag and departure from the scene did not negate his use of force and taking of the items "during the course of the single incident." At sentencing, the trial court imposed a term of six years in prison.

¶ 20 On appeal, defendant contends his conviction should be reversed because the State failed to prove beyond a reasonable doubt that he committed armed robbery. When considering a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact, which was the trial judge in this bench trial, to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Id*. Thus, a reviewing court will not substitute its judgment for that of the trier of fact on questions that involve the weight of the evidence or the credibility of witnesses, and this court will reverse a conviction only where the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt as to the defendant's guilt. *Id.*

¶ 21 To prove armed robbery in this case, the State must establish beyond a reasonable doubt that defendant: (1) took property from another; (2) by the use of force or threat of imminent force; (3) while armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1)(West 2012). Defendant contends the armed robbery statute requires proof that his force or threat of force while armed with the dangerous weapon preceded or occurred together with the taking of the items from the Home Depot. Defendant argues he did not use force or the threat of force to obtain those items and only displayed the knife and threatened Myers after relinquishing

possession of the items. The State responds that defendant committed the required taking by force or threat of force when he showed Myers the knife and threatened to stab him while contemporaneously dropping the Home Depot bag.

¶ 22 An armed robbery can take place even where the *initial* act of obtaining the property occurred without force, as occurred here. See *People v. Brooks*, 202 Ill. App. 3d 164, 169-70 (1990). The State is not required to "prove in any particular order the force and taking elements." *People v. Derr*, 316 Ill. App. 3d 272, 277 (2000). Such force can be "administered at any time during the criminal act," and as long as there is a concurrence between the use or threat of force while armed with a dangerous weapon and the taking of property, a conviction for armed robbery can be sustained. *People v. Lewis*, 165 Ill. 2d 305, 339 (1995); *People v. Robinson*, 206 Ill. App. 3d 1046, 1053 (1990); see also *People v. Collins*, 366 Ill. App. 3d 885, 894-95 (2006) (noting that a robbery can occur when a taking has occurred and the defendant uses force to leave the scene). Put another way, the use or threat of force, while armed with a dangerous weapon, at any point of a robbery supports a conviction for armed robbery "so long as it can reasonably be said to be part of a single occurrence or incident." *People v. Perea*, 347 Ill. App. 3d 26, 44 (2004) (quoting and citing *People v. Olmos*, 67 Ill. App. 3d 281, 290 (1978)).

¶ 23 In *Perea*, the defendants there were charged with armed robbery for throwing a concrete block at the victim's head after taking his shoes and sweater, and the trial court found those acts were "contemporaneous" and convicted him. *Perea*, 347 Ill. App. 3d at 31-33, 43. On appeal, the defendants argued they were not proved guilty of armed robbery because the deadly weapon, the concrete block, was not thrown until *after* the victim's shoes and sweater were removed. *Id.* at 42. The appellate court affirmed, stating that the defendants committed "one continuous act"

by beating the victim, taking his belongings, striking him with the concrete block, kicking him and then fleeing. *Id*. at 44.

¶ 24 Similarly, here, viewing the evidence in the light most favorable to the prosecution, defendant acted continuously when he removed the bolt cutters and the butane torch from the shelves inside the Home Depot store; went past the last point of purchase without paying for the items; and displayed his knife and threatened the imminent use of force when Myers immediately pursued him into the Home Depot parking lot. As in *Perea*, to sustain defendant's armed robbery conviction, the State was not required to prove defendant displayed the knife and made threats of force at the point he placed the items in his cart and departed the store without paying; rather, it was sufficient for the State to prove that defendant used the knife and threatened force while still in the Home Depot parking lot to further his criminal act of taking the items and to thwart Myers from taking back the merchandise and detaining him.

¶ 25 Defendant argues, though, that his use of the knife and his threat of force only came *after* he had relinquished the items from the Home Depot and, therefore, his conviction for armed robbery must be reversed because he never used force or the threat of force *while* taking the items. We disagree. Viewed in the light most favorable to the prosecution, the evidence shows that after wheeling the items out of the Home Depot without paying and being confronted by Myers in the store parking lot, defendant did not hand the items back or say or indicate that he was relinquishing possession of them. Instead, defendant dropped the items, pulled his knife, told Myers "you don't want to do this," and threatened to stab him. When defendant was brandishing his knife and threatening to stab Myers, while standing near the items he had dropped on the ground, he clearly was armed with a dangerous weapon and using the threat of

force in his continuing effort to take the merchandise. Defendant's decision to subsequently flee the Home Depot without the merchandise does not negate the fact that, prior thereto, he took store merchandise without paying, brandished his knife at the loss prevention officer, Myers, and threatened to use force, if necessary, to prevent Myers from retaking the merchandise. Accordingly, defendant's conviction for armed robbery is affirmed.

¶ 26 Defendant's remaining contention on appeal is that his conviction be reversed and this case remanded for a new trial because the trial court applied an incorrect standard of proof in determining his guilt. Defendant asserts the trial court convicted him solely based on its finding that Myers' testimony was more credible than his own account, and he argues the court did not apply the required standard of proof beyond a reasonable doubt.

¶ 27 The State responds that defendant forfeited this assertion by failing to raise it before the trial court. The State further points out that defendant did not argue in his initial brief that this issue should be addressed under the plain error doctrine, which allows review of forfeited claims if either: (1) the evidence is closely balanced; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. See *People v. Adams*, 2012 IL 111168, ¶ 21; *People v. Herron*, 215 Ill. 2d 167, 187 (2005). As to the merits of defendant's argument, the State asserts the court's reference to its consideration of the witnesses' credibility does not affirmatively demonstrate that the court misapplied the law.

¶ 28 Defendant responds, and we agree, that a plain error argument can be raised for the first time in his reply brief, citing *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). Defendant contends the plain error test is met under either prong set out above. In applying plain error review, the first step is to determine whether any error occurred at all, because without error, there can be no

plain error. *Id*.; see also *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). We find that no error occurred here.

¶ 29 Whether the trial court applied the correct legal standard is a question of law which is reviewed *de novo*. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 26. As the *Cameron* court noted, the State bears the burden of proving each element of the charged offense beyond a reasonable doubt, and that burden never shifts from the State to the defendant. *Id*. (citing *People v. Howery*, 178 Ill. 2d 1, 32 (1997)); see also *People v. Larry*, 2015 IL App (1st) 133664, ¶ 14. Because the trial court is presumed to know the law regarding the burden of proof and to apply it properly (*Howery*, 178 Ill. 2d at 32), that presumption will be rebutted only when the record contains "strong affirmative evidence" that the trial court used an erroneous burden of proof. *Id*. at 33-34 (noting the trial court's efforts to test, support or sustain the defense theories cannot be viewed as improperly diluting the State's burden).

¶ 30 In finding defendant guilty, the trial court initially remarked:

> "I believe both sides would agree, this is just an issue of credibility. Who has more -- which witness is more credible? Was it Robert Myers or was it the defendant?"

¶ 31 The court then recounted Myers' testimony in detail, noting that "the witness had no reason to lie here." The court then summarized defendant's version of events, noting that defendant's testimony that he carried a pencil in his hand was "quite unbelievable, especially when you take into account the fact that *** he decides now that he's going to start taking items." The court found defendant's testimony was "preposterous at best" and concluded by finding that Myers was "credible" and "truthful."

¶ 32 A trial court may freely comment upon the implausibility of the defense's theories, as long as the record shows it applied the proper burden of proof in finding the defendant guilty. *Cameron*, 2012 IL App (3d) 110030, ¶ 28. Based on a review of the record in this case, we find the record does not contain strong affirmative proof that the trial court employed an incorrect legal standard. In closing argument, defense counsel asserted that "there isn't enough evidence at this point for a finding on the armed robbery." As is true in many criminal cases, the outcome of defendant's trial turned on which version of events had greater credence to the trier of fact. Because the testimony of a single credible witness is sufficient to convict, even if it is contradicted by the defendant (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009)), the trial court's credibility finding does not suggest that the court applied the incorrect standard. The trial court's remarks reflect its weighing of the credibility of the witnesses, which, as is well-settled, is the purview of the trier of fact. See *Bradford*, 2016 IL 118674, ¶ 12. In conclusion on this issue, no error occurred that would constitute plain error.

¶ 33 Accordingly, for all of the reasons set out above, the judgment of the trial court is affirmed.

¶ 34 Affirmed.