2013 IL App (1st) 12-0315-U

THIRD DIVISION
August 21, 2013

No. 1-12-0315

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 16796
	)	
DUSHUN WILKINS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant was charged with armed robbery, defendant was not entitled to jury instructions for theft by deception; jury instructions for theft from the person were proper; judgment affirmed.

¶ 2 Following a jury trial, defendant Dushun Wilkins was convicted of armed robbery and sentenced to 12 years in prison. On appeal, Wilkins contends the trial court erred in refusing his request for jury instructions for theft by deception, and instead giving jury instructions for theft from the person. We affirm.

¶ 3 Wilkins was charged by information with armed robbery:

> "[I]n that he, knowingly took property, to wit: United States currency from the person or presence of Ronald Gates, by the use of force or by threatening the imminent use of force, and he carried on or about his person or was otherwise armed with a dangerous weapon, other than a firearm, to wit: a knife, in violation of Chapter 720 Act 5 Section 18-2(a)(1) of the Illinois Compiled Statutes***"

¶ 4 At trial, Keneif Johnson testified that on September 1, 2009, he was working with Ronald Gates, a union electrician, at a building located at 14th and Avers in Chicago. Shortly before 3 p.m., Wilkins approached Johnson and offered to pay $50 for an electrician to come look at his building. Because Wilkins would need a ride and Johnson did not have a car, Johnson twice called Gates, who was working elsewhere in the building, to inform him of Wilkins' proposal.

¶ 5 Gates testified that while working on the third floor of the building at 14th and Avers, he received a call on his cell phone, which he was initially unable to answer. He received a second call a few minutes later in which Johnson informed him that Wilkins wanted to speak with him. After Wilkins got on the phone and asked Gates to come to the front of the building, Gates went downstairs, where Wilkins offered to pay Gates $50 to look at hallway lights in his building. Gates drove himself and Wilkins to the building, and on the way, they discussed the neighborhood and people they both knew.

¶ 6 Wilkins asked Gates to pull over around California and Flournoy, where Gates observed several new buildings. Wilkins stated that his wife had only a $100 bill, and asked whether Gates had change. Gates responded that he did, and as he turned to open the car door, he saw "a blade come out," which Gates estimated was five or six inches long. Wilkins put the blade up

against Gates's neck and "kind of pulled [Gates] down in between [his] seat***" Gates told Wilkins he would not put up a fight, and Wilkins went through Gates's pockets, where Gates had a $100 bill and five $20 bills, which he had received as a reimbursement for buying supplies. After taking the cash and telling Gates not to try to follow him, Wilkins jumped out of Gates's vehicle and ran through the gangway of a nearby structure. Gates drove around looking for Wilkins, and then went to a police station to report the incident. Gates identified Wilkins in a photo array on September 3 and in a line-up on September 5. Gates admitted to a 2006 conviction for retail theft.

¶ 7 On cross-examination, Gates admitted that he told an officer that Wilkins called him twice, and explained that Wilkins "got [Johnson] to call up there," and Johnson did not have a phone with him at the time of the calls.

¶ 8 Officer Howard Ray testified that he did not recover a weapon when he searched Wilkins pursuant to his arrest on September 5. To his knowledge, no weapon was recovered from this incident.

¶ 9 Detective Robert Fujara testified that when he met with Gates on September 5, Gates stated that Wilkins' blade had been three inches long and never said that Wilkins had grabbed him by the shoulder.

¶ 10 The parties entered a stipulation that Officer Amy Ortiz interviewed Gates on September 1, and her report reflects that "the offender had called the victim twice on the phone."

¶ 11 Wilkins testified that around 3 p.m. on September 1, he went to a building at 14th and Avers and asked if someone who did drywall and electrical work was available. After a phone call was made by someone at the building, Gates arrived, and Wilkins offered him $50 to look at some light fixtures. Gates and Wilkins then began driving to the corner of Flournoy and California in Gates's vehicle, and on the way, they discussed people they knew in common.

Once they arrived and spoke for a few more minutes, Wilkins told Gates he was going to his sister's house, but she only had a $100 bill, and asked for change. In response, Gates pulled out five $20 bills "with a solid [$100] bill on top of it," and gave Wilkins the five $20 bills. Wilkins also told Gates that he had a "bunch of singles and fives," but did not like to have "that kind of money," and asked if he could exchange them for the $100 bill. After Gates agreed to this exchange, Wilkins took the money, left the vehicle, and did not return. He called Gates to tell him that he had just gotten into an argument with his girlfriend and had to leave. Although the two men had then agreed to meet at 14th and Avers, Wilkins instead went to his sister's house and later rode around in a friend's car. Wilkins denied that he put a knife to Gates's neck, grabbed his shoulder, or that he searched Gates's pockets.

¶ 12 Wilkins further testified that he never intended for Gates to actually look at the building. Wilkins said the incident "was just a random thing.***I said something to one guy, another guy indicated him, and that's how it happened." Wilkins also testified that "[i]t wasn't a robbery. It wasn't anything. It was a trust thing. It was a con game, basically." He described the incident as "just as a con, to see how far it was going to go." The purpose of having Gates drive to Flournoy was "for [us] to have a conversation for him to trust me as a person, and me him." Wilkins admitted to two prior convictions for possession of a controlled substance, one in 2008 and one in 2004, and in rebuttal, the State presented certified copies of those convictions.

¶ 13 During the jury instruction conference, defense counsel asked for an instruction for theft by deception of property not exceeding $300. The trial judge asked Wilkins if he was asking him to consider "a lesser included offense instruction, in this case, theft from the person," and Wilkins responded "Yes, sir." After being informed of the sentencing range for that offense, Wilkins again stated he wanted an instruction on theft from the person. The State then asked, "[I]t is theft from a person, not theft by deception, correct?" The trial judge responded:

> "If I give an instruction[,] it will be theft from a person.
>
> Antonio Pierce, [*People v. Antonio Pierce*], October 2007, Illinois Supreme Court, 226[ ] Ill. 2d 470.
>
> ***
>
> In that case the victim was in a bar, he bought some drinks, put his money on the bar next to him. Pierce came in, sat next to the guy, the victim was the only guy in the bar. Pierce sat down next to him. The victim had his hands on the money, he took his hand off the money, Pierce took the money off the bar and ran out.
>
> He argued on the appeal that the, and to the Supreme Court, they both disagreed with him there was no theft from the person because the money was not taken from the person of the victim.
>
> The Supreme Court and Appellate Court said it was from the person or the presence of. In this case the money [was] literally taken from Gates. So you have theft from the person.
>
> If you want an instruction for that, I'll give you one."

Defense counsel argued that in the case cited by the trial judge, "it doesn't seem there was any type of deception going on." Counsel argued that Wilkins' case was different "because there was a substantial period of time" where groundwork was laid for a deception and "this was not a case where the money was snatched or grabbed."

¶ 14 The trial judge responded:

> "It was taken from the person, however. Your client by his own testimony had no intent of doing anything at all, electrical job, whatever. The intent was from the get-go to get the man's money.

> He took it literally from Ronald Gates'[s] hand.
>
> Your request for an [instruction] of theft by deception, it is denied."

The trial judge further stated that if Wilkins was requesting an instruction on a lesser offense:

> "I'll give one on the offense of theft from [the] person, which the evidence shows based on his version is what occurred.
>
> Whatever pretext used to get the money, it is still taken from the victim's hand, taken directly from the victim. Therefore it is theft from [the] person. Under what pretext you find was used, he put the money in his hand."

After Wilkins again said he wanted an instruction for theft from the person, defense counsel stated:

> "Judge, just so the record is clear, of course we would object to the instruction theft by deception not being given."

The trial judge responded:

> "It is my viewpoint that the deception is what got the money into the man's hands. The money was nonetheless taken from the man's hand by the defendant by his own admission. Theft from the person, even accepting what he says is the case."

During closing arguments, the State argued in part that the evidence showed Wilkins was guilty of armed robbery, stating that "this wasn't a con. This was a violent act where a knife was used up against Ronald Gates'[s] throat with the purpose of gaining money."

¶ 15 Defense counsel contended:

> "No one wants to say that what he did was okay. That's not what

> he's saying. But what he is saying is that he did not commit an armed robbery. There is no use of force here. There is no knife here. There's no threat of imminent force.
>
> ***
>
> Now, you are going to go in the back and you'll get a set of jury instructions. I'm just going to go over a few.***
>
> It says the defendant is charged with the offense of armed robbery. Under the law, a person charged with armed robbery may be found not guilty of armed robbery and not guilty of theft from the person, or guilty of armed robbery, or guilty of theft from the person.
>
> ***
>
> We are asking that you find him guilty of theft of a person. There [was] no knife recovered.***"

In rebuttal, the State maintained that Gates "was robbed, by knifepoint, by***defendant." Further, although Wilkins contended he committed theft, the prosecution argued "all the reasonable evidence points to the fact, and the truthful evidence is that the defendant did have a knife."

¶ 16 The jury was instructed on the offenses of armed robbery and theft from the person. For the latter, the following instruction was given:

> "A person commits the offense of theft from the person when he knowingly obtains unauthorized control over the property by taking said property from the person or presence of another and intends to deprive the owner permanently of the use [or] benefit of

the property.***"

¶ 17 During deliberations, the jury asked to see "any statement from Officer Amy Ortiz." The court responded in a note repeating the stipulation that Ortiz interviewed Gates and her report reflects that Gates told her Wilkins called him twice. Ultimately, the jury found Wilkins guilty of armed robbery. Wilkins filed a motion for a new trial, arguing, in part, that the trial court "erred in denying defendant's request for a theft by deception instruction." In denying Wilkins' motion, the trial judge stated:

> "I gave an [instruction] for theft from [the] person, since the evidence, even his version was he took the money right from [Gates]."

The trial judge further explained:

> "The evidence was he took the money literally from the hand of the person, even by his version, it would have been theft from a person in any event. How he got the stuff in his hand, maybe by deception, is based on his version, which the jurors did not accept in any event. But he still took the money from the person, so if anything, the jurors consider theft from the person, based on your client's version did not have a knife at the time***the money was taken."

Wilkins was sentenced to 12 years in prison.

¶ 18 On appeal, Wilkins argues that the trial court misapprehended the law in refusing to give instructions for theft by deception. Wilkins further contends that the instruction given for theft from the person was inconsistent with his theory of the case and the evidence presented, and as a result, failed to accurately convey the law applicable to the case.

¶ 19 It is well-established that a defendant may not be convicted of an offense that he has not been charged with committing. *People v. Jones*, 149 Ill. 2d 288, 292 (1992). However, a defendant is entitled to have the jury instructed on a less serious offense that is included in the charged offense if: (1) the charging instrument describes the lesser offense and (2) the evidence adduced at trial rationally supports the conviction on the lesser-included offense. *People v. Ceja*, 204 Ill. 2d 332, 359-60 (2003). As the decision to allow a jury instruction is the province of the trial court, we generally review the refusal of a proposed jury instruction for an abuse of discretion. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008). However, the issue of whether jury instructions accurately conveyed the applicable law is reviewed *de novo*. *People v. Parker*, 223 Ill. 2d 494, 501 (2006).

¶ 20 We disagree with the State's contention that Wilkins has forfeited this issue for review. A party forfeits his right to complain of an error where to do so is inconsistent with the party's position in an earlier proceeding. *People v. Johnson*, 334 Ill. App. 3d 666, 680 (2002). Here, Wilkins did not advocate for the theft from the person jury instruction. After the trial judge denied defense counsel's request for a theft by deception instruction, defense counsel reiterated his objection to the failure to give the theft by deception instruction. During closing argument, defense counsel argued that Wilkins was guilty of theft from the person because that was the only lesser offense on which the jury would be instructed. Wilkins preserved the issue by objecting at the jury instruction conference and including it in his motion for a new trial. *People v. Mullen*, 141 Ill. 2d 394, 401 (1990).

¶ 21 Nonetheless, the trial court properly denied Wilkins' request for a theft by deception instruction because theft by deception is not a lesser-included offense of armed robbery in this case. Whether a charged offense encompasses another as a lesser-included offense is a question of law, which we review *de novo*. *People v. Landwer*, 166 Ill. 2d 475, 486 (1995). Section 2-9

of the Criminal Code of 1961 defines an included offense as an offense which is established by proof of the same or less than all of the facts or a less culpable mental state than that which is required to establish the commission of the offense charged. 720 ILCS 5/2-9(a) (West 2008). To qualify as a lesser-included offense, the description of the greater offense in the charging instrument must contain a "broad foundation" or "main outline" of the lesser offense. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). An offense may be deemed a lesser-included offense even though every element of the lesser offense is not explicitly contained in the charging instrument, as long as the missing element can be reasonably inferred. *Id*. at 364.

¶ 22 Here, Wilkins' charging instrument alleged that Wilkins committed the offense of armed robbery:

> "[In] that he, knowingly took property, to wit: United States currency from the person or presence of Ronald Gates, by the use of force or by threatening the use of force, and he carried on or about his person or was otherwise armed with a dangerous weapon, other than a firearm, to wit: a knife***"

A person commits theft by deception when he knowingly obtains by deception control over the property of an owner with the intent to permanently deprive the owner of its use or benefit. 720 ILCS 5/16-1(a)(2)(A) (West 2008); *People v. Morrissey*, 133 Ill. App. 3d 1069, 1071 (1985). In part, the term "deception" means to knowingly "create or confirm another's impression which is false and which the offender does not believe to be true," or to "promise performance which the offender does not intend to perform or knows will not be performed." 720 ILCS 5/15-4(a), (e) (West 2008). The key element of "deception" cannot be reasonably inferred from the charging instrument in this case, which alleged that Wilkins was armed with a knife and designated "the use of force" or "threatening the imminent use of force" as the conduct which caused the taking

of the victim's money. The charging instrument does not at all suggest that Wilkins obtained the victim's money by creating a false impression or promising performance he did not intend to perform. See generally *People v. Hamilton*, 179 Ill. 2d 319, 325 (1997) (where the indictment alleged that the defendant entered a dwelling with the intent to commit a theft, the charging instrument necessarily inferred that the defendant intended to obtain unauthorized control over and deprive another of property, and thus the charging instrument sufficiently identified theft as a lesser included offense of the charged offense of residential burglary); *People v. Washington*, 375 Ill. App. 3d 243, 248 (2007) (because the defendant's indictment for armed robbery or robbery contained the elements of theft, namely, knowingly obtaining or exerting unauthorized control over the victim's property, theft was a lesser included offense of armed robbery and robbery as charged in that case).

¶ 23 *Jones*, relied on by defendant, does not compel a different result. There, the supreme court held that theft was a lesser included offense of armed robbery as it was charged against the defendant. *Jones*, 149 Ill. 2d at 298. However, the method of theft at issue in that case was "unauthorized control over property of the owner." *Id.* at 296; see also 720 ILCS 5/16-1(a) (West 2008). As our supreme court subsequently explained in *People v. Graves*, 207 Ill. 2d 478, 484-85 (2003), each method of theft, including unauthorized theft and theft by deception, has its own elements, notwithstanding the fact that the statute creates a single offense of theft that may be performed in a number of ways.

¶ 24 In *Graves*, the court compared section 16-1(a)(1) (unauthorized theft) with section 16-1(a)(2) (theft by deception) for purposes of assessing whether the disparate sentencing ranges for these offenses constituted a proportionate penalties violation. *Id.* at 483-84. The court answered this question in the negative after concluding that unauthorized theft and theft by deception do not require proof of the same elements. *Id.* at 484-85. Specifically, theft by deception, unlike

unauthorized theft, requires proof of the element of deception. Because this latter element does not form a part of the offense of armed robbery as it was charged in this case, theft by deception cannot be a lesser included offense. Having reached this conclusion, we need not proceed to the second step of the analysis, which would examine whether the evidence adduced at trial rationally supports a conviction for theft by deception. *Kolton*, 219 Ill. 2d at 361.

¶ 25 Further, the trial court's instruction for theft from the person accurately stated the law applicable to this case. A person commits theft when he knowingly obtains or exerts unauthorized control over the property of the owner with the intent to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2008). The offense of theft from the person includes the taking of property that is in the possession of or under the control and protection of the victim. *People v. Pierce*, 226 Ill. 2d 470, 483 (2007). Wilkins contends that this offense is inconsistent with the evidence presented at trial because theft from the person requires that the defendant obtain "unauthorized" control over the property, and according to Wilkins' testimony, if believed, Gates willingly gave Wilkins the money. However, the crime of theft is not limited to the original taking of the property, and control can be unauthorized at the time of arrest. *People v. Alexander*, 93 Ill. 2d 73, 78 (1982). Here, while Wilkins' testimony showed that Gates willingly handed Wilkins the money when the two were in Gates's vehicle, Wilkins' control became unauthorized when Gates learned the true nature of Wilkins' intentions, including at the time of Wilkins' arrest. Because the evidence rationally supported an instruction for the lesser-included offense of theft from the person, the trial court's instruction was proper.

¶ 26 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 27 Affirmed.