2015 IL App (1st) 133253-U

FIRST DIVISION
April 20, 2015

No. 1-13-3253

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. 11 CR 9580
	)	
KEVIN LOMAX,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's finding of guilt for armed habitual criminal affirmed over contention that the evidence was insufficient to prove his prior attempted armed robbery conviction was a forcible felony.

¶ 2 Following a bench trial, defendant Kevin Lomax was found guilty of being an armed habitual criminal predicated on a prior unlawful use of a weapon by a felon (UUWF) conviction and an attempted armed robbery conviction; two counts of UUWF; and four counts of

aggravated unlawful use of a weapon (AUUW). He was sentenced to eight years in prison. On appeal, defendant contends that he was not proved guilty of being an armed habitual criminal because the State failed to adduce any factual details establishing that his prior attempted armed robbery conviction was a forcible felony. He thus requests that his conviction for armed habitual criminal be reversed, and that the case be remanded for resentencing on one of the UUWF convictions.

¶ 3 The charges arose from an incident that occurred on June 3, 2010, on the west side of Chicago. Officer Daniel DeLopez testified that about 11 p.m. that evening, he and two partners were patrolling the area near 839 North Keystone Avenue in an unmarked vehicle, when he observed defendant, who was wearing gray sweat pants and no shirt, standing outside the house with a group of five to seven people. Officer DeLopez saw defendant pull a handgun out of his waistband and hold it in a "low elevated position in front of him." Officer DeLopez exited the car and began to run in defendant's direction, who then ran into the house. Officer DeLopez followed him downstairs to the basement of the house, and saw him throw a handgun into a box in the hallway and then run into a bedroom and shut the door. Officer DeLopez followed him in, saw him lying in a prone position on the bed, and arrested him. The gun, which contained four bullets, was recovered from the box. Officer DeLopez testified that at the police station, they took defendant's shoe laces and the string in his sweatpants waistband, and after reading him his *Miranda* rights, defendant told the officers that "he had bought the handgun from some dude on the street for short money, for $75" and he "referred to the gun as a pocket rocket."

¶ 4 The State then entered into evidence certified copies of defendant's prior convictions for

attempted armed robbery and UUWF. Defendant testified on his own behalf that he was wearing gray sweatpants that day, which did not have a draw string and kept falling down. He and his fiancée, Kathleen Claudio, lived in the neighborhood and were invited to the house in question, and about 15 other people were present outside when they arrived. Defendant knocked on the front door, and someone let him into the house to use the bathroom on the first floor. As defendant was leaving the bathroom, two police officers who had entered the house threw him to the ground, kicked him in the face, and arrested him. He stated that he was bleeding from his nose and mouth when he was taken to the police station. Defendant denied going to the basement, having a gun or making a statement to the police about one.

¶ 5 The testimony of Kathleen Claudio, in relevant part, was substantially similar to that provided by defendant. In rebuttal, the State presented the testimony of Officer Joseph Wagner, who testified that he saw defendant run into the house after brandishing a weapon, that he was arrested in the basement of the apartment and not on the first floor, and that he was not bleeding when he was taken to the police station.

¶ 6 The State also presented the testimony of Amelia Haggard, who was the homeowner of the residence in this incident. Haggard testified that about 11 p.m. that day, she was in the second floor bedroom of the house, when she heard a commotion in her basement. She went downstairs to investigate and saw defendant, who she knew from the neighborhood, and two policemen with him. Haggard did not see any blood on defendant, and she did not give him permission to enter her home that evening.

¶ 7 Following arguments in closing, the court found defendant guilty of being an armed

habitual criminal, two counts of UUWF, and four counts of AUUW. At sentencing, the court found that all the other counts merged into the conviction for armed habitual criminal, and sentenced defendant to eight years in prison.

¶ 8 In this appeal from that judgment, defendant contends that the State failed to establish that attempted armed robbery was a forcible felony without any details about that conviction, and therefore it failed to establish the elements of armed habitual criminal. We review this question *de novo*. *People v. Thomas*, 407 Ill. App. 3d 136, 139 (2011).

¶ 9 The armed habitual criminal statute bans the possession of a firearm by any person with two prior convictions for forcible felonies. 720 ILCS 5/24-1.7(a) (West 2010). To establish the elements of armed habitual criminal, the State was required to prove that defendant possessed a firearm after twice being convicted of a forcible felony. *Id.* Section 2-8 of the Criminal Code of 1961 (Code) provides that a forcible felony is "treason, first degree murder, * * * robbery, * * * and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2010). Here, the evidence showed that defendant was in possession of a gun, and the State provided certified copies of defendant's prior convictions of UUWF and attempted armed robbery, without providing any factual details about the underlying offenses. Defendant concedes that the legislature included UUWF as one of the offenses enumerated in the armed habitual criminal statute, and therefore the State met its burden for one of the requisite prior convictions. 720 ILCS 5/24-1.7 (a)(2) (West 2010).

¶ 10 Defendant argues, however, that attempted armed robbery is not listed as one of the offenses included in the definition of a forcible felony, and since the prosecution failed to present

any evidence concerning the facts underlying the attempted armed robbery conviction, it was not sufficiently proved to be a forcible felony. Thus, we must decide whether every attempted armed robbery, without any factual details about the particular offense, necessarily qualifies as a "felony which involves the use or threat of physical force or violence." *Thomas*, 407 Ill. App. 3d at 139; 720 ILCS 5/2-8 (West 2010).

¶ 11 This court found in *Thomas*, 407 Ill. App. 3d at 140, that a forcible felony involves the threat of physical force or violence if the felon "contemplated that violence might be necessary" to carry out the crime. *Id.* (quoting *People v. Belk*, 203 Ill. 2d 187, 194 (2003)); see also, *People v. Polk*, 2014 IL App (1st) 122017, ¶ 53. To prove attempted armed robbery in this case, the State was required to prove that with intent to commit an armed robbery, defendant took a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2010); *People v. Toy*, 407 Ill. App. 3d 272, 289-90 (2011). A person commits robbery when he knowingly takes property from the person or presence of another by the use of force or threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2010); *Toy*, 407 Ill. App. 3d at 290. Section 18-2(a) of the Code provides that a person commits an armed robbery when:

> "(a) * * * [he] violates Section 18-1; and
>
> (1) [he] carries on or about [his] person or is otherwise armed with a dangerous weapon other than a firearm; or
>
> (2) [he] carries on or about [his] person or is otherwise armed with a firearm; or
>
> (3) [he], during the commission of the offense, personally

> discharges a firearm; or
>
> (4) [he], during the commission of the offense, personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person." 720 ILCS 5/18-2(a) (West 2010); *Toy*, 407 Ill. App. 3d at 290.

¶ 12 Given its statutory definition, an attempted armed robbery requires the specific intent to knowingly take property from another while armed, and to take a substantial step in the commission of that offense. Because every attempted armed robbery involves the specific intent to commit a robbery, an inherently violent offense and an enumerated forcible felony, the trier of fact who finds a person guilty of attempted armed robbery must find that the guilty person was armed, and contemplated the use or threat of force. Accordingly, we hold that every attempted armed robbery qualifies as a forcible felony for purposes of the armed habitual criminal statute, and defendant's conviction for that offense must stand.

¶ 13 Defendant contends, nevertheless, that this court misinterpreted supreme court precedent in *Thomas*, and it cannot be determined whether an offense constitutes a forcible felony without regard to the particular facts of a case. We disagree. Just as a felon found guilty of attempted murder or conspiracy to commit murder necessarily contemplates the use or threat of force to accomplish his objective of killing an individual (*Thomas*, 407 Ill. App. 3d at 140; *Polk*, 2014 IL App (1st) 122017 at ¶ 53), a felon found guilty of attempted armed robbery necessarily contemplates that he may need to use force or the threat of force to take property from another,

and takes a substantial step towards that objective while armed. See, *People v. Bongiorno*, 358 Ill. 171, 174 (1934) ("Unless the plan of robbery is to terrify the victim, and, if occasion requires, to kill any person attempting to apprehend them at the time of or immediately upon gaining possession of the property, it would be inane and childlike. * * * It is vain to argue that the killing was not included as a part, if necessary, in the commission of the [armed robbery].").

¶ 14 In reaching this conclusion, we are not persuaded by defendant's assertion that the use or threat of force is not inherent in every attempted armed robbery. He argues, citing *People v. Terrell*, 99 Ill. 2d 427, 432-35 (1984), that defendant can be convicted of attempted armed robbery for being found near the place targeted for the robbery with a gun and the materials necessary to carry out the offense, which is not inherently violent conduct. He also cites to *dicta* in *People v. Oduwole*, 2013 IL App (5th) 120039, ¶ 45, that conduct such as lying in wait, reconnoitering the place contemplated for the robbery, and possession of materials to be employed in the robbery, can constitute a substantial step to support an attempted armed robbery conviction.

¶ 15 We note, however, that in each of these examples, defendant contemplated the use or threat of force, and took a substantial step towards committing an armed robbery, but was thwarted before he could accomplish his objective. As this court observed in *Thomas*, the definition of forcible felony in section 2-8 does not require the actual infliction of physical injury; instead, it only requires the "use or *threat* of physical force or violence." (Emphasis added.) *Thomas*, 407 Ill. App. 3d at 140 (quoting 720 ILCS 5/2-8 (West 2006)). It is therefore logical to conclude that any attempt to commit armed robbery, an enumerated forcible felony,

involves the contemplation of force or violence against an individual, an awareness that such force or violence would be necessary to deprive a person of his or her property, and a willingness to use force or threaten it when necessary. See also, *Polk*, 2014 IL App (1st) 122017 at ¶¶ 53-54.

¶ 16 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.