2016 IL App (1st) 140227-U

FOURTH DIVISION
November 23, 2016

No. 1-14-0227

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. 11 CR 17148
	)	
KARL LOWERY,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

O R D E R

¶ 1 Held: Affirmed. Defendant proven guilty of armed robbery where victim testified that defendant and his accomplices took victim's car keys and a paycheck; fact that indictment specified that phone and currency was taken was surplusage.

¶ 2 Following a bench trial, defendant Karl Lowery was found guilty of home invasion, armed robbery and the unlawful use of a weapon by a felon. Defendant was sentenced to two concurrent 30-year prison terms for the home invasion and the armed robbery convictions. He was also sentenced to a concurrent seven-year sentence for the unlawful use of a weapon by a

felon. On appeal, defendant contends that he was not proven guilty of the armed robbery charge beyond a reasonable doubt because the State failed to prove all material facts of the offense as alleged in the indictment, which alleged that currency and a cellular phone were taken from the victim, whereas the victim's testimony established his keys and paycheck were actually taken. We affirm.

¶ 3 The evidence at trial established that on the evening of September 27, 2011, defendant, codefendants Samuel Elam and Henry Johnson, and several other unidentified men entered 448 West 116th Street armed with guns.[1] The armed men rounded up Dante Young, Theresa Harper, and other residents. They also beat and took items from Rubin Bridges.

¶ 4 Dante Young, a resident of the first-floor apartment, testified that he was outside when he was approached by three men and told to get into the house. The men wore masks and had guns. Young went back inside and tried to close the door, but one of the men blocked the door with a pistol and the men were able to enter the building. One man went upstairs. Another man hit Young on the head with a pistol several times and told him to put his nose on the ground. The men forced Young to "strip naked" and get on the floor. Young testified that, when Rubin Bridges—who lived in the second-floor apartment—arrived 30 minutes later, the men beat him as well.

¶ 5 Theresa Harper, Rubin Bridges's girlfriend, testified she was in bed in the second-floor apartment when she heard "some commotion." An unidentified heavyset man, wearing a black

[1] The case against defendant and codefendants proceeded to a severed, simultaneous bench trial. Codefendants' appeals have already been decided. See *People v. Elam*, 2016 IL App (1st) 140228-U; *People v. Johnson*, 2015 IL App (1st) 140229-U.

hoody and holding a gun, kicked down the door of the bedroom and entered. The heavyset man took Harper downstairs, and told her to sit in a corner of the foyer. Harper testified that defendant and codefendants were on the first floor armed with guns.

¶ 6 Harper testified that the armed men repeatedly asked her where the "shit [was] at" and who she had seen with drugs. The men, including defendant, pulled their bandanas down to talk to her and she saw their faces. When Bridges returned home, defendant pulled him inside, "slammed" him to the floor, and pistol-whipped him. The men then asked Bridges about the location of the "shit" and "keys." After Bridges gave the men his keys, they went through his pockets and "took money out of his pockets."

¶ 7 The next day, September 28, 2011, Harper made a statement to police and indentified defendant and codefendants in a lineup. At trial, Harper identified defendant and codefendants as the men with guns who spoke to her on the first floor of the building. The man who kicked in the door was not present in court.

¶ 8 During cross-examination, Harper testified that there were a total of five men, including defendant, armed with guns in the house that night. While Bridges was on the floor, the men "went in his pocket" and took money. They also took Bridges's keys. She did not remember which man went into Bridges's pockets, but "someone" did.

¶ 9 Rubin Bridges testified that when he came home around 11:30 p.m., his basement neighbor told him not to go inside. When Bridges opened the door, defendant pulled him in and pointed a gun at his face. Bridges saw Harper in the hallway and Young on the floor. Defendant

picked Bridges up and "body slammed" him to the floor. Defendant and codefendant Elam then beat Bridges with their guns.

¶ 10 Bridges testified that, during the beating, codefendant Elam told him to give up the keys and hit him with a gun, so Bridges gave Elam his car keys. The beating continued. Bridges also testified that someone removed his paycheck from his pocket.

¶ 11 Bridges testified that he eventually passed out from the beating, but woke when defendant sprayed Windex in his face. At some point, defendant and codefendant Elam dragged him upstairs. There, they beat him "some more." Although they asked where "it" was, Bridges denied living "that kind of life." He passed out and regained consciousness as the police arrived. His injuries included internal bleeding and bleeding on the brain.

¶ 12 Later, at a hospital, Bridges spoke to police officers. At trial, Bridges did not recall whether the officers asked him to sign a document before looking at certain photographs, but acknowledged that he looked at the photographs in order to determine if anyone in the photographs was involved in the beating. Bridges did not recognize the "lineup/photo spread advisory form," but recognized his signature on the form and admitted that he was given this document by the police at the same time that he was shown the photographs. At trial, Bridges identified the photographic arrays that he was shown in the hospital.

¶ 13 During cross-examination, Bridges testified that he was hit in the head a "lot" that night and was being medicated for pain at the time he viewed the photographic arrays. He indentified defendant and codefendant Johnson in the photographic arrays.

¶ 14 At trial, Bridges indicated he was approached by "a group of guys" on the street and told to "let it go," *i.e.*, drop the charges and not come to court. Bridges believed that the men were acting on behalf of defendant and codefendants.

¶ 15 The trial court stated that it would consider this testimony only as it affected Bridges's "interest, bias, motive, [and] credibility" and would not attribute anything that happened "on the street" to defendants "directly." However, "this" testimony was relevant to Bridges's credibility and "to explain in context his testimony and some things he may have said prior" to trial.

¶ 16 Officer Admiral Romero testified that when he and another officer entered the building, they were directed upstairs. There, he saw Bridges who was "bleeding profusely" from the head. Romero found defendant and codefendant Elam in a bathroom and arrested them.

¶ 17 Detective Brian Cunningham testified that Harper identified defendant in a lineup. Cunningham also showed Bridges two photographic arrays. Cunningham testified that Bridges identified defendant in one of the photographic arrays.

¶ 18 The trial court found defendant guilty of six counts of home invasion, two counts of residential burglary, two counts of unlawful use of a weapon by a felon (UUWF), and armed robbery. At sentencing, the trial court "merged" the residential burglary counts into the home invasion counts. The court also made a finding that defendant had inflicted great bodily harm during the offenses. Defendant was sentenced to two concurrent, 30-year prison terms for the home invasion and armed robbery convictions. He was also sentenced to a concurrent seven-year prison term for the UUWF conviction.

¶ 19 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of armed robbery, where the State alleged that he took Bridges's cell phone and money in the indictment, but the evidence at trial showed that he took Bridges's keys and a paycheck. The State responds that in order to sustain the conviction, the evidence must establish beyond a reasonable doubt that defendant took property from Bridges by force while armed with a gun, and that the language identifying the specific property taken from Bridges is "mere surplusage."

¶ 20 Where, as here, a defendant challenges the sufficiency of the evidence, a criminal conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant; rather, the relevant 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 crime beyond a reasonable doubt. *Givens*, 237 Ill. 2d at 334; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 21 To prove defendant guilty of armed robbery, the State had to prove that he knowingly took property from the person or presence of Bridges by the use of force or by threatening the imminent use of force, while armed with a firearm. See 720 ILCS 5/18-2(a)(2) (West 2010). In this case, the armed robbery count alleged that, on or about September 27, 2011, defendant knowingly took property, "to wit: a cellular phone and United States currency" from the person

or presence of Bridges by the use of force or by threatening the imminent use of force, and that defendant was armed with a firearm.

¶ 22 At the outset, we must reject the premise of defendant's argument that the proof at trial varied from the language of the indictment because, in fact, the court *did* hear evidence that defendant and his accomplices took money—"currency"—from Bridges: Harper testified that they removed money from his pockets. Thus, the evidence at trial did not vary from the indictment's allegation that Bridges had money taken from him.

¶ 23 Defendant acknowledges Harper's testimony but claims that her testimony should have been disregarded because Bridges would have better knowledge of what was taken from his own pockets. But recall that Bridges was subject to a savage and terrifying attack; he was repeatedly struck in the head and suffered extensive brain trauma, and thus the precise items taken from his pockets may not have been foremost in his memory of that night. Considering that we must review the evidence in the light most favorable to the State, we find no basis for favoring the testimony of a victim, while in the midst of a brutal assault that resulted in a significant brain injury, on this particular point over that of another witness who testified that she had a clear view of these events as they unfolded.

¶ 24 And even if we indulged defendant on this point and assumed that the evidence established that only keys and a paycheck were taken, we would still hold that the State's trial evidence did not fatally vary from the allegations of the indictment. To constitute a fatal variance, "a variance between the allegations in a criminal complaint and the proof at trial must be material and be of such character as may mislead the defendant in making his or her defense,

or expose the defendant to double jeopardy." *People v. Maggette*, 195 Ill. 2d 336, 351 (2001). An indictment must state the name of the accused; set forth the name, date and place of the offense; cite the statutory provision the defendant allegedly violated; and set forth in the statutory language the nature and elements of the charged offense. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). Where an indictment charges all of the essential elements of a crime, matters that are unnecessarily added may be regarded as surplusage. *Id*.

¶ 25 A good example is *Collins*, where the indictment charged the defendant with recklessly discharging a firearm and thus endangering the safety of a particular police officer, but the proof at trial showed that others, not that police officer, were so endangered. *Id*. The supreme court held that the proof at trial did not fatally vary from the indictment because "[t]he specific identity of the victim is not an essential element of the offense of reckless discharge of a firearm." *Id*. at 220. Likewise, we recently held that, where an indictment for attempted armed robbery alleged that the defendant was reaching for an individual's gun, while the proof at trial showed he was reaching for that individual's keys, there was no fatal variance between the indictment and proof because the indictment set forth the essential element of attempted armed robbery—attempting to take property by force or threat of force—and "the naming of the item that defendant attempted to take from [the victim] was surplusage." *People v. Reese*, 2015 IL App (1st) 120654, ¶ 96, *pet. for leave to appeal granted*, No. 120011 (Mar. 30, 2016).

¶ 26 To prove defendant guilty of armed robbery, the State had to prove that he knowingly took property from the person or presence of Bridges by the use of force or by threatening the imminent use of force, while armed with a firearm. See 720 ILCS 5/18-2(a)(2) (West 2010). In

this case, the armed robbery count alleged that, on or about September 27, 2011, defendant knowingly took property, "to wit: a cellular phone and United States currency" from the person or presence of Bridges by the use of force or by threatening the imminent use of force, and that defendant was armed with a firearm.

¶ 27 The allegation that defendant took a cell phone and currency from Bridges was not a material element of the charge of armed robbery. Rather, the indictment set out the essential elements of robbery by alleging that defendant knowingly took property from Bridges by the use of force while armed with a firearm. See 720 ILCS 5/18-2(a)(2) (West 2010). The naming of the specific items that were taken during the offense was surplusage. See *Reese*, 2015 IL App (1st) 120654, ¶ 96; *People v. Lewis*, 165 Ill. 2d 305, 340 (1995) (elements of robbery are "taking property by force or threat of force. Nothing more is required to sustain the conviction.").

¶ 28 Nor, in an event, would we find that defendant was prejudiced by the allegation detailing the specific property taken from Bridges, as he was put on notice of the charge with sufficient detail to permit him to mount a defense to the charge of armed robbery. See *People v. Espinoza*, 2015 IL 118218, ¶ 38 (due process requires that charging instrument adequately notify defendant of offense charged with sufficient specificity to enable proper defense). Defendant does not claim that his defense would have been different if he knew that the proof would show he took a paycheck and keys instead of a cell phone and currency.

¶ 29 We are unpersuaded by defendant's reliance on *People v. Daniels*, 75 Ill. App. 3d 35 (1979). In *Daniels*, not only was there a variance between the charging instrument and the evidence adduced at trial (the defendant was charged with the armed robbery of money, while

the evidence at trial focused on a watch taken from the victim), but the reviewing court also found that the evidence was insufficient to prove the defendant guilty of even taking the watch. *Id.* at 40-41. Specifically, the State had not shown that the victim owned or wore a watch, or that the watch possessed by one of the defendants was taken from the victim. *Id*. at 41.

¶ 30 In this case, the difference between the indictment and the evidence adduced at trial was nowhere near as drastic as in *Daniels*. In *Daniels*, there was insufficient evidence of a robbery of any kind, whether the item was alleged to be money or a watch. Here, there is no lack of evidence of the armed robbery itself, only a question of whether the indictment properly alleged what precisely was taken. See *Reese*, 2015 IL App (1st) 120654, ¶ 97 (distinguishing *Daniels* on the same basis). There is no question here that the evidence established that defendant did, in fact, take property from Bridges with the use of force—his keys and paycheck at a minimum, if not his money as well.

¶ 31 We also find distinguishable *People v. Tratner*, 334 Ill. 564, 565 (1929), cited by defendant, where the supreme court found a fatal variance between the indictment and the proof. There, the defendant was indicted for fraudulently obtaining "gold, silver, nickel, and copper coins and paper currency, both of particular and unknown denominations" from the victim, whose name was Harry H. Weiss. *Id*. The proof at trial, instead, established that the defendant "obtained checks from Weiss, and that the checks were drawn by 'The Brady Conveyors' Corporation, by Abner J. Weiss, President,' and were made payable to S. Tratner & Son." *Id*. In other words, the checks were not made payable to the victim, Harry H. Weiss, and thus "were

not the property of Harry H. Weiss." *Id*. at 566. The indictment specified the commission of larceny, but the proof at trial did not.

¶ 32 Here, in contrast, even if we put aside the fact that evidence was presented that actual money was stolen from Bridges—which lined the proof up directly with the indictment's reference to "currency"—the paycheck was clearly Bridges' property, in any event. The evidence still established the taking of the victim's property, unlike in *Tratner*.

¶ 33 For all of these reasons, we find that the State presented sufficient evidence to establish defendant's guilt, and that the trial evidence did not fatally vary from the allegations of the indictment.[2]

¶ 34 We affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.

[2] Because we discussed this fatal-variance argument in the disposition of codefendant Elam's appeal, we have incorporated much of that decision's legal and factual discussion herein. See *Elam*, 2016 IL App (1st) 140228-U.