2014 IL App (1st) 141140-U

SECOND DIVISION
October 28, 2014

No. 1-14-1140

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re: D.W., a minor,	)	Appeal from the Circuit Court
	)	of Cook County.
(People of the State of Illinois	)	
	)	
Petitioner-Appellee	)	No. 13 JD 05035
	)	
v.	)	
	)	Honorable Andrew Berman,
Diamonte W.	)	Judge Presiding
	)	
Respondent-Appellant.)	)	

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Respondent did not commit the offense of robbery when he made physical contact with the victim during the commission of a theft. Respondent waived his objection to lack of notice to his guardian when he did not raise it at any point in the delinquency proceedings and he failed to meet his burden for relief under the plain error doctrine.

¶ 2 Following a bench trial, Respondent Diamonte W. was convicted of robbery and theft.

The trial judge sentenced respondent to five years probation and 30 days in juvenile detention.

On appeal, respondent argues that: (1) the State failed to prove respondent guilty of robbery beyond a reasonable doubt because there was no forceful taking; (2) the proceedings violated due process, because no custodian or guardian was notified of his proceedings; (3) his convictions for both robbery and theft cannot stand under the one act, one crime doctrine; and (4) the mandatory five year probation period for minors convicted of forcible felonies is unconstitutional. We affirm defendant's conviction for theft, vacate his conviction for robbery, and remand the case for a new dispositional hearing.

¶ 3 BACKGROUND

¶ 4 The facts in this case are straightforward. On December 9, 2013, complainant Shannon Boland was traveling northbound from the loop on the Chicago Transit Authority's red line train. She was looking down at her iPhone and texting. When the train reached the North and Clybourn station, respondent Diamonte W. grabbed the phone out of her hand and ran. When respondent grabbed the phone, he also grabbed Boland's knuckle, pulling her as well. Boland chased after respondent off of the train and up the train station's stairs. Boland apparently yelled for help and Respondent was apprehended in the kiosk area of the station by Nicholas Toy, a contracted security guard for the CTA. When Boland reached the kiosk area and approached Toy and respondent, she learned that respondent had the phone in his pocket and, when prompted, respondent returned the phone to her. Boland confirmed it was her phone. Respondent admitted to Toy that he had taken the phone and Toy called the police.

¶ 5 The police arrived at the train station and placed respondent under arrest. Respondent made unprompted inculpatory statements to the police officers on the way to the police station. The CTA had a video recording of the incident. The CTA video shows respondent running

from the train with Boland chasing him. The video also shows respondent running up the stairs and being stopped by Toy. Respondent was charged with robbery and theft. The case proceeded to a bench trial and the trial judge found respondent guilty on both counts. The trial judge imposed a sentence of five years probation plus 30 days in the juvenile detention center.

¶ 6 At the time the offense was committed, respondent was 15 years old. Respondent's mother's parental rights had been terminated and she lived in Milwaukee. Respondent's foster-mother, Riva Walls, died in 2008 and Riva's daughter, Eurkeria Walls, took custody of respondent. The Department of Children and Family Services had temporary custody of respondent at the time of the proceedings because respondent had made allegations of abuse against Eurkeria Walls. There is no indication in the record whether any of these people ever received notice of defendant's proceedings other than that a DCFS representative appeared on respondent's behalf at his dispositional hearing.

¶ 7 ANALYSIS

¶ 8 Respondent argues that the evidence adduced at trial concerning him grabbing the phone from the victim was insufficient to prove that he took another's property by force. Accordingly, respondent argues, he should only have been convicted of theft and not of robbery. To sustain a conviction for robbery, the State must prove that the defendant knowingly took property from a person by using force or by threatening the imminent use of force. 720 ILCS 5/18–1(a). To sustain a conviction for theft from a person, the State must prove that the defendant knowingly took another person's property that was in that person's possession. 720 ILCS 5/16-1(a); *People v. Pierce*, 226 Ill.2d 470, 483 (2007). The difference between robbery and theft is that robbery entails the use of force in effectuating the taking. *People v. Hay*, 362 Ill.App.3d 459, 465 (2005).

¶ 9 Illinois courts have, on many occasions, addressed the issue of whether a robbery or theft conviction is proper when a defendant commits a so-called "snatching offense." The paramount case on the issue in Illinois is *People v. Patton*, 76 Ill.2d 45 (1979). In *Patton*, the victim was walking down the sidewalk carrying her purse in the fingertips of her hand, down at her side. *Id*. at 47. The defendant approached her and "swiftly grabbed her purse, throwing her arm back a little bit" before fleeing. *Id*. The Illinois Supreme Court, affirming the appellate court's decision, held that the snatching of the purse from the victim along with her arm being thrown back was not a sufficient use of force to constitute robbery. *Id*. at 52. In *People v. Kennedy*, 88 Ill.App.3d 365 (1980), this Court affirmed a defendant's conviction for robbery where the defendant grabbed a bank bag from the victim's hand, shoved the victim against the side of a garage, and ran away with the money. We explained in that case that if force is used to injure the victim or to overcome a struggle or resistance by the victim, the crime is robbery, not theft. *Id*. at 523. In *People v. Bowel*, 111 Ill.2d 58 (1986), the victim was walking while holding her purse by her side. The defendant approached her and "touched her fingertips as he pulled the purse from her hand with his right hand, leaving her fingers a little red but not bruised." *Id*. at 61. The defendant also took the victim's left hand and "pushed it back, immobilizing her arm and causing her body to be turned slightly." *Id*. The Illinois Supreme Court held that robbery was the proper offense under those circumstances because, since the victim was aware the defendant was approaching her, the forcible pushing back and immobilizing of the victim's arm to obtain possession of the property constituted a taking by force. *Id*. at 64. In *People v. Taylor*, 129 Ill.2d 80 (1988), the victim watched defendant cross the street and walk towards her. The defendant walked up to her, reached towards her, and grabbed the necklace from around her neck. *Id*. at 82.

The Illinois Supreme Court held that the defendant committed robbery because a necklace is so attached to a person that, without permission, it cannot be taken from a person in the absence of force. *Id*. at 85. In *People v. Merchant***,** 361 Ill.App.3d 69 (2005), the victim asked the defendant for change for a $20 bill. The defendant snatched the $20 bill from the victim. *Id*. at 71. The parties then grabbed each other, defendant slammed the victim into a window, and the two men tussled. *Id*. There, we held that the initial snatching was theft, but that the ensuing struggle elevated the offense to robbery. *Id*. at 75.

¶ 10 The courts that have decided these cases have acknowledged that it is often difficult to draw the line between theft from a person and robbery of that person. See *id*. at 70. After surveying the cases discussed above and other Illinois cases on the subject, we conclude that respondent committed the offense of theft from a person, not robbery. The robbery statute states that the offense requires that the property be taken "*by* the use of force." 720 ILCS 5/18–1(a). In this case, the contact that respondent made with the victim was incidental to the taking, it was not the means used to accomplish the taking. The pulling of the victim's knuckle in this case is most similar to the victim in *Patton* whose arm was "thrown back a little bit" when the defendant grabbed her purse. Boland was not aware of respondent's approach. She was not in fear. She was not injured or harmed in any way. There was no struggle. The contact respondent made with her was not used to overcome resistance to the theft. As the Illinois Supreme Court stated in *Patton*, when an article is taken "without any sensible or material violence to the person, [such] as snatching a hat from the head or a cane or umbrella from the hand[,] the offense will be held to be theft from the person rather than robbery." *Patton*, 76 Ill.2d at 52.

¶ 11 Here, the only evidence of "force" is that respondent made contact with the victim by

pulling her knuckle when he was attempting to pull the phone. The statute does not say that if any physical contact is made with the victim during the course of a theft then it is robbery. Illinois courts have consistently held for more than 100 years that the difference between theft from the person and robbery lies in the force or intimidation used by the perpetrator *to accomplish his goal of taking property from a person*. *Taylor*, 129 Ill.2d at 84. Here, the physical contact respondent made with the victim was not what allowed him to accomplish stealing the phone. It is also well-settled that when there is a doubt under the facts of whether the accused is guilty of robbery or theft from a person, it is our duty to resolve that doubt in favor of the lesser offense. *Patton*, 76 Ill.2d at 52. In this case, the physical contact was incidental to the theft not the vehicle for it and, thus, it does not elevate the offense to robbery.

¶ 12 Respondent also argues that the failure to notify his guardian was a clear and obvious due process violation. The Juvenile Court Act provides that when a delinquency petition is filed, a summons shall be directed to the minor's legal guardian or custodian and to each person named as a respondent in the petition. 705 ILCS 405/2-15(1). The record contains no evidence that a summons was served on any guardian in this case and the State seems to concede that no one responsible for respondent was ever served with a summons in this matter. Respondent, however, never raised this issue during the delinquency proceedings. Unless respondent raises the issue of lack of notice to a guardian during the delinquency proceedings, the matter is waived. *In re M.W.*, 232 Ill.2d 408, 430 (2009). But a minor's forfeiture of an objection to the adequacy of service or lack of service on his or her parents triggers plain error review. *Id.* at 431.

¶ 13 Under plain error review, we will grant relief in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the

defendant, or (2) if the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id*. at 431. Respondent is not entitled to relief here because the evidence of theft was overwhelming. In fact, respondent conceded both here and during the delinquency proceedings that he stole Boland's iPhone. Respondent has likewise not made any showing that he was in any way affected by the failure to notify his guardian about his proceedings. The respondent has the burden of persuasion on both the threshold question of plain error and the question whether he is entitled to relief as a result of the unpreserved error. *Id*. Respondent has not met that burden here.

¶ 14 Because we have found that respondent's conviction for robbery cannot stand, his other arguments need not be addressed. Only his conviction for theft remains so we need not address the violation of the one act, one crime principle. And theft is not a forcible felony, 720 ILCS 5/2-8, so we need not address whether the five year mandatory probation sentence for minors that commit forcible felonies, 705 ILCS 405/5-715(1), is unconstitutional.

¶ 15 CONCLUSION

¶ 16 Accordingly, respondent's conviction for theft is affirmed. Respondent's conviction for robbery is vacated. The case is remanded for a new dispositional hearing.