2018 IL App (4th) 160887-U

NO. 4-16-0887

FILED
October 25, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
DEMETRIS WATTS,	)	No. 16CF83
Defendant-Appellant.	)	
	)	Honorable
	)	Richard Lee Broch Jr.,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Where the evidence did not support a finding the defendant used force in his attempt to take money from an opened cash register, the appellate court reduced the defendant's conviction from attempt (robbery) to attempt (theft) and remanded for resentencing.

¶ 2 Defendant, Demetris Watts, appeals from his conviction for attempt (robbery) and sentence of nine years' imprisonment. On appeal, defendant argues this court should modify his conviction to attempt (theft) because the State failed to prove he was in a dangerous proximity to using or threatening the force required for attempt (robbery) and then remand the case for resentencing, with direction to the trial court to apply presentence detention credit to any fines assessed. We affirm as modified and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 A. Information

¶ 5 In August 2016, the State charged defendant by information with attempt (robbery) (720 ILCS 5/8-4, 18-1(a) (West 2014)). The State alleged defendant, with the intent to commit the offense of robbery, "performed a substantial step toward the commission of that offense [by] violently thrust[ing] his hand towards an open cash register drawer at Jack Flash in Arcola, injuring the hand of Jack Flash employee[] Elizabeth Stanton."

¶ 6 B. Jury Trial

¶ 7 On October 17, 2016, the trial court held a jury trial. The State presented testimony from police officer Seth Bean and Jack Flash employee Elizabeth Stanton. The State also presented security camera video footage from the Jack Flash convenience store. Defendant, who proceeded *pro se*, did not present any evidence.

¶ 8 1. *Opening Statement*

¶ 9 In its opening statement, the State argued, in part, the evidence would show defendant "quickly and forcefully thrust[ed] his hand across the convenience store counter towards the open cash register drawer" and "[h]is arm moved with such force that when his hand struck the [hand of Jack Flash employee Elizabeth Stanton], she [sustained injuries]."

¶ 10 2. *Officer Seth Bean*

¶ 11 Officer Seth Bean testified on August 28, 2016, at 1:30 a.m. he was dispatched to the Jack Flash convenience store. Upon his arrival, Officer Bean spoke with Jack Flash employee Elizabeth Stanton, who indicated a crime had occurred. Officer Bean obtained and viewed security camera video footage. After reviewing the video footage, Officer Bean learned a suspect, defendant, was in custody. Officer Bean went to the sheriff's department and conducted

an interview of defendant. During that interview, defendant indicated he went into the convenience store to purchase chips and a drink. Officer Bean testified defendant initially stated the "gas station attendant had like lunged her hand out at him" while he was waiting for his change from his purchase. Officer Bean testified defendant later stated he reached towards the cash register in an attempt to get his change from his purchase.

¶ 12 3. *Jack Flash Employee Elizabeth Stanton*

¶ 13 Jack Flash employee Elizabeth Stanton testified on August 28, 2016, at approximately 1:30 a.m. defendant entered the store and purchased chips and a drink with a $20 bill. After she opened the cash register to get defendant's change, defendant reached towards the cash register. Stanton described defendant's reach as a "quick grab." Stanton further testified as follows:

> "[STATE]: How close did [defendant's] hand get to the twenties?
>
> [STANTON]: Probably, you know, just above to where the twenties were. You got the slots, so it got right above the slot.
>
> [STATE]: So what you are telling the jury is, is the hand of [defendant] was directly over the twenties?
>
> [STANTON]: Yes.
>
> [STATE]: Over the drawer?
>
> [STANTON]: Yes
>
> [STATE]: Alright. And what did you do, if anything?
>
> [STANTON]: I took my hand and slapped it and slammed

the drawer shut.

[STATE]: Alright. And then what happened?

[STANTON]: I told him that was all the money he was getting and threw his change at him, and told him I was going to call the cops."

After threatening to call the police, Stanton testified defendant "stood there for a minute" and then "walked out." Stanton followed behind while on the phone with the police. Defendant left in a vehicle.

¶ 14 Stanton testified she felt "a shar[p] sting" at the moment of contact with defendant's hand. She compared the feeling to that from a "bee sting." Stanton testified the area of contact was later sore, appeared red, and had swelling.

¶ 15 On cross-examination, defendant questioned Stanton if she gave him his change, to which Stanton testified, "Yes, after you tried to reach in the drawer and I slammed your hand out of the way and slammed the drawer shut, and I said, that's all the change you are getting."

¶ 16 4. *Closing Argument*

¶ 17 In closing argument, the State asserted when Stanton "saw [d]efendant lunge toward the twenties, she stuck her hand in his way and she suffered pain and swelling as a result of her troubles." The State argued the only thing that prevented defendant from finishing the crime was Stanton's hand, "which got in the way and allowed her to shut the drawer."

¶ 18 5. *Jury Verdict*

¶ 19 After 16 minutes of deliberation, the jury returned a jury verdict finding defendant guilty of "robbery." The trial court entered judgment consistent with the verdict.

¶ 20 C. Modified Judgment

¶ 21 On October 18, 2016, defendant filed multiple *pro se* posttrial motions, alleging, in part, the jury's verdict did not match the charged offense.

¶ 22 On October 19, 2016, the State filed a response to defendant's posttrial motions, alleging, in part, the incorrect verdict form was a scrivener's error.

¶ 23 On October 24, 2016, the trial court denied defendant's posttrial motions and entered a modified judgment of conviction for attempt (robbery). In reaching that decision, the court noted, in part, it considered (1) Stanton's testimony describing how defendant "attempted to reach over the counter and grab cash out of the register, and once the cash drawer was open, *** that [defendant] reached so violently toward the cash drawer that his hand collided with hers, causing her pain and swelling" and (2) the video evidence showing "[d]efendant reaching quickly over the counter towards the opened cash drawer while the store clerk was conducting the transaction."

¶ 24 D. Sentencing Hearing

¶ 25 In November 2016, the trial court held a sentencing hearing. The State requested the maximum 10-year prison sentence, while defendant requested probation. The court sentenced defendant to nine years' imprisonment with credit for time served in presentence custody. The court ordered defendant to pay "costs." The court noted no cash bond existed and therefore it would reserve the issue as to payment of costs until the State was notified of defendant's pending release on mandatory supervised release.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant argues this court should modify his conviction to attempt (theft) because the State failed to prove he was in a dangerous proximity to using or threatening the force required for attempt (robbery) and then remand the case for resentencing, with direction to the trial court to apply presentence detention credit to any fines assessed.

¶ 29 "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2014). "Precisely what is a substantial step must be determined by evaluating the facts and circumstances of each particular case." *People v. Smith*, 148 Ill. 2d 454, 459, 593 N.E.2d 533, 535 (1992). "A substantial step occurs when the acts taken in furtherance of the offense place the defendant in a dangerous proximity to success." *People v. Oduwole*, 2013 IL App (5th) 120039, ¶ 44, 985 N.E.2d 316.

¶ 30 "A person commits robbery when he or she knowingly takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2014). "A person commits theft when he or she knowingly *** [o]btains or exerts unauthorized control over property of the owner[.]" 720 ILCS 5/16-1(a)(1) (West 2014). The use of force or the threat of the imminent use of force is an essential element in the crimes of robbery and attempted robbery, and it is that element which differentiates those crimes from the crimes of theft and attempted theft. *People v. Gilliam*, 172 Ill. 2d 484, 507, 670 N.E.2d 606, 617 (1996); *People v. Williams*, 42 Ill. App. 3d 134, 138, 355 N.E.2d 597, 600 (1976) (abrogated on other grounds by *People v. Pierce*, 226 Ill. 2d 470, 877 N.E.2d 408 (2007)). It is this element defendant asserts the State failed to prove.

¶ 31 It is undisputed no evidence exists suggesting defendant threatened the imminent use of force either before or after his attempt to obtain money from the opened cash register. The only question, therefore, is whether defendant used actual force in his attempt. Defendant asserts the State failed to produce any evidence showing he used force. The State disagrees, maintaining it presented evidence showing defendant "used at least some force in attempting to accomplish the taking [of money] by overcoming the cashier's resistance." In support of their respective positions, both defendant and the State rely solely on Stanton's testimony.

¶ 32 The State asserts Stanton's testimony showed "that as defendant attempted to grab the money in the cash register, his hand came in contact with the hand of the cashier with enough force that the cashier's hand became sore and injured." The State's characterization of the facts is misleading. Stanton testified defendant committed a "quick grab" towards the opened cash register. When defendant's hand was directly over the twenty dollar bills, Stanton testified, "I took my hand and slapped it and slammed the drawer shut." Stanton clarified any ambiguity in her testimony on cross-examination when, in response to defendant's *pro se* question as to whether she gave him his change, she testified, "Yes, after you tried to reach in the drawer and I slammed your hand out of the way and slammed the drawer shut." In summary, the undisputed evidence shows defendant committed a quick grab towards the opened cash register, which prompted Stanton to slap his hand away and then close the cash register drawer.

¶ 33 Defendant's conduct—his quick grab towards the opened cash register—does not qualify as force to constitute an attempt of robbery. See *People v. Taylor*, 129 Ill. 2d 80, 84, 541 N.E.2d 677, 679 (1989) ("When an item, which is not attached to the person or clothing of another such that resistance to its taking is created, is taken by one who, without threatening the

imminent use of force, uses no more force than the mere physical effort of transferring the item from the owner to himself, then such force is not sufficient, by itself, to constitute robbery; such a taking is a theft."). Stanton's actions were reasonable, but they cannot be translated into a use of force by defendant. We hold the evidence is insufficient as a matter of law to sustain defendant's conviction for attempt (robbery).

¶ 34 Defendant concedes both the information and the evidence are sufficient to sustain a modified conviction of attempt (theft) (720 ILCS 5/8-4, 16-1(a)(1) (West 2014)). We therefore modify defendant's conviction to attempt (theft) and remand for resentencing. On remand, defendant can raise his claim suggesting he is entitled presentence detention credit to any eligible fines imposed against him. See 725 ILCS 5/110-14(a) (West 2014).

¶ 35 III. CONCLUSION

¶ 36 We modify defendant's conviction from attempt (robbery) to attempt (theft) and remand for resentencing on that offense.

¶ 37 Affirmed as modified; cause remanded.