

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. WD 76520
)	
GARY L. COLEMAN,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
13th JUDICIAL CIRCUIT
THE HONORABLE KEVIN M.J. CRANE, JUDGE

APPELLANT'S BRIEF

Amy M. Bartholow, MOBar #47077
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 882-9855
FAX (573) 884-4793
Amy.Bartholow@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Appellant, Gary Coleman, was convicted of the class B felony of second degree robbery, Section 569.030, RSMo 2000, following a jury trial in Callaway County. The Honorable Kevin M.J. Crane sentenced Mr. Coleman to ten years in the Missouri Department of Corrections. As this appeal involves no issues reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction properly lies in this Court. Article V, § 3, Mo. Const. (as amended 1982); § 477.070.

STATEMENT OF FACTS

Mr. Coleman was charged by information with second degree robbery (LF 13).¹ Mr. Coleman challenges the evidence to support his conviction. In the light most favorable to the verdict, the evidence was as follows:

Mr. Coleman walked into the New Bloomfield branch of Bank Star One on October 6, 2012 (TR 24-25; Ex. 10). He leaned on the counter and said to bank teller Marla Rothove, "I need you to do me a favor. Put the money in this bag." (TR 28). His voice was calm and polite, and he handed her a plastic sack (TR 28, 35-37). Rothove opened her drawer, put the loose bills in the sack, handed it back to Mr. Coleman, and he left the store (TR 29). The entire encounter lasted 45 seconds (TR 30).

Rothove testified that she gave him the money because she was afraid (TR 29-30). She assumed that something could happen if she did not do what she was told; however, he did not say anything to that effect (TR 37, 40). She did not see a weapon, and he did not threaten to harm her in any way (TR 37). He did not physically put his hands on her or injure

¹ The record on appeal consists of a transcript (TR), a legal file (LF), and exhibits (Ex.).

her; passing the bag to her was the entirety of the physical contact between them (TR 38).

The one other employee in the bank, Sharon Holland, had been sitting in her office when she saw Mr. Coleman come into the bank (TR 45). She assumed he was there to do business (TR 45). When Holland saw Mr. Coleman lean on the counter, she wondered what he was doing (TR 45). She came out of her office and around the counter behind Rothove where she observed Rothove putting money in a bag; then she knew what was happening (TR 45). Mr. Coleman said to Holland in a calm, polite voice "Ma'am, I need you to stop where you are and do not go any farther." (TR 47). He was not loud, but Holland was scared (TR 48). Mr. Coleman then left the bank (TR 48). Holland then locked the doors and called the police (TR 49).

Mr. Coleman waived his right to a jury trial (TR 1-6). At a bench trial before the Honorable Kevin M.J. Crane, Mr. Coleman was found guilty of second degree robbery (TR 92). The trial court sentenced Mr. Coleman, as a persistent offender, to ten years of imprisonment in the Missouri Department of Corrections (TR 99; LF 26-27). A timely notice of appeal was filed (LF 28-29), and this appeal follows.

POINT RELIED ON

The trial court erred in overruling Mr. Coleman’s motion for judgment of acquittal at the close of all the evidence, finding him guilty, and thereafter sentencing him for second degree robbery because doing so violated Mr. Coleman’s right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was insufficient evidence from which it could be found, beyond a reasonable doubt, that Mr. Coleman threatened the immediate use of physical force, to sustain his conviction for second-degree robbery.

State v. Tivis, 884 S.W.2d 28 (Mo. App., W.D. 1994);

State v. Carter, 967 S.W.2d 308 (Mo. App. E.D. 1998);

State v. Henderson, 310 S.W.3d 307 (Mo. App. S.D. 2010);

U.S. Const., Amendment XIV;

Mo. Const., Art. I, Section 10;

Section 569.030; and

Rule 29.11.

ARGUMENT

The trial court erred in overruling Mr. Coleman’s motion for judgment of acquittal at the close of all the evidence, finding him guilty, and thereafter sentencing him for second degree robbery because doing so violated Mr. Coleman’s right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was insufficient evidence from which it could be found, beyond a reasonable doubt, that Mr. Coleman threatened the immediate use of physical force, to sustain his conviction for second-degree robbery.

Facts and Preservation

Mr. Coleman walked into the New Bloomfield branch of Bank Star One on October 6, 2012 (TR 24-25; Ex. 10). He leaned on the counter and said to the teller, Marla Rothove, “I need you to do me a favor. Put the money in this bag.” (TR 28). His voice was calm and polite, and he handed her a plastic sack (TR 28, 35-37). Rothove opened her drawer, put the loose bills in the sack, handed it back to Mr. Coleman, and he left the store (TR 29). The entire encounter lasted 45 seconds (TR 30).

Rothove testified that she gave him the money because she was afraid (TR 29-30). She assumed that something could happen if she did not do what she was told; however, he did not say anything to that effect (TR 37, 40). She did not see a weapon, and he did not threaten to harm her in any way (TR 37). He did not physically put his hands on her or injure her; passing the bag to her was the entirety of the physical contact between them (TR 38).

The other employee, Sharon Holland, had been sitting in her office when she saw Mr. Coleman come into the bank (TR 45). She assumed he was there to do business (TR 45). When Holland saw Mr. Coleman leaning on the counter, she wondered what he was doing (TR 45). She came out of her office and around the teller counter behind Rothove where she observed Rothove putting money in a bag; then she knew what was happening (TR 45). Mr. Coleman said to Holland in a calm, polite voice "Ma'am, I need you to stop where you are and do not go any farther." (TR 47). He was not loud, but Holland was scared (TR 48). Mr. Coleman then left the bank (TR 48). Holland then locked the doors and called the police (TR 49).

At Mr. Coleman's bench trial, defense counsel moved for a judgment of acquittal at the close of the State's case and at the close of all

the evidence (TR 74-75; LF 22-25). As this was a bench trial, no motion for new trial was necessary to preserve any issues for appellate review, and in any event, the sufficiency of the evidence to sustain a conviction need not be included in a motion for new trial to preserve that issue for review. Rule 29.11(e).

Claim of Error and Standard of Review

The trial court erred in overruling the motion for judgment of acquittal at the close of all the evidence, finding Mr. Coleman guilty and sentencing him upon that verdict, because the evidence was insufficient to support a conviction of second-degree robbery. The State did not prove that Mr. Coleman forcibly stole the money.

Before the State can deprive Mr. Coleman of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); also see, *State v. O'Brien*, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses “upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

In reviewing the sufficiency of the evidence, this Court limits its determination to whether a reasonable factfinder could have found guilt

beyond a reasonable doubt. *State v. Belton*, 153 S.W.3d 307, 309 (Mo. banc 2005). In so doing, the evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict. *Id.* As such, this Court will not weigh the evidence anew since “the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case.” *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002).

But this Court must also ensure that the factfinder did *not* decide the facts “based on sheer speculation.” *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993). While inferences are to be taken in the light most favorable to the verdict, *id.*, neither the jury nor this Court may “supply missing evidence, or give the [state] the benefit of unreasonable, speculative or forced inferences.” *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004).

Analysis

To make a submissible case for second-degree robbery, the State must prove that the defendant forcibly stole property. *State v. Ide*, 933

S.W.2d 849, 851 (Mo. App. W.D. 1996); *Section 569.030*. As applied in this case, “forcibly steals” is defined by statute as when, in the course of stealing, a person uses or threatens the use of immediate physical force upon another for the purpose of preventing resistance to the taking of the property. *Section 569.010*. “Robbery in the second degree merely proscribes all other forcible thefts which do not amount to first degree robbery.” *Id.*, *id.* (*citation omitted*).

“[F]ear is not an element of proof of robbery.” *State v. Brooks*, 51 S.W.3d 909, 916 (Mo. App. W.D. 2001). This Court has rejected the argument that a victim’s fearfulness is sufficient to show that the defendant threatened the use of force. In *State v. Tivis*, the defendant approached Carolyn Tagel twice while she was double-parked unloading groceries. 884 S.W.2d 28 (Mo. App. W.D. 1994). Ms. Tagel was apprehensive and scared when Tivis followed her to her apartment. *Id.* at 29. As she sat down the grocery bag, Tivis yanked Ms. Tagel’s purse off of her shoulder and ran. *Id.* This Court, noting that Tivis did not threaten Ms. Tagel and that there was no struggle, concluded that there was no forcible stealing and reversed the conviction.

The Eastern District reversed the second-degree robbery conviction of Lamont Carter because the evidence showed that when Carter

demanded “give me your purse,” Emma Moore complied, telling him to take it from her pocket. *State v. Carter*, 967 S.W.2d 308 (Mo. App. E.D. 1998). The Court found that Carter’s demand, without more, was not sufficient to show a threat of immediate physical force upon Ms. Moore.

This case is no different. Here, it is undisputed that Mr. Coleman, while asking for the money, used a calm and polite tone, never showed a weapon, never threatened nor implied that he had a weapon, nor did he threaten any harm to either bank employee. While Rothove and Holland were both afraid, absent any immediate express or implied threat of physical force on the part of Mr. Coleman, their fear is insufficient to sustain his conviction.

There was no contact with Rothove at all, except to hand her the bag and receive it back. Incidental physical contact is not enough to meet the force element. In *State v. Henderson*, 310 S.W.3d 307 (Mo. App. S.D. 2010), the defendant “brushed” a clerk’s arm while snatching money from a cash register. In reversing his robbery conviction, the Court of Appeals held that “[t]his was de minimus contact incidental to the money snatch, not a threat or use of force to overcome resistance. The trial court did not base the [robbery] conviction on it, nor could we.” *Id.* at 309.

Since the defendant said nothing to threaten the immediate use of physical force, and did nothing to actually employ physical force, the State has failed to prove that element. Regardless of Rothove and Holland's subjective responses to Mr. Coleman's actions in the bank, he did not use or threaten the use of immediate physical force while obtaining the money. Because the evidence was insufficient to support Mr. Coleman's conviction, in violation of his constitutional rights, this court should reverse the judgment and sentence, and order him discharged.

CONCLUSION

Because the evidence was insufficient to convict Mr. Coleman of second degree robbery, this Court should reverse his conviction and order his discharged.

Respectfully submitted,

/s/ Amy M. Bartholow

Amy M. Bartholow, MOBar #47077
Attorney for Appellant
Office of State Public Defender
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, MO 65203
(573) 882-9855

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Amy M. Bartholow, hereby certify to the following: The attached brief complies with the limitations contained in Rule 84.06(b) and Local Rule XLI. The brief was completed using Microsoft Word 2010, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, table of contents, table of authorities, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,117 words, which does not exceed the 15,500 words allowed for an appellant's brief.

On this 13th day of January, 2014, electronic copies of Appellant's Brief, and Appellant's Brief Appendix, were sent through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Amy M. Bartholow

Amy M. Bartholow

