



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

STATE OF MISSOURI,)	No. ED91994
)	
Respondent,)	Appeal from the Circuit Court
)	of the City of St. Louis
v.)	
)	
ROBERT EARL WILLIAMS,)	Honorable Lisa Van Amburg
)	
Appellant.)	Filed: September 22, 2009

Introduction

Robert Williams (Defendant) appeals from the trial court's judgment, following a jury trial, convicting him of one count of robbery in the second degree, in violation of Section 569.030, RSMo 2000.¹ The trial court sentenced Defendant as a persistent offender to fifteen years of imprisonment in the Missouri Department of Corrections. Finding no instructional error as claimed, we affirm.

Background

On January 5, 2007, the State of Missouri (State) filed an Indictment against Defendant, charging him with the class B felony of robbery in the second degree, for his alleged conduct on

¹ All subsequent statutory citations are to RSMo 2000, unless otherwise indicated.

October 17, 2006, acting with another, by forcibly stealing money from Timothy Wagner (Victim).

A trial was held from July 16 through 17, 2008. At trial the State submitted a verdict directing jury instruction for the offense of robbery in the second-degree. Defendant submitted an instruction on the lesser included offense of stealing from a person. The following evidence relevant to the issue on appeal was adduced at trial, viewed in the light most favorable to the submission of Defendant's proffered instruction:

Victim testified that on October 17, 2006, he, his girlfriend, and newborn son were at their home on South Spring Avenue, which was a few doors away from a bar. Around 10 p.m., they were watching the Cardinals play in a World Series baseball game. During a break in the game, Victim went outside to drink a beer and smoke a cigarette on his front porch. At that time, Victim noticed a car pull up between his house and the bar. Instead of getting out and walking toward the bar, a young black male got out of the passenger side of the car, walked toward Victim and asked him for a cigarette. As Victim reached into his pocket for his cigarettes and stepped down from the porch to the sidewalk, the man shoved Victim to the ground from the left. Victim immediately saw a second person above and in front of him, whom he assumed was the driver of the car. One of the men pressed his elbow, knee, or heel into the middle of Victim's back to hold Victim against the ground as the other man searched Victim's pockets. The men took money from Victim's pockets -- about two or three nights' worth of pizza delivery tips, or about \$200 or \$300. After the men took Victim's money, they gave him another quick shove and ran to their car. The two men got in the car and quickly drove away. Victim got up and took a couple of steps toward the car before he decided that just looking at the license plate number and car would be safer than chasing them. Victim saw all but one character of the license plate.

Victim called 911, which telephone call was played to the jury. A police officer went to Victim's house that evening and wrote a report.

Detective Michael Venker (Detective Venker) of the St. Louis Police Department testified that he had been assigned to Victim's robbery case and contacted Victim to see if he had been unsure about any of the license plate characters. When Victim responded that the last character of the license plate number could be wrong, Detective Venker searched the police system for the owner of the new license plate number. Detective Venker's search led him to Rachel Bagby (Girlfriend) on a 2002 Mazda Protégé. The police contacted Girlfriend and learned that only she and her then-boyfriend, Defendant, drove the car.

Detective Venker testified that he checked Defendant's background and then compiled a photo spread, which included Defendant's picture, to show to Victim. A few days after the robbery, the police asked Victim to look at some photographs to see if he recognized anyone. Victim flipped through the photographs quickly, but instantly recognized the Defendant's photograph as the person who had held Victim to the ground during the robbery.

About a week after Victim looked at the photographs with the police, he went to the 7-Eleven near his house. Just after Victim pulled his car into the parking lot, another car pulled in next to him. Victim looked over at the other car and the man shifted his car in reverse and drove away. Victim testified that when he saw the car's license plate, he knew instantly that it was the same license plate number from the robbery. Victim called the police and told them that he had seen the car again. Later, the police called Victim into the station to view a lineup, where Victim identified Defendant. Victim also thought another man in the lineup, Anthony Cates, looked similar to the man who had asked him for a cigarette, but Victim said he was not 100 percent positive. Victim also identified Defendant in the courtroom.

Girlfriend, who had been dating Defendant at the time of the October 17, 2006 robbery, testified that she owned a 2002 Mazda Protégé and had allowed Defendant to drive it during that time period. After Defendant was arrested in her car, Girlfriend went to the police station and identified the car as belonging to her.

Defendant testified on his own behalf at trial. He testified that on October 17, 2006, around 10 p.m., he and a friend went to the 7-Eleven near Victim's home. Victim approached Defendant's friend, used his cell phone, and told him that he had what he was looking for. Victim gave Defendant's friend Victim's address and told them to meet him there in ten minutes. Defendant testified that ten minutes later he and his friend went to Victim's apartment. Defendant testified that his friend went into Victim's home, but Defendant never got out of the car. Defendant said he did not know his friend's real name, but his nickname was Sweets. Defendant said his friend was going to buy some marijuana from Victim. His friend was in Victim's home for about five or ten minutes. Defendant saw Victim open up something, a neon light turn on, and saw a scale involved. Defendant also testified he saw hand motions go down on the table. Then Defendant's friend "came out running and jumped in the car and told [Defendant] to leave." Defendant testified that he started the car and left. When Defendant was dropping his friend off, his friend told Defendant that he took the marijuana. Defendant testified that he did not see his friend forcibly take anything from Victim because they were inside the apartment while Defendant was out in the car. Defendant "didn't know he robbed [Victim] until [Defendant] dropped him off."

After the Defendant rested his case, the trial court held a jury instruction conference outside of the presence of the jury. Defendant submitted to the trial court Instruction A

regarding felony stealing, a lesser-included offense to second-degree robbery. The proffered instruction stated:

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

If you do not find the defendant guilty of robbery in the second degree as submitted in Instruction No. 5,² you must consider whether he is guilty of stealing under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about October 17, 2006, in the State of Missouri, the defendant or another took money, which was property owned by [Victim], and

Second, that defendant or another did so for the purpose of withholding it from the owner permanently, and

Third, that the property was physically taken from the person of [Victim], then you are instructed that the offense of stealing has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the commission of that stealing, the defendant acted together with or aided another person in committing the offense,

then you will find the defendant guilty of stealing under this instruction.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

² Instruction No. 5 stated:

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about October 17, 2006, in the State of Missouri, the defendant or another took money, which was property owned by [Victim], and

Second, that defendant or another did so for the purpose of withholding it from the owner permanently, and

Third, that defendant or another in doing so used physical force or threatened the immediate use of physical force on or against [Victim] for the purpose of overcoming resistance to the taking of the property,

then you are instructed that the offense of robbery in the second degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the commission of that robbery in the second degree, the defendant acted together with or aided another person in committing the offense,

then you will find the defendant guilty of robbery in the second degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Instruction A was denied by the trial court and was not submitted to the jury. The trial court stated, "I don't think [Defendant's] alternative version even supports his being convicted of a stealing from a person. I think there was a -- what evidence would there be that he acted with or knowingly participated in that?" Defense counsel responded that Defendant drove away when he saw the friend run out of the house, but the trial court found the evidence was "after the fact."

During deliberation, the jury requested to the trial court, "will you please send us a printed statement of the definition of robbery in the [second] degree." The trial court responded to the jury's request, "You must be guided by the evidence as you recall it and the instructions I have given you."

On July 17, 2008, the jury found Defendant guilty of robbery in the second degree as submitted in Instruction No. 5.

Defendant filed a Motion for New Trial on July 18, 2008, alleging that the trial court erred in denying his proffered lesser-included offense instruction of stealing in that "[D]efendant's testimony provided support for a finding that a theft occurred but no force was used to accomplish that theft." Defendant claimed his rights to due process and a fair trial had been violated. The trial court denied Defendant's Motion for New Trial on September 25, 2008.

The trial court imposed on Defendant a sentence of fifteen years of incarceration in the Missouri Department of Corrections on September 25, 2008.

Defendant filed his timely Notice of Appeal to this Court on October 1, 2008.

Point on Appeal

In his sole point on appeal, Defendant alleges that the trial court erred in failing to submit his requested Instruction A on the lesser-included offense of felony stealing from a person. Defendant argues his testimony provided a basis for a jury finding that a theft or taking had

occurred, but that no force was used to accomplish the taking as required for conviction of the greater offense of robbery in the second degree. Defendant further contends that the trial court's error prejudiced him because, but for the trial court's error, reasonable jurors would have acquitted him of robbery in the second degree, and convicted him of felony stealing from a person. Defendant alleges that the error deprived him of his rights to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Defendant requests that this Court reverse his conviction and remand for a new trial.

Standard of Review

According to the Missouri Supreme Court Rules, "[a]ll instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence of the case." Rule 70.02(a).³ Additionally, "[t]he giving of an instruction in violation of the provisions of this Rule 70.02 shall constitute error." Rule 70.02(c). In accordance with the rule, an appellate court reviews a trial court's refusal to give a proffered verdict director *de novo*, evaluating whether the instruction was supported by the evidence and the law. Ploch v. Hamai, 213 S.W.3d 135, 139 (Mo. App. E.D. 2006). We will reverse only if the error resulted in prejudice and materially affected the merits of the action. Id. We review the evidence in the light most favorable to submission of the instruction. Id. "The refusal to give a verdict director supported by the law and the evidence is not a matter for the trial court's discretion." Marion v. Marcus, 199 S.W.3d 887, 892 (Mo. App. W.D. 2006).

³ All rule references are to the Missouri Supreme Court Rules (2008).

Discussion

An instruction must be given where there is substantial evidence to support the issue submitted. Romeo v. Jones, 144 S.W.3d 324, 330 (Mo. App. E.D. 2004). Substantial evidence is that which, if true, is probative of the issues and from which the jury can decide the case. Id. A party is entitled to an instruction on any theory supported by the evidence. Id. "Ordinarily, a decision as to whether to instruct upon a lesser included offense must be made on a case by case basis." State v. Givens, 917 S.W.2d 215, 217 (Mo. App. W.D. 1996). Section 556.046.2 provides:

The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

A defendant may be convicted only of an offense included in an offense charged in the indictment or information. Section 556.046. An offense is included in the charged offense when it is established by proof of the same or less than all of the facts required to establish the commission of the charged offense. Section 556.046.1(1). Applying these fundamental principles of law to the facts of this case demonstrates the propriety of the trial court's denial of the proffered instruction.

A defendant commits the crime of second-degree robbery "when he forcibly steals property." Section 569.030.1. One "forcibly steals" when,

in the course of stealing, . . . he uses or threatens the immediate use of physical force upon another person for the purpose of:

- (a) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
- (b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

Section 569.010.1. Absent the element of force involved, the crime of second-degree robbery is simply the crime of stealing. According to Section 570.030, a person commits the crime of

stealing "if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." Section 570.030.1. Thus, it is clear that stealing is a lesser-included offense of second-degree robbery. State v. Williams, 784 S.W.2d 276, 281 (Mo. App. E.D. 1989). Not so clear, however, is how the testimony and evidence before the jury supports a conviction of the lesser charge of stealing. Lacking this critical fact, Defendant was not entitled to the lesser-included instruction.

Section 556.046.2 limits the requirement of a lesser-included offense instruction to those cases in which there is some affirmative evidence with probative value that could form the basis of an acquittal of the greater offense *and* a conviction of the lesser offense. Givens, 917 S.W.2d at 218. The latter portion of this sentence is determinative of our holding. If in fact or by inference the evidence provides such a basis for *both* an acquittal of the greater offense and conviction of the lesser, then the trial court must instruct the jury on the lesser-included offense. Id.

Where proof of the defendant's guilt of the offense charged is strong and substantial, where the evidence clearly indicates the commission of the more serious crime, and where there is no evidence to support an adverse finding on an element of the charged crime, it is not necessary to instruct on a lesser-included offense. State v. Jackson, 743 S.W.2d 493, 496 (Mo. App. E.D. 1987). Additionally, where the evidence shows that the defendant is either guilty of the offense charged or guilty of no offense at all, there is no evidence to support the submission of a lesser-included offense. State v. Harris, 598 S.W.2d 200, 203 (Mo. App. S.D. 1980).

The question before us, then, is whether there was affirmative probative evidence before the jury that, in fact or by inference, provided a basis for both an acquittal of second-degree robbery and a conviction of felony stealing from a person. We find that there was not. In his

testimony, Defendant specifically denied having any knowledge of a crime until *after* it had been committed. Given this testimony, there existed no evidence before the jury that could support Defendant's conviction of the lesser-included offense of stealing. According to Defendant's version of the events, Defendant's friend stole marijuana⁴ from Victim in a drug deal without Defendant's knowledge. Only later, after the theft had occurred, did Defendant's friend tell Defendant that he stole the marijuana. Such evidence, if believed by the jury, proved that Defendant committed no crime at all. Defendant's mere presence in the car, without knowledge of his friend's intent or actions to steal from Victim, does not support a conviction for stealing. Defendant's proffered Instruction A required that Defendant have "purpose of committing that offense," which was not met here without Defendant's knowledge of his friend's intent or actions to steal from Victim.

We find instructive the Missouri Supreme Court's decision in State v. Neil, 869 S.W.2d 734 (Mo. banc 1994). In Neil, the Supreme Court found that a lesser-included instruction would serve no purpose where the defendant's defense was an alibi. The Neil court stated:

Here, defendant's testimony did not provide the basis for the lesser included offense. His defense was alibi. When defendant denies the commission of the charged offense and there is no evidence to mitigate the offense or provide a different version of the offense, instructing down is not required.

Id. at 739. Similarly here, Defendant's evidence, if believed, would have resulted in Defendant's acquittal of second-degree robbery; however, it also would have led the jury to conclude that Defendant was guilty of no offense at all.

Without some affirmative evidence having probative value that would allow the acquittal of the greater offense of second-degree robbery and a conviction of felony stealing from a person

⁴ Defendant's proffered instruction, however, stated, "First, that on or about October 17, 2006, in the State of Missouri, the defendant or another took *money*, which was property owned by [Victim]," (emphasis added) rather than marijuana.

as the lesser offense, we cannot find error in the trial court's refusal of Defendant's verdict director for felony stealing. Defendant's point on appeal is denied.

Conclusion

The judgment of the trial court is affirmed.

Kurt S. Odenwald, Presiding Judge

Kenneth M. Romines, C.J., Concur
George W. Draper III, J., Concur