Rel: February 16, 2024

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0170

Ex parte Antony Lavaughn Bishop

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Anthony Lavaughn Bishop

v.

State of Alabama)

(Jefferson Circuit Court: CC-19-4203; Court of Criminal Appeals: CR-20-0976)

PARKER, Chief Justice.

The writ of certiorari is quashed.

In quashing the writ of certiorari, this Court does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Criminal Appeals' opinion. Horsley v. Horsley, 291 Ala. 782, 280 So. 2d 155 (1973).

WRIT QUASHED.

Wise, Sellers, and Stewart, JJ., concur.

Parker, C.J., concurs specially, with opinion, which Cook, J., joins.

PARKER, Chief Justice (concurring specially).

I concur with quashing the writ of certiorari. I write specially to address an argument raised in Antony Lavaughn Bishop's[1] principal brief that his conduct fell within the definition of fourth-degree theft because, according to him, he did not take property "from the person of another." § 13A-8-5(a), Ala. Code 1975. After reviewing the record, I do not believe that there is any way to view Bishop's theft of the money as not from the victim's person. Accordingly, I see no error in the Jefferson Circuit Court's refusal to give Bishop's requested instruction for fourth-degree theft as a lesser-included offense of third-degree robbery.

I. Facts

On March 12, 2019, Betty Wallace was working as a shift supervisor at a CVS Pharmacy store in Birmingham. Bishop entered the store and, although he first told Wallace that he wanted to load money onto a card, demanded that Wallace give him money. Wallace thought Bishop was joking, but then Bishop said: "B****, give me your f****** money." Bishop then moved his hand around behind his back. Wallace

[1]In the Court of Criminal Appeals' opinion, this defendant's name was spelled "Anthony Lavaughn Bishop."

later testified that Bishop insinuated that he had a weapon. Wallace opened the cash drawer and threw $79 on the counter. Bishop took the money. He was arrested shortly after he left the store with the money. A grand jury later indicted Bishop for third-degree robbery, a violation of § 13A-8-43, Ala. Code 1975.

During Bishop's trial, the jury heard testimony from Wallace regarding the incident. The State also played for the jury a video recording from CVS's security camera. The video, which has no audio, shows the following: Bishop stands in front of the counter across from Wallace and fumbles with his wallet. He then lowers his wallet, which is in his right hand, and he lowers his left hand to his side. At that moment, Wallace steps back from the register. She then reaches forward to open the cash drawer. As she opens the cash drawer, Bishop moves his right hand, still holding the wallet, behind his back momentarily. Four times, Wallace grabs a handful of cash from the register and places it on the counter. Bishop collects the money as Wallace places it on the counter. He then exits the CVS store, and Wallace picks up the phone to call the police.

During the charge conference, Bishop requested an instruction on

fourth-degree theft as a lesser-included offense of third-degree robbery, but the circuit judge declined. During the jury deliberations, the jury submitted the following question to the judge: "If there is no decision that can be reached on this charge, can a lesser charge be agreed to?" The judge instructed the jury that it could not consider a lesser charge. Thereafter, the jury returned a verdict finding Bishop guilty of third-degree robbery. Bishop later submitted a motion for a new trial, arguing that the circuit court had erroneously refused to instruct the jury on fourth-degree theft. The circuit court denied that motion. The circuit court sentenced Bishop, as a habitual felony offender, to 20 years' imprisonment, split to serve 5 years in prison followed by 3 years of probation. Bishop appealed to the Court of Criminal Appeals, which affirmed his conviction and sentence. Bishop v. State, [Ms. CR-20-0976, Sept. 2, 2022] ___ So. 3d ___ (Ala. Crim. App. 2022).

II. Analysis

As with all questions regarding jury instructions, appellate courts review under the exceeding-discretion standard a trial court's refusal to give a requested jury instruction on a lesser-included offense. Arthur v. Bolen, 41 So. 3d 745 (Ala. 2010).

Bishop's primary contention is that the circuit court erred in refusing to instruct the jury on fourth-degree theft as a lesser-included offense. Bishop does not challenge the sufficiency of the evidence to support his third-degree-robbery conviction. Thus, he appears to concede that there was evidence from which the jury could have concluded that he "threaten[ed] the imminent use of force" against Wallace while committing the theft of the $79. The only issue is whether Bishop was entitled to an additional instruction on fourth-degree theft as a lesser-included offense of third-degree robbery.

This Court stated the following test for determining when a criminal defendant is entitled to an instruction on a lesser-included offense:

> "An individual accused of the greater offense has a right to have the court charge on the lesser offenses included in the indictment, when there is a reasonable theory from the evidence supporting his position. A court may properly refuse to charge on lesser included offenses ... when it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense .... [E]very accused is entitled to have charges given ... which are supported by any evidence, however[] weak, insufficient, or doubtful in credibility."

Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978) (citations omitted).

The offense of which Bishop was convicted, third-degree robbery, is

committed if a person, while committing a theft, "[t]hreatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property." § 13A-8-43(a)(2). In contrast, fourth-degree theft is "[t]he theft of property which does not exceed five hundred dollars ($500) in value and which is not taken from the person of another." § 13A-8-5(a) (emphasis added).

In his principal brief, Bishop contends that the circuit court was required to grant his request for an instruction on the lesser-included offense of fourth-degree theft because a jury could reasonably have concluded that he did not threaten to use force against Wallace. Bishop's argument assumes that the only difference between third-degree robbery and fourth-degree theft is that third-degree robbery requires evidence of force or a threat of force, whereas fourth-degree theft does not. Under the common law, before robbery and theft were divided into degrees, Bishop's assumption would have been generally correct. As some commentators have noted, "robbery is larceny plus certain circumstances of aggravation." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 344 (3d ed. 1982).

But the Alabama Criminal Code, with its varying degrees of both robbery and theft, is somewhat more complicated. As it turns out, threat of force is not the only difference between third-degree robbery and fourth-degree theft: the latter includes an additional requirement that the property be "not taken from the person of another." Fourth-degree theft is inapplicable if the property is taken from the person of another. Reynolds v. State, 334 So. 3d 262, 275 (Ala. Crim. App. 2020). Bishop addresses this element in only one paragraph of his principal brief:

> "Further, there is no contention that any money was taken off of a person in this case. [Wallace] testified [that] $79 was taken off of the counter. The surveillance video evidence presented at trial demonstrates this point. Therefore, there was sufficient evidence and sufficiently lacking evidence to support a charge of theft of property in the fourth degree."

Bishop's brief at 13 (citations to the record omitted).

Bishop's argument leaves the impression that the money was just lying there on the counter and that he merely took it without interacting with Wallace. But no reasonable fact-finder could conclude either from Wallace's testimony or from the surveillance video that Bishop merely took the money from the counter. Wallace testified that she placed the money on the counter in response to Bishop's demand for it. And it is abundantly clear from both Wallace's testimony and from the

surveillance video that the money passed through Wallace's hands immediately before Bishop grabbed it.

This Court has not directly addressed whether taking property from the immediate presence of another who is not touching the property is a taking "from the person of another." But the Commentary to § 13A-8-2 through § 13A-8-5 explains that "[t]he Criminal Code also continues to apply a more serious sanction to thefts from the person. This position seems justified because it involves either an element of danger or is committed by professional pickpockets or pursesnatchers. Either situation warrants a relatively serious punishment." Based on that commentary, it would appear that theft is from the person whenever there is an element of danger to the victim. In such a case, the offense would be first-degree theft, which is not a lesser-included offense of third-degree robbery because it is a Class B felony, which makes it more serious than third-degree robbery. § 13A-8-3(a), Ala. Code 1975 ("The theft of … property of any value taken from the person of another[] constitutes theft of property in the first degree.").[2]

[2]This appears to create an oddity in the Criminal Code. Suppose two thieves each steal $100 from their victims' persons. One strikes his victim with his fist. The other uses no force at all. The one who uses

The Court of Criminal Appeals' decision in Willis v. State, 480 So. 2d 56 (Ala. Crim. App. 1985), is instructive. In that case, the defendant placed a stop-payment order on a check in exchange for a cashier's check, which he later cashed. He then cashed the original check at a Winn-Dixie store. The defendant was convicted of second-degree theft, which was then defined as "[t]he theft of property which exceeds $100.00 in value but does not exceed $1,000.00 in value, and which is not taken from the person of another." Former § 13A-8-4(a), Ala. Code 1975. On appeal, the defendant argued that, when he cashed the original check at Winn-Dixie, the money was taken from the person of another because the Winn-Dixie cashier handed him the money when he cashed the check. The Court of Criminal Appeals rejected that argument, holding:

> "Property is 'taken from the person of another' when the taking, 'involves either an element of danger or is committed by professional pickpockets or pursesnatchers.' Alabama Code 1975, § 13A-8-2 through 13A-8-5 Commentary. The element of danger justifies the imposition of a more serious punishment under [first-degree theft]. Id. Since [the defendant's] actions in cashing the check at Winn-Dixie clearly did not involve an element of danger, the taking was not 'from the person of another.'"

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nondeadly force is guilty of third-degree robbery, a Class C felony; but the one who uses no force at all is guilty of first-degree theft, a Class B felony.

Willis, 480 So. 2d at 58.

Here, Bishop's actions involved an element of danger not involved in Willis. Bishop did not simply conduct a transaction like cashing a check that was later discovered to be fraudulent. Instead, he demanded that Wallace give him money from the cash register using obscene language. In a face-to-face confrontation, such brazen demands can easily escalate into violence. The fact that Wallace avoided further confrontation by complying with Bishop's demands did not negate the element of danger to her person.

Moreover, the majority of states that have addressed the question have concluded that theft from another's person includes theft of property in the immediate presence of the victim. As one commentator has noted:

> "There are in some jurisdictions special larceny statutes which provide a greater punishment than for ordinary larceny where the larceny in question is 'from the person' (popularly called pickpocketing) …. While the traditional view of larceny 'from the person' is that the taking must be directly from the body of the person, the current majority view is that 'from the person' includes the area within a victim's immediate presence. The rationale is that, in any taking from the area 'the rights of the person to inviolability would be encroached upon and his personal security endangered, quite as much as if his watch or purse had been taken from his pocket.' This 'immediate presence' test 'can only be satisfied if the property was in immediate proximity to the victim at the time of the taking.'"

3 Wayne R. LaFave, Substantive Criminal Law § 19.3(b) (3d ed. 2017) (footnotes omitted; emphasis added). Other commentators have addressed the minority position as follows:

> "In one case [Terral v. State, 84 Nev. 412, 422 P.2d 465 (1968),] it was said that the statutory offense of larceny from the person was meant to apply to pickpocketing and hence requires an actual taking from the person, and is not committed by a taking from the immediate presence and actual control of the person. This, however, has not been the general interpretation, as mentioned above. And it could not well be, because the statute made use of a phrase long used in connection with robbery, and regularly understood to include property taken from one's presence and control. As said by Coke in the 1600's: 'for that which is taken in his presence, is in law taken from his person.'"

Perkins and Boyce, supra, at 342-43 (footnotes omitted; emphasis added).

Here, Bishop demanded that Wallace give him money from the cash register. As discussed above, that demand involved an element of danger to Wallace. Further, the demand required Wallace to personally handle the cash before placing it on the counter. And even when Wallace placed the money on the counter, it was still in her immediate presence and under her control. For these reasons, no reasonable fact-finder could conclude that Bishop's taking of the money was "not taken from the person of another." § 13A-8-5(a). Thus, "it is clear to the judicial mind

that there is no evidence tending to bring the offense within the definition" of fourth-degree theft. Chavers, 361 So. 2d at 1107. Accordingly, I do not believe the circuit court exceeded its discretion in denying Bishop's requested instruction on fourth-degree theft.

III. Conclusion

This case serves as a reminder that whether a crime is a lesser-included offense of another depends on the elements of both the greater offense and the lesser offense. Defendants seeking an instruction on a lesser-included offense and their counsel must pay careful attention to all the elements of the alleged lesser-included offense to determine whether the defendant's conduct could have fallen within the definition of that offense. In particular, when the alleged lesser-included offense is a theft crime that includes the requirement that the theft not be from another's person, that is an element that must be considered in determining whether the defendant's conduct fell within the definition of that offense. Theft is not simply robbery minus force or threat of force. The Criminal Code's gradation of theft crimes is more nuanced and requires careful parsing of the elements of each offense to determine if an offense is available as a lesser-included offense in a given case.

Cook, J., concurs.