No. 33919 *State of West Virginia v. Billie Dawn Hatley*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., concurring:

After a thorough review of the record in this appeal, and taking into consideration the arguments made by all parties, I concur with the ultimate result in this case.

I am writing separately to express my concern that the defendant may have been overcharged or, at a minimum, that the defendant was certainly entitled to a jury instruction on simple larceny.[1] This Court has long recognized the distinction between robbery and simple larceny. In *State v. Chambers*, 22 W.Va. 779 (1883) we had one of our first opportunities to address the issue of pocketbook grabbing and concluded at Syllabus Point 2 that

> In this State the distinction between simple larceny and *larceny from the person*, except where it is accompanied with such force and fear, as will raise the crime to robbery, does not exist, and all larceny not amounting to robbery, is simple larceny. (page reference omitted).(emphasis in original text).

Our decision in *Chambers* reflected the common law definition of robbery, a point more recently recognized by this Court in Syllabus Point 1 of *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981) where we held that:

> At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3)

[1] As we stated in Footnote 2 of the majority opinion, it was not necessary to address this issue to resolve this appeal.

> from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods.

We also said, in Syllabus Point 2 of *Harless*, that:

> At common law, robbery could be accomplished either by actual physical force or violence inflicted on the victim or by intimidating the victim by placing him in fear of bodily injury. There were no degrees or grades of common law robbery.

Our decisions in *Chambers* and *Harless* can be simply summarized to mean that "all larceny not amounting to robbery is simple larceny" and that "robbery requires proof that the defendant used violence or fear in the theft of money or goods." While there were no degrees or grades of robbery at common law, our Legislature has codified two degrees of robbery – First Degree Robbery and Second Degree Robbery. First Degree Robbery is set forth at *W.Va. Code,* § 61-2-12(a) and provides in relevant part that:

> Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree . . ..

Second Degree Robbery is set forth at *W.Va. Code,* § 61-2-12(b) and provides in relevant part that:

> Any person who commits or attempts to commit robbery by placing the victim in fear of bodily injury by means other than those set forth in subsection (a) of this section or any person who commits or attempts to commit robbery by the use of any means designed to temporarily disable the victim, including, but not limited to, the use of a disabling chemical substance or an electronic shock device, is guilty of robbery in the second degree . . ..

A plain reading of subsections (a) and (b) of *W.Va. Code*, § 61-2-12 shows that the Legislature has more or less codified the common law definition of robbery and graded the degrees of robbery according to the level of violence involved, with First Degree encompassing the more dangerous and violent forms of robbery (the common law equivalent of "robbery by force") and Second Degree encompassing the less dangerous forms of robbery (the common law equivalent of "robbery by fear").[2]

In this appeal, the defendant was charged with First Degree Robbery. First Degree Robbery required that the State prove beyond a reasonable doubt that the offense alleged was committed with "violence to the person" or that the offense was committed with a "threat of deadly force by the presenting of a firearm or other deadly weapon." *W.Va. Code*, § 61-2-12(a), *supra*. In the defendant's case, there was *no evidence* that any kind of "deadly weapon" was used (threatened or actual) leaving the State with the necessity to prove beyond a reasonable doubt that the defendant used "violence to the person" when taking the purse.

Having thoroughly reviewed the record, the evidence relied upon by the State to prove "violence to the person" appears tenuous and speculative and, had we chosen to

[2] In *Harless* we distinguished the two degrees of robbery as aggravated and non-aggravated. ". . . the distinguishing feature between aggravated and nonaggravated robbery under our current robbery statute is that the former requires the utilization of physical force or the use of a deadly weapon against the victim; the latter crime requires only that the victim be placed in fear of bodily injury." *Harless*,168 W.Va. at 713, 285 S.E.2d at 465.

decide this appeal on that issue, the evidence is likely insufficient for reasonable minds to find beyond a reasonable doubt that "violence to the person" occurred.[3]

In addition to the concerns discussed above, the record also suggests that the defendant's conviction was suspect because the circuit court's instructions to the jury were incomplete. The defendant's trial counsel repeatedly requested that the circuit court instruct the jury on the meaning of "violence to the person" – requests that the circuit court refused. During deliberations, this error was compounded when the jury asked the circuit court for a definition of the phrase "violence to the person" and the jury foreperson even requested a dictionary so the jury could look up the common definition of violence. In response to the jury's request, the circuit court told the jury to rely upon "their own common sense."

The circuit court's instruction to the jury were also incomplete in terms of the lessor included offense of larceny. The record shows that the defendant requested an instruction for the lessor included offense of larceny, but that request too was refused by the circuit court which held that the defendant "must put on evidence to show there was no force" before being entitled to a jury instruction for simple larceny. In any retrial – should the State choose again to go with robbery – the jury should be instructed on the definition of "use of violence" and the jury must be given an instruction for simple larceny should the defendant request that instruction. The State bears the burden of proof in criminal cases and

[3] There is also virtually no evidence that the victim was placed in fear of bodily injury and, therefore, there was insufficient evidence for a conviction on Second Degree Robbery. *W.Va. Code,* § 61-2-12(b).

the defendant need not introduce evidence of the absence of violence to the person – a required element of First Degree Robbery – before being entitled to an instruction on a lessor included offense where the evidence was as tenuous on the greater offense as that submitted by the State at the defendant's trial below.

On remand, it is my sincerest hope that the trial court, the State and the defendant will consider the concerns discussed in this opinion prior to any retrial, as well as the cases discussed in footnote 4 of this concurring opinion. For the reasons stated, I concur with the majority opinion.[4]

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[4] In terms of further guidance, the parties may want to consider the following cases as examples of how we, and other states, have addressed cases involving facts similar to those of the defendant's offense: *Winn v. Commonwealth, 21 Va. App. 179,* 462 S.E.2d 911 (1995) (evidence was insufficient to support robbery conviction of defendant who took victim's purse, as defendant did not use even slight violence or intimidation against victim to effect theft of purse and victim did not resist taking, notwithstanding testimony that defendant "took" victim's purse "very strongly" and ran with it.); *State v. Allen*, ___ So.2d ___ (No. 2008-0326, 2008, WL 5263813, La.App. 4 Cir., December 10, 2008)(defendant's conviction for purse snatching reversed with directions that on retrial jury to be instructed on lessor included offense of theft); *State v. Albright*, 209 W.Va. 53, 543 S.E.2d 334 (2000)(defendant's conviction for non-aggravated robbery affirmed where evidence showed that even though defendant made no verbal or physical threats of violence, the victim was placed in fear of bodily injury when she stuck her arm into defendant's car in attempt to retrieve her purse, but withdrew it quickly in fear that "maybe [defendant] would drag me."); *People v. Davis*, 71 A.D.2d 607, 418 N.Y.S.2d 127 (A.D. 2 Dept. 1979)(the Court, by Memorandum Order, modified defendant's conviction of robbery for purse snatching to a conviction of grand larceny where "testimony established that defendant 'snatched' a purse and a shopping bag from the victim" but that "[t]here was no evidence that the victim was injured or was in danger of injury."); *People v. Thomas*, 119 Ill.App.3d 464, 456 N.E.2d 684 (1983)(defendant's conviction of robbery for purse snatching reversed on finding that evidence did not show evidence of force or intimidation notwithstanding fact that victim had red mark on arm from force of purse being pulled from her); *People v. Hilton*, 25 A.D.3d 505, 810 N.Y.S.2d 19 (N.Y.A.D. 1 Dept.,2006)(evidence was sufficient to support conviction (continued...)

[4](...continued)
for robbery in the third degree where evidence showed that defendant used and threatened the immediate use of force to facilitate his theft of the victim's purse, by blocking the victim's exit, demanding money and holding a bottle in a threatening manner); *People v. Merchant*, 361 Ill.App.3d 69, 836 N.E.2d 820 (Ill.App. 1 Dist., 2005)(although a simple snatching or taking of property from the person is not sufficient force to constitute robbery, the act may be robbery where a struggle ensues, the victim is injured in the taking, or the property is so attached to the victim's person or clothing as to create resistance to the taking); *Owens v. State*, 787 So.2d 143 (Fla. 2d DCA 2001)(evidence did not establish the force necessary to sustain a robbery conviction based on purse-snatching incident; victim did not resist at all, nor was she held or struck, and while the snatching produced mark on victim's shoulder, mark resulted merely from force defendant employed to remove purse.); *State v. Robertson*, 138 N.C.App. 506, 531 S.E.2d 490 (2000)(defendant used neither actual nor constructive force to gain possession of victim's purse, and thus could not be convicted of robbery; only force used by defendant was that sufficient to remove victim's purse from her shoulder, defendant never attempted to overpower victim or otherwise restrain her, defendant made no threatening remarks or gestures to victim, and any alleged threat made by defendant was not made in context of defendant trying to take victim's purse.); *Jones v. Commonwealth*, 26 Va.App. 736, 496 S.E.2d 668 (1998)(to transform purse snatching from larceny to robbery, there must be additional circumstances at time of snatching; for example, these circumstances are present when struggle ensues, where victim is knocked down, or where victim is put in fear-in other words, where defendant employs violence or intimidation against victim's person.); *State v. Sein*, 124 N.J. 209, 590 A.2d 665 (1991)(the sudden snatching of a purse from its owner's grasp does not involve enough force to elevate the offense from theft from the person to robbery unless defendant uses some degree of force to "wrest" the object from the victim.); *R.P. v. State*, 478 So.2d 1106 (Fla.App. 3 Dist., 1985)(picking pocket or snatching purse is not robbery if no more force or violence is used than is necessary to remove the property from a person who does not resist.).