STATE OF LOUISIANA	*	**NO. 2002-KA-1391**
VERSUS	*	**COURT OF APPEAL**
ELVIN R. HOLLINS, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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BYRNES, C.J., DISSENTS:

I respectfully dissent based on my conclusion that under the totality of circumstances the defendant, Elvin R. Hollins, Jr., used force and intimidation that was sufficient to sustain a conviction of attempted simple robbery when he snatched the two $20 bills from the victim/taxi driver's hand. I would reverse the trial court's post verdict judgment of acquittal and affirm the jury's verdict.

La. R.S. 14:67A provides the definition for theft:

> A. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

La. R.S. 14:65 provides:

> **§ 65. Simple robbery**
>
> A. Simple robbery is the **taking** of anything of value belonging to another **from the person of another or that is in the immediate control of another, by use of force or intimidation**, but not armed with a dangerous weapon. [Emphasis added.]
>
> B. Whoever commits the crime of simple robbery shall be fined not more than three thousand dollars, imprisoned with or without hard labor for not more than seven years, or both.

La. R.S. 14:65.1 states:

> **§ 65.1 Purse snatching**
>
> A. Purse snatching is the theft of anything of value contained within a purse or wallet at the time of the theft, **from the person of another or which is in the immediate control of another, by use of force, intimidation, or by snatching**, but not armed with a dangerous weapon. [Emphasis added.]
>
> B. Whoever commits the crime of purse snatching shall be imprisoned, with or without hard labor, for not less than two years and for not more than twenty years.

At the April 29, 2002 hearing on the defense's motion for post-verdict judgment of acquittal, the defense argued:

> MR. MEYER:
>
> There is another statute right after 65. 65.1, right? Why do they have 65.1? You know why? Because they recognize –
>
> THE COURT:
>
> I know.

MR. MEYER:

You know the answer?

THE COURT:

Well, I was going to say that have 65.1 because with the purse snatchings, when the little old ladies were getting pulled to the ground and their hips were getting broken –

MR. MEYER:

No, no, no, no, no –

* * *

No, you can still have that, that would still be a simple robbery. That would still be a simple robbery. Force and intimidation.

THE COURT:

I'm just talking about snatching.

MR. MEYER:

But the snatching is the difference. That's the difference between 65 and 65.1. The snatching. Do you know why? No force is necessary. The snatching, which would ordinarily be a theft, is now covered by 65.1 because if you snatch a purse or a wallet, now you've committed the crime of robbery even if there is no force. So that if, for instance, the allegation were that the cab driver had a wallet, went to get his wallet to get some change, and Mr. Hollins now seizes and grabs the wallet, it doesn't matter if there's force or intimidation, that is purse snatching. And that's why you have purse snatching. You get rid of the force or intimidation. But for robbery you have to have force and intimidation, and it has to be something more than just snatching, which is what he did here, according to them. He snatched. But snatching is only good for purse or wallet. It's not good enough for –

THE COURT:

For a hand.

MR. MEYER:

Huh?

THE COURT:

It's not good enough for a hand.

MR. MEYER:
Nope.
THE COURT:
In other words, if I have it in my hand, he can't snatch it out of my hand.
MR. MEYER:
He can snatch it off your hand. That's a theft.

* * *

It's a theft. If he does that, if he snatches your money out of your hand, it's a theft.

Theft under La. R.S. 14:67A does not require the proof of force or intimidation. However, simple robbery under La. R.S. 14:65 requires force or intimidation. **If purse snatching were separated as a degree of theft, it would have been listed as a subsection under the theft statute, La. R.S. 14:67. The crime of purse snatching is listed under La. R.S. 14:65.l, which is related to simple robbery.** "Snatching" is a form of force and implies intimidation where the item taken is in the immediate control of the victim. **La. R.S. 14:65.1 requires proof of force, intimidation or snatching.**

The reason that the purse snatching subsection was set apart under La. R.S. 14:65.1, is that purse snatching has a greater potential sentence than the sentence for simple robbery under La. R.S. 14:65. La. R.S. 14:65B provides that the felon convicted of simple robbery "shall be fined not more than three thousand dollars, imprisoned with or without hard

labor for not more than seven years, or both." La. R.S. 14:65.1B states that the felon convicted of purse snatching "shall be imprisoned, with or without hard labor, for not less than two years and for not more than twenty years." The legislature distinguished the two crimes of simple robbery and purse snatching in different sections because of the different sentences; however, the legislature placed them in the same statute. Purse snatching is a form of simple robbery but carries a potentially greater sentence.

In *State v. Morts*, 98-0099 (La. App. 4 Cir. 5/31/00), 765 So.2d 438, *writ denied,* 2001-0037 (La. 11/9/01), 801 So.2d 357, this Court stated that unlike purse snatching, **theft is not a crime of violence.** *State v. Jason*, 99-2551 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, **purse snatching and attempted purse snatching are crimes of violence**. The property taken in a simple robbery must be sufficiently under the victim's control that, absent force or intimidation, the victim could have prevented the taking. *State v. Vernado*, 97-2825 (La. App. 4 Cir. 9/22/99), 753 So.2d 850, *writ denied* 1999-3197 (La. 4/20/00), 760 So.2d 341. Property taken in a theft does not have to be sufficiently under the victim's physical control.

In the present case, the property (the two twenty dollar bills) was sufficiently under the victim's control that, absent force or intimidation, the victim could have prevented the taking. Snatching or grabbing has the

element of force. A quick sudden action occurs. This action has more force than the mere "touching" required for battery or "taking" required for theft.

In *State v. Robinson*, 97-269 (La. App. 5 Cir. 5/27/98), 713 So.2d 828, *writ denied* 1998-1770 (La. 11/6/98), 727 So.2d 444, the victim stated that the defendant gave him a $50 bill, but the defendant insisted that he had given the cashier a $100 bill. The cashier told the defendant he had to wait for the manager. The defendant grabbed the $50 bill that the cashier had in one hand and the change that the cashier had in the other hand. The defendant fled. The Fifth Circuit found that the defendant's use of street slang and his frightening appearance were sufficient to show intimidation for a conviction of simple robbery.

In *State v. Jones*, 00-190 (La. App. 5 Cir. 2000), 767 So.2d 808, *writs denied*, 2000-2449 (La. 6/22/01), 794 So.2d 782 *and* 2000-2493 (La. 6/22/01), 794 So.2d 783, the victim/cashier at the drive-up window of a fast food restaurant, testified that the defendant said: "Give me the money;" reached over the counter, put his hand into the cash register drawer, and took money. The Fifth Circuit noted that the language used by the defendant in *Robinson, supra*, was "street slang" but it did not threaten the victim. In *Jones*, the Fifth Circuit stated that the victim/cashier ". . . was very much intimidated by defendant and was afraid he would injure her. She was

concerned that defendant might have a weapon. She did not call for help until after defendant had fled, as she was afraid defendant would grab her." *Id.*, 767 So.2d at 811. The Fifth Circuit held that there was sufficient evidence to sustain the defendant's conviction of simple robbery.

In *State v. Florant*, 602 So.2d 338 (La. App. 4 Cir. 1992), *writ denied*, 605 So.2d 1147 (La. 1992), this court found that the evidence that the defendant took $20 offered by the victim after performing a shoe shine without making change was not "use of force or intimidation" needed to support a simple robbery conviction because the victim was not subject to any increased risk of danger when the money was taken. This court referred to *State v. LeBlanc*, 506 So.2d 1197 (La. 1987), and stated:

> The "use of force" requirement in the crime of molestation of a juvenile is much more comparable to the "use of force" requirement in simple robbery, as defined in La. R.S. 14:65, than the element of the crime of battery defined in La.R.S. 14:33. The "use of force" in La. R.S. 14:33 contemplates the minimum force or violence upon the person necessary to commit the crime of battery and distinguishes the crime from an accidental or incidental touching. Moreover, the force constitutes the criminal act itself, rather than the means of overcoming the victim's will. *On the other hand, the crime of robbery contemplates that some energy or physical effort will be exerted in the "taking" element of the crime and that some additional "use of force" in overcoming the will or resistance of the victim is necessary to distinguish the crime of robbery from the less serious crime of theft as defined in La. R.S. 14:67. Id.* at 1200.

> (Emphasis added.) This record is devoid of any evidence that the defendant expended any physical effort in the taking of the twenty dollar bill or used any force to overcome the will or resistance of the victim.
> *Florant, supra,* 602 So.2d at 341.

In the present case, when Hollins snatched the money, he used more force than an accidental or incidental touching required for a battery. The defendant did not use force that constituted the criminal act itself, *i.e.* the crime of battery, because the defendant used force as the means of overcoming the victim/taxi driver's will.

Further, in *Florant,* this Court stated that: "Unquestionably the defendant duped Mr. Wittich [the victim] into agreeing to a shoeshine, for which no price was set." *Id.* In *Florant,* the victim "tendered" the twenty dollar bill and asked if the defendant had change. The defendant grabbed the money and walked away. The victim did not protest or make a contemporaneous complaint. This Court found that the victim had been duped rather than robbed.

In the present case, the defendant, Hollins, said he had only a fifty dollar bill, and the cab driver/victim had two twenty dollar bills in his hand ready to give change to Hollins. In a money transaction involving change, the change-giver generally obtains the bill that is to be changed before giving the change. In the present case, Hollins snatched the two twenty

dollar bills before throwing a folded bill (a one dollar bill), quickly exiting the cab, running, and then rapidly walking away. When the cab driver saw that the folded bill was one dollar, the cab driver started to follow the defendant; however, the cab driver stopped, fearing that the defendant might be armed. The cab driver drove two blocks away, saw two police officers, told the officers what happened, and pointed to Hollins. The officers followed and approached Hollins, who began to run. After giving chase, the police caught Hollins.

I agree with Judge Lobrano's dissent in *Florant, id.,* 602 So.2d at 342, in which he noted that:

> The majority clearly overlooks the evidence of intimidation which is sufficient to support a conviction of simple robbery. The majority also fails to recognize that simple robbery is the taking by force *or* intimidation, not force *and* intimidation. The discussion and analogy of what constitutes force misses the point that, viewing the evidence in the light most favorable to the prosecution, a rational jury could conclude the victim was *intimidated*. Intimidation is a factual determination. This Court should not usurp the jury's conclusions where there is sufficient evidence to support it.
> . . . Mr. Wittich testified that he did not pursue defendant because he had recently undergone back surgery and "was in no condition to chase anybody or anything"; that defendant's demeanor was such that he felt intimidated and that he felt it would not be wise to confront defendant after he ran to his group of friends.

In *Florant*, 602 So.2d at 340-341, this Court stated:

> The "use of force or imtimidation" element of the offense of simple robbery was interpreted by the Louisiana Supreme Court in *State v. Mason*, 403 So.2d 701 (La. 1981), as follows:
>
> > By providing a more severe grade of theft for those instances in which a thief uses force or intimidation to accomplish his goals, the legislature apparently sought to emphasize the increased risk of danger to human life posed when a theft is carried out in face of the victim's opposition.

In the present case, in referring to the location of Clio and Magnolia, where Hollins indicated he wanted to be dropped off, the victim/taxi driver answered the defense's question as follows:

> Q. That's in the project, isn't it?
> A. Yeah, around the project.

The victim/taxi driver further answered the defense's questions:

> Q. Cab drivers, that could be a risky – it's a risky business.
> A. It's a risky business, yeah . . .
>
> * * *
>
> Q. That's a risky neighborhood too at six o'clock in the morning.
> A. Martin Luther King, yeah, it is.

The trial court overruled the prosecution's objection to making that

kind of assertion. The trial court stated:

> BY THE COURT:
> I'll let him answer. Obviously from his occupation, I'll let him give his impression of whether or not he feels that some areas of the city are more safe than others. I'll let him answer that.
> BY THE WITNESS:
> Yeah, there are some more areas that are safe[r] than others. Martin Luther King is – I wouldn't say dangerous but it's not the safest street in New Orleans.
> [BY THE DEFENSE:]
> Q. And certainly around the project area.
> A. That's right.

Intimidation is a factual determination. A reasonable jury could find that force and intimitation existed under the totality of circumstances in the dangerous area.

I find that the circumstances in *Florant, supra,* were intimidating. The present case is more similar to *State v. Robinson, supra,* (where the perpetrator snatched the money from the cashier's hands), and *State v. Jones, supra,* (where the perpetrator snatched the money from the cashier's cash register draw) than to *Florant.* Regardless, the present case differs from *Florant.* In *Florant,* the shoe shining incident took place in the French Quarter across from Jackson Square. Florant did not run away but joined a group of friends nearby. *Florant* does not show whether the event occurred at night.

Further, *Florant* was rendered in 1992. Today, tourists are warned about the crime in New Orleans. In the French Quarter and around Jackson Square, given the criminal environment in the area, the harassment of a perpetrator insisting on giving a shoe shine and grabbing money from a victim's hand gives rise to a sinister incident where the victim is perceived to be threatened or intimidated.

In the present case, the victim/taxi driver, agreed that it was dark, early in the morning at approximately 5:30 a.m. in December, when Hollins was in his cab. The testimony established that cab drivers are engaged in a risky business, and that Hollins was dropped off in the vicinity around the projects.

Under the circumstances, the record shows the "use of force" requirement where there was a more increased risk of danger to human life posed when the snatching was carried out in face of the victim's opposition. The snatching from the victim's person involved more force than a mere "taking" required for theft under the totality of circumstances. The incident was intimidating when Hollins used force to suddenly snatch the money from "the person of another", and in the victim/taxi driver's "immediate control" (from the victim's hand) in a dangerous area at night. The jury as the fact finder had sufficient evidence to determine that the victim/taxi driver

was intimidated where he was afraid to follow the perpetrator. Taxi driving itself is a risky and dangerous business.

Accordingly, I would reverse the trial court's post verdict judgment of acquittal, reinstate the jury verdict of attempted simple robbery, and remand for sentencing.