REL: December 16, 2020

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0211

Devan Bradley Scott

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-18-3755)

McCOOL, Judge.

Devan Bradley Scott appeals his conviction for first-degree robbery, see § 13A-8-41, Ala. Code 1975, and his resulting sentence of 25 years' imprisonment.

Facts and Procedural History

On August 28, 2018, a Mobile County grand jury returned an indictment that stated:

> "The GRAND JURY of said County charge, that, before the finding of this indictment, Devan Bradley Scott, whose name is to the Grand Jury otherwise unknown than as stated, did, on or about June 29, 2017, in the course of committing or attempting to commit a theft of property to-wit: United States Currency, the property of Kullen Wade, use or threaten the imminent use of force against the person of Kullen Wade, with intent to compel acquiescence to the taking of or escaping with the property, while the said Devan Scott or another participant was armed with a deadly weapon or dangerous instrument, to-wit: a gun, in violation of § 13A-8-41(a)(l) of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 6.)

The evidence presented at Scott's trial tended to establish the following facts. On June 29, 2017, Kullen Wade and his fiancée, Telasia Hawkins, returned to the apartment where they lived, and Wade testified as follows regarding what occurred when they arrived:

"Q. We got out, started unloading stuff out of the car. We were unloading stuff for like probably five or ten minutes and then a male[, whom Wade identified at trial as Scott,] approached us and asked to use my phone. And I was kind of weary [sic] about it, but I was like, well, whatever, it's a cheap phone. If he takes my phone, whatever. So I let him use my phone. He made a couple of phone calls. I stopped taking stuff inside. [Hawkins] kept taking stuff inside and coming back out. Well, [Scott] was trying to -- he was using the phone trying to get some gas money. He said he broke down down the street.

"....

"Q. So what happened next?

"A. We were kind of talking back and forth, making kind of like small conversation. And [Hawkins] said -- she come outside and said that she was fixing to go inside to take a shower.

"....

"A. ... So I grabbed the last thing out of the car, and I was going to take it inside and come back out. Well, I turned, I reached into the car, come back out of the car and walked away from [Scott] and I heard -- I kind of -- as I rounded the corner of the car I heard "give it up" and I seen him out of my peripheral and he hit me in the back of the head with the gun.

"Q. And after he hit you in the head with the gun, what did you do?

"A. Well, my first reaction was -- I mean, I don't really know. Like I turned around and tried to like tie up with him because I didn't know what was going to happen. I know I got hit with something, but I wasn't sure what was going to happen next.

"....

"Q. Did you give him any of your property?

"A. No, ma'am, I didn't have anything.

"Q. What happened next?

"A. We were wrestling on the ground and we were just wrestling. I don't know why. But I was trying to get the gun from him, but I couldn't really get the gun because he was trying to put it in his pants, like his waistband. And then Terrance [Lane] was sitting in his car and Terrance seen him hit me with the gun. Well, Terrance, we were wrestling and Terrance came walking up. Well, I think [Scott] seen [Terrance] and he tried to get up and run from me."

(R. 126-30.)

On cross-examination, Wade testified as follows:

"Q. Okay. And right before you guys got into a fight, did you have anything in your hand?

"A. A laptop.

"Q. So you had actually a laptop computer?

"A. Yes, sir.

"Q. What kind?

"A. I'm not sure. Just a purple laptop. It didn't belong to me, so.

"Q. But you were holding a laptop?

"A. Yes, sir, just like this, in my right hand.

"....

"Q. And my client, he did ask to borrow your phone, correct?

"A. Yes, sir.

"Q. But he never asked you for any money, did he?

"A. No, sir."

(R. 137-38.)

Hawkins testified as follows regarding the encounter between Scott and Wade:

"Q. And what happened when [Scott] walked up to you and [Wade]?

"A. [Scott] asked if he could use someone's phone, said how he broke down down the road and had no gas and he needed to try to get help.

"Q. And what happened next?

> "A. [Wade] let him use the phone. He offered -- he started to offer the couple of dollars he had in his pocket to help [Scott] with gas or whatever he needed. We kept unloading things back and forth while [Scott] sat at the back of the car and was calling people."

(R. 149.) It is undisputed that Scott was never able to exert control over any of Wade's property during the alleged robbery, i.e., that Scott only attempted a theft during the alleged robbery.

At the close of the State's case, the following colloquy occurred:

> "[DEFENSE COUNSEL]: ... Judge, ... taking the State's case in the light most favorable to the State, they have not proved that in any way, shape, or form, that my client attempted to commit the crime of robbery on the basis of theft regarding U.S. currency. I specifically asked Kullen Wade did my client ever ask for any money and the answer was a direct no. Kullen Wade, the only witness that could potentially prove the element of robbery, said that the phrase "give it up" was used. And at the time it was clear that what he had in his hand was a laptop, a pink laptop. And that my client never asked for money and there was a laptop in his hand. Those facts taken in the light most favorable to the State, I think my client is due to a dismissal based on judgment of acquittal. This is not, hey, no allegation of anything to do with money this entire time, Judge.
>
> "....
>
> "[THE STATE]: And, Your Honor, while the indictment does say U.S. currency, that is still a question for the jury to decide as to whether that's what he intended when he said

> give it up. I think that when robberies occur, they don't specifically ask for particular items. "Give it up" can be intended to, and you can assume that that's what he meant. He needed money. There was evidence that came out that he needed money for gas. His car broke down. He needed a ride. He needed a phone. And that's what drove the robbery itself.
>
> "THE COURT: All right. [Defense counsel], ... I deny your motion."

(R. 226-27.)

During its jury charge, the trial court instructed the jury, in relevant part, that to convict Scott of first-degree robbery, the jury was required to find that the State had proven beyond a reasonable doubt that Scott "committed or attempted to commit the theft of U.S. currency, the property of Kullen Wade." (R. 261.) That is to say, the trial court did not formally amend the indictment or do so by virtue of its jury instructions. The jury subsequently convicted Scott of first-degree robbery. On November 21, 2019, the trial court sentenced Scott to 25 years' imprisonment, and Scott provided oral notice of appeal at the sentencing hearing. Rule 3(a)(2), Ala. R. App. P.

Analysis

The sole claim Scott asserts on appeal is that the trial court erred by denying his motion for a judgment of acquittal because, he says, there was a fatal variance between the indictment and the evidence presented at trial.[1] In support of that claim, Scott argues that the State's evidence did not establish that he attempted to commit a theft of U.S. currency, as charged in the indictment; rather, Scott argues that the State's evidence established that he told Wade to "give it up" when Wade "had a laptop computer in his hand" (Scott's brief, at 12), which, Scott says, established at most that he attempted to commit a theft of the laptop computer. Relying on Hayes v. State, 65 So. 3d 486 (Ala. Crim. App. 2010), Scott

[1]As evidenced by the colloquy quoted above, defense counsel did not expressly argue at trial that there was a fatal variance between the indictment and the evidence. Nevertheless, defense counsel did move for a judgment of acquittal on the basis that, he said, the State had presented no evidence of an attempted theft of U.S. currency -- the property identified in the indictment -- but had instead presented evidence of an attempted theft of a laptop computer. Thus, we conclude that Scott preserved this issue for appellate review. See Hayes v. State, 65 So. 3d 486, 490 (Ala. Crim. App. 2010) ("However inartfully phrased, Hayes did move for a judgment of acquittal on the ground that there was a variance between the description of the property stolen -- a purse and its contents -- as set out in the original indictment and the testimony of Hanh Ha that completely different items -- a cellular telephone and a debit card -- were actually stolen.").

contends that, "in a robbery case, '[p]roof of the theft of certain property that varies from the description of the stolen property identified in the indictment is a fatal variance'" that requires the reversal of the defendant's conviction. (Scott's brief, at 13) (quoting Hayes, 65 So. 3d at 491).

In Hayes, Jerry Day Hayes was indicted for the first-degree robbery of Hanh Ha based on the alleged theft of Ha's "purse and its contents." Hayes, 65 So. 3d at 488. However, the evidence at trial established that Hayes had committed a theft of only Ha's cellular telephone and a debit card, which were not in her purse at the time of the theft. Hayes moved for a judgment of acquittal on the basis that there was a variance between the allegations in the indictment and the evidence presented at trial, but the trial court denied the motion and amended the indictment to conform to the evidence. Following his conviction, Hayes appealed and argued that there was "a material variance between the proof of the property stolen during the robbery at trial and the description of the property alleged to have been stolen as described in the indictment." Id. In addressing Hayes's claim, this Court stated:

"Proof of the theft of certain property that varies from the description of the stolen property identified in the indictment is a fatal variance.

> " ' "The policy behind the variance rule is that the accused should have sufficient notice to enable him to defend himself at trial on the crime for which he has been indicted and proof of a different crime or the same crime under a different set of facts deprives him of that notice to which he is constitutionally entitled." House [v. State], 380 So. 2d [940] at 942 [(Ala. Crim. App. 1989)]. "Not every variance is fatal. Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Reviewing a claim of variance requires use of a two step analysis: (1) was there in fact a variance between the indictment and proof, and (2) was the variance prejudicial." United States v. McCrary, 699 F.2d 1308, 1310 (11th Cir. 1983). "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." Berger, 295 U.S. at 82, 55 S. Ct. at 630. "Variance from the indictment is not always prejudicial nor is prejudice assumed." United States v. Womack, 654 F.2d 1034, 1041 (5th Cir. 1981), cert. denied, 454 U.S. 1156, 102 S. Ct. 1029, 71 L. Ed. 2d 314 (1982). The determination of whether a variance affects the defense will have to be made based upon the facts of each case. United States v. Pearson, 667 F.2d 12, 15 (5th Cir. 1982).'

"Smith v. State, 551 So. 2d 1161, 1168–69 (Ala. Crim. App. 1989).

> " 'The unified theft offense created by § 13A–8–2, [Ala. Code 1975,] while reducing the risk of variance between pleading and proof, did not, however, eliminate the necessity for considering such variances as they might pertain to the nature of the property alleged to have been unlawfully controlled. Nothing in that section transposes "currency" into a bank "check." And when in this case the charge involved "currency" and the evidence established "checks," this was a fatal variance. See House v. State, 380 So. 2d 940, 942–43 (Ala. 1979).'

"Ex parte Airhart, 477 So. 2d 979, 980–81 (Ala. 1985).

> " 'Section 15–8–90, Ala. Code 1975, provides: "An indictment may be amended, with the consent of the defendant entered of record, when the name of the defendant is incorrectly stated or when any person, property or matter therein stated is incorrectly described." Section 15–8–91[, Ala. Code 1975,] continues: "If the defendant will not consent to such amendment of an indictment, the prosecution may be dismissed at any time before the jury retires as to the count in the indictment to which the variance applies, and the court may order another indictment to be preferred at a subsequent time ...." These statutes suggest that where there is a material variance, such as incorrectly describing a person (such as the victim) in the indictment, an amendment of the indictment is appropriate for a valid prosecution.
>
> " 'In this case, the State made no attempt to amend or dismiss the indictment charging the

> armed robbery of Melanie Frazier and to reindict Verzone under a new indictment properly charging him with the armed robbery of Juliann Bradford. The State's failure to do so resulted in a fatal variance between Verzone's indictment and the proof presented at trial, and Verzone's conviction under the original indictment is therefore void.
>
> " '....'

"Ex parte Verzone, 868 So. 2d 399, 402–03 (Ala. 2003).

Hayes, 65 So. 3d at 491-92 (footnote omitted). Given those principles of law, the Court held that the trial court erred by amending the indictment over Hayes's objection and that the variance between the allegations in the indictment -- that Hayes stole Ha's "purse and its contents" -- and the evidence presented at trial -- that Hayes stole a cellular telephone and a debit card -- constituted a fatal variance that required the reversal of Hayes's conviction. Id. at 492.

We conclude, however, that Hayes is distinguishable and therefore does not entitle Scott to relief because, unlike Hayes, there was evidence in this case to support a finding that Scott attempted to commit a theft of the property identified in the indictment, i.e., U.S. currency. As noted, there was no theft of property committed in this case, only an attempted

theft of property, and it was unclear what property Scott attempted to steal because the evidence merely indicated that Scott told Wade to "give it up" without specifying the specific property he wanted Wade to surrender. However, there was evidence indicating that, just before he committed the attempted robbery, Scott claimed he needed money for gasoline and that Wade offered Scott "the couple of dollars he had in his pocket." That testimony provided circumstantial evidence upon which the jury could have found that Scott intended to rob Wade of U.S. currency when he commanded Wade to "give it up," and it is well settled that "circumstantial evidence is not inferior to direct evidence, 'and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt.' " Reid v. State, 131 So. 3d 635, 640 (Ala. Crim. App. 2012) (quoting Ward v. State, 557 So. 2d 848 (Ala. Crim. App. 1990)). Thus, because there was evidence from which the jury could have found that Scott attempted to steal the property identified in the indictment, which was not the case in Hayes, there was no variance between the allegations in the indictment and the evidence at trial.

Conclusion

Because there was evidence from which the jury could have found that Scott attempted to rob Wade of U.S. currency, there was no variance between the allegations in the indictment and the evidence at trial. Thus, the trial court did not err by denying Scott's motion for a judgment of acquittal. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.