[Cite as *State v. Evans*, 2015-Ohio-3032.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102069

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHARLES EVANS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-587192-A

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: July 30, 2015

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ANITA LASTER MAYS, J.:

I. Introduction

{¶1} Appellant Charles Evans ("Evans") was convicted by a jury of one count of robbery under R.C. 2911.02(A)(3). Evans presents a single assignment of error. He argues that the state presented insufficient evidence to support his robbery conviction under R.C. 2911.02(A)(3). We agree. Therefore Evans's conviction for robbery is reversed and remanded to the Cuyahoga County Court of Common Pleas for a conviction to be entered on the lesser included offense of theft under R.C. 2913.02(A)(1).

II. Facts and Background

{¶2} On July 6, 2014, the victim went to a bar. He arrived at the bar at approximately 6:00 p.m. and left around 11:30 p.m. He walked to the parking lot across from the bar, entered and started his car, rolled down the window, and began texting a friend on his cell phone. At this time, Evans approached the vehicle on the driver's side, and asked the victim if he remembered him from the bar.

{¶3} Evans claimed the victim and he were having a discussion in the bar about having a good time together. The victim testified that he initially thought that Evans was trying to flirt with him and was drunk. He also testified that he told Evans that he did not remember him. Evans reached into the vehicle and grabbed the victim's crotch

and said “I can make you feel good, let’s have a good time.” The victim recalled Evans squeezing him in the crotch over his jeans. He then told Evans that he was not interested and pushed his hand away. Evans became frustrated, reached into the victim’s car, and grabbed his cell phone out of his hand. Evans then told the victim that if he wanted his phone back he would have to give Evans $20, and if he did not, Evans would smash the phone.

{¶4} Evans then told the victim that he needed the money to feed his daughter because they were both staying in a shelter. Evans, while motioning with his arm, said that he would smash the phone by throwing it against the ground. It was at that point that the victim told Evans that he knew some county social workers and offered to get Evans some help. However, Evans continued stating that he wanted money from the victim.

{¶5} The victim then exited his vehicle to attempt to negotiate with Evans about getting his phone back. Evans told him that the price to get the phone back was now $40. The victim said that he would give $20 to Evans if Evans gave him the phone back. The victim testified that it was at this point that he became afraid of Evans because of his much larger size in comparison to him. So he told Evans to throw the phone into the car on the passenger seat. Evans complied. He then gave Evans $20 cash from his wallet.

{¶6} As the victim was getting into his car, Evans asked him if he would still help him to which he responded, “You’re fucked up, man.” At this time, the victim drove out

of the lot and saw a marked police cruiser once he turned the corner. He flagged the police officer down and told him what happened. The officer followed the victim back to the parking lot where the incident took place, and he gave the officer a description of Evans.

{¶7} Another officer heard the description and location of Evans on the police scanner. This officer remembered seeing a man fitting that description, located him, and placed him in the back of the police car for a "cold stand" identification. While Evans was in the back of the police car, the victim heard him make threatening statements from the car and was afraid. The police officer searched Evans and found the $20 that the victim had given him, which the police officer gave back to the victim.

{¶8} On that same day, Evans was arrested. On July 18, 2014, Evans was charged with one count of robbery, in violation of R.C. 2911.02(A)(3), a felony of the third degree and one count of gross sexual imposition, in violation of 2907.05(A)(1), a felony of the fourth degree. During the trial, the victim testified that while Evans was taking his cell phone, he did not drive off because he was too close to Evans and thought that he would hit him. He also stated that he was not scared enough to hurt Evans because he thought Evans was drunk and stupid. The victim stated that Evans did not threaten or harm him, nor did Evans have a weapon.

{¶9} The jury found Evans guilty of robbery and not guilty of gross sexual imposition. On October 1, 2014, the trial court sentenced Evans to two years imprisonment.

III. Evans's Appeal

{¶10} Evans asks this court to determine whether the evidence was sufficient to establish beyond a reasonable doubt that he was guilty of robbery pursuant to R.C. 2911.02(A)(3). Evans contends that the state presented insufficient evidence on each element of the offense of robbery to sustain the guilty verdict as a matter of law.

A. Standard of Review

{¶11} In reviewing the sufficiency of the evidence supporting an essential element of a criminal offense, a court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the element proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 267, 574 N.E.2d 492 (1991). Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When evidence of an element of the crime charged is deemed insufficient on appeal, the conviction must be reversed. *State v. McKee*, 91 Ohio St.3d 292, 298, 744 N.E.2d 737 (2001).

B. Rule and Analysis

{¶12} R.C. 2911.02(A), robbery, states: "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: (3) Use or threaten the immediate use of force against another."

{¶13} Evans was charged with one count of robbery, in accordance with the above statute. As noted, attempting or committing a theft is an element of the crime of robbery. The theft statute reads as follows:

> No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent.

R.C. 2913.02(A)(1).

{¶14} In this case, the state argues that Evans deprived the victim of his cell phone without his consent. Evans snatched the phone from his hands and threatened to smash it to the ground. Because of this deprivation, Evans is undoubtedly guilty of theft. However, in order to satisfy all of the elements to be guilty of robbery, the state had the burden to prove beyond a reasonable doubt that Evans committed this theft with the use, or threat of immediate use, of force against the victim.

{¶15} The state argues that the threat of force can be against an object and not just a person. It references R.C. 2901.01(A)(1) where force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." The argument is that because the statute states that force can be against a thing and not just a person, the elements of robbery are met since Evans threatened to smash the cell phone on the ground.

{¶16} However R.C. 2911.02(A)(3) is very clear when it states that the use or threat of use of force is against "another." The statute does not define "another" nor does any part of the Ohio Revised Code, however, the Fourth District Court of Appeals of

Ohio stated that it was proper to use the word "person" in place of "another." *State v. Clemons*, 2013-Ohio-3415, 996 N.E.2d 507, ¶ 8 (4th Dist.). We agree with this analysis. R.C. 2901.01(B)(1)(a)(i) defines "person" as "an individual* * *." "Person" does not refer to a thing. Therefore, because "another" can be defined as a person, and a person is defined as an individual, a cell phone cannot be "another." In order for Evans to be guilty of robbery, he must have committed a theft with use of force against the victim, not force against the victim's cell phone.

{¶17} Viewed in the light most favorable to the state, the evidence has to demonstrate beyond a reasonable doubt that Evans's actions satisfied each element of the statute he was convicted of violating. The state has not demonstrated that Evans used or threaten to use immediate force against the victim. Therefore, we conclude that the state presented insufficient evidence to support Evans's robbery conviction under R.C. 2911.02(A)(3). We reverse Evans's conviction of robbery.

IV. Remand to Trial Court

{¶18} The circumstances that justify remand to the trial court for sentencing on a lesser included offense have been outlined as follows:

> It must be clear (1) that the evidence adduced at trial fails to support one or more elements of the crime of which the appellant was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused.

In re York, 142 Ohio App.3d 524, 523, 756 N.E.2d 191 (8th Dist.2001), citing *Allison v. United States*, 409 F.2d 445, 451 (D.C. Cir.1969). The evidence the state introduced at

trial failed to support the "use or threaten use of force" element to the crime of robbery for which Evans was convicted. However, there was sufficient evidence to support the lesser included offense of theft. As previously mentioned, R.C. 2913.02(A)(1), theft, states:

> No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent.

According to the facts, while the victim was holding his cell phone in his hands, Evans reached through his car window and grabbed the cell phone from his hands. At no time did the victim give Evans permission or consent to take his cell phone. Evans then threatened to smash the phone to the ground unless he gave him money.

{¶19} R.C. 2901.22(B) defines knowingly as "when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." Evans was aware that his conduct was depriving the victim of his property. Under oath, the victim testified at the trial that Evans stated, "you got to give me money or I'm gonna smash your phone." This shows that Evans knew the phone was not his, it belonged to the victim, and he did not give his consent to take his phone.

{¶20} Therefore, the evidence is sufficient that Evans is guilty of violating R.C. 2913.02(A)(1), theft, a misdemeanor of the first degree.

{¶21} Evans's conviction of robbery is reversed and we remand to the trial court to convict and sentence Evans for theft.

{¶22} The trial court's order is reversed and remanded.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and

MELODY J. STEWART, J., CONCUR