MARTIN AND WOODARD v. STATE.

Opinion delivered February 11, 1929.

1. CRIMINAL LAW—IMPEACHMENT OF STATE'S WITNESS.—In a prosecution for robbery, testimony of a State's witness at the examining trial, that defendants had obtained money from him by force, though admissible in contradiction of his testimony given at the trial, was not competent to be considered as substantive testimony tending to show the guilt of the defendants.
2. CRIMINAL LAW—ADMISSIBILITY OF FORMER TESTIMONY OF ABSENT WITNESS.—Testimony of an absent witness in a criminal case, taken before the examining court, is admissible on behalf of the State.
3. ROBBERY—DEFINITION.—Robbery is the felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence or putting him in fear; and this violence must precede or accompany the taking of the property.
4. ROBBERY—NATURE OF FORCE AND INTIMIDATION.—Where force is relied on in proof of a charge of robbery, it must be the force by which another is deprived of his property and the accused gains possession of it; and if putting in fear is relied on, it must be the fear under duress of which the possession of the property is parted with.
5. ROBBERY—FORCE AND INTIMIDATION.—Taking of money from the coat pocket of another is not robbery, where no force was used and the person from whom the money was taken was not jostled or assaulted or put in fear.

Appeal from Sebastian Circuit Court, Fort Smith District; *J. Sam Wood,* Judge; reversed.

STATEMENT OF FACTS.

Charley Martin and Floyd Woodard prosecute this appeal to reverse a judgment of conviction against them for the crime of robbery.

On the part of the State it was shown that Mrs. Ray Sloan was a resident of Tulsa, Oklahoma, and that her attendance at the court for the trial of the case could not be secured by the State. The court then permitted the State to read the testimony given by her at the examining trial of the defendants. According to her testimony, she was the wife of Ray Sloan, and, some time during the summer of 1928, she went to the Goldman Hotel, in the city of Fort Smith, with her husband. The latter went into another room of the hotel with the defendants, Charley Martin and Floyd Woodard, and with Russell Cooper. After they had been gone some time, she got uneasy, and her husband told her to come up to the room where they were. As she went into the room, her husband was backed up, and had a gun on the defendants, and said that they had his money, and had crooked him out of it. The defendant Martin said, "Ray, they will get you for high-jacking." "Ray told me to get the money. I started to do it, and Martin said, 'Wait a minute, I want to talk to you,' referring to my husband. Martin then said that he would give Ray his money back, and they went out in the hall. The defendant then took Ray's gun, and Ray had $500 which he did not want to play. Martin said, 'Well, you just give me that $500—we have been up here long enough to trim you.' Martin then took the money out of Ray's left-hand coat pocket. The defendants, my husband and I then went downstairs in the hotel elevator."

On cross-examination she admitted that they were playing poker when she went into the room, and that they played three hands while she was there. She talked to Russell Cooper about twenty minutes while they were all

in the room. Martin and her husband went out in the hall after they quit playing.

Ray Sloan was also called as a witness for the State. According to his testimony, the defendants, Russell Cooper and himself, went into a room in the Goldman Hotel, in Fort Smith, Arkansas, and began to play poker. Sloan had $1,600 which he had secured for the purpose of playing in the game. He also put a pistol in his pocket. He lost the whole $1,600 in the game of poker. He denied that the defendants obtained the money from him either by force or by intimidation. He testified that he simply lost it in playing poker with the defendants. The prosecuting attorney then asked him if he had not testified in the examining court that the defendants had obtained the money from him by force at the point of a pistol. He said that he did testify in the examining court that the defendants had obtained the money from him by force and intimidation, by pointing a loaded pistol at him, but he reiterated his former testimony, and said that this was not true. He again stated that he lost the whole $1,600 in playing poker, and that the defendants did not get the money from him by force or intimidation.

Cravens & Cravens, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

HART, C. J., (after stating the facts). The main reliance of the defendants for a reversal of the judgment is that the testimony is not legally sufficient to warrant a verdict of guilty of the crime of robbery. Ray Sloan, the person charged to have been robbed, was a witness for the State at the trial. What he testified to at the examining trial was admissible in evidence in contradiction of his testimony given at the trial of the case in the circuit court, but it was inadmissible as substantive testimony tending to show the guilt of the defendants. *Midland Valley Rd. Co.* v. *Ennis,* 109 Ark. 206, 159 S. W. 214. Thus we see that the testimony of Ray Sloan is eliminated, so far as establishing the guilt of the defendants is concerned, because he testified positively at the trial

that he lost the money in a game of poker, and that the defendants did not obtain it from him by force or intimidation.

This leaves the testimony of Mrs. Ray Sloan alone to establish the guilt of the defendants. It was shown by the State that the attendance of the witness at the court could not be procured, and that she was absent in the State of Oklahoma, where she lived. This made a predicate for the introduction of her testimony at the examining court at the trial of the case. *Maloney* v. *State,* 91 Ark. 485, 121 S. W. 28. It is earnestly insisted, however, by counsel for appellants that her testimony is not legally sufficient to warrant a verdict of guilty, and in this contention we think counsel are correct. Robbery is the felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence, or putting him in fear. And this violence must precede or accompany the taking of the property. *Clary* v. *State,* 33 Ark. 561; *Routt* v. *State,* 61 Ark. 594, 34 S. W. 262; and *Coon* v. *State,* 109 Ark. 346, 160 S. W. 226. In these decisions the court also held that the taking must be done through force or fear. If force is relied on in proof of the charge, it must be the force by which another is deprived of his property and the accused gains possession of it. If putting in fear is relied on, it must be the fear under duress of which the possession of the property is parted with.

Tested by these settled principles of law, the testimony of Mrs. Ray Sloan is not legally sufficient to sustain a verdict of guilty of robbery against the defendants. No force whatever was used. The defendant Martin merely took the money out of the coat pocket of Ray Sloan. He was not in any manner jostled or assaulted, according to her testimony. Neither did there occur anything tending to show that any intimidation was used. Ray Sloan was not put in fear by the defendants to induce him to part with his money. In the Routt case, above cited, the court said that it is well established that the snatching of money or goods from the hands of another

is not robbery, unless some injury is done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it. This rule was recognized and approved in the Coon case, above cited, and the court said that the State in that case made out a case of larceny, but failed to prove robbery, because no force or putting in fear was established.

It follows that the testimony was not legally sufficient to sustain the verdict, and, for that reason, the judgment must be reversed, and the cause remanded for a new trial.