IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081720

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JASON WILLIAM ANDERSON,

Appellee.

BRIEF FOR THE APPELLANT

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STATEMENT OF THE CASE

In a bench trial in the Circuit Court of the City of Virginia Beach, on March 28, 2007, Jason William Anderson was convicted of conspiracy to commit robbery, robbery and use of a firearm in the commission of a robbery. On June 18, 2007, the Court sentenced the defendant to five years imprisonment for the conspiracy, seven years imprisonment for the

robbery, and three years for the firearm offense, suspending all but three years of imprisonment. (App. 187-88).

The Court of Appeals, on August 5, 2008, reversed the robbery and firearms convictions, while affirming the conspiracy conviction. Anderson v. Commonwealth, 52 Va. App. 501, 664 S.E.2d 514 (2008). (App. 193-199). This Court granted an appeal on February 17, 2009.

ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED IN FINDING THAT THE COMMONWEALTH HAD NOT PROVEN INTIMIDATION OF THE ROBBERY VICTIM.

QUESTION PRESENTED

WAS THE EVIDENCE SUFFICIENT TO PROVE ANDERSON GUILTY OF ROBBERY AND USE OF A FIREARM IN THE COMMISSION OF A ROBBERY?

STATEMENT OF FACTS

In November of 2006, Corey Edwards and the defendant were both employed at a Dick's Sporting Goods store in Virginia Beach. (App. 73-74). The two "had talked previously about possibly robbing Dick's Sporting Goods and it would be easy and it was nothing basically." (App. 75).

They had sought to execute the robbery in early November 2006, planning to have the defendant stage a robbery of Edwards, when Edwards was working as a cashier at the store. (App. 79). The crime did not take place because the defendant had not seen Edwards downstairs when he came into the store. (App. 79).

When they talked again about committing a robbery at the store, the defendant had said, "We could go in there, just show them the gun, and it would be simple as one, two, three to threaten somebody and get us some money." (App 80-81). The defendant had been talking about a real gun. (App. 81).

On November 18, 2006, at 9:30 or 10:00 in the morning, the defendant called Edwards to say that "it was time. It was enough money, and we should come get it - - or I should come get it." (App. 76). Edwards said that he was sleeping and asked the defendant to call him back later. (App. 76).

When the defendant called back, he "said he was relieving somebody from break downstairs." (App. 76). Edwards said that was significant because there was "always one cashier register downstairs at all times. So [the defendant] said he was going downstairs to relieve somebody's lunch break and that we had an hour to do it." (App. 76). "He would take his

register and everything that he had - - his receipts, his checks, everything - - down to that register." Importantly, he would take the cash he had in the register with him. (App. 76-77).

Edwards said that he was not going to do it himself, but would get somebody who would be the gunman and bring him to the store. (App. 77). Edwards contacted a juvenile, Noel McBride, with whom he and the defendant had previously discussed the possibility of a robbery a week or two before at Edwards' house. (App. 78). On the day of the robbery, McBride had obtained an airsoft gun, which holds CO2 and shoots plastic pellets. (App. 80-82). When McBride and Edwards arrived at the store, Edwards entered, pretending to check his time, to make sure that everything was clear. (App. 82-83). He then returned to the car and McBride entered the store. (App. 78).

Edward Rinehart, an employee of Dick's, and "the departmental lead," on that date, observed the robbery. (App. 22, 24, 31). He was with John Sangiacomo, 35 to 40 feet from the store entrance, when they saw a man wearing a black hooded sweat shirt, with the hood pulled up and a bandanna over his face, go to the defendant's register. (App. 23). That man made eye contact with Rinehart and Sangiacomo. (App. 23). Both men then walked toward the register because Rinehart thought something

did not look right and had a feeling "we're about to get robbed." (App. 24). As they started towards the man and were about fifteen feet away, Rinehart "saw a weapon come out of the gentleman's waistband." (App. 24, 27). He thought it was a semi-automatic pistol, a .45 or a 9 millimeter. (App.25). The gunman pointed the gun at the defendant. (App. 64). Rinehart stopped where he was because he was concerned about the gun. (App. 24). He then told Sangiacomo to call the store manager while he dialed 911. (App. 24).

McBride and Edwards were quickly captured and the cash, the bandana and the pistol recovered. (App. 53-54). When McBride was returned to the store, the defendant did not identify him. (App. 61). The defendant told police that although he and Edwards had discussed a robbery, it was just a joke and he never meant for it to actually take place. (App. 63). He said he was scared when McBride came in so that he did not know what to do. (App. 64).

The defendant testified, claiming he had never talked to Edwards or McBride about a robbery. (App. 96-97, 109-10).

The trial court found "that a conversation took place between the perpetrators of the robbery and the defendant." (App. 135). The court

ruled that "there is no doubt in my mind that there was a conspiracy to rob Dick's Sporting Goods." (App. 136). The court then continued:

> Was Mr. Rinehart put in fear? He said yes. He was going - - He said, Something's going to happen. I'm going over to the cash register; and he started walking toward the cash register, saw the person pull a gun out, and stopped. He had an obligation to protect the assets of the company. And so he, in essence, was put in fear because there was a gun. Otherwise, he would have gone over there.

(App. 136).

At sentencing, when the defendant presented his motion to overturn the verdict, the court ruled again:

> And the question is was anybody placed in fear? I guess that's one of the issues. And the answer is yes. Mr. Rinehart was an employee of the store, and he certainly has an obligation not to allow people to be taking stuff out of the store. He was walking over, and he saw the gunman come in the gun and a hood; and he knew there was a robbery. Eye contact was made. So if he was not afraid, he would have continued to walk. He stopped and he was in fear. He had an obligation to make sure that the money was not taken. The money was taken. And therefore I find nothing to - - that has been presented to change . . . the prior ruling of the Court.

(App. 168).

ARGUMENT

THE EVIDENCE ESTABLISHED A ROBBERY.

The Court of Appeals ruled that because the defendant was a participant in the conspiracy and the robbery, no intimidation of the named victim was shown and thus no robbery was proven. The record demonstrates, however, that Rinehart, another employee of the store, was the real victim of the robbery and was intimidated by the display of a firearm.

Standard Of Review

Because the defendant challenges the sufficiency of the evidence, that evidence must be viewed in the light most favorable to the Commonwealth and the Commonwealth must be given all reasonable inferences fairly deducible therefrom. Dowden v. Commonwealth, 260 Va. 459, 461, 536 S.E.2d 437, 438 (2000). The factfinder's verdict may not be disturbed unless it was plainly wrong or without evidence to support it. Va. Code § 8.01-680; Viney v. Commonwealth, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005); Jackson v. Commonwealth, 267 Va. 178, 204, 590 S.E.2d 520, 535 (2004).

Elements of Robbery

As this Court has held:

> Robbery, in Virginia, is a common law crime, Butts v. Commonwealth, 145 Va. 800, 811, 133 S.E. 764, 767 (1926), for which the punishment is fixed by statute, Code § 18.1-91. Robbery is a crime against the person. Falden v. Commonwealth, 167 Va. 542, 544, 189 S.E. 326, 328 (1937). Robbery at common law is defined as the taking, with the intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. The phrase ". . . . of the personal property of another, from his person or in his presence . . .", has been broadly construed to include the taking of property from the custody of, or in the actual or constructive possession of, another. Durham v. Commonwealth, 214 Va. 166, 168, 198 S.E. 2d 603, 605-06 (1973).

Johnson v. Commonwealth, 215 Va. 495, 496, 211 S.E.2d 71, 72 (1975).

Rinehart Was A Victim

It is not seriously disputed that Rinehart had constructive possession of the property and the defendant apparently concedes that if the gun had been pointed specifically at Rinehart, he would have been the victim of the robbery. (App. 19, 92-93, 116). Anderson argues, however, that no intimidation was directed at Rinehart. He told the trial court, "The controlling issue is whether any violence or intimidation was employed towards him in order to effect the taking of the property at that time." (App. 92).

The victim in Johnson was similar to the victim here:

> While Mrs. Cherry's duties did not include the collection of and accounting for the company's funds, she was an employee of the company and the law imposed upon her a duty of fidelity to her employer. This duty would include reasonable diligence on her part to protect the company's property from damage or larceny by strangers.
>
> Here the defendant and his fellow robber found it necessary to subject Mrs. Cherry, as well as the two cashiers, to violence and threats of violence to accomplish the goal of appropriating the money belonging to the gas company. The property was taken at gunpoint from Mrs. Cherry's presence.

Id. at 496-97, 211 S.E.2d at 73.

The trial court found that Rinehart, having custody or constructive possession of the money "interpose[d] himself to prevent a theft of property." (App. 138). It further found that "Rinehart was on his way to help stop this thing and he saw the gun and he stopped." (App. 138).

These factual findings, supported by the record, are inconsistent with the statement in the Court of Appeals' opinion that "Rinehart was never at the cash register or otherwise in a location where the property would be taken from his person or in his presence." 52 Va. App. at 508, 664 S.E.2d at 518. (App. 197). Because Rinehart was a mere fifteen feet from the cash register, it is unclear how it could be determined that the taking did not occur in his presence. Certainly, if an employee were returning to his register and was stopped fifteen feet from it by a person pointing a gun at

him while removing cash, a robbery would be effected because the money was taken from the employee's possession in his presence. See United States v. Lake, 150 F.3d 269, 273 (3rd Cir. 1998)(car was taken from presence of victim who was kept away from car by fear of injury).[1]

Robbery Proven Because Intimidation Established

The Court of Appeals, citing a number of its own cases, set forth the intimidation requirement as follows:

> To sustain a robbery conviction, force or intimidation must be ***directed at the person of the victim***. Spencer v. Commonwealth, 42 Va. App. 443, 449, 592 S.E.2d 400, 403 (2004); Jordan v. Commonwealth, 2 Va. App. 590, 595, 347 S.E.2d 152, 155 (1986) ("The focus must be upon the actions directed toward ***the person*** robbed. The offense of robbery requires a theft and force or intimidation directed against a custodian of personal property.").

Anderson, 52 Va. App. at 506-07, 664 S.E.2d at 517 (emphasis in original) (App. 196). This reasoning raises at least two questions: was direct physical intimidation of the victim shown and, if not, can such intimidation

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[1] "The generally accepted definition of immediate presence, as stated by the Massachusetts Supreme Court, is that '[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.'" People v. Hayes, 802 P.2d 376, 406-07 (Cal. 1990)(quoting Commonwealth v. Homer, 127 N.E. 517, 520 (Mass. 1920) and citing numerous cases and authorities for this proposition).

directed at another in the victim's presence render the taking a robbery. Under either view of the requirements for robbery, Rinehart was intimidated.

The Court of Appeals defined intimidation as follows:

> Intimidation is defined as "unlawful coercion; extortion; duress; putting in fear." "To take or attempt to take, 'by intimidation' means willfully to take, or attempt to take, by putting in fear of bodily harm." Intimidation results when the words or conduct of the accused exercise such domination and control over the victim as to overcome the victim's mind and overbear the victim's will, placing the victim in fear of bodily harm.

Id. at 507, 664 S.E.2d at 517 (quoting Bivins v. Commonwealth, 19 Va. App. 750, 752-53, 454 S.E.2d 741, 742 (1995)).

Although Bivins involved only one person other than Bivins and involved the issue of whether Bivins' taking of a cash drawer in the victim's presence constituted intimidation, the evidence here shows intimidation under the Bivins definition.[2] It cannot be seriously argued that the factfinder could not determine, as it did here, that Rinehart was put in fear. Rinehart's intent to intervene was thwarted when he observed the gun. He knew the gunman previously had seen him. His fear, caused by the sight of the gun, overcame Rinehart's mind and overbore his will. He testified

[2] In Bivins the alleged intimidation was the observation of a larceny by an unarmed man, whereas here Rinehart certainly saw what to him reasonably appeared to be a robbery.

that he was intending to intervene in what appeared to be a robbery but stopped when he saw the gun. That constitutes intimidation under any governing definition.

As in Johnson, Rinehart, as an employee, had constructive possession of Dick's money vis-à-vis McBride, the gunman. McBride was able to leave the store with the money only because Rinehart had seen the gun displayed to him. The factfinder clearly could infer that Rinehart surrendered the property because he was afraid that otherwise he would be shot. The trial judge so concluded: "[H]e . . . was put in fear because there was a gun." (App. 136).

The trial court relied upon Durham, supra:

> [I]n the Durham case it says where the owner of the personal property, or another having custody or constructive possession of same, interposes himself to prevent a theft of property – and I think that's exactly what we have right here. I think Mr. Rinehart was on his way to help stop this thing and he saw the gun and he stopped.

(App. 138).

This Court, in Commonwealth v. Jones, 267 Va. 284, 591 S.E.2d 68 (2004), also relied upon Durham. There the store manager, having seen Jones take shoes from the store without paying, followed him to the parking lot. When he confronted Jones and demanded return of the shoes, Jones displayed a firearm and was able to flee with the shoes. The Court held:

> In the present case, Jones, like the thieves in Durham, originally intended to commit larceny. While Jones was in the process of carrying out that intention and the larceny was continuing, the store manager interposed himself to prevent Jones from taking the merchandise. At that time, Jones produced the firearm to overcome the manager's opposition to the taking, and his crime became robbery, not merely larceny.

Id. at 289, 591 S.E.2d at 71.

Here, there is no reason to believe that the two men would not have prevented McBride from leaving the store with the money but for his display of the gun. Although the defendant and his accomplices may have attempted to commit their crime when nobody else was present, their plans included bringing a gun and threatening others if necessary. They conspired to commit a robbery if necessary. That robbery did become necessary when McBride discovered that others were observing his actions. Thus, as in Jones, the larceny became a robbery.

Rinehart, in relation to McBride, had equal or superior authority over the cash in the defendant's register. The presence of the gun and the defendant's statement about showing the gun and threatening somebody demonstrated that the presence of additional people was anticipated. The thieves planned to intimidate anyone present who might interfere with their plan, thus turning the crime into a robbery. The evidence, as required by Scott v. Commonwealth, 7 Va. App. 252, 264, 372 S.E.2d 771, 778 (1988),

"support[ed] a reasonable inference that the intent to rob extended to" Rinehart.

The defendant seems to argue that McBride had to point his gun at Rinehart to intimidate him. There is no such requirement in the law, because robbery is shown by the mere "presenting of firearms." See Va. Code § 18.2-58. Actual display of a gun is not necessary to intimidation. See Seaton v. Commonwealth, 42 Va. App. 739, 749-50, 595 S.E.2d 9, 13-14 (2004) (defendant announced a robbery and "conspicuously put one hand in his pocket"). McBride, having seen Rinehart, displayed the weapon to him when he withdrew it from his pocket and pointed it at Anderson.

The Court of Appeals, in finding no intimidation of Rinehart, erroneously reasoned as follows:

> Rinehart testified that McBride's only contact with him was brief eye contact, which occurred before McBride arrived at the cash register and brandished the gun. Thereafter, McBride remained with his back to Rinehart without even so much as a glance over his shoulder in Rinehart's direction. McBride did not point the air gun towards Rinehart. Rinehart testified that when McBride pulled the gun out of his waistband, Rinehart "stopped right where [he] was," approximately 15 feet behind McBride, "[b]ecause there was a weapon involved" and its presence gave him some concern. . . . It is clear from the record that Rinehart's subjective fear induced by McBride's actions did not ***facilitate*** the taking, but merely ***resulted*** *from* the taking. Id. at 754, 454 S.E.2d at 743. No force or intimidation was ***directed*** *at*

> Rinehart's person. Spencer, 42 Va. App. at 449, 592 S.E.2d at 403.

Anderson, 52 Va. App. at 507-08, 664 S.E.2d at 517-18 (emphasis in original) (App. 197).

It is unclear how the Court below could rule that Rinehart's termination of his intention to intervene in the events at the cash register did not facilitate the taking. Both he and Sangiacomo were walking towards the cash register and stopped just fifteen feet away when they saw the gun. The taking had not yet occurred and, without the display of the firearm, the men likely would have prevented any taking. Moreover, because the taking had not yet occurred, Rinehart's fear could not have been the result of the taking, but rather was produced by the display of the weapon.

The defendant conceded below that the evidence supported the inference that McBride knew that Rinehart "was a Dick's Sporting Goods employee." (App. 163). The gun intimidated Rinehart who was planning to approach more closely to attempt to forestall the robbery. He did not do so when he saw the gun. The money was taken from his possession through intimidation directed at him.

Rinehart Was Intimidated By The Threat To The Defendant

Even if this Court were to find no direct intimidation of Rinehart, the acts of the defendant's accomplice constituted a robbery because of Rinehart's perception of the danger to Anderson. In Waters v. Commonwealth, 29 Va. App. 133, 510 S.E.2d 262 (1999), Smith was a confederate of the robbers:

> After the restaurant closed at 11:00 p.m., Smith left a door unlocked to facilitate Waters' entry into the restaurant. Waters entered the restaurant wearing a hooded sweatshirt drawn around his face and displaying a knife. Waters put the knife close to Richardson's face and ordered everyone to move toward the rear of the restaurant. During the commotion, Waters cut Richardson's chin. When they arrived at the rear of the restaurant, Waters locked Cahoon, Danforth, and Richardson in a closet and ordered Smith to remain outside the closet. Accompanied by Waters, Smith opened the safe and put money from the safe into a bag. Smith also opened the cash registers.

Id. at 135-36, 510 S.E.2d at 263. The force and intimidation were directed most specifically against Richardson, with Cahoon only observing the force used against, and the intimidation of, Richardson. Nevertheless, the Court concluded:

> Although Waters focuses his analysis upon Smith's role in assisting him to take the restaurant's money, the evidence clearly proved that Waters used violence and intimidation to secure Cahoon in the closet as a means of facilitating the taking of money. ***Holding a knife close to Richardson and using the threat of injury to Richardson, Waters forced Cahoon and two other persons to enter the closet***. Cahoon,

> a manager trainee, was an employee of the restaurant and had earlier deposited money in the restaurant's safe. As an employee, Cahoon had a duty to exercise "reasonable diligence . . . to protect the company's property from damage or larceny by strangers." Id. at 497, 211 S.E.2d at 73. Thus, the evidence was sufficient to prove beyond a reasonable doubt the elements of robbery. See id. at 496-97, 211 S.E.2d at 72-73.

29 Va. App. at 139, 510 S.E.2d at 265 (emphasis added).

Waters does not support the defendant's position, but rather shows that physical intimidation of one victim obviously can be viewed as intimidation of another victim who is observing the robbers' acts against that first victim. The intimidation in Waters was directed at all the employees present who were not Waters' accomplices. Similarly, the intimidation here was directed at Rinehart and Sangiacomo and any other employees who might view the event and try to intervene. Rinehart, observing the threat to Anderson, stopped his intended intervention. In Waters, Cahoon, without intimidation "directed" at him, moved away from the money; Rinehart, in a similar situation, did not move closer to protect the money. In both cases the acts of intimidation were used "as a means of facilitating the taking of money." Id. at 139, 510 S.E.2d at 265.

This is consistent with LaFave's understanding that "the threat of immediate bodily injury or death need not be directed at the owner himself; it may be made to a member of his family, or other relative, or even to

someone in his company, though there is no threat to do harm to the owner himself." W. LaFave & A. Scott, *Substantive Criminal Law*, § 20.3d, 186 (2nd Ed. 2007); see also State v. Crosswell, 612 A.2d 1174, 1179 (Conn. 1992)(accepting this principle). Moreover, a number of States, which define robbery by statute, have included threats to persons "present with" or "in the company of" the victim as providing the required intimidation. See, i.e., Ariz. Rev. Code § 4602; Cal. Penal Code § 212; Nev. Rev. Stat. Ann. § 200.380; N.M. Stat. Ann. § 20-12-53; 21 Okl. St. § 794; S.D. Codified Laws § 22-30-3; Wis. Stat. § 943.32. There is no reason why Rinehart's concern for the defendant's safety should not serve as the fear necessary to robbery.

It seems clear that if a custodian of property delivers that property to an unauthorized person because of intimidation of another in his presence, the act is a robbery. If a person enters a store and threatens a customer or employee and at the same time directs a different employee in possession of property to hand over that property, it is a robbery.

The Robbers Intended To Intimidate

The defendant argued below that the Commonwealth had failed to prove that he intended to intimidate Reinhart. The Court of Appeals, however, recognized that the evidence supported the finding that the

defendant and his accomplices had entered into a conspiracy to rob the store. As shown above, the defendant agreed with Edwards and McBride that one of them would appear at the Dick's store with a gun, "show them the gun" and "threaten somebody" to obtain money. (App. 81). To claim now that they never intended to intimidate anyone not involved in the conspiracy is inconsistent with their intent to display the gun and to use a real gun. The conspirators agreed to take money from the store and agreed to intimidate any store employee, other than the defendant, who observed the robbery.

Even if the main purpose of the gun had been to make the robbery look genuine, a clearly foreseeable, and previously discussed, effect of the display of the gun was the intimidation of any observers. The display of the gun was clearly not directed at the defendant but at any observers in the store. Having seen Rinehart, McBride displayed a firearm in his presence. The conspirators intended to intimidate anyone they had to in order to accomplish the robbery.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals reversing the judgment of the Circuit Court of the City of Virginia Beach convicting the defendant of robbery and use of a firearm.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellant herein.

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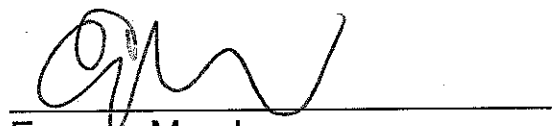
CERTIFICATE OF TRANSMISSION AND SERVICE

On March 30, 2009, the required number of copies of this petition were hand-delivered to the Clerk of this Court and three copies were mailed to Gregory B. Turpin, Esquire, Clarke, Dolph, Rappaport, Hull, Brunick & Garriott, P.L.C., Smithfield Building, Suite 101-A, 6160 Kempsville Circle, Norfolk, VA 23502, counsel for the appellee.



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