IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081720

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JASON WILLIAM ANDERSON,

Appellee.

REPLY BRIEF

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ARGUMENT

THE EVIDENCE ESTABLISHED A ROBBERY.

Rinehart Possessed The Store's Funds

The defendant does not argue that Rinehart could not be a victim of the robbery because the money was not taken from his presence or

possession. He limits his argument to a claim that Rinehart was not intimidated by the co-conspirators' actions.

Robbery Proven Because Intimidation Established

The defendant, citing Seaton v. Commonwealth, 42 Va. App. 739, 595 S.E.2d 9 (2004), argues that the Commonwealth did not show that Rinehart was intimidated but improperly relied upon Rinehart's observation of the defendant's apparent intimidation. The defendant's reliance on Seaton is misplaced.

He says Seaton requires the fact finder to determine "whether the individual to whom the accused directed intimidation was, in fact, intimidated, and not whether a witness standing nearby was indirectly intimidated by conduct or words meant for the victim." (Def. Br. 14). Of course, in Seaton the defendant was charged not with robbing Hudson, the supervisor and "witness," but with robbing the teller. 42 Va. App. at 743, 595 S.E.2d at 11. It was the teller's intimidation that was in issue.[1] Here, the defendant is charged with robbing Rinehart. Rinehart was the victim, not a mere witness, and thus the Commonwealth had to, and did, show that

[1] Because the Court of Appeals determined that the teller was intimidated, it did not reach the question of whether Hudson had constructive possession of the money in the teller's drawer. 42 Va. App. at 753 n. 4, 595 S.E.2d at 16 n.4.

he was intimidated. Moreover, the conduct of McBride, the gunman, was not meant for Anderson, who would have surrendered the money no matter what McBride did, but for anyone around who might intervene.

Similarly Waters v. Commonwealth, 29 Va. App. 133, 510 S.E.2d 262 (1999), offers no help to the defendant. There 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. It is important to notice that the force and intimidation was 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 can be viewed as intimidation of another victim observing the robbers' acts against that first victim. The display of a knife to, or the pointing of a gun at, one employee certainly justifies a second employee's belief that, if he intervenes, force will also be applied against him. 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, who was with Rinehart.

The Commonwealth does not argue that every employee observing a robbery becomes a victim so that the number of robberies equals the number of persons intimidated. Thus, The Commonwealth did not name Sangiacomo, Rinehart's companion, as a second victim in this case. As the cases cited by the defendant hold, "the appropriate 'unit of prosecution' is determined by the number of persons from whose possession property is

taken separately by force or intimidation." Jordan v. Commonwealth, 2 Va. App. 590, 596, 347 S.E.2d 152, 156 (1986) (emphasis added); Scott v. Commonwealth, 7 Va. App. 252, 262, 372 S.E.2d 771, 777 (1988). Here, there was only one separate taking and only one count of robbery available for prosecution. There may be numerous victims when a gunman displays his weapon to numerous employees although only one robbery can be punished. Here, however, the evidence fully established that property belonging to Dick's was taken from Rinehart through display of the weapon.

The defendant discusses Johnson v. Commonwealth, 215 Va. 495, 496, 211 S.E.2d 71, 72 (1975), at length. He says that case does not support the claim that "indirect intimidation" of a mere witness constitutes intimidation of that witness. That case, however, which discussed only whether a saleswoman was in possession of the store's property, did state that force had be used against that victim. It did not, of course, discuss "indirect intimidation," but did talk of the employee's duty to the employer. "This duty would include reasonable diligence on her part to protect the company's property from damage or larceny by strangers." Id. at 496-97, 211 S.E.2d at 73. Rinehart was in the process of performing that duty when the display of the firearm prevented him from doing so.

The trial court properly relied upon Durham v. Commonwealth, 214 Va. 166, 168, 198 S.E. 2d 603, 605-06 (1973), and could have cited Commonwealth v. Jones, 267 Va. 284, 591 S.E.2d 68 (2004), as situations where, as here, an employee attempted to intervene in a larceny so that the display of a weapon turned what might otherwise have been a simple larceny into a robbery.

A mere witness, someone who has neither the duty nor the power to intervene, is not a victim. An employee, watching the crime from a safe but remote place on a display from a surveillance camera would not be a victim if he had no power to intervene. It was Rinehart's thwarted duty and effort to intervene that rendered him a victim.

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, saying, "[H]e . . . was put in fear because there was a gun." (App. 136). If Rinehart ever became a "mere witness," it was only because his intervention was prevented by the display of the gun.

The Robbers Intended To Commit Robbery

The defendant argues that the evidence failed to show an intent to rob. However, since the Court of Appeals held that the evidence supported the finding that the defendant and his accomplices had entered into a conspiracy to rob the store, there can be no serious argument that the robbers did not intend to rob any employee in the store who might have happened upon the crime. The defendant had told Edwards that one of them should 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 Court of Appeals ruled:

> Edwards' testimony was sufficient proof of an explicit agreement between Edwards and appellant to carry out a taking of Dick's property, with the intent to steal, and to do so by violence or intimidation ***directed at whomever might pose an obstacle to the taking***.

Anderson v. Commonwealth, 52 Va. App. 501, 509, 664 S.E.2d 514, 518 (2008) (App. 198-99) (emphasis added).

The display of the gun was clearly not directed at the defendant but at any observers in the store. Having seen Rinehart, wearing a Dick's

lanyard, McBride nevertheless displayed a firearm in his presence. When he did so, he "presented" a firearm 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 May 5, 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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