IN THE COURT OF APPEALS OF IOWA

No. 0-228 / 99-0737
Filed May 31, 2000



STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEMETRICE BARTHOLOMEW GOSA,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, K. D. Briner and Todd A. Geer, Judges.

Defendant appeals from the judgment and sentence entered upon his conviction of second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

STREIT, P.J.

Demetrice Gosa appeals his conviction for second-degree robbery, claiming the trial court erred in refusing to instruct the jury on first-degree theft and that the statute under which he was sentenced is unconstitutional. Finding no merit to his claims, we affirm the conviction.

I. Background Facts & Proceedings.

The State charged the defendant, Demetrice Gosa, with second-degree robbery, in violation of Iowa Code section 711.3 (1997). Prior to the case being submitted to the jury, Gosa requested the court instruct the jury on first-degree theft. The court denied the requested instruction, and a jury convicted him of the charged offense. In sentencing Gosa, the court applied Iowa Code section 902.12(4), which requires a person, convicted of first or second-degree robbery, serve one hundred percent of the imposed sentence.[1]

Gosa appeals, claiming he was denied his constitutional right to due process when the trial court refused to give his requested instruction and that Iowa Code section 902.12 is unconstitutional under the Eighth Amendment.

II. Standard of Review.

We review de novo constitutional claims of error. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

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[1] This law is more widely known as the eighty-five percent rule. It has acquired this misnomer due to Iowa Code section 903A.2, which limits a prisoner's "good behavior time" to an amount not to exceed fifteen percent of the imposed sentence. Thus, the actual time served counting all reductions is eighty-five percent of the sentence imposed.

III. The Refused Instruction.

Gosa first claims he was denied his right to due process when the court refused to give his requested instruction on first-degree theft. "Ordinarily, the district court must instruct on a defendant's theory of defense provided the defendant makes a timely request, the theory underlying the requested instruction is supported by the evidence, and the requested instruction is a correct statement of the law." *State v. Johnson*, 604 N.W.2d 669, 672 (Iowa App. 1999). Such an instruction, however, is only appropriate if it tends to contradict one or more essential elements of the crime charged. *State v. Johnson*, 534 N.W.2d 118, 124 (Iowa App. 1995). A defendant is also entitled to an instruction on all lesser included offenses. Iowa R. Crim. P. 6(3).

The trial court properly refused to grant Gosa's requested instruction as it stated an inapplicable rule of law, and was not a lesser-included offense. *See State v. Johnson*, 534 N.W.2d at 124. In a situation where a single act can conceivably violate more than one criminal statute, the prosecutor has sole discretion in determining which charge to file. *State v. Perry*, 440 N.W.2d 389, 391-92 (Iowa 1989). In the present case, the State chose to pursue a charge of robbery in the second degree. An instruction detailing an uncharged crime has simply no bearing on the charge before the jury and is a wholly inapplicable statement of law. *Id.* Furthermore, an instruction on first-degree theft would not set forth any facts that would tend to undermine the elements of robbery. *See id.* Finally, it is well settled that first-degree theft is not a lesser-included offense of

robbery. *State v. Holmes*, 276 N.W.2d 823, 825 (Iowa 1979). Therefore, the court properly denied Gosa's request, and the conviction is affirmed.

IV. The Constitutionality of Iowa Code section 902.12.

Gosa next claims Iowa Code section 902.12 is unconstitutional. However, he concedes this issue has previously been decided adverse to his position by our supreme court in *State v. Hoskins*, 586 N.W.2d 707 (Iowa 1998), *State v. Ceaser*, 585 N.W.2d 192 (Iowa 1998), and *State v. Lara*, 580 N.W.2d 783 (Iowa 1998), but raises it to perfect a claim for federal habeas corpus relief. In accordance with the aforementioned precedential authority, we reject his constitutional claim. The conviction is affirmed.

AFFIRMED.