STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID TERENCE HARDRICK;

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

Nos. 180669
LC Nos. 94-002568
94-002569

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID TERENCE HARDRICK,

Defendant-Appellant.

Nos. 181707
LC Nos. 94-002566;
94-002567; 94-002570

Before: Taylor, P.J., and Murphy and E. J. Grant,* JJ.

PER CURIAM.

After a bench trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284; two counts of first-degree retail fraud, MCL 750.356c; MSA 28.588(3); two counts of larceny from a person, MCL 750.357; MSA 28.589; unarmed robbery, MCL 750.530; MSA 28.798; and three counts of habitual offender, third offense, MCL 769.11; MSA 28.1083. He appeals as of right. We affirm in part and reverse in part.

These convictions arose out of a series of robberies from a Seven Eleven Store. The store clerk identified defendant as the individual who robbed the store on seven different occasions, two of

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* Circuit judge, sitting on the Court of Appeals by assignment.

which occurred in the same day. On the first occasion, defendant came into the store with what appeared to be a gun but was later determined to be a knife and asked the clerk if he would trade merchandise for the knife. When the clerk responded in the negative, defendant came around the counter and took five cartons of cigarettes and left the store. The following occurrences were similar in that defendant came into the store, stated that he had a weapon, and proceeded to take cigarettes or other items from the store. Defendant testified that he was simply trading items such as the knife and marijuana for merchandise.

Defendant contends that there was insufficient evidence presented at trial to support his convictions. First, defendant argues that there was insufficient evidence to prove that he took property by force and violence, assault or putting in fear, so as to support the unarmed robbery conviction. We disagree.

In an appeal challenging the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994).

With regard to the incident from which the unarmed robbery arose, defendant took cigarettes from the store. In addition, defendant told the clerk that he had a "twenty-five" in his pocket and the clerk testified that he was scared. Thus, the clerk was placed in fear by an act of force or an assault. See *People v Laker*, 7 Mich App 425, 429; 151 NW2d 881 (1967) (the act of force necessary to satisfy this element is sufficient if the party robbed has a reasonable belief that he may suffer injury unless he complies with the demand). A rational trier of fact could conclude that there was sufficient evidence to support a conviction of unarmed robbery.

Next, defendant contends that there was insufficient evidence presented to support his conviction of larceny. He claims there was no evidence presented that he took property which was in the possession or immediate presence of another. We disagree.

The elements of larceny from a person are: (1) the property of another is taken, (2) there was a moving of the property whereby defendant took possession or control of it, (3) the property must have been taken from the person of the complainant which means from the body of the complainant or from his immediate area of control or immediate presence, (4) defendant intended to permanently deprive the complainant of the property, and (5) the taking was without consent and against the will of the complainant. *People v Wallace*, 173 Mich App 420, 426; 434 NW2d 422 (1988). The evidence related to the larceny from a person conviction showed that defendant told the clerk to bag up cigarettes whereupon defendant took the bag from the clerk. The act of taking the bag satisfies the element of taking from the clerk's possession or immediate presence. In addition, the clerk was the only employee in the store. Therefore, any merchandise in the store was under his control and possession and was in

his immediate presence. Consequently, there was sufficient evidence to support defendant's conviction of larceny from a person.

Defendant also contends that there was insufficient evidence presented to support a conviction of assault with intent to rob while armed. We disagree. The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 687 (1991).

The clerk testified that on one of the occasions defendant came into the store and told him that he had a "three-eighty" in his pocket and that he ought to "pop" the clerk because he almost got caught the last time he came in the store. Defendant grabbed fifteen cartons of cigarettes and left the store. The clerk testified that he did not actually see the gun but he thought he saw something in defendant's waistband that had a rubber handle and looked like a gun. Clearly, when defendant absconded with the merchandise, he possessed the intent to rob. This was evidence that defendant had the present ability to carry out his threat to the clerk while armed. *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993). Therefore, there was evidence of force and violence. Consequently, there was sufficient evidence presented to sustain defendant's conviction of assault with intent to rob while armed.

Finally, defendant contends that there was insufficient evidence presented to support his two convictions of first-degree retail fraud. We agree. For a conviction of first-degree retail fraud, the property must be offered for sale at a price more than $100. MCL 750.356c; MSA 28.588(3). Here, there was no evidence presented regarding the value of the cigarette cartons. Although the trial judge attempted to take judicial notice of the value, there was no evidence upon which he could base this determination. Cf. *People v Schmidt*, 196 Mich App 104, 107; 492 NW2d 509 (1992).

Affirmed in part, reversed in part, and remanded for entry of an order dismissing the two first-degree retail fraud counts.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant