

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL LAMAR KELLAM,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 191856

Recorder's Court

LC No. 95-003648-FC

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to one to five years' imprisonment. We affirm.

Defendant argues that the trial court's finding that an assault took place was clearly erroneous. The prosecutor characterizes defendant's argument as one challenging the sufficiency of the evidence. We conclude that, regardless of the proper characterization of defendant's argument, his conviction should be affirmed.

If defendant's argument is viewed as a challenge to the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993). "The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute." *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). The statute defines a weapon as "a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon." MCL 750.529; MSA 28.797. A simple criminal assault "is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery" *People v Jones*, 443 Mich 88, 92; 504 NW2d 158 (1993), quoting *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979), and *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978).

Viewing the evidence in the light most favorable to the prosecution, the victim testified that defendant told her he had a gun, he showed her something that appeared to be a gun, and then he demanded to go into the office where the safe was located. The victim put the money from the safe into the bags specified by defendant because she was afraid he would kill her if she did not do so. The victim's fear that she would receive an immediate battery if she did not cooperate with defendant was objectively reasonable and establishes the element of an assault. The felonious taking of property was established by the victim's testimony that over \$5,000 was taken from the safe, and defendant's statement to the victim that he had a gun while displaying something that appeared to be a gun established use of a dangerous weapon or an item made to look like a dangerous weapon that led the victim to reasonably believe it was a dangerous weapon. Thus, there was sufficient evidence to establish all the elements of armed robbery.

If defendant's argument is viewed as a challenge to the trial court's factual findings, such findings may not be set aside on appeal unless they are clearly erroneous. MCR 2.613(C). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Defendant was initially also charged with possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), but was acquitted of that count. Defendant argues this acquittal should undermine our confidence in the trial court's conclusion that an assault took place. The felony-firearm statute, however, requires proof that an actual firearm was used during the commission of a felony, *People v Stevens*, 409 Mich 564, 567; 297 NW2d 120 (1980), while the armed robbery statute only requires that the defendant use an item made to look like a dangerous weapon that leads the victim to reasonably believe it is a dangerous weapon. The victim's belief that defendant had a gun was reasonable even if the prosecutor did not present sufficient evidence to convince the trial court beyond a reasonable doubt that an actual firearm was used.

Defendant also argues that the victim's testimony that defendant assured her that he would not hurt her should also call into question the trial court's factual findings. Defendant's assurances do not necessarily make the victim's fear of an immediate battery unreasonable. To the contrary, defendant's statement that he had a gun, his order that the victim go with him to the office, and his request that she send home the only other employee in the building so there would not be any witnesses provide ample support for the trial court's implicit conclusion that the victim feared an immediate battery and its explicit conclusion that an assault had taken place. In light of the evidence as a whole, we are not "left with a definite and firm conviction that a mistake has been made." *Gistover, supra*.

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra