STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL RAY-LOU MORTON,

Defendant-Appellant.

UNPUBLISHED
October 7, 1997

No. 191382
Jackson Circuit Court
LC No. 95-072818-FC

Before: Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798. He was thereafter sentenced to eight to twenty years' imprisonment as a third habitual offender, MCL 769.11; MSA 28.1083. He appeals as of right and we affirm.

I

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of armed robbery. A court assesses the merits of a directed verdict motion through consideration of the evidence presented by the prosecution in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of the crime. *Id.*

Defendant contends that the armed robbery charge was improperly submitted to the jury because the prosecution failed to present sufficient evidence that defendant was armed within the meaning of the armed robbery statute, MCL 750.529; MSA 28.797. To be convicted of armed robbery, the accused must have been armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. *Id.; Jolly, supra*, p 465. It is sufficient if the article itself is harmless, so long as it was used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon. *People v Parker*, 417

Mich 556, 565; 339 NW2d 455 (1983). A subjective belief that a weapon exists is insufficient to satisfy the armed robbery statute. *People v Banks*, 454 Mich 469, 472; 563 NW2d 200 (1997).

Taken in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find that defendant had an article used or fashioned in a manner to lead the complainant to reasonably believe the article to be a dangerous weapon. The complainant, John Cotton, was working at a gas station during the early morning of June 10, 1995. According to Cotton, defendant entered the store and asked where the sandwiches were. Defendant retrieved a sandwich, walked to the counter to ask where the microwave oven was, and told Cotton to "ring up $1.99." Defendant then went to the microwave. Cotton turned around to look in the code book to determine the price of the sandwich, when he heard a motion behind him. He turned around to find defendant at the counter, approximately two feet away. Cotton noticed an object in defendant's right hand. The object was twelve to fourteen inches long, with a knob at the end, and was wrapped in black tape. Cotton testified that he did not know what the object was, but that it looked like a weapon, and that he perceived it to be a weapon. Defendant told Cotton to open the cash register, and defendant moved the object toward Cotton as he did so. Cotton opened the cash register, stepped back, and defendant reached over and grabbed cash from the register.

In this case, there was evidence of actual possession of an article fashioned in a manner to lead the complainant to reasonably believe that the article was in fact a dangerous weapon. Although the article may not actually have been a gun or rifle, considering the complainant's description of the article, combined with defendant's use of the article, it was certainly fashioned by defendant in a manner to lead the complainant to believe that the article was a dangerous weapon. Accordingly, the trial court did not err in permitting the jury to consider the charge of armed robbery.

II

Defendant next argues that the trial court erred in refusing to give his requested instructions of larceny in a building, MCL 750.360; MSA 28.592, and larceny, MCL 750.356; MSA 28.588.[1] The trial court denied these requested instructions, and instead instructed the jury on armed robbery, unarmed robbery, and larceny from the person.

Larceny in a building and larceny are cognate lesser offenses of armed robbery. *People v Beach*, 429 Mich 450, 484; 418 NW2d 861 (1988).[2] To determine whether an instruction on a cognate lesser offense should be given, the record must be examined and, if there is evidence which would support a conviction of the cognate lesser offense, then the trial court, if requested, must instruct on it. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). With respect to jury instructions, the lesser included offense rule for misdemeanors is: (1) there must be a proper request for the misdemeanor instruction, (2) there must be an appropriate relationship between the charged offense and the requested misdemeanor, (3) the requested misdemeanor must be supported by a rational view of the evidence, and (4) the requested instruction must not result in undue confusion or some other injustice. *People v Stephens*, 416 Mich 252, 261-264; 330 NW2d 675 (1982). In either situation, the rules are essentially the same.

The trial court found that there was insufficient evidence to support the offenses of larceny in a building and larceny, and, therefore, denied defendant's requested instruction on these offenses. Defendant testified at trial that he walked up to the counter with a sandwich, told the complainant to open the cash register, and then grabbed approximately $50 in cash from the register and ran out of the store. Defendant denied having a weapon and denied having any type of object as described by the complainant. Defendant, however, also admitted that he went behind the counter, told the complainant to open the cash register, and grabbed some money. Further, defendant admitted that his action of going behind the counter within a few feet of the complainant "would probably intimidate him to some point."

Although there was evidence to support the offenses of larceny in a building and larceny, had the jury accepted some of defendant's testimony only, we find that any error in failing to give the instructions on larceny in a building and larceny to be harmless. In this case, the jury was instructed on the offense of larceny from the person and such an instruction was rejected because of the conviction of unarmed robbery. The jury's rejection of the larceny from the person charge indicates that it would have likewise rejected the charges of larceny in a building and larceny. We believe this is especially true because unarmed robbery contains the additional element of requiring an assault, the use of force or violence, or putting the complainant in fear. CJI2d 18.2. No larceny offense requires the element of the use of force, violence, or an assault. Therefore, based on the jury's rejection of the larceny from the person charge, we believe that any error in failing to instruct on the offenses of larceny in a building and larceny was harmless error. See, e.g., *Beach, supra,* pp 490-491.

Moreover, in *People v Bailey,* 451 Mich 657, 671; 549 NW2d 325 (1996), our Supreme Court held that "[w]here a defendant admits activity that, as a matter of law, constitutes proof of the distinguishing element, the basis for the instruction on the lesser crimes evaporates." Because defendant in the present case admitted that his action of going behind the counter and within a few feet of the complainant would probably have intimidated the complainant, defendant essentially admitted to the element of unarmed robbery that the defendant put the complainant in fear. Thus, the trial court's decision to not instruct on the charges of larceny from a building and larceny was not error requiring reversal.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] Because defendant took less than $100 in cash, this case concerns only the misdemeanor offense of larceny. See MCL 750.356; MSA 28.588.

[2] We note that our Supreme Court's holdings regarding whether larceny offenses are necessarily lesser included offenses or cognate lesser offenses of robbery are inconsistent. In *People v Chamblis,* 395 Mich 408, 425; 236 NW2d 473 (1975), the Court held that larceny from the person is a necessarily

lesser included offense of armed robbery. In *People v Kamin*, 405 Mich 482, 501; 275 NW2d 777 (1979), the Court held that larceny from the person is a cognate lesser offense of armed robbery. In *People v Jankowski*, 408 Mich 79, 87-89; 289 NW2d 674 (1980), the Court held that larceny in a building and larceny are necessarily lesser included offenses of armed robbery. The Supreme Court's contrary holding in *Beach, supra*, p 484, that only larceny from the person is a necessarily lesser included offense of robbery, appears to be the Supreme Court's latest word on this question.