

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON RAY PHILLIPS,

Defendant-Appellant.

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UNPUBLISHED

December 16, 1997

No. 199222

Muskegon Circuit

LC No. 96-139013-FC

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant was charged with assault with intent to rob while armed, and following a two-day jury trial, was convicted of the lesser offense of larceny from a person, contrary to MCL 750.357; MSA 28.589. Defendant was sentenced to 54 to 120 months in prison, to be served consecutively to two sentences he was already serving. Defendant appeals as of right. We affirm.

I

Defendant first argues that the evidence presented was insufficient to sustain his conviction. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements were proved beyond a reasonable doubt. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

Conviction of larceny requires a showing of the following elements:

“(1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with felonious intent, (4) the subject matter must be the goods or personal property of another, (5) and the taking must be without the consent of and against the will of the owner.” [*People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992), quoting *People v Jones*, 106 Mich App 429, 432; 308 NW2d 243 (1981).]

In this case, the police officer victim, Dana Garland, testified that defendant physically grabbed her money out of her left hand, against her will, and held onto it until the police arrived; further, defendant testified that he intended to keep the money, knowing that it did not belong to him. This evidence, if believed by the jury, was sufficient to satisfy the necessary elements of larceny from a person beyond a reasonable doubt. Defendant's argument on appeal is nothing more than an assertion that defendant's testimony was more credible than Garland's. However, this Court's review of the sufficiency of evidence does not involve weighing the evidence or making determinations regarding credibility. *Reeves, supra* at 34.

## II

Defendant also argues that the trial court erred in imposing his sentence. He states that the court erred in its scoring for offense variables 1 and 13 (OV1 and OV13),<sup>1</sup> involving implied use of a weapon and serious psychological injury suffered as a result of the offense, respectively, and that, as a result of the miscalculations, defendant's sentence was placed within the wrong guideline range and ultimately violated the principle of proportionality.

### A

We will not review a sentencing court's scoring determination unless (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). In the instant case, defendant argues that the court's scoring determinations regarding defendant's implied use of a weapon in OV1 and the victim's psychological injury in OV13 were wholly unsupported. This argument is belied by the record.

Defendant argues that the trial court could not consider evidence that defendant impliedly used a weapon because the jury found defendant guilty of the lesser offense of larceny from a person, a crime that does not require use of a weapon as one of its elements. We disagree. Despite defendant's conviction of a lesser offense, the court could conclude, by a preponderance of the evidence, that a particular aggravating factor occurred for purposes of sentencing. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). Here, the court properly considered Garland's testimony that defendant had his hand in his pocket, made to look like a weapon.

Defendant also alleges that the trial court incorrectly considered Garland's psychological injury, arguing that such an injury was not proven by Garland's testimony that she visited a psychologist on one occasion several months after the event occurred. Again, review of guideline calculation errors is precluded unless the calculations were based on "wholly unsupported" facts. *Mitchell, supra* at 177. Because Garland testified to defendant's implied use of a gun and her subsequent psychological trauma, it cannot be said that the court considered a "wholly unsupported" factual predicate.

Defendant's challenge to the court's scoring calculations does not present a cognizable claim for review.

B

Defendant's argument that his sentence violated proportionality is based on his argument above that the wrong guideline calculation was used. However, because this Court will not review defendant's challenges to the scoring used to calculate the proper guideline range, this Court is left to review the sentence imposed within the range calculated by the trial court.

The guideline range in this case was 24 to 72 months. Defendant's minimum sentence of 54 months was well within that range, and thus is presumed to be proportionate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant has failed to present any unusual circumstances at sentencing or on appeal that would overcome this presumption. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995).

Affirmed.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ Jane E. Markey

<sup>1</sup> In his supplemental brief, defendant further argues that the trial court erred in scoring OV1 at all. Specifically, defendant posits that the court should have used the guidelines applicable for larceny (for which OV1 is not applicable) rather than the guidelines for robbery. He is mistaken. Apparently recognizing that larceny from a person is akin to a robbery offense, the drafters of the sentencing guidelines expressly provided that the offense variables in the robbery category be used when determining a sentencing guidelines range for larceny from a person. Michigan Sentencing Guidelines (2d ed), p 19, 21.