

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTELLE B. PALMER,

Defendant-Appellant.

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UNPUBLISHED  
February 25, 2003

No. 238190  
Wayne Circuit Court  
LC No. 01-005928-01

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial conviction of first-degree retail fraud, MCL 750.356c.<sup>1</sup> We remand for entry of a conviction of second-degree retail fraud, MCL 750.356d, and resentencing on that conviction.

Defendant was originally charged with assault with intent to rob while unarmed, MCL 750.88. He asserts on appeal that because he was found not guilty of the charged offense, his conviction of the cognate offense must be reversed, apparently arguing that the conviction of the lesser offense was somehow inconsistent with the finding that defendant was not guilty of the greater.<sup>2</sup> We disagree. The evidence showed that defendant entered a Target store that was open to the public, placed items valued at between \$200 and \$1,000 in a bag, and attempted to leave the store without paying for the items. Defendant engaged in a physical struggle with two loss prevention officers who stopped him near the door.

The trial court found defendant not guilty of the charge of assault with intent to rob while unarmed on the ground that the evidence did not show beyond a reasonable doubt that the assault was for the purpose of or with the intent to accomplish a robbery, as opposed to an altercation resulting from a confrontation with the security guards. The trial court initially found defendant

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<sup>1</sup> Defendant was also convicted of misdemeanor assault and battery, but does not challenge that conviction.

<sup>2</sup> Defendant does not rely on *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), which held that lesser included offense instructions are required only for necessarily included offenses and not cognate lesser offenses. *Cornell* was decided after the instant case was tried, and the issue was not preserved.

guilty of larceny in a building, MCL 750.360, and assault and battery, MCL 750.81, rejecting defense counsel's assertion that second-degree retail fraud, MCL 750.356d, would be a more appropriate conviction offense than larceny in a building because the incident occurred in a retail establishment. At sentencing, the trial court stated that it had reconsidered and had concluded that the proper offense conviction was retail fraud. The court sentenced defendant to three years' probation, with the first year in jail. Defendant received credit for 133 days.<sup>3</sup> The judgment of conviction states that defendant was convicted of first-degree retail fraud.

The court's verdict was not inconsistent. The court found that defendant attempted to steal items from the store, and committed an assault and battery. The court was not convinced that the assault and battery was committed with the intent to steal the items. Rather, the court thought it possible that defendant was simply trying to get away when he engaged in the assault and battery.

Although not raised, we also note that defendant had adequate notice that retail fraud was a possible verdict, and defense counsel, in fact, argued to the court that it was retail fraud, rather than assault with intent to rob, that defendant had committed. Error requiring reversal must be that of the trial court and not error to which defendant contributed by deliberate plan. *People v Griffen*, 235 Mich App 27, 46; 597 NW2d 176, lv den 461 Mich 919; 605 Nw2d 316 (1999). On three separate occasions defendant specifically requested that he be charged with retail fraud in the second degree rather than assault with intent to rob while unarmed: at the conclusion of the preliminary examination, in his motion to quash the information, and during the trial. A party cannot request a certain action of the trial court and then argue on appeal that the resulting action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995), lv den 451 Mich 902; 549 Nw2d 580 (1996) citing *People v Murray*, 106 Mich App 257, 262; 307 NW2d 464 (1981).

We affirm the conviction of retail fraud, but remand for correction of the degree of retail fraud. The court found defendant guilty of "retail fraud" without specifying the degree, but the judgment of conviction lists first-degree retail fraud. A person is guilty of first-degree retail fraud if he, while a store is open to the public, steals property of the store that is offered for sale at a price of \$1,000 or more. MCL 750.356c(1)(b). A person is guilty of second-degree retail fraud if he, while a store is open to the public, steals property of the store that is offered for sale at a price of \$200 or more but less than \$1,000. MCL 750.356d(1)(b). It is uncontroverted that second-degree retail fraud is the appropriate offense. We vacate defendant's conviction of first-degree retail fraud and remand for entry of a conviction of second-degree retail fraud and for sentencing on that conviction. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra

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<sup>3</sup> The maximum term for the conviction of assault and battery was ninety days in jail. MCL 750.81(1). Because defendant had already served 133 days in jail, he received no additional time for that offense.