

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY WILLIAM TARASOFF,

Defendant-Appellant.

UNPUBLISHED

July 24, 2007

No. 269575

Macomb Circuit Court

LC No. 2005-003837-FC

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530, and sentenced as an habitual offender, second offense, MCL 769.10, to 29 to 270 months' imprisonment.¹ He appeals as of right. We affirm.

I

Defendant was convicted of robbing the twenty-year-old complainant, a traveling door-to-door magazine salesperson, in July 2005 in Sterling Heights. The complainant testified that, as she was working, defendant and Joseph Markus approached her and asked about her magazines, and the three began to converse. As the complainant was smoking a cigarette with Markus and defendant, Markus took her "pat case" containing her receipts, lists, and Visa card, as well as \$220. At the complainant's insistence, her case was returned, but without the money. The complainant attempted to retrieve the money and, as she patted down Markus, he revealed a knife underneath his shirt. Markus told the complainant that he would return the money if she "h[u]ng out" with him later. The complainant then used defendant's cellular telephone and feigned calling friends to arrange the later meeting, but instead she called her supervisor, who was driving around the area. When defendant noticed the complainant talking "gibberish,"

¹ Defendant was charged with armed robbery, MCL 750.529 (with larceny from a person, MCL 750.357, as an alternative offense) and conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529 (with conspiracy to commit larceny from a person, MCL 750.157a and MCL 750.357, as an alternative offense). The trial court dismissed the conspiracy charges after a directed verdict motion. The court instructed the jury on unarmed robbery as a lesser-included offense of armed robbery.

defendant said, “don’t make me bust out my gun.” Within minutes of the call, the supervisor arrived, and defendant and Markus fled in different directions.

The complainant’s supervisor was unable to catch defendant or Markus. A passerby testified that he saw defendant running and eventually hiding in a bush near a garage. A resident of the area testified that defendant ran into his garage and asked to be hidden because the police were looking for him. Defendant said that he robbed a magazine salesperson and hid a nine-millimeter gun and that Markus had the money. Defendant changed his clothes while in the garage and was picked up by an acquaintance after making a telephone call.

The police located defendant after retrieving his cellular telephone number from the complainant’s supervisor’s cellular telephone. When the police approached defendant at his home, defendant denied robbing the complainant but accused Markus of doing so. When asked if he had a gun at the time, defendant admitted that he told the complainant that he had “something.” The police arrested Markus at his home and found \$194 and a folding knife, which the complainant identified at trial.

II

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to request an adjournment “when faced with late discovery.” We disagree.

As stated in *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995):

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Defendant has failed to demonstrate that, had defense counsel moved for an adjournment, there is a reasonable probability that the motion would have been successful. “No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown” MCL 768.2. A trial court’s ruling on a motion for an adjournment is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Moreover, “a defendant must show prejudice as a result of the trial court’s abuse of discretion” in denying an adjournment. *Id.*

Defendant was initially charged with larceny from a person. Subsequently, in a separate information, defendant was charged with armed robbery, conspiracy to commit armed robbery, and conspiracy to commit larceny from a person. Both cases were set for trial on the same day. On the first day of trial, the trial court allowed the prosecutor to consolidate the two cases, thereby amending the second information to add larceny from a person as an “alternative” or lesser-included offense of armed robbery, pursuant to MCR 6.120(a). In doing so, the court explained that the offense of larceny from a person arose out of the same facts and circumstances as the charges of armed robbery, conspiracy to rob while armed, and conspiracy to commit

larceny from a person. Defense counsel objected to the consolidation, arguing that he did not have an amended information, that he did not receive an amended witness list so “he was at a loss” as to which witnesses from the two cases would be called, and that he was at a “significant disadvantage” in having to try a completely different case. In response, the trial court noted that “[a]ll of the information within these informations had already been furnished to the defendant” and that the witness list “is the same in both cases.”

Defendant has not established a reasonable basis for an adjournment. Initially, contrary to defendant’s statement, the defense was not “faced with late discovery.” As aptly noted by the trial court, all of the evidence, including the witnesses, were the same in both cases, and the larceny from a person charge was only an alternative offense to the armed robbery charge. In addition, defense counsel was appointed to represent defendant for the charge of armed robbery in August 2005, and trial commenced in January 2006. Thus, defense counsel was fully aware of the facts in this case, which were not complex. Further, defendant does not claim that he was surprised by any witness and makes no specific claims of prejudice. There is simply nothing in the record to support defendant’s assertion that defense counsel should have moved for an adjournment or that defense counsel was unprepared to try the case.

Under these circumstances, a request for an adjournment would have been futile. Consequently, defense counsel was not ineffective. *Snider, supra* at 425.

III

Defendant also argues that the trial court deprived him of due process when it refused to allow him to plead guilty to the lesser offense of larceny from a person. We disagree. A trial court’s decision to reject a defendant’s guilty plea is reviewed for an abuse of discretion. See, generally, *People v Grove*, 455 Mich 439, 444; 566 NW2d 547 (1997).

On the first day of trial, defendant requested to enter a plea of guilty to larceny from a person. The prosecutor objected. In refusing to accept defendant’s plea, the court stated:

No, I’m not taking your client’s plea. I’m consolidating those matters under one file. It’s clear that that was the intention. That’s what the Court is going to do. It’s clear that they arise under the same facts and circumstances.

In denying defendant’s motion for a new trial on this issue, the trial court explained:

[T]he most serious charge here was robbery armed. Prior to the trial the prosecution did move to consolidate all charges in one information, and larceny from a person was added at that time. That - - at the time the Court ruled that the larceny from a person arose out of the same facts and circumstances as the armed robbery, and - - and under those circumstances tendering of the plea to the lesser included offense of larceny from a person would have been an invasion into the prosecutorial function. The attempt to - - in other words, the attempt to plead to the lesser included offense and walk from the armed robbery was apparently the tactic that was being employed at the time, and the Court would have none of it since larceny from a person was merely an included offense.

The trial court consolidated the larceny and robbery charges because they arose out of the same offense, and larceny is a lesser offense of robbery. A defendant does not have a constitutional right to plead guilty to a lesser offense to avoid prosecution on a greater charge. See *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971) (“There is, of course, no absolute right to have a guilty plea accepted,” and a “court may reject a plea in exercise of sound judicial discretion.”). In addition, “the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.” *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998); see also *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Defendant has not demonstrated that the prosecutor’s decision to charge larceny from a person as an alternative offense to armed robbery was an abuse of discretion. See *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996) (a prosecutor abuses his discretion only if “a choice is made for reasons that are unconstitutional, illegal, or ultra vires”) (internal citation and quotation marks omitted). The trial court did not abuse its discretion in rejecting defendant’s plea.

IV

Defendant finally argues that the trial court erred in refusing to instruct the jury on the misdemeanor offenses of (1) larceny less than \$200 and (2) larceny of \$200 or more, but less than \$1,000, as lesser-included offenses of armed robbery and larceny from a person. We disagree.

“MCL 768.32 only permits instruction on necessarily included lesser offenses, not cognate lesser offenses.” *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); see also *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002).

A necessarily included offense is one that must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. In other words, if a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater. [*People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003) (internal citations and quotation marks omitted).]

A cognate offense may contain one or more elements not found in the greater offense. *Cornell, supra* at 345. The determination whether an offense is a lesser-included offense is a question of law subject to de novo review. See *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

Larceny less than \$200, and larceny of \$200 or more, but less than \$1,000,² are not necessarily included offenses of armed robbery,³ or larceny from a person.⁴ A person can

² MCL 750.356 provides:

(1) A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:

(continued...)

commit the offenses of armed robbery and larceny from a person by stealing property from a person or in a person's presence, regardless of the value of the property. In contrast, "[a] larceny is committed when one steals the property of another *outside* the person's presence." *People v Perkins*, 473 Mich 626, 635 n 9; 703 NW2d 448 (2005) (emphasis added); see also *People v Beach*, 429 Mich 450, 483; 418 NW2d 861 (1988) ("only larceny from the person is necessarily included in robbery"). In addition, the plain language of both MCL 750.356(4)(a) and (5) require that the property taken have a specific monetary value. Because larceny less than \$200, and larceny of \$200 or more, but less than \$1,000, are not necessarily included lesser offenses of armed robbery or larceny from a person, the trial court's refusal to instruct the jury on those offenses was not error. *Reese, supra* at 446.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens

(...continued)

(a) Money, goods, or chattels.

* * *

(4) If any of the following apply, the person is guilty of a misdemeanor . . .

:

(a) The property stolen has a value of \$200.00 or more but less than \$1,000.00.

* * *

(5) If the property stolen has a value of less than \$200.00, the person is guilty of a misdemeanor

³ The elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529.

⁴ "The elements of larceny from a person are (1) the taking of someone else's property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person's immediate area of control or immediate presence." *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), *aff'd* 473 Mich 626 (2005); see also MCL 750.357.