

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 1, 2011

v

ROBERT LEE MCGHEE,
Defendant-Appellant.

No. 294140
Wayne Circuit Court
LC No. 08-009654-FH

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

SHAPIRO, J. (*concurring*).

I concur. Contrary to the majority, however, I would conclude that the trial court erred in not instructing the jury on unarmed robbery, a lesser included offense of armed robbery. In *People v Reese*, 466 Mich 440; 647 NW2d 498 (2002), the Supreme Court held that where a defendant is charged with armed robbery the jury should also be instructed on unarmed robbery in all cases in which “there is [a] real dispute concerning whether defendant was armed.” *Id.* at 447. In that case, the Court held that an unarmed robbery instruction need not have been given because the evidence that the perpetrator was armed was “overwhelming” and defense counsel “did not explicitly argue that defendant was not armed . . . [but instead] argued that defendant was mistakenly identified as the perpetrator” *Id.* at 448.

In the instant case, defense counsel’s entire closing argument focused on the issue of whether or not the defendant was armed. Indeed, in that closing argument, defense counsel did not argue that a robbery had not occurred nor that defendant was not the robber. His argument attacked only the accuracy of the victim’s recollection that defendant had a gun and argued at some length that the object briefly seen in defendant’s hand in the video could have been “keys, cell phone [or a] wallet” rather than a gun. He also pointed out that the color of the gun described in the victim’s testimony did not match the gun later found in defendant’s van.

Thus, there was a “real dispute” over the weapon element of armed robbery, the sole element that distinguishes it from unarmed robbery. I believe that the majority opinion confuses the issue of sufficiency of the evidence with the standard for giving a lesser included instruction. That there is sufficient evidence to convict of armed robbery is irrelevant to the question whether a lesser included instruction was mandated. Indeed, if there was not sufficient evidence to instruct on armed robbery, the court would be obligated not only to instruct on unarmed robbery, but to direct a verdict of acquittal on armed robbery. The controlling issue on whether a lesser

included instruction must be given is whether the element that distinguishes the charged and lesser offense is in dispute, and in this case it was.

However, I conclude that, given the conduct of the jury's deliberations, this error was harmless. A failure to provide an instruction concerning a necessarily included offense is harmless unless the error resulted in a miscarriage of justice, in that, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006). This jury was clearly concerned with whether or not the videotape showed a gun and was ultimately satisfied that it did beyond a reasonable doubt. While deliberating, the jury asked to have the tape played again for them even though they had viewed it one day earlier during the victim's testimony. They initially asked to view it twice in succession and then returned to their deliberations. Sometime later they asked to view the moments in the video where the prosecutor asserted the gun could be seen, with freeze frame format, and the court allowed them to do so five times. Immediately after the multiple viewings of the freeze frames, the jury returned the guilty verdict.

Had the jury simply rendered a guilty verdict without this clear focus whether this element of the charged offense was present, this would have been a much closer question. Such a conviction would raise the real risk that the jury had been unsure whether a gun was used, but given only the choices of convicting of armed robbery or outright acquittal, it lowered the burden of proof on the disputed element in order to convict on the only charge before it. Here, however, the jury demonstrated that they understood that the burden was on the prosecution, they repeatedly and carefully examined the relevant proofs, and after doing so were satisfied that the prosecution had proven beyond a reasonable doubt that defendant was armed.

/s/ Douglas B. Shapiro