

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DEVONTE HARRIS,

Defendant-Appellant.

UNPUBLISHED

July 10, 2007

No. 267333

Kent Circuit Court

LC No. 05-007851-FH

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

PER CURIAM.

Defendant appeals as of right his jury conviction of unarmed robbery, MCL 750.530. We reverse and remand for entry of a judgment of conviction for the offense of larceny from a person, MCL 750.357, and for resentencing.

On July 21, 2005, at approximately 6:00 a.m., defendant called the dispatcher at Port City Cab and asked that a taxicab be sent to 569 Martha Street SW. Taxicab driver Jacqueline Miller was dispatched to the address. Defendant entered the taxicab, which was a minivan, carrying a black backpack and a plastic grocery bag containing frozen food. He sat in the seat directly behind Miller, and asked her to take him to 1925 Stonebrook. A week before Miller took someone to that address and the passenger ran on her without paying so she asked defendant for money—a deposit—up front. Defendant said he did not have any money but she would get paid when they got to Stonebrook. Miller refused to take defendant and they argued.

During the argument, defendant told Miller “that the next time he saw me, he was going to put a cap in me.” Then defendant reached out and grabbed money that Miller had sitting in a cup holder on the van’s console and exited the minivan. After the police arrived, Miller identified defendant as the perpetrator and he was arrested. At trial, Miller testified that she did not feel threatened by defendant and she was not concerned that he had any weapons. She felt that defendant’s comment about putting a “cap in” her was an empty threat. Defendant testified that he and Miller “were cool” but that they got into an argument because Miller owed him \$100 for crack cocaine. He maintained that he did not steal any money from Miller. The jury found defendant guilty of unarmed robbery.

Defendant contends that there was insufficient evidence presented at trial to support his conviction for unarmed robbery. We agree. After viewing the evidence in the light most favorable to the prosecution, drawing all reasonable inferences and resolving credibility conflicts

in favor of the verdict, we conclude that a rational trier of fact could not have found the essential elements of unarmed robbery proved beyond a reasonable doubt. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A conviction for unarmed robbery required the prosecution to prove: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, (3) while unarmed. MCL 750.530; *People v Johnson*, 206 Mich App 122, 125; 520 NW2d 672 (1994). In this case, defendant argues that the prosecutor failed to prove, beyond a reasonable doubt, that he took the money by force, violence, assault, or putting the victim in fear. We agree.

The evidence introduced at trial did not support a finding that defendant committed the larceny by force, violence, or assault. An assault is defined as an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Nothing in the record indicated that defendant attempted to commit a battery upon Miller. Moreover, the evidence established that defendant's acts did not place Miller in reasonable apprehension of receiving an immediate battery. Miller testified that she was not threatened by defendant's comment that he was going to "put a cap in" her and she was not concerned that he had any weapons. She considered his comment to be an "empty threat," which she disregarded "[t]o a certain degree" because she "didn't think he was going to turn around and shoot [her] – at that point."

And, the evidence did not support a conclusion that the larceny was accomplished by fear. Whether property is taken as a result of fear must be determined from the victim's perspective. *People v Hearn*, 159 Mich App 275, 281; 406 NW2d 211 (1987). "When a person is induced to part with property out of fear, the test to determine whether a robbery has been committed is whether 'the party robbed has a reasonable belief that he may suffer injury unless he complies with the demand.'" *Id.*, quoting *People v Kruper*, 340 Mich 114, 121; 64 NW2d 629 (1954).

First, Miller did not testify that defendant's actions placed her in fear or that she was scared of defendant. See *Johnson, supra* at 126; *People v Laker*, 7 Mich App 425, 428-429; 151 NW2d 881 (1967). To the contrary, she testified that she did not feel threatened by defendant, that she considered his comment about "put[ting] a cap in" her an "empty threat," and that she did not fear that he had any weapons or that he was going to shoot her.

Second, Miller was not induced to part with her property out of fear. See *Kruper, supra; Hearn, supra*. When she refused to drive defendant an argument ensued and defendant grabbed the money, on the spur of the moment, before he exited the taxicab. Defendant never requested the money from Miller or asked Miller to comply with his request to avoid further injury. In fact, Miller testified that, even after she and defendant argued in the taxicab, she "wasn't even expecting" defendant to take the money. In sum, the evidence was insufficient to prove that defendant took Miller's property by force or violence, or by assault or putting in fear; thus, his conviction for unarmed robbery is reversed. See *People v Randolph*, 466 Mich 532, 548, 550; 648 NW2d 164 (2002).

However, larceny from a person is a necessarily included offense of unarmed robbery. *People v Beach*, 429 Mich 450, 484; 418 NW2d 861 (1988). 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)].

The jury was instructed on the crime of larceny from a person in this case. Moreover, the jury's finding, that defendant was guilty of unarmed robbery, necessarily included a finding that defendant committed every element of the crime larceny from a person. Therefore, a remand for entry of a judgment of conviction of that offense is appropriate. See *Randolph, supra* at 552 n 25, 553; *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001).

Defendant also contends that the trial court erred in scoring 15 points under Offense Variable ("OV") 10, MCL 777.40. Defendant objected to the scoring of OV 10 in his motion for resentencing therefore this issue is preserved. See MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

We review issues concerning the proper interpretation and application of the statutory sentencing guidelines de novo on appeal. *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006). If there is any evidence to support the given score, we will affirm the trial court's scoring decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

In calculating a sentencing guidelines range, a trial court must assess 15 points under OV 10 if predatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The timing and location of an assault may be evidence of preoffense predatory conduct. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). In this case, the trial court concluded that, by calling the taxicab company and requesting a taxicab, defendant engaged in preoffense conduct, the primary purpose of which was to victimize the cab driver. However, contrary to the trial court's finding, the record did not support the conclusion that defendant called the taxicab company and summoned a taxicab for the purpose of robbing, or committing any other offense against, the taxicab driver.

Trial testimony established that defendant called the taxicab company and identified himself, by name, to the dispatcher, whom he had met before. He requested that a taxicab be dispatched to 569 Martha, where his close friend resided and where he stayed on occasion. He entered the taxicab carrying a bag of frozen food, told the driver that he had to take the meat home to feed his babies, and asked to be driven to another address. He was not wearing a disguise; he did not brandish any weapons. He argued with the driver for 15 minutes, giving the driver more than sufficient time to make an identification, then abruptly took the money, exited the taxicab, and left. It cannot be inferred from the evidence in this case that defendant targeted Miller, or any other taxicab driver, or that he waited for an opportunity when she would be alone to commit the crime. See *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002). The record in this case does not support the scoring of 15 points under OV 10 for preoffense predatory conduct. Thus, upon resentencing, the trial court shall not assess any points under OV 10 for predatory conduct.

Defendant's conviction for unarmed robbery is reversed and the matter is remanded for (1) entry of a judgment of conviction for larceny from a person, and (2) resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter