

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLYNN SHERWOOD GASTON,

Defendant-Appellant.

UNPUBLISHED

August 5, 1997

No. 193175

Recorder's Court

LC No. 95-003599

Before: Young, P.J., and Gribbs and S. J. Latreille*, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for unarmed robbery, MCL 750.530; MSA 28.798, for which he was sentenced to six to fifteen years in prison. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to the trial court to convict him of unarmed robbery. We disagree. To satisfy the requirements of due process, the prosecutor must introduce sufficient evidence that could justify a trier of fact in reaching the conclusion that a defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). An appellate court reviewing the sufficiency of the evidence following a bench trial must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995); *People v Bell*, 155 Mich App 408, 414; 399 NW2d 542 (1986).

We conclude that the prosecution presented sufficient evidence for the trial court to convict defendant of unarmed robbery beyond a reasonable doubt. To convict a defendant of unarmed robbery, the prosecution must prove beyond a reasonable doubt that the defendant feloniously took property from another by force, violence, assault, or by putting the other in fear, while the defendant was unarmed, and that the defendant possessed the intent to rob at the time the act was committed.

* Circuit judge, sitting on the Court of Appeals by assignment.

People v Johnson, 206 Mich App 122, 125-126; 520 NW2d 672 (1994); *People v Himmelein*, 177 Mich App 365, 378-379; 442 NW2d 667 (1989).

Defendant argues that the prosecution failed to carry its burden because he acted under duress. To successfully assert the defense of duress, a defendant must show that he or she was compelled to commit a criminal act because of being threatened with serious conduct such that the defendant's free will was overcome. *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975). The defendant must present evidence from which the trier of fact could conclude:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm. [*Id.* at 623; see also *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996).]

In this case, the prosecution presented evidence that defendant entered the victim's home with an unidentified assailant. Defendant asked the victim where his watch, money, and rings were as the other person patted down the elderly victim, ushered the victim upstairs, attempted to tie him up, and locked the victim in the bathroom. As the events unfolded, defendant informed the victim that the other assailant had a gun and would probably shoot him if he did not give up his property. As defendant stated this, the unidentified man held his hand in his pocket simulating the presence of a gun. After the assailants left, the victim remained locked in the bathroom for over two hours. Following these events, the victim discovered that several pieces of property were missing from his home.

Defendant's version of the events is not materially different. The only difference is that defendant claims he participated in the robbery under duress, fearful that the unidentified assailant would shoot him if he did not assist. However, defendant admitted that he left the house following the unidentified assailant; but never returned to let the victim out of the bathroom or to call the police.

The trial court chose not to believe defendant. Witness credibility is a matter for the trier of fact to ascertain, and will not be resolved anew on appeal. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Considering the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that defendant did not act under duress; but rather feloniously took property from the victim by force, while defendant was unarmed and possessed the intent to rob.

Defendant next argues that the trial court erred in preparing his sentencing information report. Specifically, defendant claims that the trial court improperly assessed twenty-five points under offense variable two (OV2) based on its determination that defendant subjected the victim to terrorism.

We reject defendant's argument because it is directed at the trial court's "calculation of the sentencing variable on the basis of [its] discretionary interpretation of the unchallenged facts," rather than the accuracy of the factual basis for the sentence. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Since the sentencing guidelines do not have the force of law, "[t]here is no juridicial basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guidelines variables." *Id.* at 176-177.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Roman S. Gribbs

/s/ Stanley J. Latreille