

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALAN EBRIGHT,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 197357

Eaton Circuit Court

LC No. 96-000019-FH

Before: Holbrook, P.J., and Young and J.M. Batzer*, JJ.

MEMORANDUM.

Defendant was convicted by a jury of larceny from a person, MCL 750.357; MSA 28.589, and sentenced to serve three to ten years in prison. He appeals as of right and we affirm.

Defendant first argues that the trial court erred in failing to instruct the jury on the lesser included offenses of larceny over \$100, MCL 750.356; MSA 28.588, and/or larceny in a building MCL 750.360; MSA 28.592. We disagree. Preliminarily, we conclude that these are cognate lesser offenses. Cognate lesser offenses share several elements with the greater crime and are of the same class or category. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996). However, cognate lesser offenses may contain some elements not found in the higher offense. *Id.* Larceny over \$100 and larceny in a building are cognate lesser offenses of larceny from the person because they share several elements with larceny from the person and also have additional elements not found in the latter offense. Unlike larceny over \$100, larceny from the person does not require proof that the value of the property exceeds \$100. Similarly, larceny from the person does not require proof that the crime was perpetrated in a building. “The requested instruction on the cognate offense must be consistent with the evidence and defendant’s theory of the case.” *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). A review of the evidence in this case convinces us that these cognate lesser offenses were not consistent with the evidence presented and defendant’s theory of the case. No evidence was presented to suggest that defendant obtained possession of the money other than directly from the victim’s hand. In fact, consistent with his defense that he lacked the requisite specific intent, defendant testified that he did not even recall the incident. Defendant was merely inviting the jury to

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

engage in pure

speculation and find that he committed the cognate lesser offenses. See *Bailey, supra* at 674. Accordingly, the trial court did not abuse its discretion in refusing to give these instructions. See *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991).

Next, defendant argues that the trial court erred in scoring prior record variable (PRV) 7, thereby increasing the recommended minimum sentencing range under the sentencing guidelines. Recently, the Michigan Supreme Court held that “[t]here is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how guidelines should be applied, or misapplication of guideline variables.” *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Accordingly, appellate review of the trial court’s sentencing guidelines calculations in this case is precluded.

Affirmed

/s/ Donald E. Holbrook, Jr.

/s/ Robert P. Young, Jr.

/s/ James M. Batzer