

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT C. THOMAS,

Defendant-Appellant.

UNPUBLISHED

July 30, 1999

No. 210382

Oakland Circuit Court

LC No. 97-150452 FC

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and assault with intent to rob while unarmed, MCL 750.88; MSA 28.283. He was sentenced to one to fifteen years' imprisonment for each conviction. Defendant appeals as of right and we affirm.

Defendant raises two issues on appeal, claiming that the trial court abused its discretion in denying his motion for a new trial because the verdict is against the great weight of the evidence and that his dual convictions of unarmed robbery and assault with intent to rob while unarmed violate the prohibition against double jeopardy. We disagree on both accounts and affirm.

A new trial may be granted if the verdict was against the great weight of the evidence. A motion for a new trial based on the weight of the evidence should be granted only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). In the present case, defendant claims that there was no evidence that he actually assaulted Larry Ludlow and argues, therefore, that his conviction for unarmed robbery was against the great weight of the evidence.

On the evening of December 29, 1996, defendant and four friends went to the home of Heather Martin. Ludlow and Martin were present at the home when defendant arrived. Martin became concerned because the group was acting rowdy. Ludlow believed that defendant and his friends were under the influence of alcohol. In order to encourage them to leave Martin's home, Ludlow offered to take defendant and the others to the city of Detroit so that they could purchase marijuana from a person with whom Ludlow was acquainted. Defendant and his friends agreed to follow Ludlow to Detroit in

their own cars. After leaving Martin's home, Ludlow picked up his friend, Todd Polczynski, because Polczynski knew the exact location of the person from whom the group planned to purchase the marijuana and because Ludlow "didn't feel comfortable having this many people follow me." Ludlow then stopped at a gas station and the cars following him also stopped. While at the gas station, defendant and his friend, Cardell Smith, asked Ludlow if they could ride in his car. Ludlow agreed and the two got into the back seat of his car while he went inside to pay for gas.

When Ludlow returned to the car, Polczynski was being choked from behind by defendant. According to Ludlow and Polczynski, defendant threatened to shoot Polczynski and Polczynski gave defendant approximately \$100 to \$150 that he had in his pocket. Also, according to Ludlow and Polczynski, defendant then took Ludlow's radar detector from his car and demanded that Ludlow give defendant his pager and unlock the trunk so that defendant and his friends could gain access to the car's stereo speakers. As Ludlow struggled to open the trunk, defendant struck Polczynski in the face. Defendant then took Ludlow's amplifier while his friends tore Ludlow's speakers from his trunk and fled the scene.

Ludlow testified that he observed defendant choking Polczynski and heard defendant threaten to "blow [Polczynski's] head off" if he did not surrender his money to defendant. He stated that he saw a "blackish, gray object" in defendant's hand that he believed was metal and could have been a gun. Ludlow also testified that he gave defendant his pager after defendant demanded it because, "I was under the impression the man had a gun. I wasn't going to say no." Thereafter, Ludlow observed defendant hit Polczynski in the face, and Ludlow did not protest defendant's taking of his radar detector and amplifier.

Based on that evidence, we conclude that defendant's conduct put Ludlow reasonably in fear of injury which enabled defendant to take Ludlow's property. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). Thus, defendant's conviction for unarmed robbery was not against the great weight of the evidence and the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to that conviction.

Defendant also claims that testimony indicating he had a claim of right to the money in Polczynski's possession establishes that his conviction for assault with intent to rob while unarmed was against the great weight of the evidence. An assault with intent to rob while unarmed occurs when a perpetrator commits an assault, either by committing a forceful act that causes immediate injury to another or by committing a forceful act that makes another reasonably afraid of being injured, with the intent to permanently deprive the other of his property. *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998).

Here, all of the witnesses that observed the incidents at the gas station, including defendant, testified that defendant held Polczynski in a headlock and demanded that he give defendant money. Defendant, Smith, and Matthew Hancock testified that they had given Polczynski approximately \$130 to purchase marijuana earlier in the evening. According to those witnesses, the argument between defendant and Polczynski ensued when Polczynski refused to return that money after defendant, Smith, and Hancock decided they did not want the marijuana Ludlow and Polczynski planned to purchase.

Ludlow and Polczynski, however, testified that no one gave them money that evening and that the money Polczynski surrendered to defendant rightfully belonged to Polczynski. Questions of credibility and intent should be left to the trier of fact to resolve. MCR 2.613(C); *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

Giving due regard to the special opportunity and ability of the trial court to determine the credibility of witnesses, we conclude that defendant's conviction for assault with intent to rob while unarmed was not against the great weight of the evidence. See *id.* at 555. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial with respect to the verdict finding defendant guilty of assault with intent to rob while unarmed.

Defendant next argues that his convictions were violative of double jeopardy protections because the two convictions involved the same offense. The guarantee against double jeopardy protects against multiple prosecutions and multiple punishments for the same offense. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). A trial court's determination of a double jeopardy issue is a question of law that is reviewed de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

In the present case, defendant choked Polczynski and demanded that he surrender his money. Compelling testimony indicates that defendant then took money that belonged to Polczynski. Thereafter, defendant demanded that Ludlow surrender his property. Ample evidence indicated that Ludlow was put in fear when defendant hit Polczynski in the face. Defendant then took property from Ludlow's car. We conclude that the evidence establishes that defendant had an intent and goal with respect to Ludlow and his possessions that was wholly separate from his prior intent to assault and rob Polczynski and that defendant's assault upon Polczynski was complete before defendant's commission of the unarmed robbery. There is no double jeopardy violation if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other. *Id.* at 708, citing *People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986); see also *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998) (there is no double jeopardy violation where the defendant's convictions arise out of wholly separate transactions).

Affirmed.

/s/ Michael J. Kelly

/s/ Kathleen Jansen

/s/ Helene N. White