

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH SAMUEL HALL,

Defendant-Appellant.

UNPUBLISHED

December 10, 1999

No. 210022

Wayne Circuit Court

Criminal Division

LC No. 97-003587

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIKKI NICOLE WASHINGTON,

Defendant-Appellant.

No. 210023

Wayne Circuit Court

Criminal Division

LC No. 97-003587

Before: Doctoroff, P.J., and Holbrook and Kelly, JJ.

PER CURIAM.

In Docket No. 210022, defendant Joseph Samuel Hall appeals as of right his bench trial convictions of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to 1-1/2 to 10 years' imprisonment for the armed robbery conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

In Docket No. 210023, defendant Nikki Nicole Washington appeals as of right her bench trial conviction of armed robbery, MCL 750.529; MSA 28.797, for which she was sentenced to 1-1/2 to 10 years' imprisonment. We affirm.

Defendants Hall, Washington, and Harrison Smith, allegedly robbed a pharmacy, where Washington was a cashier. According to witnesses, Hall walked into the store, pointed a gun at Washington, and emptied her cash register of approximately \$1,500 in cash. Smith allegedly assisted Hall in his escape. The store security guard, Maurice Robinson, and the store manager, Kevin Armstead, witnessed the crime.

On appeal, both defendants argue that the prosecutor failed to elicit evidence sufficient to prove the elements of armed robbery beyond a reasonable doubt. Primarily, defendants contend that the prosecutor failed to show the existence of an assault and failed to show that Hall took the money out of Washington's register while in the presence of a victim with superior rights to the property. We disagree.

In reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The elements of armed robbery, MCL 750.529; MSA 28.797, are: (1) an assault; (2) a felonious taking of property from the victim's person or presence; and (3) the defendant must be armed with a weapon described in the statute. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). A simple criminal assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an imminent battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

First, defendants argue that the prosecutor failed to elicit evidence to prove beyond a reasonable doubt that Hall assaulted either Robinson or Armstead. Viewing the evidence in a light most favorable to the prosecutor, we disagree. As to Robinson, evidence established that he was standing at the front of the store near Washington's register when Hall walked into the pharmacy. Hall stood at Washington's register, drew a handgun, looked at Robinson and said, "[H]ey, man." At that point, Robinson ran to the back of the store and instructed the pharmacist to call the police. Robinson testified that he did not attempt to stop Hall because he feared for his safety. Hall's actions placed Robinson in reasonable apprehension of receiving an immediate battery.

Hall argues that he never pointed the gun at Robinson. However, Robinson was near Washington and Hall addressed him while pointing the gun at Washington. Robinson reasonably could have interpreted Hall's actions as a threat of harm. Indeed, Robinson ran away at that point. In light of this evidence, we conclude that Hall assaulted Robinson. See *People v Lawson*, 65 Mich App 562, 566; 237 NW2d 559 (1975) ("Although the defendant claims otherwise, the fact that the defendant held the gun only to Mrs. Post's head is of no consequence in determining whether or not the others were assaulted. The actions of the defendant were sufficient to place the others in fear and to prevent them from resisting the taking or exercising their free will. This is all that is necessary to constitute an assault.").

Further, Hall assaulted Armstead, the store manager, when he displayed the gun at Washington's register. The facts established that Armstead saw Hall with the gun and hid from him in a spot where he could view the robbery. Armstead waited approximately five seconds before following

Hall out the door. Although Armstead did not explicitly testify that Hall's actions placed him in fear of receiving an immediate battery, the evidence of his hiding and waiting circumstantially supports this conclusion.

Moreover, armed robbery is a continuous offense, which is not complete until the perpetrator reaches a place of temporary safety. *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989). The evidence supports the inference that Hall displayed his gun with the intention of causing fear in whomever was present at the pharmacy to prevent anyone from attempting to stop him. Viewing the evidence in a light most favorable to the prosecutor, we find that a rational trier of fact could find beyond a reasonable doubt that Hall assaulted both Robinson and Armstead.

Defendants also argue that the prosecutor failed to elicit evidence to establish beyond a reasonable doubt that Hall took money from a victim with rights to the money in Washington's register. See *Lawson, supra* at 565 ("it is essential, in order to constitute robbery, that property be taken by means of an assault from one having the care, custody, control, management, or possession of the property"). To prove armed robbery, the prosecutor must show only that the property was taken in the presence of the victim and that the victim's right to possession was superior to the defendant's. *People v Jones*, 71 Mich App 270, 272; 246 NW2d 381 (1976). With respect to robbery, a thing is within the presence of a victim if it is within his reach, inspection, observation or control, so that he could, if not overcome by violence or prevented by fear, retain possession of it. *People v Clark*, 113 Mich App 477, 480; 317 NW2d 664 (1982).

Armstead had a right to possess the store's funds that was superior to Hall's. Evidence established that Armstead was ultimately responsible for the pharmacy's cash. Evidence further established that Hall took the money from Washington's register when Armstead could see the money being taken and was in a position to stop the taking if he were not prevented from doing so by fear. Thus, as to Armstead, the evidence, viewed most favorably to the prosecution, was sufficient to prove the essential elements of armed robbery beyond a reasonable doubt.

Defendants further argue that Robinson's sole duty as a security guard was to patrol the pharmacy and no evidence suggested that he had a right to manage the money in Washington's drawer. However, Robinson was an employee of the pharmacy. His duty was to guard and protect the store's property. The fact that the pharmacy had a non-intervention policy only in the event of armed robbery suggests that Robinson was hired to stop the theft of its property in all other situations. Although he ran to the back of the store when the robbery began, Robinson was in full view of the money when Hall took it and explicitly testified that he did not prevent the taking because Hall placed him in fear. We cannot accept defendants' argument that Robinson had no right to control or manage the property taken by Hall. Viewing the evidence in a light most favorable to the prosecution, we conclude that, as to Robinson, the prosecution proved the elements of armed robbery beyond a reasonable doubt.

In sum, a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could conclude that the prosecution proved the elements of armed robbery beyond a reasonable doubt, specifically the existence of an assault and a taking from the presence of people with superior rights of possession over the property.

Second, Hall argues that the admission of non-testifying codefendant Washington's statement, in which she detailed Hall's role in the robbery scheme, violated his Sixth Amendment right to confrontation, citing *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), as support for his argument.¹ However, this Court has declined to extend the *Bruton* rule to bench trials, because a judge, unlike a jury, is able to consider the confession for the limited purpose of establishing the guilt of the confessor. *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992). Therefore, because the instant convictions arose out of a bench trial, we reject Hall's argument that admission of Washington's statement violated *Bruton*.

Nevertheless, Hall contends that Washington's statement formed the basis of his felony-firearm conviction. We disagree. The trial court expressly found Hall guilty of felony-firearm on the basis of the testimony of Armstead and Robinson, both former soldiers, who stated that Hall used a blue steel, semiautomatic, nine or .45 millimeter handgun to rob the Rite Aid, not the BB gun the defense contended was the robbery weapon. Admission of Washington's statement did not violate Hall's constitutional rights.

Third, Hall argues that the prosecutor made improper statements during her closing and rebuttal arguments that injected extraneous issues into the proceedings, confused and inflamed the jury, and generally denied him a fair and impartial trial. However, Hall was tried by a judge, not a jury. A judge possesses a superior knowledge of the law that allows him to ignore improper statements of counsel. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992); *Butler*, *supra* at 66. The trial judge's findings of fact clearly evidence his resistance to the prosecutor's alleged misconduct. In sum, Hall was not prejudiced by the prosecutor's alleged misconduct.

Fourth, Hall and Washington both argue that the trial court misapplied the sentencing guidelines offense variables on the basis of the court's discretionary interpretation of the unchallenged facts, i.e., that the court wrongly considered Washington to be a victim under OV 1, wrongly considered Armstead to be a victim under OV 6, and wrongly concluded that Washington was a leader in this criminal enterprise. These do not present cognizable claims of error on appeal. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

Finally, both defendants argue that their sentences are disproportionate. Because defendant Washington has fully served her minimum term, the issue she raises regarding the proportionality of her sentence is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Further, defendant Hall's sentence is presumptively proportionate because it falls within the guidelines recommended range. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Contrary to Hall's argument, his lack of a criminal record and his history of sound employment are not "unusual circumstances" sufficient to overcome the presumption of proportionality. *Id.*, 533; *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

¹ In *Bruton, supra*, the Supreme Court prohibited the introduction of a nontestifying codefendant's confession in a joint jury trial where the confession inculpated the defendant. The rationale behind this decision was that the jury would be unable to confine the use of the confession to the issue of the confessor's guilt, and that admission of the confession would deny the defendant's Sixth Amendment right to cross examination. The Court determined that a limiting instruction could not cure the substantial prejudice that resulted from admission of the damaging confession. *Id.* at 131, 136; *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992).