

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACQUELINE BORDEN,

Defendant-Appellant.

UNPUBLISHED

July 13, 2001

No. 223717

Kent Circuit Court

LC No. 99-007466-FH

Before: Saad, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction of armed robbery, MCL 750.529, entered after a jury trial. We reverse and remand for a new trial. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with armed robbery on an aiding and abetting theory. The complainant, a cab driver, testified that defendant, a fare whom he knew, declined to leave the cab after he asked her to do so. Complainant stated that an armed man entered the cab and turned off the ignition. While the man did so, defendant took money from his (complainant's) pocket. Defendant denied participating in the robbery, and testified that after the armed man entered the cab he took money from complainant and a chain from her.

The trial court instructed the jury on the offense of assault with intent to rob while armed, MCL 750.89, an offense with which defendant was not charged and on which neither party had requested an instruction. The prosecutor reminded the court that the charged offense was armed robbery. The court informed the jury of that fact, but did not instruct the jury on armed robbery. The court instructed the jury on the lesser included offense of unarmed robbery, MCL 750.530. The verdict form indicated that the principal charge was armed robbery. The jury found defendant guilty of armed robbery.

Defendant moved to vacate her conviction and for a new trial on the ground that the jury was not instructed on the offense of which it convicted her. In the alternative, defendant sought resentencing on a conviction of assault with intent to rob while armed. The trial court denied the motion, finding that defendant's failure to object to the instructions at trial waived the issue. In addition, the court concluded that because the instructions for armed robbery and assault with intent to rob while armed were similar, the error did not violate defendant's substantive rights.

We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

The United States Constitution requires that a criminal conviction rest upon a jury determination that the defendant is guilty of every element of the crime charged beyond a reasonable doubt. US Const, Ams V, VI. An instructional error concerning one element of a crime, whether the error is one of omission or misdescription, is subject to a harmless error analysis. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999). The complete failure to instruct a jury on any of the elements of an offense is a structural error requiring reversal. *People v Duncan*, 462 Mich 47, 52-53, 57; 610 NW2d 551 (2000).

We reverse defendant's conviction and remand for a new trial. The offenses of armed robbery and assault with intent to rob while armed share some elements. See CJI2d 18.1 and CJI2d 18.3. Assault with intent to rob while armed is a necessarily included lesser offense of armed robbery. *People v Garrett*, 161 Mich App 649, 652; 411 NW2d 812 (1987). Defendant was not charged with and did not request an instruction on the offense of assault with intent to rob while armed. Plaintiff's contention that because the jury found that the elements of assault with intent to rob while armed had been established beyond a reasonable doubt it necessarily found that she aided and abetted the offense of armed robbery is without merit. The jury was never instructed on the elements of armed robbery. The absence of instruction on any elements identified as elements of armed robbery deprived the jury of the law to be applied to the facts, and left it to speculate as to what the prosecution was required to prove to establish the charged offense. A verdict based on such speculation is not a reliable indicator of the defendant's guilt or innocence. *Duncan, supra*. The trial court's failure to instruct on the charged offense of armed robbery constituted structural error requiring reversal, notwithstanding defendant's lack of objection to the instructions at trial. *Id.*, 57.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy