# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 8, 2002 |
| v | No. 224544<br>Kent Circuit Court |
| BRIAN JAMES CHERRY,<br><br>Defendant-Appellant. | LC No. 98-011801-FH |

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

HOLBROOK, JR., P.J. (*dissenting*)

I respectfully dissent. I would vacate defendant's unarmed robbery conviction and remand to the circuit court for resentencing on the first-degree retail fraud conviction.

The elements of unarmed robbery are: (1) a felonious taking of property from the person of another or in his presence, (2) by force and violence or by assault or by putting in fear, and (3) being unarmed. MCL 750.530; *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993); *People v Himmelein*, 177 Mich App 365, 378; 442 NW2d 667 (1989). I do not believe that sufficient evidence of the element of force was shown to sustain defendant's unarmed robbery conviction.

In *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989), this Court stated that in Michigan, "the use of force or intimidation in retaining the property taken or in attempting to escape rather than in taking the property itself is sufficient to supply the element of force or coercion essential to the offense of robbery." *Tinsley* indicated that this rule of law arises from the fact "that Michigan views robbery as a continuous offense, which is not complete until the perpetrator reaches a place of temporary safety." *Id.* I disagree with the Tinsley Court's conception of the origins of this principle.

In *People v Beebe*, 70 Mich App 154, 158; 245 NW2d 547 (1976), this Court indicated that when analyzing a defendant's use of force to see if the element of force or intimidation was present, the action's of the defendant should be viewed through what the *Beebe* Court called a "'transaction' perspective." The transactional approach is not, however, simply a method by which acts not contemporaneous with the act of taking can be viewed as elevating a simple larceny into a robbery. In other words, the transactional approach is not a fictional bridge that can be employed to combine acts removed by time and space into a single transaction, unless a

defendant has reached an undefined "place of temporary safety." Instead, the purpose of the transactional approach is to give a framework through which the separate acts can be viewed in order to determine if the required concurrence between the defendant's state of mind and the act of force existed. *People v LeFlore*, 96 Mich App 557, 562; 293 NW2d 628 (1980).

In *Beebe*, the defendant had gone into a market and asked the owner for five cases of beer. *Beebe, supra* at 156. After the owner had placed four cases in the trunk of the defendant's car, the owner asked his wife if the defendant had paid for the beer. *Id.* at 156-157. She told him that the defendant had not yet paid. *Id.* at 157. When the owner requested payment, the defendant pulled a gun "said, 'We'll call it even', or something like that," and then drove off. *Id.* The *Beebe* Court concluded that when the defendant pulled the gun, the "goods were sufficiently within the victim's control that he could have recovered them if he had not been overcome by fear." *Id*. at 159. Thus, because the evidence established that the defendant had employed force with the intent of taking from the presence of the market owner the beer, the elements of armed robbery had been proved. *Id*. at 159-160.

In *LeFlore, supra*, this Court again emphasized that the purpose of the transactional approach is to determine if the requisite concurrence between a defendant's acts and state of mind exists to support a charge of robbery. The *LeFlore* Court cited *Beebe* for the proposition that an assault that follows a taking can be used to establish the requisite force "if that force is used to completely sever the victim's possession." *LeFlore, supra* at 562. "Implicit in this recognition," the LeFlore Court explained, "is the requirement that the defendant intend at the time of the assault to preserve his possession of the stolen goods; his larcenous intent must be constant. . . . Unless there is a purposeful relationship between these two elements, the criminal episode is merely two isolated crimes." *Id.* In *LeFlore*, the defendants had assaulted two women walking home from a store. *Id.* at 560. During the struggle, the complainant's money had fallen from her blouse after it was torn. *Id.* "One of the two defendants picked up the fallen money and the struggle continued." *Id.* The incident ended with one of the defendants attempting to run over complainant with a car. *Id.* The LeFlore Court concluded that insufficient factual findings existed so as to determine the defendants' intent. *Id.* at 562.

The majority relies on *People v Newcomb*, 190 Mich App 424; 430 NW2d 749 (1991), and *People v Velasquez*, 189 Mich App 14; 472 NW2d 289 (1991), as support for its conclusion that sufficient evidence was adduced at trial on the element of force. In *Newcomb*, this Court observed that the "transactional approach to armed robbery provides that a taking is not considered complete until the assailant has accomplished his escape." *Newcomb, supra* at 431. Thus, because the defendant had not yet left the victim's room with the property when the defendant wielded a hammer, the *Newcomb* Court concluded that the requisite concurrence between the element of force and intent had been established. *Id.* This is in accord with *Beebe*, where the defendant employed force before he had exited the victim's store and made off with the beer.

The facts are quite different in the case at hand. Here, defendant had left the store and had proceeded to his car in the parking lot when he was confronted by the security guard. It is clear from the record that defendant was not guilty of robbery when he initially took the shoes because he had not employed any force or intimidation in accomplishing this act. He had also

not committed robbery when he left the store, because he had not employed force or intimidation in exiting the building or in crossing the parking lot to his car.

I also find *Velasquez* to be distinguishable. In *Velasquez*, the defendant had not yet removed the property from the presence of the rightful owner. Indeed, the salesman was right outside the car and was attempting to block the defendant's escape. *Velasquez, supra* at 15-16. As in *Beebe*, the force was sufficiently contemporaneous to the taking of the goods that the concurrence between the larcenous intent and the use of force was evident.[1] I do not believe that the situation in the case at hand is analogous. Defendant was not confronted when he initially took the shoes, nor was there any attempt to block his exit from the store that defendant then overcame through the use of force or intimidation. There is also no evidence that defendant knew he was being followed and was in the process of fleeing from such pursuit.

I also do not agree that a conflict exists between *Velasquez* and *People v Randolph*, 242 Mich App 417; 619 NW2d 168 (2000), lv granted 465 Mich 885 (2001). Regardless of how the *Velasquez* Court formulated the legal principles, the evidence in *Velasquez* showed that the defendant had escaped and had thus completed the larcenous transaction.

MCL 750.530[2] is clear that the use of force must be intended to accomplish the act of taking. Here, the evidence was insufficient to establish a continuity of intent between the taking of the shoes and the struggle in the parking lot. However, the evidence adduced was sufficient to support the first-degree retail fraud conviction. Therefore, I would vacate defendant's unarmed robbery conviction, and remand for resentencing on the conviction of first-degree retail fraud.

/s/ Donald E. Holbrook, Jr.

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[1] In fact, because the acts of force in both *Beebe* and *Velasquez* occurred while the victims retained sufficient dominion and control over the property, I believe the acts were contemporaneous, and thus there was no need to turn to the "retain or escape" standard in order to infer intent.

[2] The statute reads:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Thus, unlike modern robbery statutes that have followed and employed the approach set forth in the Model Penal Code, MCL 750.530 retains its link to the common law. At common law, the act of force or intimidation had to arise before or at the time of the taking. LaFave & Scott, Criminal Law, § 8.11(e), pp 785-786. I would advise caution in adding a judicial gloss to the statutory language.