

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL DION GARRETT,

Defendant-Appellant.

UNPUBLISHED

March 26, 2002

No. 227944

Genesee Circuit Court

LC No. 00-005676-FH

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of unarmed robbery, MCL 750.530, and was sentenced to five to fifteen years' imprisonment. He appeals as of right. We affirm defendant's conviction, but remand for further proceedings in connection with defendant's sentence.

Defendant shoplifted clothing from a store. He was spotted and intercepted by three loss prevention officers before leaving the store. They escorted him to the loss prevention office. When an officer was opening the office door, defendant grabbed one of the officers in a headlock and started fighting with the other two as they attempted to get defendant to unhand the officer. Defendant broke free and ran out of the store. He fled the parking lot on the hood of a friend's automobile and was arrested a year later.

I

Defendant argues that a special jury instruction was erroneous because the instruction allowed the jury to find the "force" element for robbery based on events that occurred after he took the property. Defendant also argues that a different special instruction should have been given, one which would instruct that force be part of the taking, not part of the escape.

Although defendant objected to the prosecutor's requested special instruction, he did not request that a different instruction be given. In fact, at trial, defendant requested that only the standard jury instructions be read to the jury. Thus, while defendant has preserved his objection to the instruction actually given, he has not preserved for appeal his request that an alternative special instruction should have been given. *People v Handley*, 415 Mich 356, 360; 329 NW2d 710 (1982).

With regard to unarmed robbery, the trial court gave the following special instruction:

The use of force in retaining property taken or in attempting to escape rather than in the taking of the property itself is sufficient to supply the element of force essential to the offense of robbery.

Because robbery is a continuing offense, the “force” element of the offense is satisfied when force has been used to effect an escape. *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989). The offense is not complete until the perpetrator has reached a place of temporary safety. *Id.*, *People v Randolph*, 242 Mich App 417; 619 NW2d 168 (2000), lv gtd 465 Mich 885 (2001); *People v Newcomb*, 190 Mich App 424, 430-431; 476 NW2d 749 (1991);

Jury instructions will be upheld if they accurately state the law. *People v McKinley*, 168 Mich App 496, 508; 425 NW2d 460 (1988). The special instruction was crafted consistent with *Tinsley* and related cases and, therefore, accurately stated the law. No error occurred.

II

Defendant also challenges the trial court’s supplemental instruction regarding the difference between unarmed robbery and the lesser included offense of larceny. The court clarified the difference during deliberations in response to a note from the jury. Defendant objected that the court had rephrased the jury’s question to remove a grammatical error, but defendant did not object on the grounds asserted on appeal. Thus, the issue is not preserved. In any event, defendant argues on appeal that the supplemental instruction should also have stated that force must accompany the taking of the property, and not the escape. We reject this argument for the reasons stated in the first issue. Moreover, the instruction accurately stated the legal difference between larceny and robbery. See *People v Denny*, 114 Mich App 320, 323-324; 319 NW2d 574 (1982).

III

Finally, defendant argues that his sentence improperly exceeded the sentencing guidelines’ recommended minimum sentence range.¹ The issue was preserved through a motion for resentencing. *People v Walker*, 428 Mich 261, 266; 407 NW2d 367 (1987). We review defendant’s sentence for an abuse of discretion based on the concept of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

When defendant was sentenced, the guidelines recommended a minimum sentence range of four to ten years. The court sentenced defendant to a minimum of five years, which (at the time) appeared to fall within the guidelines.

Defendant later moved for resentencing, arguing that the prior record variables (PRV) had been improperly scored because his other convictions were erroneously counted both as prior convictions and subsequent/concurrent convictions. Defendant is correct. His other

¹ Because the offense occurred before the January 1, 1999, effective date of the legislative sentencing guidelines, MCL 769.34(2), the former judicial guidelines apply.

convictions should have been scored only under PRV 7 as concurrent/subsequent convictions. It appears the trial court agreed with defendant's argument at the motion for resentencing. During the motion hearing, the court stated, without further explanation, "the attorney today is absolutely correct." When called upon to adjust the sentence, however, the court declined to reduce the five-year minimum sentence, stating the original sentence was "proportionate to the offense."

When a court imposes a sentence exceeding the guidelines, it is required to state reasons on the record and on the Departure Form. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). The court here did not do so. The court also did not update the sentencing information report to reflect the recalculated guidelines. Accordingly, we remand this matter for further proceedings. On remand, the court shall amend the sentencing information report to reflect the recalculated guidelines, and shall either resentence defendant within the guidelines range or explain its reasons for exceeding the guidelines. We retain jurisdiction to review defendant's sentence after the proceedings on remand. *People v Pena*, 457 Mich 885; 586 NW2d 925 (1998).

Defendant's conviction is affirmed. The matter is remanded for further proceedings consistent with this opinion. Jurisdiction is retained.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot