Court of Appeals, State of Michigan

ORDER

Pat M. Donofrio
Presiding Judge

People of Michigan v James Stephan Pinson

Docket No. 251809

LC No. 03-022986

Jane E. Markey

Karen M. Fort Hood
Judges

On the Court's own motion, the 11/30/2004 opinion is hereby VACATED. The opinion contained a clerical error. A new opinion is attached which corrects the error.

Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

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Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2004
v	No. 251809 Saginaw Circuit Court
JAMES STEPHAN PINSON, Defendant-Appellant.	LC No. 03-022986-FC

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, fleeing and eluding, third degree, MCL 750.479a, felon in possession of a firearm, MCL 750.224f, and resisting and obstructing a police officer, causing injury, MCL 750.81d. He was sentenced as a habitual offender, fourth offense, MCL 769.12, and appeals as of right.[1] We affirm.

At approximately 11:00 a.m. on February 23, 2003, an employee and assistant manager were working at Leroy's Jewelry in the Fashion Square Mall when defendant entered the store. The employee began to assist defendant. The assistant manager overheard defendant ask to see the most expensive jewelry, platinum. Suspicious of defendant based on his extremely casual clothes, a sweatshirt and baggy pants, and the expensive merchandise requested, the assistant manager took the employee's keys and began to assist defendant. When defendant asked to see an item, the assistant manager merely pulled the item, told defendant the price, and locked the merchandise back in the case.

Defendant kept his right hand in his front sweatshirt pocket, pulled plastic grocery bags with his left hand, and demanded merchandise. Defendant advised that he had a weapon and a partner nearby. Based on defendant's threat to kill and the appearance of the outline of a gun through the sweatshirt, the assistant manager complied. Defendant did not merely want the

[1] In addition to the mandatory terms for the firearm offenses, defendant was sentenced to thirty to fifty years' imprisonment for all other convictions, except the resisting and obstructing conviction was given a term of ten to fifteen years' imprisonment.

jewelry, but ordered the trays containing the jewelry be put in the bags. Defendant then tried to quickly leave the mall. However, his pants were too loose, and he had to stop to pull them up from his ankles. Meanwhile, the plastic bags were tearing and jewelry fell to the ground, leaving a trail from the store to the parking lot.

Mall security was alerted to the theft and began to pursue defendant from a distance based on the report of a gun. Once outside the mall, defendant jumped into the passenger side of a waiting vehicle. Security advised the driver of the vehicle to return the merchandise. The driver[2] reflected, looking at both defendant and security, then exited the vehicle. Defendant jumped into the driver's seat and led police on a high-speed pursuit. Defendant crashed the vehicle into a home and did not obey officer's orders to stop reaching back into the vehicle. Defendant did not reach for a gun (although a .38 revolver, reported as stolen, was found in the vehicle), but for jewelry and began to run. An officer who tried to stop defendant with a foot sweep found himself on the ground unable to move.[3] Defendant ran away and was hit by a police car arriving at the scene. He got up and continued to flee, but was tackled and arrested by police. Jewelry was found in the car, in the snow (with the assistance of a metal detector), and in defendant's clothing when medical personnel came to the scene to treat defendant's injured leg. At the police station, defendant was alone in an interview room that was monitored by cameras. Defendant was observed reaching behind toward his rear end. Rings wrapped in tissue were discovered between defendant's buttocks. This basic factual scenario serves as the basis for the convicted offenses.

Defendant first alleges that there was insufficient evidence to support the conviction for armed robbery. We disagree. Our review of a challenge to the sufficiency of the evidence is de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When examining the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). It is the role of the trier of fact, not the appellate court, to determine the inferences that may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of armed robbery include an assault involving the felonious taking of property from the victim's presence or person while the defendant is armed with a weapon. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The armed robbery statute, MCL 750.529, provides that the robber may be armed with a dangerous weapon or any article used or fashioned in a manner designed to lead a person to the reasonable belief there is a dangerous

[2] The driver initially gave police a false name and reported that he was the victim of a carjacking. The driver indicated that he was waiting for a friend named "Rabbit" who was still in the mall. Subsequent investigation discovered the false name and led to the conspiracy charge.

[3] In addition to the injury to the police officer, the assistant manager of Leroy's suffered a mild heart attack, requiring him to seek treatment, but he did return to work at the jewelry store. The employee, however, quit her employment with the jewelry store after the robbery because of safety concerns.

weapon. "[A] concealed hand, held in such a manner as to resemble a pistol, may satisfy the 'armed' element of armed robbery." *People v Burden*, 141 Mich App 160, 165; 366 NW2d 23 (1985).

In the present case, the assistant manager testified that defendant entered the store wearing a sweatshirt with a front pocket. The assistant manager was suspicious of defendant because of his style of dress and his request to see the most expensive items in the store, platinum jewelry. The assistant manager began to wait on the customer. He testified that defendant maintained his right hand in his pocket while he was in the store. Defendant pulled out bags from his pocket with his left hand, ordered the assistant manager to fill the bags, and indicated that he had a gun in his pocket. The assistant manager testified that it appeared that defendant had a gun in his pocket based on the outline in the sweatshirt. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence that defendant was "armed" for purposes of the armed robbery statute. *Id*.; MCL 750.529.

Defendant next alleges that there was insufficient evidence to support the conspiracy conviction. We disagree. "A criminal conspiracy is a mutual understanding or agreement between two or more persons, expressed or implied, to do or accomplish a criminal or unlawful act." *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). No overt acts are required to establish the conspiracy. *Id*. Rather, the elements of the crime are satisfied immediately upon entry by the parties into the mutual agreement. *Id*.

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the conspiracy conviction. *Johnson, supra*. Defendant was observed seated in a vehicle in the mall parking lot with another man, the driver, shortly before the robbery. The vehicle was not parked at the curb, but was parked in a space in the opposite direction. That is, the vehicle was parked in such a way that it did not need to be backed out of the parking space and was parked against the direction of aisle traffic. A security officer patrolling the parking lot, observed the men, noting the unusual manner in which they were parked. Moreover, he noted that the two men visually followed him as he traveled through the parking lot. Normally, patrons acknowledge security and look away. In the mall, defendant advised the employees that he was armed and he would kill them unless they complied with his requests. He further advised the employees that he had a partner. When security personnel pursued defendant from the mall, defendant jumped into the waiting vehicle. Security personnel told the driver to return the merchandise. Defendant yelled to the driver, "go, man, go." The driver looked back at defendant and security personnel as if trying to decide whose directions he should follow. Under these circumstances, there was sufficient evidence from which the jury could infer that defendant and his driver entered into an agreement to rob the jewelry store. *Johnson, supra*; *Bettistea, supra*.

Next, we note that defendant contends that two felony convictions utilized to support the habitual offender fourth offense arose from the same incident. This issue was not raised and addressed before the trial court and is not preserved for appellate review. *Bettistea, supra* at 135. Moreover, review of the habitual offender information reveals that two felony convictions arising from an incident on September 21, 2001, did not serve as the basis for the fourth habitual offense. Accordingly, this unpreserved claim of error is without merit.

Lastly, defendant challenges the scoring of offense variable 13. This issue also is not preserved because it was not raised and addressed below. *Bettistea, supra*. In any event, a sentencing court has discretion to determine the number of points to be scored, and the score will be upheld where there is any evidence to support the scoring decision. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). There was sufficient evidence to support the score.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood