STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON LEE STRICKLAND,

Defendant-Appellant.

UNPUBLISHED
December 21, 2004

No. 249897
Menominee Circuit Court
LC No. 02-002655-FH

Before: Murphy, P.J., White and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted armed robbery, MCL 750.92(2) and MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction, consecutive to and followed by eleven months' incarceration in jail plus sixty month's probation for the attempt conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, then an employee of the Menominee McDonald's restaurant, went to the restaurant after hours on May 20, 2002, "with the intent to take some money in order to pay his debts." The shift manager on duty testified that she was putting cash drawers into the safe when she was accosted by a masked man with a gun. The masked man motioned her to get into the cooler and then shut the cooler door behind her. After waiting "a few seconds," the manager grabbed a lunch box, left the cooler quietly, snuck up behind the masked man intruder and struck him as he was "bent down grabbing at the money in his hands." After being struck, the man arose, "pointed and fired the gun" twice in the manager's direction, then "dropped the money and ran out the back door." The restaurant's maintenance worker, noticing a person with a gun approaching the counter wearing a mask, ran across the street to ask employees at a Taco Bell to call 911.

Defendant first argues that the evidence was insufficient to support his conviction of attempted armed robbery; specifically that the prosecution failed to prove that defendant attempted to take property from the victim's person, or in her presence, before or while using armed force or the threat thereof for that purpose. We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The elements of armed robbery include the taking of property from the victim's person or in the victim's presence, and the use of force or fear for that purpose before or during the larcenous taking. *People v Randolph*, 466 Mich 532, 546; 648 NW2d 164 (2002). Defendant argues that because "no one was present at the time [defendant] attempted to take the money," it necessarily follows that "there was no victim who was 'within reach' of the 'thing' taken." However, the manager's account of submitting to the armed intruder's commands to leave the money she was counting and securing, shutting her in the cooler, then taking money from her station, indicates that the intruder used force to dispossess the manager of the restaurant's money. For purposes of armed robbery, "[t]here is no requirement that the money taken be within a victim's presence if it is within his control and he lost control because of the violence of, [or] his fear of, the defendant." *People v Wiley*, 112 Mich App 344, 347; 315 NW2d 540 (1981).

Further, according to the manager, defendant had some of the money in hand as he fired shots in response to the physical resistance she offered. This evidence was sufficient to persuade a rational trier of fact that defendant attempted to take money in the manager's presence, while using armed force to do so.

Defendant next argues that the trial court erred in refusing to provide an instruction on attempted larceny in a building. "[Q]uestions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 Mich 655 (2003). The trial court noted that larceny in a building is a cognate lesser offense of armed robbery, not a necessarily included one. See *People v Ramsey*, 218 Mich App 191, 195 n 6; 553 NW2d 360 (1996). Instructions on cognate lesser offenses may not be given. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). The trial court properly cited *Cornell* and denied the request.

Finally, defendant argues that the trial court erred in scoring offense variables (OV) 1 and 4. We disagree. A scoring decision will not be reversed if any evidence exists to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant was assessed twenty-five points for OV 1 pursuant to MCL 777.31(1)(a) which directs a sentencing court score that number of points if a "firearm was discharged at or toward a human being." Although defense counsel argued at sentencing that the two shots could be considered accidental and the result of the struggles with the manager, the trial court found that defendant loaded his gun in preparation for the crime and displayed it in the execution of the crime. The trial court further determined that defendant was charged with the knowledge that a struggle might have ensued that would result in shots being fired. Because there was evidence to support the trial court's scoring on OV 1, twenty-five points were properly assessed.

Defendant was also assessed ten points for OV 4 pursuant to MCL 777.35(2) which directs the trial court to consider whether the victim suffered "serious psychological injury" that "may require professional treatment." The statute adds, "the fact that treatment has not been sought is not conclusive." Defendant argues that there was no evidence to support the conclusions either that the victim suffered serious psychological injury, or that she sought professional treatment in the matter. However, at sentencing, the investigator who prepared defendant's presentence investigative report recounted that the victim "stated after the event that she did go to some counseling briefly and that she felt that in the future that she was probably going to need some further counseling," and added, "She said it was just very traumatic to her

and that . . . in the future she thought she would need additional help . . . ." Because there was evidence to support the trial court's conclusion that the victim suffered psychological injury needing professional treatment as the result of the crimes, we will not disturb the court's assessment of ten points for OV 4.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly