STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2009
v	No. 281382 Oakland Circuit Court
MARIO CORRILIUS HARDIN, Defendant-Appellant.	LC No. 2007-215655-FC

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and sentenced as an habitual offender, second offense, MCL 769.10, to 10 to 40 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from a robbery at a party store in Waterford, Michigan, on July 8, 2007. Daniel Walters testified that when he was in the store's parking lot preparing to enter his car after purchasing a pack of cigarettes, he noticed defendant standing immediately behind him. Defendant had followed Walters out of the store. Walters testified that as he turned around "something was stuck to my side and I was asked to give my things [to defendant]." Specifically, Walters testified that defendant stated something to the effect of "you're going to give me all of your things." Walters complied and handed defendant his wallet and cigarettes; defendant then took the items and fled the scene. Walters testified that he did not see what defendant actually placed in his side, nor did he see any weapon or item that appeared to be a weapon in defendant's possession. However, he believed the item pressing against his side was a "foreign object, a gun" because the object "didn't feel like fingers . . . it felt a little bigger, a lot more pressure to my side." The owner of the store also witnessed part of the confrontation, but he did not notice any weapon or item in defendant's left hand and was not in a position to observe what was in defendant's right hand. Defendant did not threaten to shoot, stab, or kill Walters, nor did he orally assert that he was in possession of a weapon. However, defendant admitted at trial that he planned to rob a store customer that day. Defendant defended the armed robbery charge by denying that he possessed a weapon or fashioned an article as a weapon. Specifically, he claimed that he was holding a bag of potato chips in his right hand and took Walters' property with his left hand. Yet, during a police interview, when defendant was asked why Walters informed police that a weapon was stuck in his side, defendant asserted that he physically touched Walters, who may have mistakenly thought defendant had a weapon.

Defendant first contends there was insufficient evidence to prove he was "armed" when he robbed Walters. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo by this Court. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). All facts are construed in the light most favorable to the prosecution and we must determine whether any rational trier of fact could have concluded that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

MCL 750.529 states that a person is guilty of armed robbery when that person

> engages in conduct proscribed under section 530 [unarmed robbery] and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon . . . .

Defendant did not orally assert that he had a weapon and Walters did not observe a weapon. Our review is therefore limited to whether there was sufficient evidence to show that defendant used or fashioned an article in a manner to cause Walters to reasonably believe he possessed a dangerous weapon, or that defendant represented "otherwise" that he was in possession of a dangerous weapon. The jury may find the existence of an article fashioned as a dangerous weapon on the basis of all circumstantial evidence that is sufficient. *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993). To establish that a defendant used an article to induce the victim to believe it to be a dangerous weapon, the prosecution must present more than mere evidence of a victim's subjective belief. *Id*. at 468. Instead, the prosecution must show possession of an article by presenting some objective evidence. See *id*. at 467. "The existence of some object, whether actually seen or obscured by clothing or something such as a paper bag, is objective evidence that a defendant possesses a dangerous weapon or an article used or fashioned to look like one." *Id*. at 469. Moreover, use of a hand can suffice to prove armed robbery. See *People v Burden*, 141 Mich App 160, 165; 366 NW2d 23 (1985).

In *Jolly*, *supra* at 461, 463, the defendant made an oral threat and the victim testified that he observed a bulge in the defendant's midsection. The Court held that there was sufficient objective evidence to submit the armed robbery question to the jury. *Id*. at 466-467. Similarly, this Court in *People v Taylor*, 245 Mich App 293, 302; 628 NW2d 55 (2001), found there was sufficient objective evidence to find that the defendant was armed when he put his hands in his clothing and grabbed a bulge while announcing "this is a stick up." *Id*. However, in *People v Banks*, 454 Mich 469, 480-481; 563 NW2d 200 (1997), the Court found that there was no objective evidence to support a finding that the defendant's accomplice was armed. In *Banks*, *supra* at 475, 479-480, the victim thought the accomplice was armed but did not observe a weapon, article, or bulge and was not threatened by the defendant. The evidence in the instant case is similar to that in *Banks* in that Walters testified that he did not observe a weapon or article and defendant did not orally threaten to use a weapon. However, the key distinguishing factor in the instant case is the fact that defendant made physical contact with Walters in a way that led him to believe that defendant was in possession of a dangerous weapon. Similar to *Jolly*, *supra*, and *Taylor*, *supra*, where the victims visually observed an apparent object obscured by the

defendant's clothing, here, although Walters did not visually see an object, he physically felt an object pressing against his side and believed the article was a weapon. Defendant admitted to police that he made physical contact with Walters and that it was possible that Walters mistakenly believed that he was physically touched with a weapon. Furthermore, according to Walters, defendant stated something to the effect of "you're going to give me all your things," at the same time Walters felt the pressure in his side. Defendant's threatening demand, when coupled with defendant's action of placing an unknown object, even if the object was his hand fashioned in a certain way, into the side of Walters and applying pressure, can be reasonably understood to indicate the presence of a weapon. Reviewing the evidence and reasonable inferences in the light most favorable to the prosecution, we find that there was sufficient evidence to allow a rational juror to conclude beyond a reasonable doubt that defendant was "armed" during the commission of the robbery pursuant to MCL 750.529. None of the other elements of armed robbery are challenged on appeal, and we find defendant's sufficiency challenge to be without merit.

Defendant next contends that he was denied the effective assistance of counsel at trial when his attorney failed to request a jury instruction regarding larceny, MCL 750.356. This argument is without merit.

Defendant failed to preserve the issue of ineffective assistance of counsel for review because he did not move in the lower court for a new trial or an evidentiary hearing; therefore, our review is limited to the existing record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Whether defendant was denied his right to the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). We review a trial court's findings of fact for clear error and issues of constitutional law de novo. *Id*. When a defendant claims trial counsel was ineffective, defendant has the burden to show

> (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. [*People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).]

It is proper for a trial court to instruct a jury on a necessarily included lesser offense if "all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). An instruction on a cognate lesser offense is not permissible. *People v Randy R Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007). A cognate lesser offense is an offense that is of the same class or category and shares some common elements with the greater offense, but has some elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). The greater offense charged in the instant case was armed robbery, MCL 750.529. "The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *People v Bobby Lynell Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). The elements of larceny are

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject

> matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999) (internal citation and quotation marks omitted).]

"A larceny is committed when one steals the property of another outside the person's presence." *People v Perkins*, 473 Mich 626, 635 n 9; 703 NW2d 448 (2005). Armed robbery requires an assault, which necessarily requires the presence of a person. All the elements of the lesser offense on which defendant bases his claim, MCL 750.356, are not therefore included in the greater offense. Larceny also requires a showing that goods were carried away; armed robbery does not. Because larceny includes two elements that are not included in the elements of armed robbery, larceny is a cognate lesser offense, and an instruction on that offense was impermissible. *Randy R Smith, supra* at 63. In *People v Beach*, 429 Mich 450, 483; 418 NW2d 861 (1988), the Court made clear that larceny from a person, MCL 750.357, is the only category of larceny that is a necessarily included lesser offense of armed robbery. Defendant does not argue that an instruction on that crime should have been given. On the record before us, we find that trial counsel's failure to request an instruction on larceny, MCL 750.356, did not fall below an objective standard of reasonableness under professional norms.

Even if trial counsel should have requested an instruction on larceny or larceny from a person, there is no "reasonable probability that if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *Odom, supra* at 415. The jury was given an instruction on the lower offense of unarmed robbery and failed to find defendant guilty of this lesser offense. There is nothing in the record to suggest that the outcome at trial would have been different if the jury was given an instruction on larceny as well. Any error in the failure to instruct on a larceny offense was harmless where the trial court instructed the jury on the offense of unarmed robbery and the jury rejected that charge. See, generally, *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990). Defendant was not denied his right to effective assistance of counsel, and his request for a remand is denied.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood