STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 3, 2009
v	No. 285565 Oakland Circuit Court
IVAN JERMAINE MOSLEY, Defendant-Appellant.	LC No. 2007-218368-FH

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of unarmed robbery, MCL 750.530, and the court sentenced defendant as a fourth habitual offender, MCL 769.12, to a prison term of 4 to 20 years. He appeals as of right, and we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the circuit court erred in denying his motion to quash his bindover for unarmed robbery. Defendant contends that the evidence at the preliminary examination showed that he had abandoned his attempt to commit a larceny, and that any subsequent assault did not occur "in the course of committing a larceny." We disagree.

A circuit court's decision to grant or deny a motion to quash a charge is reviewed de novo to determine if the district court abused its discretion in binding the defendant over for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). The prosecutor is required to demonstrate at the preliminary examination that a crime has been committed and that there is probable cause to believe that the defendant committed the crime. *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003). It is sufficient that the prosecutor presents some evidence with respect to each element of the offense charged, or evidence from which the elements may be inferred. *Id.*

The evidence showed that defendant loaded a shopping cart with store merchandise and attempted to leave the store without paying for the items. When a store security officer confronted defendant in the vestibule area to the exit of the store, defendant pushed the cart toward the officer and then punched the officer in an effort to get away.

An abandonment occurs when there is a voluntary, genuine change of heart. *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). An abandonment defense is not

available when the defendant fails to complete an attempted crime because of unexpected resistance, or circumstances that increase the probability of detection or apprehension. *Id.* Here, the evidence showed that defendant had already committed a larceny, and that his subsequent act of pushing the shopping cart toward the security officer occurred only after he was confronted and attempted to avoid apprehension. The district court properly concluded that an abandonment defense is not available under these circumstances. Furthermore, under the unarmed robbery statute, a person commits unarmed robbery if the person uses force or violence against another person, or assaults another person, "in the course of committing a larceny." MCL 750.530(1). For purposes of this statute, "in the course of committing a larceny" includes acts that occur "in flight or attempted flight after the commission of the larceny[.]" MCL 750.530(2). Here, the evidence showed that defendant assaulted another person during his flight after committing the larceny. Such evidence is sufficient to support the force or assault element of robbery. *People v Passage*, 277 Mich App 175; 743 NW2d 746 (2007). Accordingly, the district court did not abuse its discretion in binding defendant over for trial on unarmed robbery.

For these same reasons, we reject defendant's related argument that the evidence at trial was insufficient to support his conviction for unarmed robbery. The evidence that defendant committed a larceny by leaving the store with a shopping cart full of items without paying for them and, when confronted by a store security officer, pushed the cart toward the officer and then began punching at the officer in an effort to flee, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant committed unarmed robbery. *Passage, supra* at 178; *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Defendant also argues that his sentence violates the constitutional prohibitions against cruel or unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. We disagree.

The sentencing guidelines range for defendant's unarmed robbery conviction is 19 to 76 months. Defendant was sentenced within this range to a minimum prison term of four years. "[A] sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). In order to overcome the presumption of proportionality, a defendant must demonstrate unusual circumstances that would render the presumptively proportionate sentence disproportionate. *People v Lee*, 243 Mich App 163; 622 NW2d 71 (2000). Here, defendant merely argues that his sentence is disproportionate because the evidence did not support his conviction. As previously discussed, however, that argument is without merit. Further, the remedy for an unsupported conviction is to vacate the conviction, not resentencing. Defendant was sentenced as a fourth habitual offender to a minimum term that was in the middle of the sentencing guidelines range. Defendant has not demonstrated any unusual circumstances to overcome the presumptive proportionality of his sentence and, accordingly, there is no merit to his claim that his sentence is constitutionally cruel or unusual.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra