

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD JUAN THOMAS,

Defendant-Appellant.

UNPUBLISHED

October 6, 2009

No. 287382

Oakland Circuit Court

LC No. 08-219869-FC

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his convictions of armed robbery, MCL 750.529, and resisting and obstructing a police officer, MCL 750.81d, following a bench trial. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's alleged female accomplice entered a bank in Southfield and handed the teller a note. According to the teller, the note stated that defendant's accomplice had a gun, that the teller had 20 seconds to place all of her big bills into an envelope and that if she tried to alert anyone or to "press any unknown buttons," she would be shot. The teller placed \$1,296.50 into a bag, along with a dye pack. The accomplice then left the bank and entered a car driven by defendant. The dye pack exploded, filling the car with red smoke. The two fled from the car to a nearby wooded area. When the police arrived, defendant tried to run. When defendant ignored the officers' warnings to stop, the officers shot him with a taser gun. At trial, defendant's accomplice testified that she and defendant had a relationship, and that this was not the first bank the two had robbed together. She stated that he convinced her to participate by telling her he could not rob them himself because he was on parole. Defendant, in contrast, maintained that he was not involved in the robbery. He testified that his companion asked him to drive her to the bank so that she could obtain money, and that he had no idea she planned to rob the bank. He contended that he later tried to flee because he panicked.

In addition to resisting and obstructing, defendant was charged in the alternative with both armed robbery and bank robbery, MCL 750.531. The trial court first found him guilty of resisting and obstructing. The trial court then considered whether plaintiff presented sufficient evidence that defendant aided and abetted the female accomplice's armed robbery. The trial court found the testimony from defendant's accomplice credible and did not believe defendant's claim that the accomplice manipulated defendant into helping her. The trial court reasoned that

having found defendant guilty of armed robbery, “there is no need to then consider count two which is the bank robbery alternative charge.”

On appeal, defendant argues that he should have been charged only with bank robbery because that statute is more specific. He relies on case law holding that where two statutes prohibit the same conduct, the defendant must be charged under the more specific, and more recently enacted, statute. See *People v Patterson*, 212 Mich App 393, 394-395; 538 NW2d 29 (1995). However, if two statutes prohibit different conduct (i.e., an additional element is required to convict the defendant of one crime, but not the other), the prosecutor has the discretion to charge under either statute. *People v Werner*, 254 Mich App 528, 536-537; 659 NW2d 688 (2002); *People v Peach*, 174 Mich App 419, 423; 437 NW2d 9 (1989).

With respect to armed robbery and bank robbery, this Court observed in *People v Avery*, 115 Mich App 699, 701-702; 321 NW2d 779 (1982):

The essential elements of armed robbery consist of an assault, a felonious taking of property from the victim's person or presence, and that the defendant be armed with a weapon. In contrast, the statute on bank robbery does not require that a defendant be armed, nor does it require an assault or felonious taking. In addition, the statute on bank robbery requires that there be an intent to steal from a building, bank, safe, or other depository of money to establish a violation whereas the statute on armed robbery requires the felonious taking to be from a person or in his presence.

There will be times when the statute on armed robbery and the statute on bank robbery will overlap. However, not every violation of the statute on bank robbery will result in a violation of the statute on armed robbery. This is not a case of the Legislature carving out an exception to a general statute and providing a lesser penalty for a more specific offense, in which case the prosecutor would have to charge the defendant under the statute fitting the particular facts. The crimes of armed robbery and bank robbery involve different elements and carry the same possible sentence. [Citations omitted.]

For the reasons noted and under the facts of that case, the *Avery* Court concluded the prosecutor had the discretion to charge either bank robbery or armed robbery. *Id.* at 702.

Defendant attempts to distinguish *Avery* arguing that the Legislature has since changed the elements of the armed robbery statute. We disagree. Defendant notes that under the current version of MCL 750.529 an individual can be found guilty of armed robbery even if he is no longer armed with a weapon; consequently, the rationale of *Avery* no longer applies. But, while the elements for armed robbery and bank robbery might overlap more closely than before the 2004 amendment to MCL 750.529, the crimes still have distinct elements. Armed robbery continues to require a theft from a person while bank robbery does not. Bank robbery can include, but does not require, an assault. MCL 750.531. Defendant has not shown that the amended armed robbery statute changes the outcome of the *Avery* analysis.

In this case, there was factual support for both charges, and because the prosecution had the discretion to charge defendant with either bank robbery or armed robbery, there was no plain error in charging defendant in the alternative with both offenses.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello