

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID CROCKETT SIMS,

Defendant-Appellant.

UNPUBLISHED

November 23, 2010

No. 294020

Kent Circuit Court

LC No. 08-010820-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of unarmed robbery, MCL 750.530, for which he was sentenced as a fourth habitual offender, MCL 769.12, to 7½ to 30 years in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that plaintiff failed to present sufficient evidence to satisfy the elements of unarmed robbery beyond a reasonable doubt. We disagree.

A challenge to the sufficiency of the evidence for a criminal conviction may be raised for the first time on appeal. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987). Claims of insufficient evidence are reviewed de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). Evidence is sufficient when a rational fact-finder could determine that the prosecution proved every element of the crimes charged beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Direct and circumstantial evidence, including any reasonable inferences, can prove an element of an offense equally well. *Id.* at 536. This evidence, no matter its type, must be viewed in the light most favorable to the prosecution. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

Conviction for unarmed robbery requires proof beyond a reasonable doubt that (1) defendant committed or attempted to commit a larceny, and (2) defendant used force or violence against a person in the course of committing the larceny. MCL 750.530. At trial, the security officer at the grocery store testified as to the underlying incidents. The security officer witnessed defendant shoplift a package of razors. The security officer stopped defendant from leaving the store and attempted to lead him to an office in the back of the grocery store to question him and wait for the police to arrive. Defendant pushed the security officer into a display rack and ran out of the store. At trial, the prosecution presented a security video that corroborated the security

officer's testimony. The uncontroverted evidence, viewed in the light most favorable to the prosecution, proved that defendant committed a larceny and used force against the security officer in flight after the larceny. Therefore, defendant's claim of insufficient evidence fails.

Defendant next argues that his trial attorney's failure to object to improper jury instructions denied him the effective assistance of counsel at trial. Defendant did not move for a new trial or an evidentiary hearing at the trial court level. Therefore, the issue is unpreserved and we can review it only to the extent that the alleged mistakes of counsel are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

To establish a claim of ineffective assistance of counsel, it must be shown that (a) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (b) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (c) the resulting proceeding was fundamentally unreliable or unfair. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Judicial scrutiny of counsel's performance must be highly deferential. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The performance of counsel is compared to an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be taken in difficult cases. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994).

A jury in a criminal trial should be instructed by the trial court to consider the principal charge first, and if the jury fails to convict or acquit or is unable to agree whether to convict or acquit on the principal charge, then it may turn to lesser offenses. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). In this case, the trial court instructed the jury that it was to find defendant not guilty of the charged offense before considering the lesser offenses. The court did not instruct that if the jury was unable to agree on whether to convict or acquit on the principal charge, it may turn to the lesser offenses of retail fraud and assault.

Defendant's trial counsel did not object to the flawed jury instruction. But the evidence establishes that, even if defendant's trial counsel would have objected, the result would not have been different. The evidence was more than sufficient to convict defendant of unarmed robbery. Several witnesses and a security video clearly showed that defendant shoplifted a package of razors and used force against the security officer to flee the store and avoid being arrested. The proceedings were not fundamentally unreliable or unfair. Although defendant's trial counsel should have objected to the jury instruction, the instruction was not outcome determinative in light of the evidence against defendant. Defendant is not entitled to relief based on ineffective assistance of counsel.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad