STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2012
v	No. 302856 Muskegon Circuit Court
JUAN LUIS REYNA, Defendant-Appellant.	LC No. 10-059344-FC

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to rob and steal being armed, MCL 750.89; possession of a firearm during the commission of a felony, MCL 750.227b; and resisting and obstructing a police officer, MCL 750.81d(1). We affirm.

At approximately 10:30 p.m. on May 9, 2010, Debra Couch arrived home from work. As Debra walked toward the backdoor of her house, defendant and another man attacked her. Debra's husband, Timothy Couch, came outside and fought off the two attackers who then fled the scene. The police arrested defendant later that night, and Timothy identified him as one of the attackers. The police subsequently recovered a gun from the immediate area in which they apprehended defendant. Defendant later admitted to police that he intended to rob the Couches and that he possessed a gun on the night in question, but he discarded it moments before the police apprehended him. At trial, the trial court denied defendant's requested jury instruction on the lesser offense of attempted larceny from a person.

Defendant argues that the trial court committed error requiring reversal by denying his requested jury instruction. We disagree. "[J]ury instructions that involve questions of law are . . . reviewed de novo." *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005). We review for an abuse of discretion the trial court's determination whether a jury instruction is applicable to the facts of the case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, "a preserved, non-constitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), quoting MCL 769.26; see also *Gillis*, 474 Mich at 140 n 18 (noting that instructional errors "are deemed non-constitutional errors").

A trial court errs where it refuses to give "a requested instruction on a necessarily included lesser offense . . . if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Attempted larceny from a person requires the perpetrator to intentionally take actions toward stealing and moving the property of another from her person or immediate area of control. See *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005); *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). Accordingly, we find that attempted larceny from the person is a necessarily included lesser offense of the charged greater offense of assault with intent to rob while armed because "[i]t is impossible to commit the greater offense without first committing the lesser offense." *Cornell*, 466 Mich at 361.

However, in order for the trial court to properly give the jury an instruction on a necessarily included lesser offense, the parties must dispute the elements "differentiating the two offenses . . . and the evidence would support a conviction of" the necessarily included lesser offense. *Cornell*, 466 Mich at 358 n 13. The elements differentiating assault with intent to rob while armed from the lesser offense of attempted larceny from the person are (1) an assault and (2) defendant being armed at time of the assault. See *Akins*, 259 Mich App at 554; *Perkins*, 262 Mich App at 271-272. At trial, the defense did not dispute that defendant committed an assault, but disputed whether the prosecution proved that defendant was armed at the time of the assault. Debra testified that one of the men aimed a gun at her face. Officer Hain testified that defendant admitted to possessing a gun during the assault, brandishing the gun, and subsequently discarding the gun before apprehension. This account was consistent with the gun that the police recovered near where they apprehended defendant. Accordingly, we find that a rational view of the evidence regarding the elements that differentiate the two offenses did not support a finding that defendant merely committed the lesser offense of attempted larceny from the person, *Cornell*, 466 Mich at 365-366 and therefore, the trial court did not abuse its discretion in refusing to give the lesser included jury instruction.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause