

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 9, 2012

v

KEVIN EDWARD CHORAZYCZEWSKI,
Defendant-Appellant.

No. 305735
Oakland Circuit Court
LC No. 2011-236227-FC

Before: MURRAY, P.J., AND CAVANAGH AND STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530. He was sentenced as an habitual offender, third offense, MCL 769.11, to 10 years and 9 months to 30 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that his trial counsel was ineffective for failing to request an instruction regarding larceny from a person as a necessarily included lesser offense of unarmed robbery. We disagree.

The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Here, the issue was not preserved and our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303, citing *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The record indicates that defense counsel declined to ask for an instruction in regard to larceny from a person based on his belief in the lack of merit in such a request. Under MCL

768.32(1), a jury instruction may be given for a necessarily included lesser offense. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). “A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense.” *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004). “[A] requested instruction on a necessarily included lesser offense is proper 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), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). A rational view of the evidence supports an instruction on a necessarily included lesser offense when the differing element or elements are “sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense.” *Cornell*, 466 Mich at 352, quoting *People v Stephens*, 416 Mich 252, 263; 330 NW2d 675 (1982).

To be guilty of unarmed robbery, an individual must: “(1) feloniously take the property of another, (2) by force or violence or assault or putting in fear, and (3) be unarmed.” *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010); MCL 750.530. The elements of larceny from a person are “(1) the taking of someone else’s property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person’s immediate area of control or immediate presence.” *People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004), aff’d 473 Mich 626 (2005); MCL 750.357. Larceny from a person is a necessarily included lesser offense of unarmed robbery, *People v Light*, 290 Mich App 717, 725; 803 NW2d 720 (2010), distinguished from that offense by the absence of force as an element, *People v Douglas (On Remand)*, 191 Mich App 660, 664; 478 NW2d 737 (1991).

Despite the fact that larceny from a person was a necessarily included lesser offense in this case, an instruction in regard to the necessarily included lesser offense of larceny from a person was unsupported by a rational view of the evidence. There was evidence that defendant picked up a portable television in a Costco store; put it inside his coat, left the store and was in the vestibule when store employees tried to stop him. Each witness at trial indicated that defendant tried to run away from the Costco store, using force, violence, assault, or by putting others in fear. *Harverson*, 291 Mich App at 177. All of the evidence supported that force was used by defendant, and if the jury believed defendant took the television, it could not have convicted defendant of larceny from a person instead of unarmed robbery. *Douglas*, 191 Mich App at 664. The different element of force was “not sufficiently in dispute” to allow the jury to find defendant innocent of robbery but guilty of larceny from a person. *Cornell*, 466 Mich at 352 (quotation omitted).

This Court recently interpreted the larceny from a person statute, MCL 750.357, in *People v Smith-Anthony*, ___Mich App___; ___NW2d___ (Docket No. 300480, issued May 3, 2012). The defendant in *Smith-Anthony* was observed placing merchandise in a shopping bag while in a retail store and then leaving the store without making payment. The defendant was subsequently acquitted of unarmed robbery but convicted of larceny from a person. *Id.* at slip op 1. In reversing that conviction, this Court noted that the text of the statute in question explicitly prohibited the “stealing from the person of another.” *Id.* at slip op 2. The Court explained that

the larceny from a person statute criminalized not a mere property crime, but a criminal act “against a person and a person’s property rights.” Therefore, because the property at issue was not “on a victim's person or within a victim's ‘immediate’ custody and control,” the statute was inapplicable to the defendant's conduct. *Id.* at slip op 3.

Similarly, defendant’s theft of the television from the Costco store was witnessed only by Miguel Reyes, loss prevention agent for Costco, who saw the theft through his video surveillance of defendant. Based on *Smith-Anthony*’s holding, the fact that Reyes observed defendant’s theft through video surveillance was not evidence that would support that the television was taken from a person or from a person’s immediate area of control or immediate presence as required to support an instruction regarding larceny from a person.

Because the testimony supported that there was force employed by defendant in his attempt to flee from Costco in this case and because there was no evidence that the television was taken from a person or from a person’s immediate area of control or immediate presence, the jury could not consistently find defendant innocent of robbery and guilty of larceny from a person, *Cornell*, 466 Mich at 352, and a rational view of the evidence did not support a necessarily included lesser offense instruction regarding larceny from a person, *Id.* at 357. Defense counsel was not ineffective for failing to request the instruction. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Defense counsel’s representation did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens