STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AURELIUS HUMBER,

Defendant-Appellant.

UNPUBLISHED
December 26, 2000

No. 217344
Wayne Circuit Court
Criminal Division
LC No. 98-006889

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and felonious assault, MCL 750.82; MSA 28.277. She was sentenced to seven to twenty years' imprisonment for the assault with intent to rob conviction and two to four years' imprisonment for the felonious assault conviction, to be served concurrently. She appeals as of right. We affirm in part and reverse in part.

Defendant argues that the trial court erred in finding that the evidence did not support her defense of duress. There is no merit to this issue. A trial court's findings in a bench trial will not be set aside on appeal unless clearly erroneous. *People v Cyr*, 113 Mich App 213, 222; 317 NW2d 857 (1982); MCR 2.613(C). This Court gives special regard to the trial court's opportunity to judge the credibility of the witnesses who appeared before it. Provided there is sufficient evidence presented to support the court's findings, the trial court's decision will be affirmed. *Id*.

Where duress is claimed as an affirmative defense, the defendant has the burden of producing prima facie evidence of duress. *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998). A defendant may satisfy this burden by producing evidence from which the trier of fact could find the following:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

D) The defendant committed the act to avoid the threatened harm. [*People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997).]

The threatening conduct or act of compulsion must be present, imminent, and impending. A threat of future injury is not enough, and the threat must have arisen without the negligence or fault of the person who insists upon it as a defense. *Id.*

Here, the trial court correctly determined that defendant failed to present prima facie evidence of duress. Defendant's testimony, accepted as true, failed to establish either that the threat of harm was immediate, or that she was free of fault or negligence in creating the situation that allegedly necessitated her commission of the offense. Rather, she voluntarily smoked crack cocaine, knowing that she did not have the money to purchase it, and knowing that the seller would demand payment. In any event, the trial court also rejected defendant's duress defense because it did not find defendant's testimony credible. We defer to the trial court's assessment of the credibility of the witnesses who appeared before it. *Cyr, supra*. The trial court did not err in rejecting defendant's defense of duress.

Next, defendant argues that her convictions for both felonious assault and assault with intent to rob while armed violate the double jeopardy protections under the state and federal constitutions. US Const, Am V; Const 1963, art 1, § 15. We agree. Felonious assault is a lesser included offense of assault with intent to rob while armed. See *People v Harding*, 443 Mich 693, 705; 506 NW2d 482 (1993). In this case, the prosecutor argued and the trial court concluded that defendant's two convictions for assault with intent to rob and felonious assault arose out of two separate assaults, once of which was completed before the other began. *Id*., at 703. We do not agree. From the beginning of the criminal assault when defendant demanded the victim's money and threatened to cut him, to the point where defendant pulled out a box-cutting knife and struggled with the victim, until defendant left the scene, this crime involved defendant's ongoing attempt to take the victim's money. Compare *People v Yarbrough*, 107 Mich App 332, 335; 309 NW2d 602 (1981); *People v Johnson*, 94 Mich App 388, 391; 288 NW2d 436 (1979). There is no basis for a finding here that there were two separate consecutive assaults. Accordingly, we reverse defendant's conviction and sentence for felonious assault. *People v Jankowski*, 408 Mich 79, 96; 289 NW2d 674 (1980).

Defendant's conviction and sentence for assault with intent to rob is affirmed. Defendant's conviction and sentence for felonious assault is reversed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ David H. Sawyer