

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JAMES CHERRY,

Defendant-Appellant.

UNPUBLISHED

March 8, 2002

No. 224544

Kent Circuit Court

LC No. 98-011801-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of unarmed robbery, MCL 750.530.¹ The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to two to thirty years' imprisonment. We affirm.

Defendant's conviction arose after he took a pair of shoes from Kohl's Department Store. After defendant left the store with the shoes, a security guard apprehended him in the parking lot after a struggle, during which defendant grabbed the guard's throat. Defendant contends that the factual circumstances in this case did not sufficiently support a conviction for unarmed robbery because his struggle with the security guard occurred after he had already taken the shoes. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

In *People v Newcomb*, 190 Mich App 424, 428, 430; 476 NW2d 749 (1991), the defendants wielded a hammer after entering the victim's room and taking some unspecified property. One of the defendants was convicted of armed robbery and argued on appeal that "because the hammer was used after the actual taking was completed, the elements of armed robbery were not met." *Id.* at 430. This Court stated:

¹ The jury actually convicted defendant of unarmed robbery *and* first-degree retail fraud, MCL 750.356c. The trial court determined that the retail fraud conviction merged into the unarmed robbery conviction and sentenced defendant only for unarmed robbery.

. . . in the case at bar, even if the hammer appeared after the property was in the Newcombs' hands, the defendants had not yet left the victim's room. The victim was still considered to be in possession of her property and the armed robbery was still in progress. The elements of armed robbery were therefore proven, and the evidence was sufficient to support defendant's conviction. [*Id.* at 431.]

In the instant case, defendant took the shoes from Kohl's and was still in the process of absconding with them when he assaulted the security guard who followed him from the store. We view this as substantially similar to the situation in *Newcomb*.

People v Velasquez, 189 Mich App 14, 15; 472 NW2d 289 (1991), issued before *Newcomb*, provides even stronger support for upholding defendant's conviction in the instant case. In *Velasquez*, the defendant went on a test drive of a vehicle with an automobile salesman. *Id.* at 15. The defendant and the salesman stopped at a store and went inside. *Id.* After they returned to the vehicle, the defendant got into the driver's seat, locked the doors, and attempted to drive away without the salesman. *Id.* at 15-16. The salesman testified that he blocked the defendant's path but that the defendant drove toward him and hit his leg while attempting to get away. *Id.* at 16. The defendant was convicted of armed robbery as a result of the incident. *Id.* at 15. On appeal, he argued that insufficient evidence supported his conviction and that the trial court therefore should have granted his motion for a directed verdict. *Id.* at 16. This Court ruled:

If, as it apparently did, the jury believed the salesman, there was sufficient evidence to support defendant's conviction. According to [the salesman], defendant used the car as a dangerous weapon, to prevent [the salesman] from regaining possession of it, and by "lurching" it toward [the salesman], not only frightened him but also brushed against his leg, causing injury.

* * *

We further find that the fact that defendant did not assault [the salesman] until after defendant had locked him out of the car and attempted to abscond with it is of no import. Robbery is a continuous offense which is not complete until the perpetrator reaches a place of temporary safety. *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989). Hence, the use of force or intimidation in retaining the property taken or in attempting to escape rather than in taking the property itself is sufficient to supply the element of force or coercion essential to the offense of robbery. *Id.* Defendant's motion was properly denied, because there was sufficient evidence to submit the case to the jury. [*Velasquez, supra* at 16-17.]

Velasquez clearly supports defendant's conviction in the instant case. Indeed, by assaulting the security guard, defendant was "us[ing] . . . force or intimidation in retaining the property taken or in attempting to escape. . . ." *Id.* at 17. This was "sufficient to supply the element of force or coercion essential to the offense of robbery." *Id.*

In light of *Newcomb* and, especially, *Velasquez*, we affirm defendant's conviction of unarmed robbery. See MCR 7.215(I)(1) (stating that a panel of this Court "must follow the rule

of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990”). We acknowledge that in *People v Randolph*, 242 Mich App 417, 421; 619 NW2d 168 (2000), lv granted 465 Mich 885 (2001), this Court essentially contradicted *Velasquez*. The *Randolph* Court, reviewing a factual circumstance similar to that in the instant case, stated:

There was evidence presented at trial that defendant used force as a means of escaping the store’s security guards; therefore, viewing defendant’s crime as a whole larcenous transaction, defendant would have been guilty of unarmed robbery if he had succeeded in his escape However, viewing the crime as a whole larcenous transaction requires the conclusion that there was insufficient evidence to support defendant’s conviction of unarmed robbery because defendant was unsuccessful in escaping and thus he never completed the larcenous transaction. Therefore, we conclude that there was insufficient evidence to support defendant conviction of unarmed robbery. [*Id.*]

This analysis contradicted the specific holding in *Velasquez* that “the use of force or intimidation in retaining the property taken or in *attempting to escape* rather than in taking the property itself is sufficient to supply the element of force or coercion essential to the offense of robbery.” *Velasquez, supra* at 17. As noted above, MCR 7.215(I)(1) requires that this Court “follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990. . . .” When two post-November 1, 1990 cases conflict, we are to follow the first decision on the issue. See *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 689-690; 599 NW2d 546 (1999). Accordingly, *Velasquez* takes precedence over *Randolph* and, in our opinion, requires us to affirm defendant’s unarmed robbery conviction.

Next, defendant argues that the trial court imposed a disproportionate sentence. We review a trial court’s sentencing decisions for an abuse of discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). Defendant’s argument is so poorly developed that we need not even address it. See, e.g., *People v Watson*, 245 Mich App 572, 587; 629 NW2d 421 (2001). At any rate, defendant’s criminal history demonstrated an inability to conform his conduct to the requirements of the law, and his sentence was within statutory limits. Under these circumstances, no abuse of discretion occurred. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ Patrick M. Meter

I concur in both the reasoning and result of this opinion and write separately to opine that *People v Randolph*, 242 Mich App 417; 619 NW2d 168 (2000) was wrongly decided.

/s/ Mark J. Cavanagh