STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL WALKER,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 233777
Wayne Circuit Court
LC No. 00-008201-01

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of bank robbery. MCL 750.531. He was sentenced as a third habitual offender to a term of six to twenty years in prison. He now appeals and we affirm.

Defendant does not dispute that he went to the drive-thru window of the First Federal of Michigan bank in Detroit and passed the teller a note, which read "give me money. Don't hit the button. Quick." Defendant does, however, dispute that his intent was to rob the bank. Rather, defendant's theory was that it was his intent to get arrested and be locked in the local jail.

Defendant's first argument on appeal is that there was insufficient evidence to sustain the conviction. We disagree. In determining whether there was sufficient evidence to sustain a conviction, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find all of the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

MCL 750.531 provides as follows:

> Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money, bond or other valuables, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of

such larceny or felony, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

In the case at bar, the jury was instructed under CJI2d 18.6 as follows:

> The defendant is, Mr. Walker, is charged with the crime of bank, safe, and vault robbery.
>
> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant wounded or attempted or threatened to wound or frightened someone else.
>
> Second, that the defendant did so for the purpose of stealing from a bank.
>
> Third, that the defendant intended to commit larceny. Larceny means taking away someone else's property, intending to take it away from the person permanently.
>
> It is not necessary that the crime of larceny be completed. However, there must be proof beyond a reasonable doubt that the defendant intended to commit that crime.

Defendant argues that the evidence was insufficient in two respects: first, that the victim was placed in fear and, second, that defendant actually intended or attempted to commit a robbery. We disagree.

With respect to putting the victim in fear, defendant's argument must fail. Defendant points to the victim's calm demeanor and the fact that she had the presence of mind to take down defendant's license plate number, as well as the fact that defendant made no overt threats. It is true that the teller's testimony did not set forth that she felt frightened at the time. Although she testified that she was frightened enough by the incident to not return to work, her only testimony regarding he feelings at the time of the incident was that she was "shocked." However, she also testified that defendant "pointed at me and told me that he was going to get me" after she refused to give him any money.

Although bank robbery may be established by placing the victim in fear, that is not required. Rather, as the jury was instructed, bank robbery may be established by the making of a threat. And the teller did testify to defendant's making a threat. Furthermore, defendant testified that, although he did not intend to actually rob the bank, he did intend that his actions appear enough like a bank robbery so as to be arrested. It would be a logical conclusion from that evidence that defendant intended the teller to feel sufficiently threatened or frightened so as to summon the police. In sum, when viewing the evidence in the light most favorable to the prosecution, we are satisfied that a rational trier of fact could conclude that the defendant threatened the victim and, therefore, this element was proven beyond a reasonable doubt.

Turning to whether defendant intended to commit a larceny, he admitted to handing the teller a hold-up note which demanded money. We think that it is a reasonable conclusion for the trier of fact to draw that a hold-up note reflects an intent to commit a larceny. While defendant's theory, that he only intended to get himself arrested and never actually intended to take any money, is perhaps plausible, the evidence certainly does not dictate that conclusion. Further, the crime of bank robbery does not require success. Therefore, it was for the jury to observe defendant and gauge his credibility while testifying. The jury could then decide whether defendant's story, that he did not actually intend to steal, was believable. The jury obviously found defendant's explanation to be unbelievable. That is their prerogative and we will not second-guess the jury.

Defendant also argues in conjunction with the issue of intent that handing a hold-up note to the teller does not establish an overt act necessary to commit an attempt and, therefore, he abandoned the robbery when he left the bank before obtaining any money. We disagree. First, we are satisfied that handing a hold-up note to the teller constituted an overt act. As for whether defendant abandoned the crime, as defendant acknowledges, abandonment is an affirmative defense. *People v Kimball*, 109 Mich App 273, 286-287; 311 NW2d 343 (1981); modified on other grounds 412 Mich 890; 313 NW2d 285 (1981). Furthermore, failure to complete a crime does not constitute abandonment. *Id.* at 287. Accordingly, the trier of fact could have concluded that defendant failed in his attempt to rob the bank, not that he abandoned the attempt.

For the above reasons, we conclude that there was sufficient evidence to support defendant's conviction.

Defendant next argues that the trial court erred in allowing the use of defendant's prior robbery conviction. We disagree. Defendant argues that the conviction should have been excluded as improper prior bad acts evidence under MRE 404(b). To be admissible under MRE 404(b), the prosecutor must offer the evidence for some purpose other than to show character or propensity, the evidence must be relevant to an issue of consequence at trial, the probative value must not be substantially outweighed by the danger of undue prejudice, and a limiting instruction must be provided upon request. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

The prosecutor identified a permissible purpose for the use of the evidence: intent. Defendant claimed that he did not intend to rob the bank; the evidence of his prior bank robbery showed a similar plan or scheme, namely handing a note to a drive-thru teller demanding money. The only material difference between the instant offense and the prior offense is that in the prior bank robbery, defendant's note indicated that he was armed. Furthermore, the evidence was relevant inasmuch as defendant denied the intent to rob. As for undue prejudice, the trial court was satisfied that the cautionary instruction was sufficient, as are we.[1]

---

[1] The trial court instructed the jury as follows:

> You have heard evidence that was introduced to show that the defendant committed a crime for which he is not on trial.

(continued…)

For the above reasons, we conclude that the trial court did not abuse its discretion in allowing the use of evidence of defendant's prior bank robbery.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad

(…continued)

> If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show that the defendant specifically meant to take money from the bank.
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.