

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY PAUL LEE,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2003

No. 243098

Kent Circuit Court

LC No. 01-001558-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery. MCL 750.529. He was sentenced to seven to twenty-five years in prison. He now appeals and we affirm.

Defendant's conviction arises from the robbery of William Morrissey. Mr. Morrissey was a customer at a McDonald's restaurant in which defendant worked. Defendant waited on the victim and had opportunity to see the victim with a large sum of money. Defendant left work, leaving with a friend, Cecile Davis, while the victim was still in the restaurant. Defendant and Davis were outside the victim's home when the victim arrived. Davis beat the victim in the face with a rear-view mirror from an automobile. Defendant grabbed the money from the victim's pocket. The victim reported to the police that one of the attackers was from the McDonald's restaurant and he also made a positive identification later than evening after defendant had been apprehended. The victim also testified that defendant had threatened to shoot him and held his hand at his waist covering what the victim believed to be a gun. The victim testified at trial that the gun was not drawn during the robbery.

Defendant first argues on appeal that there was insufficient evidence to establish the element of being armed. We disagree. We review a claim of insufficiency of the evidence by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). At trial, the victim testified as follows:

Well, because [defendant] had his hand down in his waist, like this (indicating), and [Davis] had a rear-view mirror, and he grabbed me and he says, "You give me your money or I'm going to shoot you," and I was holding him with one arm and holding his friend with the other arm, and his friend was hitting me profusely with the rear-view mirror in his hand, and Mr. Lee was grabbing my

money out of my pocket at the same time, holding a gun in his waist, and I kept looking at his hand with the gun on it and waiting for him to shoot me while he was hitting me and he was grabbing me with his hand, down my pocket.

On cross-examination, the victim did back off from this statement slightly in response to a question whether or not he had actually seen a gun:

Well, I saw what appeared to be a handgun. He was covering it with his hand, but it was dark out and I thought that the gun was black, just as the night was black. So I thought that, you know, that he had a gun, and that's when I was afraid of getting shot.

When defense counsel pressed the matter, the victim stated, "No, I didn't see a handgun, no."

To establish the element of armed for armed robbery, the prosecutor must show that the defendant was either armed with a dangerous weapon or used an object in a manner to make the victim reasonably believe that he had a dangerous weapon. *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993). There are two separate grounds to support a conclusion that there was sufficient evidence to establish the armed element in this case. First, the victim testified that he saw an object covered by defendant's hand, which the victim believed to be a gun, and defendant threatened to shoot the victim if he did not turn over the money. Even accepting that the victim could not positively identify the object under defendant's hand as a gun, at a minimum the jury could reasonably conclude that defendant used an object in a manner to make the victim believe that he had a gun. In this respect, this case is similar to *Jolly*, wherein the Court observed as follows:

In this case, an Arby's employee stated that he saw a bulge in defendant's vest. It was his belief that the bulge was a gun, especially in light of the fact that defendant's accomplice threatened that defendant would shoot or kill the employee if he failed to comply with the demand for money. Both the bulge and the threat are circumstantial evidence that defendant was armed either with a dangerous weapon or an article fashioned to look like one.

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In the case before us, defendant elicited the aid of an accomplice, the accomplice called attention to defendant while threatening the Arby's employee that defendant would shoot him if he did not comply, and the employee noticed a bulge under defendant's vest located in a place where a handgun could conceivably be concealed. To require that the article either be seen by the victim or recovered from a defendant would not only be unrealistic, but runs counter to established case law holding that the essential elements of a crime may be proven by circumstantial evidence. [*Id.* at 470-471.]

The second basis for upholding defendant's conviction is that his accomplice, Cecile Davis, beat the victim with the rear-view mirror while defendant removed the money from the victim's pocket. Defendant argues that his guilt cannot be established under an aiding and abetting theory because the evidence does not support a conclusion that he either aided Davis in

obtaining the rear-view mirror used to attack the victim or that defendant participated in the assault itself. While defendant appears correct on the first point, he is incorrect on the second. Defendant did tell the investigating officer that he saw Davis attack the victim, but that he himself was not involved. But the victim clearly testified that defendant did participate in the assault, specifically by removing the money from the victim's pocket while Davis was beating the victim with the rear-view mirror. If the jury chose to believe the victim's testimony rather than the defendant's, a prerogative that they apparently exercised, then there was sufficient evidence to support defendant's guilt as an accomplice in the robbery. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), overruled in part on other grounds in *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

Defendant next argues that he should be entitled to credit for time served. Because defendant was on parole at the time of the instant offense, the trial court imposed a sentence that is consecutive to the sentence from which defendant was on parole and denied credit for time served. Defendant acknowledges that the trial court's determination is required under our decision in *People v Watts*, 186 Mich App 686; 464 NW2d 715 (1991), but argues that *Watts* was incorrectly decided. We are not persuaded that *Watts* was incorrectly decided and decline defendant's invitation to revisit the issue.

Affirmed.

/s/ Michael R. Smolenski

/s/ David H. Sawyer

/s/ Stephen L. Borrello