

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

SCOTT ERIC ROPER,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262672

Van Buren Circuit Court

LC No. 05-014405-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to rob while armed, MCL 750.89. He was sentenced to 42 months to 30 years' imprisonment for each conviction. He now appeals as of right. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. FACTS

On December 22, 2004, defendant entered the non-public area of a pharmacy located within the Felpausch grocery store in Paw Paw in an attempt to obtain the drug Oxycontin. After entering, defendant asked for Oxycontin. He then walked further into the interior of the pharmacy area, past the pharmacy technician, Erin Chamberlain (victim under Count Two), in the direction of the pharmacist, Debra Ferguson (victim under Count One), who was sitting at the opposite end of the pharmacy counter. When defendant was standing between the two women, Ferguson realized that he was not someone authorized to be in the work area and that his repeated demands for Oxycontin were seriously intended. She responded by asking defendant to leave, and she instructed Chamberlain, who was closer to the door, to go for help. At that point, defendant turned toward Chamberlain. Chamberlain thought he said something to the effect of, "Get back here." Chamberlain also observed defendant handling an item in his pocket that she assumed to be a weapon. She did not, however, see a knife or other weapon in defendant's hand. Chamberlain exited through the same door by which defendant had entered.

As defendant turned away from her, Ferguson saw him reach into his shirt's right breast pocket. While she did not see defendant remove an item, Ferguson observed that he was holding a knife in his right hand when he completed his turn toward Chamberlain. Prompted by a belief that defendant was following after Chamberlain with the knife, Ferguson grabbed defendant from behind and struggled with him. She held on to defendant as he moved toward a pair of

open shelves holding bottles of prescription drugs. Defendant attempted to open bottles from one shelving unit, but he succeeded only in scattering pills onto the floor because Ferguson was still holding him from behind. When he reached a second shelving unit, he managed to open a random bottle and put several pills into his mouth. At about this time, a customer in the store and a fellow Felpausch employee came to Ferguson's aid by bringing and holding defendant to the floor until police arrived. Responding police officers found and photographed a knife on the floor near the shelving units. Defendant denied owning or having any knowledge of the knife when initially questioned by police, however, at trial defendant admitted that the knife was his.

Defendant's sole issue on appeal is whether the evidence was sufficient to enable a jury to conclude that he was "armed" within the meaning of MCL 750.89 at the time of the crime.

II. STANDARD OF REVIEW

When reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

III. ANALYSIS

The offense of assault with intent to rob while armed has three elements: (1) an assault, (2) an intent to rob, and (3) the defendant's being armed. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986).

There are two distinct ways to satisfy the armed element of MCL 750.89. The first requires a finding that the defendant used an *actual* weapon in the assault, while the second requires a finding that defendant used a *feigned* weapon. See *People v Hayden*, 132 Mich App 273, 294-295; 348 NW2d 672 (1984). The first method requires proof beyond a reasonable doubt that defendant possessed a dangerous weapon, whether or not the weapon was actually seen by the victim. *Hayden, supra* at 295. Under the second method, sufficient evidence must be introduced for a trier of fact to find beyond a reasonable doubt that the defendant possessed an article, harmless in itself, that was "used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon." *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993).

Defendant argues on appeal that one of his convictions, involving one of the two victims, must be analyzed as a feigned weapon case because the victim did not testify to seeing or being threatened with a weapon in defendant's possession. We disagree. The two victims involved in the case are a pharmacist and a pharmacy technician. Defendant entered the non-public area of a pharmacy in an attempt to obtain the drug Oxycontin. He walked past the technician, Erin Chamberlain, in the direction of the pharmacist, Debra Ferguson. Ferguson asked defendant to leave, and she instructed Chamberlain, who was closer to the door, to go for help. At that point, defendant turned toward Chamberlain. She observed defendant handling an item in his pocket, which she assumed to be a weapon. Chamberlain did not, however, see a knife or other weapon in defendant's hand. Ferguson, on the other hand, testified that she saw defendant reach into his shirt's right breast pocket, and she then saw him holding a knife in his right hand. He pointed

the knife in Chamberlain's direction. Ferguson thereafter struggled with the defendant for several seconds until she was aided by others in restraining him.

Responding police officers found defendant's knife on the floor of the pharmacy. He claimed that he was carrying it only because it was part of the equipment he regularly used to convert Oxycontin tablets into the liquid, injectable form of the drug. Defendant denied wielding the knife at any time during his encounter with victims Chamberlain or Ferguson.

Defendant argues on appeal that the facts, as they relate to Chamberlain, fall below the "absolute minimum level of evidence" sufficient to satisfy the similar "armed" element of the armed robbery statute, MCL 750.529{?}. *People v Banks*, 454 Mich 469, 475; 563 NW2d 200 (1997). He maintains that the minimum threshold was established by our Supreme Court in two cases dealing with feigned weapons. See *Banks, supra* at 475; *Jolly, supra* at 468. And, he points out that, where no actual weapon was used by the defendant, the victim's subjective belief that the defendant was armed is insufficient without additional support of "some objective evidence of the existence of a weapon or article." *Jolly, supra* at 468.

Defendant's analysis misconstrues the operation of the alternative methods for satisfying the armed element of the statute. Michigan Courts have long recognized that, only when the "record is devoid of evidence that defendant actually possessed a dangerous weapon during the robbery," is it necessary for the prosecutor to resort to the second method of feigned weapon analysis. *Jolly, supra* at 465. Under the first method for establishing the "armed" element of the crime, use of an actual weapon, the prosecutor is not required to either submit the weapon used by defendant into evidence or to prove that the victim actually saw the weapon. *Id.* at 469. "This alternative represents an eminently reasonable legislative determination that the mere possession of a dangerous weapon escalates the risk of violence and the degree of danger to the victim, even if the weapon is not seen by the victim." *Hayden, supra* at 294. The limit on this principle, however, is that "proof that only focuses on the subjective belief of the victim" is insufficient to be submitted to the jury. *Jolly, supra* at 468.

In this case, the proof did not focus only on Chamberlain's subjective belief. Chamberlain's testimony was supported by Ferguson's testimony that defendant actually drew a knife while in the pharmacy and by the objective evidence that defendant's knife was recovered at the scene. When viewed in the light most favorable to the prosecution, the evidence was clearly sufficient to support that defendant was armed, specifically carrying a knife, during the incident. Because there was proof beyond a reasonable doubt that defendant possessed a dangerous weapon at the time of the crime, the "armed" element was satisfied by sufficient evidence. *Id.*

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette