STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 275613 Genesee Circuit Court
MICHAEL ROGER NEELY, Defendant-Appellant.	LC No. 2006-017793-FH

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals, by leave granted, his jury trial conviction of assault with intent to commit unarmed robbery, MCL 750.88. Defendant was sentenced as a habitual fourth offender (MCL 769.12) to 9 ½ to 25 years' imprisonment. Because defendant was not overcharged and there was sufficient evidence to convict him of the charged crime, we affirm.

Defendant's conviction arises out of an incident that occurred at Jumbo Video, a video rental store, on February 16, 2006. On that date, a store employee observed defendant place a DVD in his pocket. The employee blocked defendant's exit from the store and asked him to produce the DVD. Defendant refused, grabbed the employee's neck and pushed her, then left the store and ran down the street with the DVD. Defendant was apprehended a short time later. At trial, the defense conceded that defendant had committed shoplifting, but maintained that he did not initiate the confrontation with the store employee, but instead responded to her confrontation as he tried to leave the store, and thus committed no assault as it applies to unarmed robbery. Defendant was nevertheless convicted of assault with intent to commit unarmed robbery.

On appeal, defendant contends that he was overcharged, and that the rule set forth in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002), that an unarmed robbery conviction requires sufficient evidence that the force used to accomplish the taking was contemporaneous with the taking, should be extended to the charge of assault with intent to rob. Defendant asserts that application of *Randolph, supra*, results in a finding that there was insufficient evidence to convict him of the crime charged. We disagree.

Statutory interpretation is a question of law calling for review de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). The purpose of statutory interpretation is to give effect to the intent of the Legislature. *Denio, supra*, 454 Mich at 699. Statutes that have a common purpose should be read to harmonize with each other in furtherance of that purpose.

People v Pfaffle, 246 Mich App 282, 296; 632 NW2d 162 (2001). However, the omission of a provision in one part of a statute that is included in another part is presumed to be intentional. See *Thompson v Thompson*, 261 Mich App 353, 362 n 2; 683 NW2d 250 (2004).

MCL 750.88 provides, "Any person, not being armed with a dangerous weapon, who shall assault another with force and violence, and with intent to rob and steal, shall be guilty of a felony . . . ." In *People v Chandler*, 201 Mich App 611, 615; 506 NW2d 882 (1993), this Court defined the elements of this offense as follows:

> [T]o show an assault with intent to rob while unarmed requires an assault, i.e., an attempt or offer to do corporal injury with the present intention and present ability to carry out that offer, with force and violence, and with the intent to rob and steal, and the defendant being unarmed.

The use of conjunctive language in the assault with intent to rob statute indicates that there must be both an assault, and the use of force and violence. *Chandler, supra*, 201 Mich App at 614.

Defendant urges application of a rule that our Supreme Court set forth in *Randolph, supra*, 466 Mich 532, according to which, for purposes of unarmed robbery, "the force used to accomplish the taking . . . must be contemporaneous with the taking." *Id.* at 536. Accordingly, "force used later to retain stolen property is not included." *Id.* The Court rejected the transactional approach to the crime, *id.* at 536, 540-541, and held that "a larceny is complete when the taking occurs. The offense does not continue." *Id.* at 543. Accordingly, where a shoplifter leaves a store with stolen property, then uses force to retain it when confronted by store personnel outside the building, that use of force does not elevate the crime to unarmed robbery. *Id.* at 547. Those facts do not constitute unarmed robbery, because the resort to force "by no means accomplished a severing of the store's constructive possession of the merchandise." *Id.* at 548-549.

Plaintiff, however, urges application of this Court's pronouncements in *People v Passage*, 277 Mich App 175; 743 NW2d 746 (2007), in which this Court, construing an amendment to the unarmed robbery statute, held that unarmed robbery occurs where a thief uses force against a person "during flight or attempted flight after the larceny was committed." *Id.* at 178. The unarmed robbery statute, MCL 750.530, now provides as follows:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
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> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

This formulation replaces the one the Supreme Court was construing in *Randolph*, 466 Mich at 536:

> "Any person who shall, *by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person or another, or in his presence,* any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony . . . ." [Emphasis in the original.]

The Legislature's amendment to the above statute evidences a clear intent to include behavior occurring after the actual physical larceny has taken place within the application of the term "assault."

In contrast, the operative statute in the instant case, MCL 750.88, features no such legislative revision. Plaintiff argues that the Legislature's amendment of MCL 750.530 effectively broadens the definition of "robbery" that should apply to all robbery crimes. However, that broadening, by its own terms, applies only to that specific section of the criminal code. MCL 750.530(2).

MCL 750.88 thus joins the earlier version of the unarmed robbery statute in referring to "assault," and "force and violence," without words indicating that those references include such acts done "in flight or attempted flight after the commission of the larceny." Accordingly, *Randolph* is instructive in this case, to the exclusion of *Passage*.

In *Randolph*, *supra*, 466 Mich at 549, the Supreme Court concluded that "when [the] defendant placed the merchandise under his clothing, he committed a taking without force, and his conduct constituted a completed larceny." The Court added, "The concealment evidences that, at the time he took the merchandise, defendant intended to permanently deprive the owner . . . of it," but that the "[d]efendant's later acts, whether viewed as an unsuccessful attempt to retain the property or as an attempt to escape, are too removed from the completed taking to be considered contemporaneous." *Id.*

In this case, the store employee testified to spotting defendant putting a DVD into his pocket and told him he needed to walk forward to the store's metal detector. According to the witness, defendant then walked with her to the metal detector, but did not go through it. In response to her continued demand that he surrender the merchandise, or to empty his pockets, defendant started pushing the employee, struggled to get around the metal detector, then grabbed the employee's neck and shoved her up against the wall before departing with the merchandise. While defendant would argue that the above represents an attempt to merely retain or escape with the stolen merchandise, such that an extension to *Randolph* would properly apply, we note a crucial distinction between the present matter and *Randolph*, which leads to the opposite conclusion.

In *Randolph*, store personnel observed the defendant concealing merchandise, then elected to allow him to leave the store before confronting him. *Randolph*, *supra*, 466 Mich at 534, 548 and n 18, 549. The Supreme Court regarded that defendant as having thus succeeded in severing, at least momentarily, that store's constructive possession of its merchandise. *Id.* at 548-549. In this case, however, the store employee who confronted defendant did so without delay, inside the store, upon seeing him place one of the store's DVDs in his pocket. Defendant had tried, but failed, to hide that item on his person, thus inducing a person with superior title to it immediately to exercise her still-existing constructive possession of it by way of demanding its

return, in response to which defendant resorted to assaultive conduct to complete the taking and only then sever the employee's, and the store's, rightful constructive possession. Accordingly, despite *Randolph*'s applicability to this case, under these facts it presents no bar to defendant's conviction of assault with intent to rob and steal.

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey