

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RAY,

Defendant-Appellant.

UNPUBLISHED

December 18, 2008

No. 273541

Shiawassee Circuit Court

LC No. 06-003920-FC

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Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of safe breaking, MCL 750.531, and breaking and entering a building with intent to commit larceny, MCL 750.110. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 90 to 240 months' imprisonment for the safe breaking conviction and 40 to 240 months' imprisonment for the breaking and entering conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that there was insufficient evidence to convict him of safe breaking because the prosecution failed to show that an ATM was a "safe, vault or depository" within the meaning of the statute. We disagree. MCL 750.531 provides in pertinent part:

Any person who, with intent to commit the crime of larceny, or any felony, 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.

The evidence at trial was that the ATM machine in question was "a standard ATM," i.e., a machine that holds money and from which "you withdraw money" using a debit card. Random House Webster's College Dictionary, 2001 Second Revised Edition, defines depository as "a place where something is deposited or stored, as for safekeeping...." We conclude that an ATM constitutes a "depository of money" within the meaning of MCL 750.531.

There was also testimony that the ATM was bolted to the floor with large bolts in each corner of the machine, meaning that absent the use of a debit card, the ATM was otherwise impenetrable to the average user. The evidence further revealed that defendant and others tied a

chain around the ATM, attached the chain to the hitch of a truck, and attempted to lift the ATM from its bolted position on the floor by accelerating their vehicle. This evidence supports the conclusion that defendant attempted “to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money” within the meaning of the safe breaking statute, and supports the jury’s finding.

Defendant next argues that the trial court’s jury instructions improperly assumed that an ATM was a safe, vault or depository under the safe breaking statute. As mentioned above, an ATM is a safe, vault or depository for purposes of the safe breaking statute. As such, the trial court’s instruction was accurate. Additionally, as the trial court noted, there was also evidence of the taking of a cash register in this case. By specifically referring to the ATM in the safe breaking instructions, the trial court hoped to clarify for the jury which conduct formed the basis of the charge against defendant.

Finally, defendant argues that he was denied the effective assistance of counsel. The issue has not been preserved, and thus appellate review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant claims that counsel was ineffective for failing to specifically request an instruction that the jury would first have to find that the ATM was “substantially impenetrable” and “intentionally constructed to protect valuables,” before it could find defendant guilty of safe breaking. Such an instruction would have been superfluous and defense counsel was not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Christopher M. Murray  
/s/ Joel P. Hoekstra  
/s/ Kurtis T. Wilder