STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 280256 Wayne Circuit Court
EARL MCKINLEY CHADWICK, JR., Defendant-Appellant.	LC No. 06-005613-FC

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] his jury trial convictions of attempted assault with intent to rob while armed, MCL 750.92; MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to two to seven and a half years' imprisonment for the attempted assault with intent to rob while armed conviction, two to seven and a half years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred by denying his motion for a directed verdict on the charge of assault with intent to rob while armed. Defendant contends that, because there was not an explicit or implied demand for any property, there is no evidence that he had the intent to rob. We disagree.

"This Court reviews de novo a trial court's decision on a motion for directed verdict to determine whether the prosecutor's evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt." *People v Martin* 271 Mich App 280, 319-320; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008).

[1] We initially denied leave to appeal, but the Supreme Court ordered that we consider defendant's case as on leave granted. *People v Chadwick*, 482 Mich 982; 755 NW2d 630 (2008).

"'The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.'" *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Defendant only challenges that there was sufficient evidence of his intent to rob.

In order to prove defendant had the intent to rob, the prosecution must show that at the time of the assault, the defendant intended to permanently take money or property from the victim. *People v Garcia*, 448 Mich 442, 482-483 n 22 (Cavanagh, J.); 531 NW2d 683 (1995). However, it is not necessary for the defendant to actually take any money or property from the victim. *Id*. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, including the intent to steal. *People v Truong* (*After Remand*), 218 Mich App 325, 337; 553 NW2d 692 (1996).

Based on the evidence, a rationale jury could infer that defendant was acting in concert with Darnell Fields[2], who was a codefendant, to lure the victim from behind the bulletproof glass in order to gain access to the cash register. This inference would be based upon the multiple conversations Fields had with defendant near the entrance of the gas station, while Fields argued with the victim. Fields caused a disturbance, which the victim responded to by coming out from behind the glass. At that point, defendant pointed a gun at the victim that he held inside a plastic bag, just as the police arrived. Moreover, Fields had already propped the entrance door open with a garbage can, prohibiting the victim from using the automatic lock button. Also, the concerted effort of defendant and Fields was shown by their multiple discussions through the entrance door, and their participation in the same phone call after their arrest, asking an unidentified person to come and help them.

Taken together, the facts of defendant standing near the entrance, repeatedly conferring with Fields, and his readiness with a gun after the victim was lured from his enclosed work area was sufficient action to constitute aiding and abetting, establishing defendant's intent to rob. See *People v Palmer*, 392 Mich 370, 378-379; 220 NW2d 393 (1974) (holding that a defendant was an aider and abettor when he acted silently, remained in position to render assistance, and took positive action to prohibit interference with the crime). Therefore, a rationale jury could have concluded that the elements of assault with intent to rob while armed were satisfied.[3]

Next, defendant argues that there was insufficient evidence to show that he committed an attempted assault with intent to rob while armed. Defendant contends that neither defendant nor Fields made an effort to steal anything during the 30-minute encounter, and the victim never saw defendant's gun so the jury's verdict is based on speculation. We disagree.

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[2] The jury was unable to reach a verdict regarding Fields.

[3] As a result of this conclusion, defendant's argument that his felony-firearm conviction should be vacated because there was insufficient evidence for the underlying felony is without merit.

A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id*., quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (internal quotation omitted).

An attempt offense consists of "(1) an attempt to commit an offense prohibited by law and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001); MCL 750.92. Again, "'[t]he elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal.'" *Akins*, *supra* at 554, quoting *Cotton*, *supra* at 391. Defendant again only challenges whether there is sufficient evidence to show he had the intent to rob.

The same analysis regarding defendant's intent to rob is applicable here. Therefore, based on the facts, a rational trier of fact could find that the essential elements of attempted assault with intent to rob while armed were proven beyond a reasonable doubt.

Lastly, defendant argues that he should be resentenced because Offense Variable (OV) 1 was improperly scored at 15 points. Defendant contends that there was no testimony that the victim saw a gun, and that judicial fact-finding on this issue violated his constitutional rights. We disagree.

This Court reviews a trial court's scoring decision "to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (quotation marks and citation omitted). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres* (*On Remand*), 269 Mich App 414, 417; 711 NW2d 398 (2006). Furthermore, this Court reviews "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id*.

Contrary to defendant's assertion, his constitutional rights were not violated by the judicial fact-finding at sentencing. This is because *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), are inapplicable to Michigan's indeterminate sentencing scheme in which a trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Harper*, 479 Mich

599, 644-645; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

OV 1 is scored at 15 points when "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). The testimony showed that defendant held a gun inside a plastic bag and waved it at the victim. Additionally, Officer West testified he observed the barrel of the gun pointing outside of the plastic bag at the victim when he arrived on the scene. The firearm, which was a .357 revolver, was retrieved from defendant. Therefore, the record supports that a firearm was pointed at the victim and OV 1 was properly scored.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray