STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2011
v	No. 298998 Calhoun Circuit Court
VINCENT PLOCHA, IV, Defendant-Appellant.	LC No. 2009-004205-FC

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant Vincent Plocha IV appeals as of right his jury convictions of assault with intent to rob while armed, MCL 750.89; two counts of possession of a firearm during the commission of a felony, MCL 750.227b; felon in possession of a firearm, MCL 750.224f; and carrying a concealed weapon, MCL 750.227. Because we conclude that there were no errors warranting relief, we affirm.

We shall first address defendant's argument that there was insufficient evidence to establish that he assaulted the victim. Because there was insufficient evidence to support this element of assault with the intent to rob while armed, defendant contends that this Court must vacate that conviction and the felony-firearm conviction that was predicated on the assault with intent to rob while armed charge. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

In order to prove that a defendant committed an assault with the intent to rob while armed, the prosecutor must prove that the defendant committed an assault, that he had the intent to rob, and that he was armed. MCL 750.89; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). "[T]he assault element is satisfied where the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened." *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998). The prosecutor need not present evidence that the defendant actually aimed a weapon or otherwise physically threatened the victim in order to establish the assault; the prosecutor may establish this element by proving that the defendant displayed a weapon in such a way as to imply the threat of

violence. See *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980) (noting that displaying a weapon "implies a threat of violence" and that a felonious assault can occur without "proof of the use of or attempt to utilize any force at all."). The key inquiry is whether the victim had an apprehension of imminent injury and whether that apprehension was reasonable. *Reeves*, 458 Mich at 244.

When viewed in a light most favorable to the prosecution, there was sufficient evidence to enable a rational jury to conclude beyond a reasonable doubt that defendant assaulted the victim. Defendant walked into the Chicken Coop restaurant where the victim was working and approached the register while holding his coat closed. Defendant then opened his coat to reveal a gun and told the victim to open the cash register. The victim began to cry and eventually opened the cash register. A reasonable jury could find that, by concealing the gun—later determined to be a shotgun—and then deliberately revealing it to the victim, defendant was in effect threatening to shoot the victim with the shotgun, if the victim failed to comply with his order to open the cash register. Further, the evidence that the victim began to cry demonstrated that she actually had such an apprehension of an imminent battery. And, defendant clearly had the present ability to act on that threat. Accordingly, there was evidence to support the jury's verdict that defendant committed an assault. See *Reeves*, 458 Mich at 244; *Pace*, 102 Mich App at 534.

Next, defendant argues that he did not receive the effective assistance of counsel. Specifically, he argues that his trial lawyer should have asked the trial court to instruct the jury on attempted armed robbery as a necessarily included lesser offense of assault with the intent to rob while armed. The trial court did not hold a hearing on the ineffective assistance of counsel claim; as such, our review is limited to mistakes that are apparent on the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). In order to warrant relief for ineffective assistance of counsel, defendant must demonstrate that his trial counsel's decision fell below and objective standard of reasonableness under prevailing professional norms and that, but for the error, there is a reasonable probability that the outcome of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

This Court has held that attempted armed robbery is a necessarily lesser included offense of assault with the intent to rob while armed. See *Akins*, 259 Mich App at 553. However, since the decision in *Akins*, the Legislature has modified the elements of armed robbery. See 2004 PA 128. As currently codified, a person can commit armed robbery by merely representing that he or she is armed without actually possessing a weapon or article used or fashioned to lead another to believe that it is a dangerous weapon. See MCL 750.529. As such, attempted armed robbery might no longer be a necessarily included lesser offense of assault with the intent to rob while armed. See MCL 750.89 (requiring proof that the defendant possessed a weapon or article used or fashioned to lead another to believe that it is a dangerous weapon). And defendant's trial counsel could not be faulted for failing to request an instruction on an offense that is not a necessarily included offense, because such a request would have been futile. See *People v Mendoza*, 468 Mich 527, 532-533, 664 NW2d 685 (2003).

Nevertheless, we need not determine whether attempted armed robbery is still a necessarily included lesser offense of assault with the intent to rob while armed. Given the evidence produced at trial, defendant's trial lawyer had a reasonable argument that defendant had not committed an assault and, on that basis, argued for acquittal. Moreover, defendant's trial lawyer might have reasonably believed that a request for an instruction on attempted armed robbery would diminish the force of that argument and, correspondingly, would reduce defendant's chances for an acquittal. Under these circumstances, we must assume that the decision not to request the instruction was a matter of trial strategy. See *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982) ("The decision to proceed with an all or nothing defense is a legitimate trial strategy."). Defendant has not overcome the strong presumption that his counsel's conduct was a matter of trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck