STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2011
v	No. 299787 Saginaw Circuit Court
MICHAEL LEE WILSON, Defendant-Appellant.	LC No. 10-034039-FH

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of unarmed robbery, MCL 750.530, and the trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to a prison term of 10 to 30 years. Defendant appeals as of right. We affirm.

Three loss prevention officers working for a Sears department store observed defendant, a person of interest to the officers, enter the store. Daniel Reynolds, the officer monitoring the store's closed circuit television system, directed officers Corey Johnson and Greg Rohde to enact a plan that had been put in place in the event defendant entered the store. Reynolds recorded defendant concealing two razors with a retail value of approximately $130 inside his jacket and exiting the store without paying for either. Defendant was confronted by the officers outside the store, and an altercation ensued. Eventually, defendant was handcuffed and taken into custody.

Defendant first argues that the prosecution failed to present evidence sufficient to support the unarmed robbery conviction. In reviewing an argument regarding the sufficiency of the evidence, we review the evidence de novo in the light most favorable to the prosecution to determine if a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). In doing so, however, we will not interfere with the fact-finder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992)[1] The prosecution need not refute every reasonable theory of innocence, but must provide evidence sufficient for a rational trier of fact to find that the

[1] Amended on other grounds 441 Mich 1201 (1992).

essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicting evidence is resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The unarmed robbery statute, MCL 750.530, reads 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.

Defendant does not dispute that he committed a larceny by smuggling merchandise out of the store; rather, he disputes that he used any force or violence in connection with that larceny.

Johnson testified that defendant shoved him in the chest as he attempted to apprehend defendant and that defendant flailed his arms in an attempt to free himself from Johnson's grasp. Rohde testified that he witnessed a struggle between Johnson and defendant, and Reynolds testified to seeing both of his associates in a struggle with defendant outside the store. Thus, the prosecution provided direct evidence of the use of force by defendant. Therefore, viewed in the light most favorable to the prosecution, the prosecution presented evidence sufficient to convince a rational trier of fact that the elements of the crime of unarmed robbery were proven beyond a reasonable doubt.

Defendant also argues that the prosecution improperly cross-examined him, thereby denying him of a fair trial. Review of alleged prosecutorial misconduct is precluded if the defendant failed to raise a timely objection at trial, unless an objection could not have cured the purported error or the failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant objected to some, but not all, of the allegedly improper questioning, but on grounds different than those raised on appeal. Accordingly, this issue has not been properly preserved. Our review is therefore limited to considering whether the prosecutor's actions amounted to outcome-determinative plain error affecting substantial rights. *Id.*

Remarks made by the prosecution are subject to numerous limitations in order preserve a defendant's right to a fair and impartial trial. Among these limitations is a prohibition on questioning a defendant as to the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Assuming that the prosecutor improperly questioned defendant with regard to whether the officers lied regarding their version of events, defendant cannot establish that the error affected his substantial rights. The prosecution's questions followed defendant's direct examination in which he denied portions of the testimony of Reynolds, Johnson, and Rohde. After that direct examination, the jury was already placed in the position of having to believe either defendant's version of events or the version of events put

forward by the prosecution's witnesses. Accordingly, cross-examination involving whether defendant thought the prosecution's witnesses were lying merely highlighted a conflict in the evidence the jury was faced with resolving. See *People v Loyer*, 169 Mich App 105, 118; 425 MW2d 714 (1988) (error deemed not to be harmful "cannot premise a reversal of defendant's conviction").

Defendant also contends that it was improper for the prosecutor to question defendant on his opinion regarding the legal question of whether a shove constitutes the use of force. Again, assuming that the question was improper, the prosecutor's question did not constitute outcome-determinative plain error affecting substantial rights. The trial judge clearly instructed the jury that it was to "take the law as I give it to you. If a lawyer says something different about the law, follow what I say." "To sum up," the judge continued, "it is your job to decide what the facts of this case are, to apply the law as I give it to you, and in that way, to decide the case." These instructions place the burden on the jury to decide whether the evidence showed that defendant used force and violence against Johnson. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, the evidence presented was sufficient to establish beyond a reasonable doubt the use of force by defendant.

Finally, defendant argues that the trial court erred in refusing to instruct the jury on the lesser charges of third-degree retail fraud and attempted unarmed robbery. Issues of law arising from jury instructions are reviewed de novo by this Court. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A trial court's determination whether an instruction was applicable to the facts of a case is reviewed for an abuse of discretion. *Id*.

This issue is governed by MCL 768.32(1), which reads as follows:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), the Michigan Supreme Court clarified the meaning of MCL 768.32(1). First, the Court noted that the statute applied not only to crimes with specific degrees, but to any crime in which different grades of offenses or degrees of enormity have been recognized. *Id*. at 353-354. Second, the Court noted that there were two forms of lesser offenses: necessarily included lesser offenses and cognate offenses. *Id*. at 345-346. Necessarily included lesser offenses are crimes that must be committed in order to commit the greater offense, while cognate offenses are those that share many elements with the greater offense, but may contain some elements not found in the larger offense. *Id*. at 345. Finally, the Court held that trial courts are only required to give instructions on necessarily included lesser offenses, and only if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and a rational view of the evidence would support the instruction. *Id*. at 357.

In this case, defendant alleges error on the part of the trial court in refusing to instruct the jury on attempted unarmed robbery and third-degree retail fraud. Applying the rule in *Cornell*, third-degree retail fraud is clearly a cognate offense.[2] While committing retail fraud may be part of committing a robbery, it is not a necessarily included offense. For example, any larceny accompanied by the use of force that does not take place in a store or its immediate vicinity would constitute a robbery that does not include retail fraud. Accordingly, the trial court did not err in declining to instruct the jury on that charge.

Attempted unarmed robbery poses a slightly different question under *Cornell*. As an attempt to commit the greater crime charged, attempted unarmed robbery is clearly within the statutory language of MCL 768.32(1). However, under *Cornell*, even where MCL 768.32(1) applies, a court does not need to instruct the jury if a rational view of the evidence would not support the instruction. *Cornell*, 466 Mich at 356.

[2] MCL 750.356d(4) reads in relevant part as follows:

> A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the third degree, a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00 or 3 times the value of the difference in price, property stolen, or money or property obtained or attempted to be obtained, whichever is greater, or both imprisonment and a fine:
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> (b) While a store is open to the public, steals property of the store that is offered for sale at a price of less than $200.00.
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In this case, given the evidence presented at trial, no rational jury could view the evidence presented and find defendant not guilty of unarmed robbery but guilty of attempt to commit unarmed robbery. The sole disputed element at trial was the use of force or violence by defendant, and defendant denied both using force or violence and having any intent to use force or violence. If the jurors believed the testimony of Johnson over the testimony of defendant, then they would have to find defendant guilty of unarmed robbery. But if they found the testimony of defendant more credible than the testimony of Johnson, then they would have to acquit defendant of both unarmed robbery and attempted unarmed robbery. No interpretation of the testimony presented at trial would lead a rational jury to find defendant guilty of one offense and not guilty of the other, and as such, no rational view of the evidence supported an instruction on attempted unarmed robbery.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey