

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 24, 2013

v

ANDREA ROSE MICSAK,

Defendant-Appellant.

No. 308317
Saginaw Circuit Court
LC No. 11-035523-FC

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Defendant was found guilty by a jury of unarmed robbery, MCL 750.530, as a lesser included offense of armed robbery, MCL 750.529. The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to a prison term of 46 months to 30 years. Defendant appeals as of right. We affirm because the jury instructions were correct, trial counsel's performance was adequate, and defendant's prior convictions were admissible under the circumstances of the case.

This appeal involves a shoplifting incident that occurred at a Kohl's department store in Kochville Township. Misty Ann Wilson, a loss prevention officer at the store, testified to witnessing defendant leaving the store wearing a pair of "jeggings" (leggings made of stretchy denim material) that she had not paid for. Wilson said that defendant was wearing them underneath the dress she wore into the store. Defendant testified that she entered the store wearing her own pair of jeggings under the dress.

When defendant exited the building, Wilson followed her into the parking lot. Wilson testified that she confronted defendant as she was getting into her parked car. According to Wilson, she identified herself as a loss prevention officer, showed identification, and told defendant she wanted her "pants back." She testified that she positioned herself between defendant and the driver's side door of defendant's vehicle and told defendant that she would call the police if defendant did not return the pants, to which defendant replied "call the fucking police." Defendant then slammed the car door on Wilson's arm twice, leaving a bruise. As a result, Wilson radioed the store manager, who called the police. Wilson then walked to the back of defendant's car to record its license plate number. Wilson stated that as she was standing behind defendant's vehicle, defendant started the car and revved the engine. Wilson jumped out of the way just before defendant backed out of the parking space and sped out of the parking lot.

Defendant testified that she never realized that she struck Wilson in the arm. She also testified that she did not see Wilson standing behind her vehicle, and never intended to back her car into Wilson.

Defendant was tried for armed robbery, but the lower court also instructed the jury on charges of unarmed robbery and felonious assault, MCL 750.82. The jury acquitted defendant of armed robbery but convicted her of unarmed robbery.

Defendant challenges the lower court's decision to instruct on the lesser included offense of felonious assault. Defendant objected to the lower court's jury instructions over the advice of counsel. The lower court overruled that objection. Accordingly, the issue is preserved for appeal. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Whether the trial court erroneously instructed on a lesser included offense is a question of law which this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

The lower court must clearly present the case and the applicable law to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Under MCL 768.32(1), the lower court can instruct on a lesser offense, but only if it is necessarily included in the greater offense. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *Id.* "Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense." *People v Wilder*, 485 Mich 35, 44-45; 780 NW2d 265 (2010). Accordingly, the lower court must examine the elements of the greater offense, as charged, to determine whether the alternative elements of the lesser crime are subsumed within the charged offense. *Id.* at 44.

To prove that this defendant committed an armed robbery, the prosecution must have established beyond a reasonable doubt that:

First, the defendant . . . used force or violence against . . . [Wilson].

Second, the defendant did so while . . . she . . . was in the course of committing a larceny. A "larceny" is the taking and movement of someone else's property or money with the intent to take it away from that person permanently.

"In the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during the 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 or money.

Third, [Wilson] was present while defendant was in the course of committing the larceny.

Fourth, that while in the course of committing the larceny, the defendant:

* * *

possessed a weapon designed to be dangerous and capable of causing death or serious injury; [or]

possessed any other object capable of causing death or serious injury that the defendant used as a weapon [CJI2d 18.1 (ordinals omitted).]

To prove that defendant committed felonious assault, the prosecution must have established beyond a reasonable doubt that:

First, that the defendant either attempted to commit a battery on [Wilson] or did an act that would cause a reasonable person to fear or apprehend an immediate battery. A battery is a forceful or violent touching of the person or something closely connected with the person.

Second, that the defendant intended either to injure [Wilson] or to make [Wilson] reasonably fear an immediate battery.

Third, that at the time, the defendant had the ability to commit a battery, appeared to have the ability, or thought . . . she . . . had the ability.

Fourth, that the defendant committed the assault with a[n automobile]. [CJI2d 17.9 (ordinals omitted).]

A dangerous weapon is “any object that is used in a way that is likely to cause serious physical injury or death,” including items designed for peaceful purposes, but “used as dangerous weapons.” CJI2d 17.10(1), (2).

Defendant argues that felonious assault is a cognate lesser offense of armed robbery because it is possible to commit an armed robbery without actually possessing a dangerous weapon. See CJI2d 18.1(5)(d). A cognate offense contains several, but not all, elements found in the greater offense. *Id.* The lower court cannot instruct on a cognate offense if, as defendant claims is the case here, it would violate a defendant’s right to adequate notice. *Wilder*, 485 Mich at 41; *People v Darden*, 230 Mich App 597, 601; 585 NW2d 27 (1998). When deciding whether felonious assault is a cognate lesser offense of armed robbery, the lower court correctly considered the offense of armed robbery as charged, alternative elements aside. *Wilder*, 485 Mich at 44-45.

In order to convict defendant of armed robbery as charged, the prosecution had to prove that defendant used her vehicle to inflict force or violence upon Wilson, that her vehicle was a dangerous weapon, and that she did so while committing a larceny. In order to convict defendant of felonious assault as charged, the prosecution had to prove that defendant intended to batter Wilson, and that she did so while possessing a dangerous weapon. Under the circumstances, it would have been impossible for defendant to commit the armed robbery without also committing the felonious assault. The elements of felonious assault are therefore completely subsumed within the elements of armed robbery under the circumstances of this case.

Next, defendant argues that her counsel was ineffective for failing to request an instruction on the lesser included offense of larceny from a person. To establish an ineffective

assistance of counsel claim, the defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the result was fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

Defendant's assertion that counsel should have asked for an instruction on larceny from a person is at odds with the position taken personally by defendant at trial that she only wanted the jury to consider the armed robbery charge. Counsel cannot be faulted for failing to request another lesser included instruction when defendant had stated an objection to counsel previous request to have the jury instructed on two other lesser included offenses.

In any event, counsel's decision not to request an instruction on larceny from a person can be seen as a reasonable trial strategy. See *Davis*, 250 Mich App at 368. Larceny from a person is distinguishable from robbery, either armed or unarmed, because it does not require the use of force or violence against another person. *People v Perkins*, 262 Mich App 267, 271-72; 686 NW2d 237 (2004). Similarly, felonious assault requires that the defendant have committed an assault. MCL 750.82; CJI2d 17.9. Defense counsel could have reasonably believed that the prosecution failed to prove beyond a reasonable doubt that defendant used force or violence against Wilson while stealing the pair of jeggings. As such, it was reasonable to force the jury into an "all or nothing" decision on the robbery and assault charges, rather than allowing the jury to compromise by convicting defendant of larceny from a person.

Defendant also argues that the lower court denied defendant a fair trial by asking defendant a biased and prejudicial question while she was on the stand. The court has great discretion in conducting trials, and may question witnesses in order to clarify testimony or elicit additional relevant information. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992); MRE 614(b). However, that discretion is not unlimited. *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). A trial court must not invade the prosecutor's role, and must ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Id.* The test is whether the trial judge's questions may have unjustifiably aroused suspicion in the minds of the jury as to a witness's credibility, or "quite possibly" could have influenced the jury to the detriment of the defendant's case. *Conyers*, 194 Mich App at 405.

Here, the lower court asked defendant a single question: whether jeggings are a type of clothing that defendant wears under a dress on a hot day. That question was not argumentative, prejudicial, unfair, or partial. Nor did it discredit defendant's prior testimony. The lower court simply elicited additional relevant information regarding the character and use of the jeggings. The question allowed defendant a fair opportunity to explain why she wore the jeggings under her dress on the date of the incident, and the lower court did not challenge or criticize her response. Accordingly, the lower court's conduct was not likely to raise suspicion in the minds of the jury as to defendant's credibility or negatively influence defendant's case.

Moreover, the court specifically instructed the jury that its "comments, ruling, questions and instructions are also not evidence." It also instructed as follows:

[W]hen I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that. You are the only judges of the facts, and you should decide this case from the evidence.

Next, defendant argues that the lower court should not have scored any points under offense variable (OV) 1 or OV 2 at sentencing because both require the use of a weapon during the commission of a crime, and the jury found defendant guilty of unarmed robbery. However,

A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. [MCR 6.429(C); see also MCR 769.34(10)].

The sentence in this case was within the applicable guidelines range, and defendant did not object below or make a motion for remand in this Court. Therefore, we will not address this issue. *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004).

Defendant next argues that the trial court erred by admitting defendant's prior convictions into evidence. The prosecution stated for the record that it did not originally intend to impeach defendant with her previous convictions under MRE 609. But, after defendant placed her character and motive at issue, the prosecution believed she "opened the door" to cross-examination on her previous convictions. The lower court stated for the record that it discussed the issue with counsel during a bench conference prior to cross-examination, and that it agreed with the prosecution as to the admissibility of defendant's previous convictions. On appeal, defendant correctly argues that her previous convictions were not admissible under MRE 609. However, her convictions were admissible under MRE 404(b), which provides as follows:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

Defendant's prior convictions are admissible under MRE 404(b) to prove intent and absence of mistake. Defendant testified on direct examination that she was "freaked" out by having someone accuse her of stealing and said, "That's not in my character." She also testified that she did not see Wilson standing behind her vehicle when she began backing out of her parking space. In making these statements, defendant asserted that she had no intention of using force or violence during the commission of the robbery, and that backing up her vehicle was simply a mistake, not an attempt to run over Wilson.

As the prosecution argued, this "opened the door" to cross-examination on defendant's prior convictions. Defendant's previous convictions tended to contradict her statement that such behavior was not in her character. Similarly, defendant's previous convictions established that she has committed acts of violence in the past, thereby making it less likely that her acts of violence in this instance were a mistake.

Defendant also argues that even if her previous convictions satisfy the requirements of MRE 404(b)(1), the prosecution failed to provide pretrial notice of its intention to introduce defendant's previous convictions under MRE 404(b)(2). However, MRE 404(b)(2) allows the prosecution to give notice during trial for good cause shown. The prosecution stated for the record that it decided to introduce defendant's previous convictions only after defendant testified that she had no violent intent and spoke of her character. The trial court did not abuse its discretion in finding that this constituted good cause.

Finally, defendant claims that she was denied effective assistance of counsel because defense counsel failed to object to the introduction of her previous convictions. Because defendant's previous convictions were admissible under MRE 404(b), any objection would have been meritless. Defense counsel cannot be deemed "ineffective for failing to advocate a meritless position." *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ William C. Whitbeck
/s/ Henry W. Saad
/s/ Douglas B. Shapiro