STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 259184 Saginaw Circuit Court
MAURICE DEWAYNE MAYES, Defendant-Appellant.	LC No. 04-024225-FC

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because the trial court did not err when it instructed the jury, and because the prosecution presented sufficient evidence to support defendant's convictions, we affirm.

This case arises out of defendant's participation in an armed robbery that occurred on January 12, 2004 at a Burger King restaurant in Saginaw, Michigan. The prosecution charged defendant along with codefendants, Trumon Cannon and Larry Hibler.[1]

Defendant first argues that the trial court erred when it refused to allow the jury to consider evidence that the firearm used during the robbery was inoperable, and by refusing to instruct the jury that a felony-firearm conviction may only be based on the use of an operable firearm during the commission of the underlying felony. It is defendant's position that an inoperable handgun does not qualify as a "firearm" under the statutory definition in MCL 750.222(d) because such a handgun cannot expel a dangerous projectile. The prosecution argued below that a handgun is a firearm for purposes of the felony-firearm statute, even if it is currently

[1] *People v Cannon*, unpublished opinion per curiam of the Court of Appeals, issued _____ (Docket No. 259532); *People v Hibler*, unpublished opinion per curiam of the Court of Appeals, issued _____ (Docket No. 260107).

inoperable, because such a handgun nevertheless "may" expel a dangerous projectile. This Court addressed this precise issue in *People v Brown*, 249 Mich App 382; 642 NW2d 382 (2002) and stated,

> First, we note the prosecution's argument that a "firearm" is "a weapon from which a dangerous projectile *may be* propelled . . . ." MCL 750.222(b) (emphasis added). The statutory term "may" is permissive, as opposed to the term "shall," which carries a mandatory, nondiscretionary connotation. *People v Seeburger*, 225 Mich App 385, 392-393; 571 NW2d 724 (1997); *People v Tabar*, 132 Mich App 376, 379; 347 NW2d 458 (1984). Interpreting the statute according to the fair import of its terms, we agree with the prosecutor that a handgun that is designed to expel a dangerous projectile, and that could do so but for a missing firing pin and spring, qualifies under MCL 750.222(b) as a weapon from which a dangerous projectile *may* be propelled. [*Brown, supra* at 386.]

In light of the holding in *Brown, supra*, the trial court did not err when it refused to instruct the jury that it could find defendant not guilty of felony-firearm if the prosecutor failed to prove that the gun was operable at the time of the offense.

Defendant also argues that the trial court erred in denying his requests for jury instructions on the lesser included offenses of attempted armed robbery, unarmed robbery, larceny from a person, and larceny in a building. A jury instruction on a lesser included offense is appropriate only where the requested lesser offense is a necessarily included lesser offense. MCL 768.32; *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). An instruction on a cognate lesser offense is not to be given. *People v Brown*, 267 Mich App 141, 146; 703 NW2d 230 (2005). A cognate lesser offense is an offense that shares several of the same elements and is part of the same class or category as the greater offense, but contains some elements distinct from the greater offense. *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004). An offense is not a necessarily included lesser offense unless all of the elements of the lesser offense are completely subsumed in the greater offense. *Nickens, supra* at 626. Furthermore, a requested instruction on a necessarily included lesser offense is appropriate only where the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense, and where a rational view of the evidence would support it. *Brown, supra* at 146.

MCL 750.92, which proscribes the attempt to commit a crime, reads in pertinent part as follows:

> Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows . . . .

Attempt is not a necessarily included lesser offense of the completed crime. *People v Adams*, 416 Mich 53, 56; 330 NW2d 634 (1982) (overruling in part *People v Lovett*, 396 Mich 101; 238 NW2d 44 (1976)). "While a completed offense may necessarily include as a factual matter

conduct that, taken alone, would constitute an attempt to commit the offense, we are now of the opinion that because the elements of an attempt are not duplicated in the completed offense the judge is not required to instruct the jury on attempt without regard to the evidence or the defense presented or argued." *Id*. Because attempted armed robbery is not a necessarily included lesser offense of armed robbery, there was no error in the trial court's refusal to give the requested jury instructions regarding attempt. *Id.* at 58-59.

Unarmed robbery is a necessarily included lesser offense of armed robbery. *People v Reese*, 242 Mich App 626, 630; 619 NW2d 708 (2000). The elements of unarmed robbery are: (1) the felonious taking of any property which may be the subject of larceny from the person or presence of the complainant, (2) by force and violence, assault or putting in fear, (3) while not armed with a dangerous weapon. *People v Denny*, 114 Mich App 320, 323-324; 319 NW2d 574 (1982). The element that distinguishes robbery from unarmed robbery is the use of a weapon or an article used as a weapon. *Reese, supra* at 630.

Under circumstances such as those in this case, however, where there is no factual dispute regarding the use of a weapon during a robbery, the trial court is not required to give an instruction on unarmed robbery. *Reese, supra* at 634. There was no dispute at trial regarding the perpetrators' use of a weapon to facilitate the robbery at issue here. Victims testified one of the perpetrators threatened them with a gun. In fact surveillance video shows one of defendant's codefendants pointing his gun at restaurant employees. There was also credible testimony that defendant was wearing a gun in the waistband of his pants in such a way that it was visible to witnesses. And police recovered a gun from defendants' escape route. Therefore, because the use of a weapon during the robbery was not a "disputed fact" at trial, and because a rational view of the evidence could not have supported a finding that the individuals who committed the robbery were unarmed, it was proper for the trial court to refuse to provide a jury instruction on the necessarily included lesser offense of unarmed robbery.

The trial court's rejection of defendant's request for an instruction on larceny from the person, MCL 750.357, was also proper because it was unsupported by a rational view of the evidence. See *People v Membres*, 34 Mich App 224, 227-228; 191 NW2d 66 (1971). The perpetrators in the instant case clearly used force and threat of force in robbing the restaurant.

The elements of larceny in a building, MCL 750.360, are: (1) an actual or constructive taking; (2) an asportation; (3) with a felonious intent; (4) of someone else's property; (5) without that person's consent; (6) in a building. *People v Cavanaugh*, 127 Mich App 632, 636; 339 NW2d 509 (1983). Larceny in a building is distinguishable from the crime of armed robbery in that larceny from a building includes the additional element that the theft occurs in a building, and by virtue of the absence of an element involving the use of force. *People v Stein*, 90 Mich App 159, 167; 282 NW2d 269 (1979). Larceny in a building is therefore a cognate lesser included offense of armed robbery. Accordingly, because larceny in a building is merely a cognate lesser included offense of armed robbery, the trial court properly denied defendant's request for an instruction on that offense. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002).

Finally, defendant argues that the evidence presented at trial was insufficient to prove his guilt beyond a reasonable doubt. In reviewing the sufficiency of the evidence in a criminal case,

the Court reviews the evidence in the light most favorable to the prosecution, and must determine whether a rational trier of fact could find that the essential elements of the offense(s) were proved beyond a reasonable doubt. *People v Johnson,* 460 Mich 720, 723; 597 NW2d 73 (1999). It is for the trier of fact to determine the inferences that may fairly be drawn from the evidence and the proper weight to be accorded those inferences. *People v Hardiman,* 466 Mich 417, 428; 646 NW2d 158 (2002).

The record evidence included eyewitness testimony, physical evidence collected from the crime scene, physical evidence collected from or near defendant's person, and a videotape of the robbery itself. According to the testimony of Burger King employees present during the robbery, a man wearing clothing matching the clothing defendant wore when police apprehended him, jumped across the Burger King counter and grabbed money out of the Burger King safe while Hibler demanded money from the Burger King employees at gunpoint. Employees saw defendant carrying a gun in the back of the waist of his pants. A security system recorded the robbery on videotape. When the police finally apprehended defendant after a foot pursuit in a direction away from the Burger King as well as a physical struggle, defendant had approximately $1,207 in cash stuffed into his two front pockets. The police also recovered a loaded chrome revolver from the snow in the Burger King parking lot the evening of the robbery. Viewing the evidence in the light most favorable to the prosecution, the jury could have reasonably concluded that defendant committed armed robbery, that he conspired with at least one other person to commit that robbery, and that defendant carried or had in his possession a firearm (as defined by MCL 750.222) while committing the offense of armed robbery. This overwhelming and undisputed evidence was sufficient to support defendant's convictions.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto