STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBIN ROBERTS ROSS,

Defendant-Appellant.

UNPUBLISHED
December 11, 1998

No. 208003
St. Joseph Circuit Court
LC No. 97-008491 FH

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and larceny from the person, MCL 750.357; MSA 28.589. Defendant was sentenced to serve, as a fourth habitual offender, MCL 769.12; MSA 28.1084, concurrent and enhanced sentences of twelve to thirty years' imprisonment on each of the convictions. We affirm in part and vacate in part.

At approximately midnight on the night in question, defendant went to the business facility of his former employer, opened up a drop box which was used to provide the cross-country truck drivers with their paychecks and assignments, removed several packets, and then proceeded to bring them back to his car. The complainant, the manager of the company, was on the premises preparing for a trip when he witnessed defendant's actions from inside a nearby garage. Complainant verbally confronted defendant and, while defendant was inside his car, complainant even attempted to reach in and retrieve the packets. A "tussle" ensued over the packets which eventually resulted in the complainant being dragged briefly around the lot as he hung from the car door. The complainant was able to retrieve two or three of the packets. A day later, some of the contents from the other packets were discovered in a parking lot in a nearby city. Defendant contended that although he no longer worked for the trucking company, he had a reasonable belief that a correspondence directed toward him was in the mailbox, thus he was legitimately on the premises looking in the box. Defendant further contends that when he was approached by the complainant, he dropped the packets and left the premises. Defendant testified that he had no intention of keeping the packets.

First, defendant contends that his convictions for unarmed robbery and larceny from the person violate the prohibition against double jeopardy. We agree. The double jeopardy provision of the

Michigan Constitution, Const 1963, art 1, § 15, protects citizens from suffering multiple punishment and successive prosecutions for the same offense. *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). "The purpose of the double jeopardy protection against multiple punishment for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature." *People v Rivera*, 216 Mich App 648, 650; 550 NW2d 593 (1996). In *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984), the Supreme Court set forth some general principles for determining legislative intent for purposes of a double jeopardy analysis:

> Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. For example, the crimes of larceny over $100, MCL 750.356; MSA 28.588, and larceny in a building, MCL 750.360; MSA 28.592, although having separate elements, are aimed at conduct too similar to conclude that multiple punishment was intended.
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> A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions.

Applying the foregoing principles, we conclude that defendant's convictions for both unarmed robbery and larceny from the person violate double jeopardy.

The elements of unarmed robbery are: (1) that the defendant by force and violence, assault or putting in fear, (2) feloniously took any property, which may be the subject of larceny, from the person of the complainant or in his presence, and (3) that the defendant was not armed with a dangerous weapon. *People v Tolliver*, 46 Mich App 34, 37; 207 NW2d 458 (1973). In order to be convicted of larceny from a person, it must be shown that: (1) the property of another was taken; (2) there was some moving of that property whereby the defendant obtained possession and control of it; (3) the property must have been taken from the person of the complainant, meaning that the property must have been taken from the body of the complainant or from within his immediate area of control or immediate presence; (4) at the time of the taking the defendant must have intended to deprive the complainant permanently of the property; and (5) the taking must have been without the consent and against the will of the complainant. *People v Wallace*, 173 Mich App 420, 426; 434 NW2d 422 (1988).

Larceny from the person is a lesser included offense of armed and unarmed robbery. It is distinguished from those two offenses by the absence of force as an element. *People v Douglas*, 191 Mich App 660, 664; 478 NW2d 737 (1992). "Robbery, although it contains an element of theft, is

primarily an assaultive offense." *Id.* "Although larceny from a person is not an assaultive offense in the same sense as robbery, i.e., that the larceny is committed with violence or intimidation, the statute is aimed at the protection of both persons and property." *Id.* Considering the foregoing, it is apparent that both unarmed robbery and larceny from the person are intended to prevent harm to the person. Put another way, both statutes prohibit conduct that is violative of the same social norm. Thus, they are too similar to conclude that multiple punishment was intended.

The second principle espoused in *Robideau* supports this conclusion as well. As stated above, the absence of force distinguishes larceny from the person and unarmed robbery. *Douglas, supra* at 664. The other elements of the crimes are essentially the same. Larceny from the person is punishable by up to ten years, MCL 750.357; MSA 28.589, while unarmed robbery is a fifteen-year felony, MCL 750.530; MSA 28.798. "Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Robideau, supra* at 487.

As a final note, we reject the prosecution's argument that defendant's convictions do not violate double jeopardy because there were two distinct crimes committed. While it is true that "[w]hen two dissimilar offenses have occurred, one following the other, conviction and sentence for each offense does not constitute double jeopardy. . . ," *People v Wynn*, 197 Mich App 509, 510-511; 496 NW2d 799 (1992), the facts in this case do not support application of the rule.

Because we find that there is an absence of a clear legislative intent to permit multiple punishments, defendant's convictions for both unarmed robbery and larceny from the person constitute a double jeopardy violation. We therefore vacate defendant's conviction for larceny from the person, the lower charge. *People v Harding*, 443 Mich 693, 714, 735; 506 NW2d 482 (1993).

Next, defendant argues that the trial court erred when it permitted the prosecution to offer evidence that defendant committed prior bad acts while he was employed with complainant's company. We disagree. Because the evidence was not being offered to prove the character of defendant in order to show action in conformity therewith, but instead was being offered to show the implausibility of defendant's defense, the admission of the evidence did not violate MRE 404(b) as defendant contends. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

Defendant also contends that the trial court erred in denying his motion for directed verdict which was brought at the close of the prosecution's proofs. We disagree. In determining whether the prosecution has introduced sufficient evidence to avoid a directed verdict, this Court must consider all of the evidence presented by the prosecution up to the time the motion is made, view the evidence in the light most favorable to the prosecution, and then determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable double. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

As grounds for his motion, defendant argued that there was insufficient evidence for a jury to conclude that the packets were taken from a person. Defendant maintained that the crime was

completed when the packets were removed from the mailbox and that at this point in time, the complainant was inside the garage several feet from the box. We disagree with defendant's analysis and conclude that, because there was evidence that defendant and complainant were within three inches of each other when they wrestled for control of the packets, a jury could have reasonably concluded that the packets were taken "from the person" or from his immediate presence. *People v Chamblis*, 395 Mich 408, 424-425; 236 NW2d 473 (1975); overruled in part on other grounds, *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982).

Defendant also contends that during closing arguments the prosecutor shifted the burden of proof when he stated: "But if you believe Robin Ross is a person not to be trusted, and distrust him beyond a reasonable doubt, your verdict should be guilty." Because the prosecutor's remarks did not suggest that defendant must prove something but instead was a comment upon the credibility of defendant's testimony, and the trial court instructed on the burden of proof, we conclude that there was no shifting of the burden of proof. In any event, defendant did not object and a curative instruction would have eliminated any potential prejudice. Therefore, we decline to address this issue further. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Next, defendant contends that the trial court abandoned the mantle of impartiality when it, for all practical purposes, informed the jury that what was thought to be a one-day trial had turned into two days because defendant was one hour late on the first day of trial. Our review of the record reveals that the trial court did not actually inform the jury of the tardy party and that to infer that the jury would assume that person to be defendant would be sheer speculation. In any event, the trial court queried the jury regarding whether the delay in the proceedings would affect its decision-making process. The jury's response in the negative convinces this Court that no prejudice inured to defendant as a result of the trial court's remarks.

Lastly, defendant contends that the trial court based his sentence upon inaccurate information and that he failed to receive the effective assistance of counsel when defense counsel failed to object to the sentence on this ground. We disagree. Defendant's sentence reflected, in part, the trial court's determination that defendant was an alcoholic who, because of his denial, showed little hope of being rehabilitated and that he acted with gross indifference to the complainant's safety. There was ample information to support these findings. Therefore, defendant's sentence was not based upon inaccurate information and he was not denied the effective assistance of counsel. A trial counsel is not required to raise meritless objections. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant's convictions of unarmed robbery and habitual offender, fourth offense, and sentence of twelve to thirty years are affirmed. Defendant's conviction of larceny from the person is reversed and vacated.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra