

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY THOMAS THRASHER,

Defendant-Appellant.

UNPUBLISHED

May 4, 2023

No. 360013

Van Buren Circuit Court

LC No. 2020-022406-FC

Before: SHAPIRO, P.J., and REDFORD and YATES, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. Defendant was denied the effective assistance of counsel because his attorney failed to request a jury instruction on assaultive intent when the lack of such intent was the sole defense at trial.

Defendant was shoplifting. A store worker followed him out of the store—not because she thought he had stolen—but because she wanted to remove the antitheft device on one item. She called out “stop” and reached for the shopping cart as he left the store and her hand or fingers got caught in the cart. Defendant, having heard the command to stop, sought to escape from the scene. When he increased his speed and took a few more steps the worker was pulled along with the cart and as a result she struck a concrete barrier just outside the door of the store and broke her arm.

Defendant did not deny the theft or the events involving the worker who was injured. A videotape was shown to the jury of the events. The sole defense to unarmed robbery presented to the jury was that defendant was unaware that the employee had gotten her hand stuck in the cart and he did not realize that she was being pulled along with it. In other words, he admitted theft and that a person was injured by his actions when attempting to leave the premises, but asserted that he lacked assaultive intent because he did not realize that the employee was being pulled along with the cart and that she would strike the post. Defense counsel focused on this argument in opening and closing statements and in his direct examination of the defendant and the cross-examination of the injured worker.

Despite this, defense counsel did not request a jury instruction that intent is required not only as to the theft, but also the intent to commit an assault. The standard jury instruction was

therefore given which states that intent is required only as to the theft.¹ I conclude that the failure to request a special instruction regarding assaultive intent constituted ineffective assistance of counsel. I also conclude that had such an instruction been given there is a reasonable likelihood of a different outcome. The jury acquitted defendant of armed robbery and the video is not inconsistent with defendant's testimony.

/s/ Douglas B. Shapiro

¹ It is not surprising that the standard instruction addresses intent only as to the theft as it is a rare robbery case in which the defense is lack of intent to commit an assault. My research has revealed no such cases.

It is also questionable whether the model instruction accurately states the law. The elements of assault with intent to commit unarmed robbery are "(1) an assault with force and violence, (2) *an intent to rob* and steal, and (3) defendant being unarmed." *People v Reeves*, 458 Mich 236, 242; 580 NW2d 433 (1998) (emphasis added). MCL 750.530 defines "robbery" as a larceny by force or violence. See *People v Williams*, 288 Mich App 67, 71 n 2, 73; 792 NW2d 384 (2010). Thus, in order to intend robbery, one must necessarily intend to use force. Yet this crucial element does not appear in the model instruction.

The majority reads too much into *People v Passage*, 277 Mich App 175; 743 NW2d 746 (2007). There was no dispute in that case that the defendant intended to use force against others; indeed, after being confronted about unpaid merchandise, the defendant engaged in a physical altercation and struggle with multiple store employees. *Id.* at 176. Instead, the defendant argued that he was entitled to a directed verdict because he used force only in an attempt to evade capture and not to accomplish the robbery. See *id.* at 177-178. This Court determined that this argument was without merit. *Id.* at 178. I agree with that conclusion, but it has no bearing on this case. Again, the issue here is whether defendant had the required intent to use force or violence against the store employee; that element was undisputed in *Passage*.