

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS  
OWENS,P.J, and TALBOT and GLEICHER, JJ**

**PEOPLE OF THE STATE OF MICHIGAN,**  
Plaintiff-Appellee,

v

**GLENN WILLIAMS,**  
Defendant-Appellant.

14<sup>th</sup> Circuit Case # 06-53640-FC  
COA # 284585  
MSC # 141161

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**MUSKEGON COUNTY PROSECUTOR**

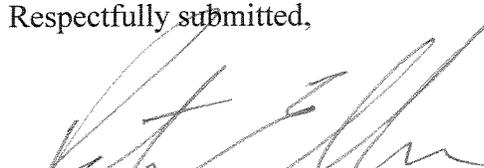
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**BRIEF ON APPEAL - APPELLANT**

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Dated: May 13, 2011



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## QUESTIONS FOR REVIEW

I. THE TRIAL COURT DID NOT ESTABLISH A FACTUAL BASIS FOR ARMED ROBBERY. THERE WAS NO LARCENY. THE REVISED ROBBERY STATUTE HAS NOT ELIMINATED LARCENY AS AN ELEMENT OF ROBBERY. THEREFORE, MR. WILLIAMS FAILED TO STATE A FACTUAL BASIS FOR THE PLEA AND THE ENTIRE PLEA AND SENTENCE AGREEMENT IS VOID. IS MR. WILLIAMS ENTITLED TO HAVE THE PLEAS SET ASIDE?

**DEFENDANT-APPELLANT** answers **YES**.

The **TRIAL COURT** would answer **NO**.

## STATEMENT OF JURISDICTION

The Defendant-Appellant files this Application for Leave to Appeal as provided by Const 1963, art 1, §20 pursuant to MCR 7.301(A)(2) and MCR 7.302.

The underlying offense occurred on or about July 13, 2006.

The defendant pled guilty in both of the trial court cases on January 11, 2007. (14a) The trial court imposed sentences of 24 to 40 years on February 9, 2007. (49a; 50a)

Mr. Williams filed a timely Motion to Withdraw the Plea. (51a)

The trial court denied Mr. Williams' motion. (67a)

The Defendant-Appellant timely filed his Court of Appeals Application.

On June 16, 2008, the Court of Appeals issued an order granting leave as to "the issue of a completed larceny only" in case # 06-053640-FC. (72a) It denied leave as to all other issues.

On April 8, 2010, the Court of Appeals issued its opinion affirming the convictions and ruling that larceny is no longer an element of robbery. (79a)

Mr. Williams filed a timely Application for Leave to Appeal with this Court. On March 23, 2011 this Court granted leave to appeal. (3a)

This Brief is due on May 18, 2011 and is timely filed pursuant to MCR 7.309(B)(1)(b).

## SUMMARY OF ARGUMENT

The trial court upheld Mr. Williams' plea to armed robbery despite the fact that Mr. Williams committed no larceny. The majority below determined that the revised robbery statutes have eliminated the larceny element from robbery crimes. The Appellant maintains, to the contrary, that the revised robbery statutes merely adopt the "transactional approach" to the analysis of robbery offenses. That is, a defendant may be guilty of robbery if he used force before, during or after committing the larceny at issue. A defendant cannot be guilty of robbery if he did not commit a larceny.

MCL 750.529. A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represent orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

MCL 750.530. 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.

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 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.

The Appellant's position is supported by a plain reading of the statute which speaks to the "commission" of a larceny and refers repeatedly to "**the** larceny" (as opposed to "**a** larceny") in its definition of operative clauses in the statute. Where the language of a statute is plain, it must be enforced as written. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005).

To the extent that the statute is ambiguous, it should not be read to abrogate the common law and to undermine the common understanding of the word "robbery." *Hoerstman Gen*

*Contracting v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Larceny has always been an element of robbery. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The revised statute was adopted in response to this Court's ruling in *People v Randolph*, 466 Mich 532 (2002) in which this Court rejected the transactional approach in favor of the contemporaneous taking approach. The legislative intent was to reinstitute the transactional approach. Indeed, the legislature specifically refers to force used before during and after a larceny. There is no evidence that the legislature intended to eliminate the taking element. The legislative history reveals the intent "to include any crime of larceny that involved the use of force or violence, or fear at any time during the commission of the crime." House Legislative Analysis, HB 5015, February 12, 2004.

The prosecution and the majority below focus upon the word "attempt" and the phrase "in the course of" to infer a legislative intent to eliminate the taking element. The Appellant maintains that the word "attempt," read in context, contemplates behavior that occurs before the completed larceny. The phrase "in the course of" modifies the phrase "committing a larceny" which is then defined – with repeated use of the definite article "the" to preface "larceny" – with four references to actual, completed larcenies.

Mr. Williams is entitled to withdraw his plea in the case before the Court and in his other case to which he pled guilty as part of a single, plea and sentence contract.

## STATEMENT OF FACTS

### Citations herein reference the page number of the Appellant's Appendix

The Muskegon County Prosecutor charged Mr. Williams in two separate incidents. Case # 06-53668-FC involved a crime that occurred at Clark's Gas Station. ("Clark") The unidentified perpetrator in this case told the clerk that "this is a robbery." (34a) The clerk gave the perpetrator money. (34a) The trial court accepted a no contest plea. (44a)

Case # 06-53640-FC involved a crime that occurred at Admiral Tobacco. ("Admiral") Mr. Williams admitted at the plea hearing that he held his hand under his coat to imply a weapon. (39a) He said "you know what this is. Just give me what I want." (40a; 42a)

Mr. Williams never admitted taking any kind of property from the store. (37a-42a) The prosecution has never argued that Mr. Williams took any property and the courts below have all analyzed the case with the assumption that no larceny took place.

On February 9, 2007, the court imposed concurrent sentences of 24 to 40 years in prison for each of the two cases. (49a; 50a)

Mr. Williams filed a timely post-judgment motion and brief, and a series of amended motions and briefs, seeking to withdraw the pleas pursuant to MCR 6.310(C). Mr. Williams ultimately focused his arguments on two themes: 1) that there was no factual basis to support the pleas to armed robbery in either case, and in particular in the Admiral case in which no property was ever touched, (54a-57a ) and 2) that the plea taking procedure was so faulty that Mr. Williams' Constitutional right to a voluntary plea was violated. (61a-66a)

With respect to the Admiral case, in which no larceny was committed, the trial court interpreted the revised robbery statutes. (67a-70a)

MCL 750.529 reads as follows, in pertinent part.

A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represent orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

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.

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 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.

On March 18, 2008, the trial court issued an Opinion and Order Denying Defendant’s Motion to Withdraw the Pleas. The court adopted the prosecution’s position that the amended statute has eliminated the larceny requirement for robbery offenses. (68a-70a)

Mr. Williams filed a timely Application for Leave to Appeal pursuant to MCR 7.205(F)(4). The Defendant-Appellant asked for remand on both trial court cases.

On June 16, 2008, the Court of Appeals Court granted the Application for Leave to Appeal with respect to “the issue of a completed larceny only.”

Mr. Williams timely filed his Brief on Appeal with respect to the issue of the “completed larceny” pursuant to MCR 7.212(A)(1)(a)(iii).<sup>1</sup>

The Court of Appeals framed the issues as follows.

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<sup>1</sup> The Defendant-Appellant also filed a *pro per* Application for Leave to Appeal in this Court with respect to trial court case # 06-053668-FC (Clark). This Application was denied.

Based on these recent revisions, it must be determined whether a perpetrator must actually commit a completed larceny to be convicted of an armed robbery. Specifically, with reference to the issue on appeal, we must address whether the trial court erred in accepting defendant's guilty plea to the offense of armed robbery when there was no proof or evidence of a completed larceny. (81a)

In a 2 -1 decision, the Court of Appeals affirmed Mr. Williams' conviction and asserted that the revised robbery statute has eliminated the larceny element from the crime of robbery. "We find that the statutory language now encompasses attempts, and that, as a result, a completed larceny is no longer required for a conviction of armed robbery." (81a)

Judge Gleicher dissented. She concluded that "the Legislature did not intend that the armed robbery statute, to which defendant pleaded guilty, would permit a conviction absent an accomplished larceny." (95a)

As conceded by the majority below (88a-89a), other panels of the Court of Appeals have reached the opposite conclusion as to the meaning of the revised robbery statute. That is, other panels have determined that larceny remains an element of robbery. A panel that included Judge Owens, a member of the majority in the instant case, reached the conclusion that larceny remains an element<sup>2</sup> in *People v Carter*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (docket number 268408).

Mr. Williams filed an Application for Leave to Appeal with this Court regarding all issues for which the Court of Appeals did not grant leave. He also filed a Supplemental Application for Leave to Appeal in this Court asking for the remand of the entire matter to the Court of Appeals for consideration of the proper remedy in the event this Court ordered plea withdrawal in case # 06-053640-FC. The Application and Motion were denied. (73a)

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<sup>2</sup> The *Carter* court was examining the carjacking statute that uses language identical to the language in the robbery statute.

Mr. Williams filed a Petition for Habeas Corpus and a Motion to Stay Proceedings pending the outcome of the instant appeal. The Federal Court granted the Stay. (74a)

This Brief is timely filed pursuant to MCR 7.309(B)(1)(b).

## ARGUMENT

**I. THE TRIAL COURT FAILED TO ESTABLISH A FACTUAL BASIS FOR ARMED ROBBERY. THERE WAS NO LARCENY. LARCENY REMAINS AN ESSENTIAL ELEMENT OF ARMED ROBBERY UNDER THE CURRENT VERSION OF THE ROBBERY STATUTES. THEREFORE, MR. WILLIAMS FAILED TO STATE A FACTUAL BASIS FOR THE PLEA. THE ENTIRE PLEA AND COBBS AGREEMENT IS VOID. THE PLEAS IN THIS CASE AND IN THE COMPANION CASE MUST BE SET ASIDE.**

**Preservation of Issue for Appeal:** Mr. Williams filed a motion to withdraw the pleas within 6 months of sentencing as required by MCR 6.310(C). The defendant asserted that “there was an error in the plea proceeding that would entitle [him] to have the plea set aside.” MCR 6.310(C). He specifically raised the issue presented below.

Upon leave granted by the Court of Appeals, Mr. Williams timely filed his Brief on Appeal.

**Standard of Review:** Where a defendant fails to state a factual basis for the charged offense, the plea must be set aside. *Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

The sufficiency of the evidence to support a criminal conviction is reviewed *de novo*. *People v Wolfe*, 440 Mich 508 (1992).

Issues of statutory interpretation are reviewed *de novo* on appeal. *Feyz v Mercy Mem Hospital*, 475 Mich 663, 672; 719 NW2d 1 (2006).

**A. MR. WILLIAMS NEVER TOOK, MOVED OR TOUCHED PROPERTY DURING THE INCIDENT. THERE IS NO FACTUAL BASIS FOR THE ARMED ROBBERY CONVICTION. MR. WILLIAMS IS ENTITLED TO WITHDRAW THE PLEAS.**

Due process of law, as well as the court rules, requires that a guilty plea not be accepted without a sufficient finding of guilt from the factual basis for the plea. US Const, Am XIV; Const 1963, art 1, § 17; MCR 6.302(D)(1); *Guilty Plea Cases*, 395 Mich 96 (1975).

The test for determining the adequacy of the factual basis is whether the trier of fact could properly convict on the facts as stated by the defendant. *Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

The elements of armed robbery are: 1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while defendant was armed with a dangerous weapon or otherwise implied that he had a weapon. MCL 750.529, 750.530. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). (The specific question of whether larceny is required under the amended statute is discussed below.)

During the plea in the Admiral case, Mr. Williams never admitted taking, moving or otherwise touching any property. Indeed, neither the Court nor the attorneys even asked Mr. Williams if he took any property.

MR. KOSTRZEWA: July 14, 2006, Mr. Williams, on that day were you at the Admiral Tobacco shop, near the corner of Henry and Sherman Street.

THE DEFENDANT: Yes, I was.

MR. KOSTRZEWA: And did you enter into the store there?

THE DEFENDANT: Yes, I did.

MR. KOSTRZEWA: And did you have contact with the clerk that was there?

THE DEFENDANT: Yes, I did.

MR. KOSTRZEWA: And when you went into the store, was it your intent to steal money from the store?

THE DEFENDANT: Yeah. Yes, it was my intent to steal money from the store. Yes, it was.

MR. KOSTRZEWA: Okay. When you went in and had contact with Ms. Campfield, with the intent to steal money from the store, did you have your hand in your coat?

THE DEFENDANT: When I first walked into the store - - Being honest, when I first walked into their store, I had on my jersey jacket, a gray t-shirt up under, some blue jean shorts. The night before . . .

MR. KOSTRZEWA: Okay. Did you have your hand up under your coat at some point in the time that you contacted her?

THE DEFENDANT: Yeah. Yeah. Yeah.

MR. KOSTRZEWA: Okay.

THE DEFENDANT: Yeah, she said, it was like that on the video. I don't - - I don't clearly remember. But she said that. I was - - I was under the influence of drugs. But I guess if she said it, then I did.

MR. KOSTRZEWA: Okay. Okay.

THE DEFENDANT: Just key things about what happened in there that I vaguely remember. I remember her saying to me out of the blue as soon as I got off the phone - - hanging up my cell phone and putting it in my pocket. I remember her saying - - I never got a chance to say anything to her. I just walked in. I was on the telephone. I hung up my phone, and she - - First thing come out of her mouth - -

MS. SMEDLEY: Okay. Shh. No more.

MR. KOSTRZEWA: Mr. Williams. Mr. Williams, if could just ask you some questions. I just want to elicit facts that - -

THE DEFENDANT: Yeah, I had my hand in my jacket, a couple times.

MS. SMEDLEY: Hold on a second . . .

MR. KOSTRZEWA: Okay. You indicated, sir, that at some point when you're dealing with Ms. Campfield inside the store, that you had your hand inside your coat, is that right?

THE DEFENDANT: Yes, I did.

MR. KOSTRZEWA: Okay. And you demanded that she give you the money out of the register at some point?

THE DEFENDANT: I never - - I never - - That's what I'm saying. I never got a chance to say that.

MR. KOSTRZEWA: Okay. Did you tell her things like, you what this is, just give me what I want?

THE DEFENDANT: Yeah. I said that.

MR. KOSTRZEWA: Okay.

THE DEFENDANT: I did. I did. I said that.

MR. KOSTRZEWA: Okay. And at that time - -

THE DEFENDANT: Yes, I did. And then she cut me off - -

MR. KOSTRZEWA: Mr. Williams - -

THE COURT: Well, hold on. Shhh.

THE DEFENDANT: Okay.

MR. KOSTRZEWA: Please . . . (1/11/07 at 24-27)

MR. KOSTRZEWA: At the time that Ms. Campfield is there, she's right in front of the register, is that correct?

THE DEFENDANT: Yes.

MR. KOSTRZEWA: And you were right even with her, just across the counter top, is that right?

THE DEFENDANT: I think to the left side a little more over here.

MR. KOSTRZEWA: Yeah. You actually were right in front of her and then you kind of moved to her left side a little bit, is that right?

THE DEFENDANT: To her right side. Yeah.

MR. KOSTRZEWA: It'd be to her right.

THE DEFENDANT: Yeah, my right. Yeah.

MR. KOSTRZEWA: Okay. To your right; to her left, correct?

THE DEFENDANT: Yes, sir.

MR. KOSTRZEWA: But she's in the direct vicinity of the cash register, is that right?

THE DEFENDANT: Yes, sir.

MR. KOSTRZEWA: And at the time that you have your hand - - have your hand in your coat, you are telling her - - and I'll get the words right - - you know what this is, just give me what I want, is that correct?

THE DEFENDANT: That's what I said.

MR. KOSTRZEWA: Okay. And it was your intent, at that time, for her to give you the money out of the cash register, is that right?

THE DEFENDANT: Yeah.

MR. KOSTRZEWA: All right.

THE COURT: Great - -

MR. KOSTRZEWA: And I think that satisfies.

THE COURT: Great. I think we're all set on Admiral. (1/11/07 at 28-29)

The prosecution has never argued that Mr. Williams committed a larceny. The trial court and Court of appeals both analyzed the question with the assumption that no larceny occurred.

On the facts as stated by Mr. Williams, a finder of fact could not convict him of robbery armed. The plea must be set aside. *Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

In *Guilty Plea Cases, supra*, the Supreme Court ruled that a hearing may be held to fill in the missing element(s) from a plea. Such a hearing is proper only where the defendant has substantially admitted his guilt but an element was overlooked by the prosecutor or court. *People v Brown*, 96 Mich App 565; 293 NW2d 632 (1980).

In the instant case, a hearing would be unnecessary for two reasons. First, Mr. Williams did not substantially admit guilt to robbery armed. He did not admit to the essential element of larceny. Second, there is in fact no evidence that Mr. Williams took property. Under no circumstances could Mr. Williams be properly convicted of armed robbery in this case.

The guilty plea and the conviction must be set aside and the matter set for trial. *Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

**B) LARCENY IS A NECESSARY ELEMENT OF ARMED ROBBERY. LARCENY HAS ALWAYS BEEN AN ELEMENT OF ROBBERY AND CONTINUES TO BE AN ELEMENT OF ROBBERY UNDER THE AMENDED STATUTE.**

**1) INTRODUCTION: UNDER THE OLD STATUTE AND UNDER THE REVISED STATUTE LARCENY IS AN ESSENTIAL ELEMENT OF ROBBERY.**

Mr. Williams never admitted a larceny during his plea. Mr. Williams failed to establish an essential element of the charged crime. The plea is therefore invalid and must be set aside.

*Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

The Court of Appeals opined that the plea was complete because, under the amended robbery statutes, the element of larceny has been eliminated. (81a-90a)

The Court of Appeals is incorrect. Larceny remains an integral and necessary element of armed robbery, pursuant to common law, common understanding and pursuant to the plain language of the relevant statutes.

MCL 750.529 reads as follows, in pertinent part.

A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represent orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

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.

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 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.

The trial court and the Court of Appeals both focused upon a single word (“attempt”) in MCL 750.530(2) in reaching the conclusion that the larceny element has been eliminated from the crime of robbery.

In particular, the Court of Appeals reasoned that because MCL 750.530(2) defines “in the course of committing a larceny” to include “acts that occur in an attempt to commit the larceny,” the statute allows a conviction for armed robbery where there has been an “attempt” at larceny but where no larceny has in fact been committed. (82a-88a)

The language of the current statute, however, uses the term “larceny” repeatedly. It talks about larceny in definite terms, using the definite article – “the larceny.” In the definition of “in the course of committing a larceny” the statute describes the various stages of a larceny crime. The statute in no way eliminates the element of larceny.

The amendment adopts the “transactional” approach to analyzing a larceny that had been rejected by this Court in 2002. Under the transactional approach, force used at any stage during a larceny – before, during, after – will raise the crime to robbery. The new statute merely expands the window of time in which the use of force can elevate a larceny to robbery.

## **2. THE PLAIN LANGUAGE OF THE STATUTE ESTABLISHES THAT LARCENY IS AN ESSENTIAL ELEMENT OF ANY ROBBERY.**

If the wording or language of a statute is plain and unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and the statute must be enforced as written. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005); *Shinholster v Annapolis Hospital*, 471 Mich 540, 549; 685 NW2d 275 (2004). “In ascertaining legislative intent, this

Court gives effect to every word, phrase and clause in the statute. *Id.* If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed.” *People v Passage*, 277 Mich App 175, 179 n. 2, (2007) citing *Tombs*, *supra*, at 451.

The Court of Appeals focuses upon a single word – “attempt” – to support its conclusion that an attempt will support a robbery conviction. (83a) However, statutory language must be examined in context in order to derive its true meaning.

The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context . . . . It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120, 132 - 133; 120 SCT 1291; 146 LEd2d 121 (2000), quoting *Davis v Michigan Dep't of Treasury*, 489 US 803, 809, 109 SCt 1500, 103 LEd 2d 891 (1989). See also *Nat'l Assoc of Home Builders v Defenders of Wildlife*, 127 SCt 2518; 168 LEd 2d 467 (2007).

Although MCL 750.529 is the robbery armed statute, it is actually MCL 750.530 – the unarmed robbery statute – that controls this question. MCL 750.530 sets forth the elements of robbery and defines larceny. (MCL 750.529 simply adds the armed elements for the crime of armed robbery.)

MCL 750.530(1) repeats the word “larceny” twice. The crime can only be committed if a person is already in the course of committing a larceny – and the person then uses force. The plain language of this part of the statute establishes unequivocally that larceny is an element of unarmed robbery and (via the application of MCL 750.529) of armed robbery.

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. (Emphasis added.)

The statute refers to the *commission* of a larceny. It does not talk about an attempt, or an intent, to commit a larceny.<sup>3</sup> Webster's Ninth New Collegiate Dictionary defines "commit" as follows. "To carry into action deliberately: PERPETRATE. (Commit a crime.)"

The use of the phrase "committing a larceny" suggests that Legislature was thinking about an actual larceny. Further, as noted by Judge Gleicher, the prepositional phrase "in the course of" means "in the progress of; during." (96a-97a) The common meaning of these words suggests that the Legislature contemplated an actual, completed larceny.<sup>4</sup>

Subsection 2) defines "in the course of committing a larceny."

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 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**. (Emphasis added.)

Further, reading the entire definition, it is clear that the statute requires the commission of an actual larceny, not a mere attempt. The statute defines "in the course of committing a larceny" as "acts that occur in an attempt to commit **the larceny**." The statute uses **the definite article – the** – to refer to the larceny. This language makes clear that the crime must include an actual larceny, i.e., the larceny at issue in the charged crime.

"The use of *the* signals that the reference is to a specific and unique instance of the concept (such as person, object, or idea) expressed in the noun phrase." From *Wikipedia*, definition of "definite article."

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<sup>3</sup> Contrast this language with the language in 750.531, regarding bank robbery, which specifically references "intent," repeats the word "attempt" three times, and concludes by specifically stating that a perpetrator is guilty whether or not he commits a larceny.

<sup>4</sup> The majority argues that the Legislature's use of the phrase "in the course of committing a larceny" – "a" larceny, rather than "the" larceny – "denotes a more generic, non-specified or generalized act." (83a) But as argued above, this phrase, when read as whole, clearly denotes an actual larceny. Further, as argued by the majority, the statute's glossary must be relied upon to discern the meaning of defined terms. Thus, because the glossary uses the definite article ("the larceny") then the Legislature means a definite larceny, that is, an actual, completed larceny.

*Webster's Ninth New Collegiate Dictionary* offers many definitions of “the,” including these first two definitions:

“a - Used as a function word to indicate that a following noun or noun equivalent is *definite* or *has been previously specified by context* or by circumstances.”

“b - Used as a function word to indicate that *a following noun or noun equivalent is a unique or a particular member of its class.*”

By using the definite article – “the larceny” - the Legislature indicated that the larceny at issue is the “definite,” “unique,” “previously specified” instance of larceny, i.e., the larceny committed by the defendant in the charged crime.

If, on the other hand, the statute defined “in the course of committing a larceny” to include “acts that occur in an attempt to commit a larceny” an argument might be made that the statute eliminated the larceny element. But the statute does not read this way. The statute talks about “**the** larceny.”

Moreover, the complete definition of “in the course of committing a larceny” makes clear that the legislature is talking about an actual larceny. The definition contains four clauses, all within a single sentence. The first clause refers to “acts that occur . . . in an **attempt** to commit **the larceny.**” The second clause refers to “acts that occur . . . **during** the commission of **the larceny.**” The third clause refers to “acts that occur . . . in flight or attempted flight **after** the commission of **the larceny.**” The final clause refers to “acts that occur . . . in an attempt to **retain possession of the property.**” When read as a whole, the definition makes clear that if force is used before, during or after the larceny, a robbery has occurred. *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120, 132 - 133; 120 SCT 1291; 146 LEd2d 121 (2000)

Read in context, the “attempt” clause refers to pre-larceny conduct, just as the second clause refers to the larceny itself and the remaining clauses refer to post-larceny conduct.

The appellant urges this Court to review the statute in its entirety. If the entire sentence in which the word “attempt” appears - and the entire statute - are given their plain meanings, then armed robbery continues to require larceny. As stated by Judge Gleicher:

Subsection 530(1) signifies that a person who uses force or violence at any point from the inception of the larceny until its conclusion is subject to prosecution for armed robbery. By elucidating in § 530 the ‘acts’ constituting robbery, the Legislature intended to expand the temporal scope of the crime, transforming it into a transactional offense. Reading § 530(1) and (2) as a contextual whole, it appears that the Legislature sought to make clear that robbery encompasses acts that occur before, during and after the larceny, not that the Legislature intended to eliminate larceny as an element of the crime. (97a)

Further, when looking at the entire statutory scheme, it becomes clear that the statute does not eliminate the element of larceny.

The legislature did not eliminate the crimes of assault with intent to rob while armed and assault with intent to rob unarmed. The legislature did not eliminate the crimes of attempted armed robbery and attempted unarmed robbery. If, as the Court of Appeal maintains, there is no longer a larceny element for robbery, then these other crimes would no longer exist. Yet, these other crimes do exist.

In the overall statutory scheme, the robbery statutes punish persons who use force and commit a larceny. The assault with intent to rob statutes punish persons who use certain types of force and do not commit a larceny. The crime of attempted robbery punishes people who fail to complete, for one reason or another, the crime of robbery.

Lay people and attorneys alike understand robbery to involve larceny. Hundreds of years of Anglo-American jurisprudence have treated larceny as a necessary element of robbery. *People*

*v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Randolph*, 466 Mich 532, 536 (2002); *People v Scruggs*, 256 Mich App 303, 308 (2003). The Court of Appeal should not be permitted to nullify common sense and hundreds of years of jurisprudence by pointing to a single word, out of context, and proclaiming that larceny is no longer an element of robbery.

The majority's view would subject a defendant (who is armed or pretending to be armed) to life in prison for stating "this is a robbery," even where the defendant immediately decamps without ever touching anybody's property. Can this be the intent of the legislature?

In the instant case, Mr. Williams did not commit a larceny. He did not admit to committing a larceny. Thus, the defendant failed to provide a factual basis for the guilty plea to armed robbery. The plea was not valid and must be set aside. *Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

**3. UNDER COMMON LAW, LARCENY HAS ALWAYS BEEN AN ELEMENT OF ROBBERY. THE COMMON LAW CANNOT BE ABROGATED ABSENT A CLEAR PRONOUNCEMENT FROM THE LEGISLATURE. THE LEGISLATURE DID NOT PLAINLY ABROGATE THE COMMON LAW WITH THE 2004 REVISIONS AND THEREFORE LARCENY MUST REMAIN AN ELEMENT OF ROBBERY.**

Under Michigan law, larceny has always been an element of robbery. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Randolph*, 466 Mich 532, 536 (2002).

"Unarmed robbery at common law required a taking from the person accomplished by an earlier or contemporaneous application, or threat, of force or violence." *People v Scruggs*, 256 Mich App 303, 308 (2003) citing *Randolph, supra*. The essence of armed robbery is that property is forcefully taken from a person whose right of possession is superior to that of the defendant.

*People v Eric Rodgers*, 248 Mich App 702 (2001). The perpetrator must not only take property, but must harbor the intent to permanently deprive the owner of the property. *People v Fordham*,

132 Mich App 70 (1984); *People v Wilbert*, 105 Mich App 631 (1981). Any movement of goods is sufficient to constitute the asportation element of larceny. *People v Turner*, 120 Mich App 23 (1982).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while defendant was armed with a dangerous weapon or otherwise implied that he had a weapon. MCL 750.529, 750.530. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

“Since, by definition, robbery includes larceny, robbery requires a caption and asportation of the property of another.” Wharton's Criminal Law (15<sup>th</sup> ed), §457, p 13.

Common law principles must not be abrogated, except by clear pronouncements of the Legislature. *Hoerstman Gen Contracting v Hahn*, 474 Mich 66, 74; 711 NWW2d 340 (2006); *Heinz v Chicago Road Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). Both the majority and the dissent recognized this principle. (87a; 96a)

The Legislature did not pronounce the death of the larceny element in robbery offenses. Rather, the Legislature wrote a statute that is ambiguous, at best, on the question. Judge Gleicher correctly noted that “neither § 529 nor § 530 contains definite, clear or plain language evincing the Legislature's intent to fundamentally alter the understanding of more than a century, that ‘larceny is one of the essential elements of an armed robbery charge.’ [*People v*] *LaTeur*, 39 Mich App [700], 706 [1972].” (96a)

The majority argued that there is no concern about the abrogation of the common law because the relevant statutes are “clear in encompassing attempts within the purview of ‘in the course of committing a larceny’ by definition.” (87a)

The appellant maintains that the Legislature was not at all “clear in encompassing attempts.” Judge Owens himself reached the opposite conclusion in *People v Carter*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (docket number 268408).

The carjacking statute, as amended by 2004 PA 128, requires that the defendant act “in the course of committing a larceny of a motor vehicle.” MCL 750.529a(1). A larceny requires both the taking and asportation of the subject property. *People v Cain*, 238 Mich. App. 95, 120; 605 N.W.2d 28 (1999).

In the opinion below, the majority acknowledged *Carter* and several other Court of Appeals opinions that required the element of larceny even in the face of the 2004 revisions. These cases include *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2009 (docket number 287382); *People v Monk*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2009 (docket number 280291); *People v Richardson*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (docket number 270606). (88a-89a) (Unpublished opinions are attached hereto.)

Additional cases have determined larceny to remain an element of robbery even in the face of the recent revisions. *Purifoy v Stovall*, case # 2:08-CV-10736, ED MI, April 20, 2009; *People v McGee*, 280 Mich App 680 (2008).

Thus, where multiple panels of the Court of Appeals and a federal judge have concluded that the revised statute requires a larceny, the Legislature has not unambiguously eliminated the larceny element from robbery.

The majority below cited MCL 750.531 (regarding bank robbery) and noted that it specifically punishes *attempts* at bank robbery. The majority stated that “this is important to demonstrate the concept or legislative act of including language that encompasses an attempt

within the statutory definition of a crime is neither unusual nor inconsistent with the most current revisions pursuant to 2004 PA 128.” (86a-87a)

The Appellant maintains that the language of MCL 750.531 (regarding bank robbery) proves that the legislature did **not** intend to encompass attempts in the robbery statutes. The bank robbery statute uses the word “attempt” three times, it references “intent” and then it specifically states that a person will be guilty of the offense “**whether he succeeds or fails in the perpetration of such a larceny.**” Thus, the legislature is capable of writing an unambiguous statute that includes attempts when the legislature intends to include attempts. The robbery statutes contain no such language.<sup>5</sup>

The Legislature did not clearly and unequivocally abrogate the common law. *Hoerstman Gen Contracting v Hahn*, 474 Mich 66, 74; 711 N.W.2d 340 (2006); *Heinz v Chicago Road Investment Co.*, 216 Mich App 289, 295; 549 N.W.2d 47 (1996). Rather, the Legislature adopted the transactional approach to robbery crimes, looking at whether force was used at any time in the commission of the larceny.

**4. THE AMENDED STATUTE ADOPTS THE “TRANSACTIONAL APPROACH” TO THE ANALYSIS OF LARCENY OFFENSES. THIS APPROACH ALLOWS FOR A ROBBERY CONVICTION WHERE A DEFENDANT USES FORCE AT ANY STAGE DURING A LARCENY OFFENSE. LARCENY CONTINUES TO BE AN ESSENTIAL ELEMENT OF ROBBERY.**

For years, the Court of Appeals utilized a “transactional approach” when analyzing a larceny case to determine if an alleged use of force elevated the larceny to a robbery. *People v Sanders*, 28 Mich App 274; 184 N.W.2d 269 (1970); *People v LeFlore*, 96 Mich App 557 (1980); *People v Newcomb*, 190 Mich App 424 (1991). Under the transactional approach, the Court of

Appeals reviewed the entire criminal transaction to determine if both larceny and force were present. The Court of Appeals ruled that where a defendant used force – whether before during or after the larceny – the defendant could be found guilty of robbery. *Sanders, supra; LeFlore, supra; Newcomb, supra*. Under the transactional approach, “the robbery is not complete until the robber has escaped with stolen merchandise.” *People v Scruggs*, 256 Mich App 303 (2003).

This Court rejected the “transactional approach.” *People v Randolph*, 466 Mich 532 (2002). In *Randolph* this Court ruled that a defendant may be found guilty of robbery only where the force used to accomplish the taking is applied contemporaneously with the taking.

We base our holding on the language of the unarmed robbery statute and the common-law history of unarmed robbery. From that we conclude that the force used to accomplish the taking underlying a charge of unarmed robbery must be contemporaneous with the taking. The force used later to retain stolen property is not included. Those Court of Appeals cases that have held otherwise, applying a “transactional approach” to unarmed robbery, are herein overruled. *Randolph, supra*, at 536.

Under both the transactional approach (as used by the Court of Appeals) and the contemporaneous taking approach (as used by the Supreme Court), the prosecution carried the burden of proving that the defendant committed larceny. Under no circumstances was the larceny element eliminated from the analysis.

Shortly after the publication of the *Randolph* decision, the Michigan legislature adopted the current robbery statute. 2004 PA 128, Effective July 1, 2004. The 2004 Amendments adopted the transactional approach that had been used by the Michigan Court of Appeals.

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<sup>5</sup> “Armed robbery continues to require a theft from a person while bank robbery does not.” *People v Thomas, supra*.

As noted by Judge Gleicher in her dissent, the legislative history reveals the intent “to include any crime of larceny that involved the use of force or violence, or fear at any time during the commission of the crime.’ House Legislative Analysis, HB 5015, February 12, 2004.”<sup>6</sup> (97a)

In a 2004 case, Justice Corrigan took note that the new statute adopted the transactional approach.

The Legislature effectively overruled *Randolph* after this Court released its decision in that case. MCL 750.530 now provides . . . Thus, effective July 1, 2004, the Legislature has explicitly stated that unarmed robbery is a transactional offense. *People v Morson*, 471 Mich 248, 265 fn 2 (2004).

Thus, this Court has already taken note that the amended statute did not eliminate the element of larceny. Rather, by adopting the transactional approach, the legislature *expanded the time frame around the larceny* during which the use of force will elevate the larceny to a robbery. The statute now defines “in the course of committing a larceny” to include any acts that occur before, during or after the larceny. If the defendant uses force before, during or after the larceny, he may be guilty of robbery.

The Michigan Standard Jury Instructions indicate that the legislature adopted the “transactional approach” that was formerly used by the Court of Appeals. See Commentary, CJI2d 18.1.<sup>7</sup>

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<sup>6</sup> The majority acknowledged the intent of Legislature to adopt the transactional approach. (86a) The majority stated that the Legislature intended to go beyond the adoption of the transactional approach and do away with the element of larceny altogether. The majority relied upon its interpretation of the statutory language and stated that “it is beyond the role of this Court to speculate regarding what the Legislature intended to do.” Three pages later, however, the majority does speculate and cites the Legislative history to support its view that the “inclusion of attempts was deliberate.” (88a) The quotation cited by the majority merely parrots the language used in the statute and sheds no light on the Legislature’s intent.

<sup>7</sup> The majority cites the actual jury instruction in support of its view. The instruction, however, merely parrots the language in the statute. It sheds no light on the intent of the Legislature. (83a-84a)

Under common law - and under the “contemporaneous taking” approach that was sensibly employed by this Court - a defendant may be convicted of robbery if he uses force before taking property. “Unarmed robbery at common law required a taking from the person accomplished by an earlier or contemporaneous application, or threat, of force or violence.” *People v Scruggs*, 256 Mich App 303, 308 (2003) citing *Randolph, supra*. Under this traditional definition, a pre-larceny use of force may lead to a robbery conviction if the use of force “accomplished” the taking.

The amended statute, by including “acts that occur in an attempt to commit the larceny,” expands the relevant timeframe a bit further back. Under this definition, if a robber uses force during the incident but before actually seizing property, he may be guilty of robbery. That is, even if the use of force does not “accomplish” the taking, if the defendant does indeed accomplish a larceny during the same transaction, he may be guilty of robbery.

The majority supports the view that the Legislature did more than adopt the transactional approach by noting that the Legislature deleted the phrase “rob, steal and take” – which had been part of the old statute – from the revised statute. (85a) “Had the Legislature not intended a broader view, this language could have remained untouched.”

The majority missed the more obvious reason that the Legislature removed the “rob, steal and take” language. The revised statute focuses attention on the timeframe - both before and after the larceny – during which force may elevate the larceny to robbery. Further, the repetitive “rob, steal and take” language was confusing. The use of the word “rob” to define “robbery” violates grammar school rules against self-referential definitions. The use of “rob, steal and take” suggests three separate elements when larceny is the single element at issue. The Legislature cleaned up these problems.

Thus, as noted by Justice Corrigan, and as acknowledged even by the majority below, the Legislature adopted the transactional approach to the analysis of larceny offenses. Pursuant to the transactional approach, as delineated by the Court of Appeals over the decades, a defendant must commit a larceny before he can be convicted of robbery.

In the instant case, Mr. Williams did not commit a larceny. Thus, the defendant failed to provide a factual basis for the guilty plea to armed robbery. The plea was not valid and must be set aside. *Guilty Plea Cases*, 395 Mich 96 (1975); *People v Haack*, 396 Mich 367 (1976); *People v White*, 411 Mich 366 (1981).

**C. DUE PROCESS DEMANDS THAT THE *NOLO CONTENDERE* PLEA IN THE CLARK'S CASE MUST ALSO BE SET ASIDE.**

**1. THE PARTIES NEGOTIATED THE TWO TRIAL COURT CASES AS ONE UNIFIED MATTER. A SINGLE CONTRACT COVERED THE RESOLUTION OF BOTH TRIAL COURT MATTERS. THE TWO CASES ARE INEXTRICABLY LINKED. A FATAL FLAW WITH RESPECT TO EITHER PLEA MUST INVALIDATE THE ENTIRE AGREEMENT.**

In Michigan, a plea or a *Cobbs* agreement functions as a contract between the court and the defendant. Plea agreements are interpreted using ordinary contract principles. *People v Lombardo*, 216 Mich App 500; 549 NW2d 596 (1996). “Plea agreements are contractual in nature, and as such, courts are guided by general principles of contract interpretation when construing plea agreements. *See United States v Mandell*, 905 F.2d 970, 973 (6th Cir. 1990).” *United States v Moncivais*, 492 F3d 652 (2007).

Trial court case numbers 06-53668-FC and 06-53640-FC were handled together from the moment they came to the Circuit Court. On January 9, 2007, the parties appeared before Judge Hicks for a “*Cobbs* hearing.” (4a-13a) Both cases were on the docket in order for the court to offer a preliminary evaluation of sentence. (6a) No *Cobbs* discussion was conducted on that date.

On January 11, 2007, the parties again convened for a hearing with Judge Hicks. Apparently, a *Cobbs* discussion had been held off record and the court had given Mr. Williams until the end of the day to make a decision. (16a)

The parties discussed the guidelines as if both matters were being resolved pursuant to a single deal. (17a-22a) The parties discussed the *Cobbs* offer (24 years on the minimum) as if both matters were being resolved pursuant to a single deal. (23a-27a) The defense attorney articulated the *Cobbs* offer – a 24-year cap on the minimum sentence – only one time. (23a) The

trial judge articulated the *Cobbs* offer only one time. (26a) The judge then began taking the pleas to both cases. (27a)

The Appellant was not able to identify a Michigan case that deals with exact fact pattern found in the instant case. However, courts in other jurisdictions have dealt with very similar scenarios. In *State v Harmon*, 2008 Iowa App. LEXIS 83, n. 1 (2008) (copy attached) the Iowa Court of Appeals surveyed the case law on this question.

Our survey of case law from other states reveals varying approaches to this issue. See *People v Rotroff*, 138 Cal. App. 3d 796, 188 Cal Rptr 378, 382 (Cal. Ct. App. 1982) (holding court did not "disturb the balance of the bargain" by granting partial withdrawal of the plea); *Whitaker v State*, 881 So. 2d 80, 82 (Fla. Dist. Ct. App. 2004) (holding trial court erred in granting partial withdrawal of plea, as negotiated plea deal was a package); *State v Bisson*, 156 Wn.2d 507, 130 P.3d 820, 826 (Wash. 2006) (holding remedy of withdrawal of plea agreement limited to withdrawal of entire plea agreement, as agreement was indivisible package deal); *State v Roou*, 2007 WI App 193, 305 Wis. 2d 164, 738 N.W.2d 173, 178-181 (Wis. Ct. App. 2007) [\*6] (examining totality of circumstances to decide whether defendant should have been allowed to withdraw entire plea, including whether breach of plea agreement was material and substantial, whether defendant would have pled guilty to one charge had he known of problem with other charge, and whether there was agreement not to reinstate original charges); *State v Nelson*, 2005 WI App 113, 282 Wis. 2d 502, 701 N.W.2d 32, 41 (Wis. Ct. App. 2005) (stating appropriate remedy depended on totality of circumstances, including whether defendant would obtain a windfall from breach of plea agreement).

These cases involve fact patterns and procedural rules that vary to a greater or lesser extent from the instant case and Michigan's rules. Even so, the majority of states surveyed in *Harmon* respected the integrity of the bargain and allowed - or **mandated** - the withdrawal of all pleas made pursuant to a single bargain. Michigan should apply the same rule.

The Supreme Court of Washington focused upon the necessity of maintaining the integrity of a plea agreement.

We hold that, if Bisson initially elects the remedy of withdrawal of the plea agreement, the remedy is restricted to the withdrawal of his plea in its entirety . . . Bisson's plea agreement can be regarded only as "indivisible" -- "a 'package deal'"

-- since the pleas to the eight counts and the five weapon enhancements were made contemporaneously, set forth in the same document, and accepted in one proceeding. *State v Bisson*, 156 Wn.2d 507, 130 P.3d 820, 826 (Wash. 2006)

Likewise, the Florida Court of Appeal required the trial court to vacate all pleas made pursuant to a single agreement. The Florida Court of Appeal emphatically stated that one plea may not be separated out from a bargain involving multiple pleas.

In negotiating a plea deal, the parties (both the State and the defendant) generally intend to adjudicate together, essentially as a package, all the cases which are pending against the defendant. This intention is generally referred to by the courts as constituting the "benefit of the bargain". See generally *Guynn v State*, 861 So. 2d 449 (Fla. 1st DCA 2003). When a defendant successfully challenges and is permitted to withdraw a plea of *nolo contendere* or guilty which was entered as a result of a plea bargain, the negotiated plea bargain is "abrogated". See *Williams v State*, 762 So. 2d 990 (Fla. 4th DCA 2000) (explaining that when a plea of guilty or *nolo contendere* is withdrawn and accepted by the court, it is as if the plea had never been entered *ab initio*); *Bell v State*, 262 So. 2d 244 (Fla. 4th DCA 1972) (holding that when defendant withdrew his plea of guilty and it was accepted by the court, it was as if a plea had never been entered *ab initio*).

Here, the record demonstrates that the parties entered into a negotiated plea agreement wherein the defendant agreed to plead no contest to one count in each case, and in return the State agreed to *nolle prosequere* the remaining charges in each case and to recommend concurrent sentences of five years' imprisonment followed by ten years' sex offender probation. Applying the law cited above, the trial court erred in granting only a partial withdrawal of said plea. *Whitaker v State*, 881 So. 2d 80, 82 (Fla. Dist. Ct. App. 2004)

In the instant case, the integrity of the sentence bargain has been fatally undermined. Not only did the "parties intend to adjudicate together" the two cases, the court fashioned its *Cobbs* offer in reliance upon a misapprehension regarding the evidence and law. That is, the trial court believed that Mr. Williams was guilty of two armed robberies. At the very least, the trial court believed that the prosecution had evidence to make a prima facie case of armed robbery in both cases. The trial court was wrong. The prosecutor never had sufficient evidence in case # 06-053640-FC (Admiral) because there was no larceny in that case. Thus, the judge made a *Cobbs*

offer based, in part, upon an important misapprehension. The judge then sentenced Mr. Williams based on the same misapprehension.

Judge Gleicher, in her dissent, expressed her belief that the Appellant should be allowed to withdraw both pleas.

Because the length of the sentence imposed by the circuit court in the Clark station robbery (#06-053668-FC) was directly linked to and packaged with defendant's plea in the Admiral Tobacco case as part of a bargain made pursuant to *People v Cobbs*, 443 Mich 276, 505 NW2d 208 (1993), I believe that defendant should be permitted to withdraw the nolo contendere plea in #06-053668-FC. (97a)

If this Court remands for plea withdrawal in the Admiral case, it must remand for plea withdrawal in the Clark case too. This is the only way to maintain the integrity of the bargain and to respect due process of law.

**2. DUE PROCESS DEMANDS THAT A GUILTY PLEA BE MADE VOLUNTARILY BY A PERSON WHO UNDERSTANDS THE MEANING AND TRUE CONSEQUENCES OF HIS PLEA. MR. WILLIAMS DID NOT KNOW THAT – AS A MATTER OF LAW – THE PROSECUTOR COULD NOT PROVE ARMED ROBBERY IN THE ADMIRAL CASE. HIS PLEA IN THE CLARK CASE WAS INVOLUNTARY.**

Mr. Williams negotiated for a plea and/or sentence agreement while facing both charges. (6a-11a; 16a-22a)

Mr. Williams claimed innocence in the Clark's robbery. By the time of the Circuit Court proceedings, no identification had been made and no line-up had been conducted. At the 1/9/07 hearing, Mr. Williams requested a line up in order to develop evidence that he did not commit the Clark's robbery. (7a) The prosecutor resisted this request, and demanded that the defense produce authority requiring a line up. (8a)

In short, Mr. Williams maintained a claim of innocence and the prosecutor labored under difficulties with identification. Mr. Williams stood ready to try the Clark case.

Mr. Williams chose to plead guilty, however, because he believed – wrongly - that the prosecutor could prove armed robbery in the Admiral case.

Due process demands that a defendant's guilty plea must be voluntarily and understandingly made. Const 1963, art 1, §17; US Const Am XIV; *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970); *Machibroda v United States*, 368 US 487; 82 S Ct 510; 7 L Ed 2d 473 (1962). In *Brady v United States, supra*, 397 US at 748 n 6, the Court said that pleas: “must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”

A plea may not be the product of incomprehension on the part of the defendant. *Boykin v Alabama*, 395 US 238, 243; 89 S Ct 1709; 23 L Ed 2d 274 (1969).

A plea must be made by “one competent to know the consequences, and should not be induced by *fear, misapprehension*, persuasion, promises, inadvertence, or *ignorance*.” *In re Valle*, 364 Mich 471, 477; 110 NW2d 673 (1961). (Emphasis added.)

Here, Mr. Williams pled guilty in the Clark case out of fear and ignorance. Despite weaknesses in the government’s proofs (no identification) regarding the Clark crime, Mr. Williams felt compelled to enter a plea because of the perceived strength in the Admiral case. That is, Mr. Williams believed that the government could properly convict him of armed robbery in the Admiral case and therefore he had no choice but to accept an agreement covering both crimes. (Here again is more proof that the two cases were resolved via a single contract.)

The prosecutor and the judge also believed that an armed robbery conviction was proper in the Admiral case. Thus, Mr. Williams’ misapprehension was not a function of delusion or

wishful thinking. He legitimately thought that the prosecutor could properly convict him of armed robbery in the Admiral case. This belief turned out to be wrong *as a matter of law*. He should not be forced to live with a decision made in the face of such a misapprehension.

### 3. SUMMARY

In summary, the parties negotiated and settled the matter with one acceptance of one *Cobbs* offer, that is, with **one contract**. Because the contract failed as to at least the Admiral portion of the plea, both convictions must be vacated and the matters set for trial. Further, because Mr. Williams pled guilty in the Clark's case out of fear and ignorance arising from the Admiral case, the plea was not voluntary.

If this Court determines that the plea in the Admiral case lacked a factual basis, then **both convictions should be set aside**. It is necessary for both cases to be remanded to honor due process of law and to allow for an effective remedy. Without remand in both cases, Mr. Williams will not enjoy a remedy at all. He will serve 24 to 40 years for a crime that he would have taken to trial if the truth had been known during the Circuit Court proceedings.

The Court of Appeals did not retain jurisdiction over the Clark case. The Defendant-Appellant filed an Application with this Court asking for remand of the entire matter to the Court of Appeals in order to settle the question of remedy. This Court has denied leave as to all issues raised in the Clark case and denied remand. This Court also denied a Motion for Reconsideration.

The Appellant filed a habeas corpus petition in federal court regarding all of the claims not at issue in the instant appeal. The federal court is holding the petition in abeyance pending resolution of all state proceedings. (74a)

There is no procedural barrier to this Court remanding both cases for plea withdrawal. Federal Judge Cleland noted that the Michigan Court of Appeals may permit plea withdrawal in both cases. (76a)

As a matter of due process and fundamental fairness, this Honorable Court should remand both trial court matters for plea withdrawal.

## RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, the Defendant-Appellant respectfully requests that this Court determine that larceny remains an element of robbery and remand with instructions that the pleas in both cases be set aside and the convictions vacated.

Respectfully submitted,



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Dated: May 13, 2011

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON KELLICE CARTER,

Defendant-Appellant.

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UNPUBLISHED  
March 27, 2007

No. 268408  
Wayne Circuit Court  
LC No. 05-009504-01

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was charged with carjacking, MCL 750.529a. Following a jury trial, he was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in instructing the jury on UDAA because it is not a lesser included offense of carjacking. Although defendant did not request the UDAA instruction, he did not object to the prosecutor's request for the instruction. A defendant must object to the jury instructions to preserve an instructional error for review. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Because defendant failed to object, the issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Gonzalez, supra*.

A court is only required to instruct on a necessarily included lesser offense if requested and the lesser offense is supported by a rational view of the evidence. The court is not permitted to instruct on cognate lesser offenses. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). A necessarily included lesser offense is "an offense which contains some of the elements of the greater offense, but no additional elements," such that the "greater offense cannot be committed without committing the lesser offense." *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990).

Defendant argues that UDAA is not a lesser included offense of carjacking because the latter crime requires that he take a vehicle, whereas the former requires both that he take the vehicle and drive it away. Defendant contends that carjacking does not require the asportation of

the vehicle, i.e., he can take the vehicle without driving it away. However, defendant relies on case law setting forth the elements of carjacking before its amendment in 2004. Regardless of whether one can take a vehicle without moving it, the carjacking statute, as amended by 2004 PA 128, requires that the defendant act “in the course of committing a larceny of a motor vehicle.” MCL 750.529a(1). A larceny requires both the taking and asportation of the subject property. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Accordingly, defendant has failed to establish plain error.

Defendant next argues that the evidence was insufficient to sustain the verdict. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that he did not take possession of the car without the victim’s permission because she agreed to let him get into the car to try to start it. However, “[t]here is a distinction between surrendering possession and giving mere custody.” *People v Manning*, 38 Mich App 662, 666; 197 NW2d 152 (1972). A surrender of temporary custody for a limited purpose is not a transfer of legal possession. *Id.* at 666-667. The victim testified that she gave defendant permission to try his hand at starting the car; she did not give him permission to take her car. This testimony supports a finding that the victim surrendered temporary custody of the car rather than actual legal possession, and thus defendant took unlawful possession of the car when he kept it and drove off in it once it started.

Affirmed.

/s/ Brian K. Zahra  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD JUAN THOMAS,

Defendant-Appellant.

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UNPUBLISHED

October 6, 2009

No. 287382

Oakland Circuit Court

LC No. 08-219869-FC

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his convictions of armed robbery, MCL 750.529, and resisting and obstructing a police officer, MCL 750.81d, following a bench trial. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's alleged female accomplice entered a bank in Southfield and handed the teller a note. According to the teller, the note stated that defendant's accomplice had a gun, that the teller had 20 seconds to place all of her big bills into an envelope and that if she tried to alert anyone or to "press any unknown buttons," she would be shot. The teller placed \$1,296.50 into a bag, along with a dye pack. The accomplice then left the bank and entered a car driven by defendant. The dye pack exploded, filling the car with red smoke. The two fled from the car to a nearby wooded area. When the police arrived, defendant tried to run. When defendant ignored the officers' warnings to stop, the officers shot him with a taser gun. At trial, defendant's accomplice testified that she and defendant had a relationship, and that this was not the first bank the two had robbed together. She stated that he convinced her to participate by telling her he could not rob them himself because he was on parole. Defendant, in contrast, maintained that he was not involved in the robbery. He testified that his companion asked him to drive her to the bank so that she could obtain money, and that he had no idea she planned to rob the bank. He contended that he later tried to flee because he panicked.

In addition to resisting and obstructing, defendant was charged in the alternative with both armed robbery and bank robbery, MCL 750.531. The trial court first found him guilty of resisting and obstructing. The trial court then considered whether plaintiff presented sufficient evidence that defendant aided and abetted the female accomplice's armed robbery. The trial court found the testimony from defendant's accomplice credible and did not believe defendant's claim that the accomplice manipulated defendant into helping her. The trial court reasoned that

having found defendant guilty of armed robbery, “there is no need to then consider count two which is the bank robbery alternative charge.”

On appeal, defendant argues that he should have been charged only with bank robbery because that statute is more specific. He relies on case law holding that where two statutes prohibit the same conduct, the defendant must be charged under the more specific, and more recently enacted, statute. See *People v Patterson*, 212 Mich App 393, 394-395; 538 NW2d 29 (1995). However, if two statutes prohibit different conduct (i.e., an additional element is required to convict the defendant of one crime, but not the other), the prosecutor has the discretion to charge under either statute. *People v Werner*, 254 Mich App 528, 536-537; 659 NW2d 688 (2002); *People v Peach*, 174 Mich App 419, 423; 437 NW2d 9 (1989).

With respect to armed robbery and bank robbery, this Court observed in *People v Avery*, 115 Mich App 699, 701-702; 321 NW2d 779 (1982):

The essential elements of armed robbery consist of an assault, a felonious taking of property from the victim's person or presence, and that the defendant be armed with a weapon. In contrast, the statute on bank robbery does not require that a defendant be armed, nor does it require an assault or felonious taking. In addition, the statute on bank robbery requires that there be an intent to steal from a building, bank, safe, or other depository of money to establish a violation whereas the statute on armed robbery requires the felonious taking to be from a person or in his presence.

There will be times when the statute on armed robbery and the statute on bank robbery will overlap. However, not every violation of the statute on bank robbery will result in a violation of the statute on armed robbery. This is not a case of the Legislature carving out an exception to a general statute and providing a lesser penalty for a more specific offense, in which case the prosecutor would have to charge the defendant under the statute fitting the particular facts. The crimes of armed robbery and bank robbery involve different elements and carry the same possible sentence. [Citations omitted.]

For the reasons noted and under the facts of that case, the *Avery* Court concluded the prosecutor had the discretion to charge either bank robbery or armed robbery. *Id.* at 702.

Defendant attempts to distinguish *Avery* arguing that the Legislature has since changed the elements of the armed robbery statute. We disagree. Defendant notes that under the current version of MCL 750.529 an individual can be found guilty of armed robbery even if he is no longer armed with a weapon; consequently, the rationale of *Avery* no longer applies. But, while the elements for armed robbery and bank robbery might overlap more closely than before the 2004 amendment to MCL 750.529, the crimes still have distinct elements. Armed robbery continues to require a theft from a person while bank robbery does not. Bank robbery can include, but does not require, an assault. MCL 750.531. Defendant has not shown that the amended armed robbery statute changes the outcome of the *Avery* analysis.

In this case, there was factual support for both charges, and because the prosecution had the discretion to charge defendant with either bank robbery or armed robbery, there was no plain error in charging defendant in the alternative with both offenses.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY KEITH MONK,

Defendant-Appellant.

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UNPUBLISHED  
January 22, 2009

No. 280291  
Berrien Circuit Court  
LC No. 2007-401091-FC

Before: Owens, P.J. and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and bank robbery, MCL 750.531. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent sentences of 168 to 504 months' imprisonment for the armed robbery, and 71 to 355 months' imprisonment for bank robbery. Defendant appeals as of right. We affirm.

The facts presented at trial established that defendant, completely covered in black clothing, winter gear and sunglasses, entered a Horizon Bank branch in St. Joseph Township, walked directly to one of its tellers, Aune Quenle, and demanded all of the cash in her drawer. Defendant had a shiny cylindrical object in his hand that bank employees believed was the barrel of a gun. Quenle proceeded to give defendant approximately \$10,000 in primarily \$50 and \$100 bills; some of the money was paper-clipped or batched with rubber bands, and ten of the \$50 bills were marked with recorded serial numbers. Defendant motioned to two other bank employees, Patricia Damico and Judy Michael, and ordered them to get behind the teller line and give him the money from the other drawers. They tried to comply with defendant's demands, but the drawers were empty. The robbery lasted only one to two minutes. Defendant was subsequently identified as the robber through surveillance videotapes, and from his possession and distribution of the bank's batched and marked bills. Defendant denied at trial that he was the robber, and alleged that a friend of his named "RT" had borrowed his truck the morning of the robbery and later gave defendant the marked bills. During sentencing, the trial court found that defendant perjured himself and scored offense variable (OV) 19, MCL 777.49, at ten points.

On appeal, defendant argues that his convictions for both armed robbery and bank robbery violate constitutional guarantees against double jeopardy, Const 1963, art 1, § 15; US Const, Am V, as they impose multiple punishments for the same criminal transaction. He also argues that the trial court abused its discretion when it scored ten points for OV 19.

Whether multiple punishments violate constitutional protections against double jeopardy is a question of law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). This type of double jeopardy claim also requires this Court to construe the applicable criminal statutes to determine whether the Legislature intended multiple punishments. *People v Ford*, 262 Mich App 443, 448-449; 687 NW2d 119 (2004). The test to determine if two punishments for the same incident or transaction violate double jeopardy under the Michigan and United States constitutions is the “same elements” test, set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). See *People v Smith*, 478 Mich 292, 295-296; 733 NW2d 351 (2007); *Ford, supra*. This test requires a reviewing court to “inquire[] whether each offense contains an element not contained in the other; if not, they are the ‘same offense’ and double jeopardy bars additional punishment.” *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). See also *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997). If each offense “requires proof of an element the other does not,” there is a presumption that the Legislature intended multiple punishments unless there is a clear expression of contrary legislative intent. *Ford, supra*.

The convictions for armed robbery and bank robbery, even when applied to the same criminal transaction, do not violate federal or state constitutional protections against double jeopardy. MCL 750.529, the armed robbery statute, and MCL 750.51, the bank robbery statute, each require proof of an element the other does not.

The armed robbery statute, MCL 750.529, states in relevant part:

A person who engages in conduct proscribed under section 530 and who, in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon...is guilty of a felony punishable by imprisonment for life or for any term of years.

The cross-referenced section, MCL 750.530, proscribes the use of “force or violence against any person who is present” or the assaulting or placing of people in fear “in the course of committing a larceny.” MCL 750.530(1). Acts included in the phrase “in the course of committing a larceny” include all acts that occur during a larceny’s attempt or commission. MCL 750.530(2). An attempted or committed larceny by an armed individual, or by a person the victim reasonably believes is armed, is required under the statute. MCL 750.529; MCL 750.530. The statute does not expressly require that any property actually taken must be owned by the victim. Rather, property must just be taken from the victim or his presence in the course of a larceny. MCL 750.529; MCL 750.530. The armed robbery statute lacks a key element necessary to violate the bank robbery statute, the intent to steal property from “any building, bank, safe, vault or other depository of money . . .” *Ford, supra* at 458.

In contrast, the bank robbery statute, MCL 750.531 states in relevant part:

Bank, safe, vault robbery – Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear any person for the purpose of stealing from any building, bank, safe or other depository of money...shall, whether he succeeds or fails in the perpetration of such larceny or

felony, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.

Under the bank robbery statute, therefore, it is not necessary to prove a larceny actually occurred, and the statute does not require proof that a dangerous weapon was used, possessed, or reasonably believed to be used or possessed during the commission of the crime. MCL 750.531. See also *People v Vannoy*, 417 Mich 946; 332 NW2d 150 (1983) (Reversing this Court's determination that a defendant could not be charged under both statutes). The key is that the perpetrator possess a specific intent to commit a "larceny or any felony" while committing an act that is proscribed in the statute, such as to "threaten" or to "put in fear any person" for the purpose of stealing from a bank. MCL 750.531. The proscribed conduct is the threatening or injuring of another in order to take money; by "whatever means accomplished, the focus of the offense is on accessing a bank, safe, vault or other depository containing valuables for the purpose of stealing its contents." *Ford, supra* at 455.

Because the statute for bank robbery and the statute for armed robbery each require an element the other does not, no double jeopardy violation occurred in this case. The convictions for armed robbery and bank robbery emerging from a single criminal transaction must be affirmed.<sup>1</sup>

With respect to the trial court's scoring of OV 19 at ten points, we find that the trial court did not abuse its discretion and that resentencing is not required. The issue of the trial court's scoring of OV 19 is preserved and is reviewed under the abuse of discretion standard to determine if the score is supported by the evidence in the record. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The trial court's findings of fact will be reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005) (citations and internal quotation marks omitted).

Under MCL 777.49(c), a score of ten for OV 19 is warranted when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." Our Supreme Court has held that this provision is to be interpreted broadly when assessing OV 19. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Among other acts, interference with law enforcement investigation and providing "perjured" testimony are valid bases to score OV 19 at ten points. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008); *Barbee, supra* at 288.

In the present case, defendant, while on the stand, denied that he committed the crime and testified he believed that his friend RT was the likely culprit. The trial court determined that this

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<sup>1</sup> Defendant attempted to distinguish this Court's precedent in *Ford* from the facts of his case by noting that our holding in *Ford* was limited to cases where the facts demonstrated that one of the two crimes was completed before the other was executed. See *Ford, supra* at 459. This argument is irrelevant because it assesses whether or not multiple sentences for a single criminal transaction violate double jeopardy protections by looking at the facts of the case. Our Supreme Court expressly rejected this approach in *Smith, supra* at 296.

testimony was perjured and, therefore, interfered with the administration of justice. In addition to defendant's demeanor and testimony in court, the trial court based its conclusion on the following: 1) defendant did not tell the police about RT, and never mentioned RT until the trial; 2) the trial court's own viewing of the videotapes supported that defendant was in fact the robber; 3) defendant had marked and bundled bills from the bank in his possession; 4) out-of-court statements made by two men in prison with the defendant, David Sims and Christopher Moore, indicated defendant lied about RT; and 5) eyewitness testimony during trial supported defendant's guilt. The trial court did not "clearly err" in its conclusion that defendant perjured himself while testifying as his testimony was incredible. The facts in this particular case support the trial court's determination that OV 19 warranted a score of ten points. The trial court did not abuse its discretion.

Defendant also alleges that the trial court's reliance on the out-of-court statements of Sims and Moore was itself an abuse of discretion. It is permissible for a court to consider hearsay during sentencing; this "does not deprive the defendant of any constitutional right so long as the defendant is afforded an adequate opportunity to rebut any matter that he believes to be inaccurate." *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988); *People v Uphaus*, 278 Mich App 174, 184; 748 NW2d 899 (2008). In this case, defendant had an opportunity to rebut the statements by Moore and Sims in a memorandum to the trial court. Defendant was also given the opportunity during sentencing to raise any issues. Further, a sentencing hearing is not a criminal trial; constitutional requirements, such as the right to confront adverse witnesses, are not applicable, and the rules of evidence do not apply to sentencing proceedings. MRE 1101(b)(3); *Uphaus, supra* at 183. Defendant's constitutional and due process rights, therefore, were not violated. Since the scoring of OV 19 at ten points did not constitute an abuse of discretion, the sentencing was within the guidelines and must be affirmed. MCL 769.34(10).

Affirmed.

/s/ Donald S. Owens  
/s/ David H. Sawyer  
/s/ Jane E. Markey

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRELL LADON RICHARDSON,

Defendant-Appellant.

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UNPUBLISHED  
October 25, 2007

No. 270606  
Oakland Circuit Court  
LC No. 2005-204126-FC

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, three counts of carjacking, MCL 750.529a, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 21 to 48 months' imprisonment for the assault conviction, 40 to 60 months' imprisonment for the CCW conviction, 210 months' to 40 years' imprisonment for each carjacking conviction, and 24 months' imprisonment for each felony-firearm conviction. We affirm.

Defendant's convictions arose from three carjacking incidents that occurred near Farmington Hills, Michigan on August 13, 2005. On the night of the carjackings, defendant pulled into a gas station parking lot in a dark-colored Buick and approached Oleksiy Bolyukh, who was driving a silver gray BMW with an Illinois license plate. While Bolyukh was pumping gas, defendant approached him, held a gun to his head, took his car keys and wallet, and drove away in the BMW. Defendant's friend followed in the dark car. A few minutes later, police officers recognized two vehicles matching the dispatcher's description at a nearby intersection. The police followed the cars. Defendant turned onto a dead-end road, exited the BMW, and ran toward Middlebelt Road. He then approached a car stopped at the intersection of Middlebelt Road and Nine Mile Road. He pounded on the car window with his gun, demanding that the driver, Katherine Goddard, unlock the door. When Goddard refused to do so and the light turned green, Goddard floored her accelerator and defendant ran away. He then approached Cheryl and Terry Bias, who were walking near the same intersection stepping out of a hamburger restaurant. Defendant pointed his gun at Cheryl and demanded that she give him her car. When she refused and headed toward the restaurant to summon the police, defendant ran across the street toward a coin laundry. Defendant finally approached Tosh Louk, whose house was located near the coin laundry. Louk was not wearing a shirt and had a tattoo across his stomach that read "outlaw." Holding his semi-automatic chrome-plated gun, defendant informed Louk that he had "carjacked

someone” and asked for Louk’s help. Fearful that he would be shot or his parents’ car would be stolen, Louk agreed to help defendant escape. With Louk’s assistance, police arrested defendant the following day.

## I.

Defendant first argues on appeal that the trial court erred by allowing testimony from Ali Majed that on August 12, 2005, two African-Americans stole his dark-colored Buick and threw him off of a bridge. Defendant argues that Majed’s testimony constituted inadmissible bad-acts evidence under MRE 404(b). We need not address whether the testimony was admissible, however, because we hold that defendant waived this issue for appellate review.

Immediately after Majed’s testimony, defense counsel asked the prosecutor to stipulate that Majed was unable to identify the people who stole his Buick. The prosecutor agreed. Later, the prosecutor read the following stipulation to the jury: “First, that Mr. Majed cannot identify the person or persons that took the car from him on the 12th. And, second, that the offense of— that occurred in Wayne County to Mr. Majed is not an allegation for this jury to consider.” Defense counsel withdrew his motion to strike Majed’s testimony about being thrown from a bridge, apparently to avoid highlighting that portion of the testimony for the jury. Given the prosecutor’s stipulation and defense counsel’s decision to withdraw the motion to strike, defendant waived any objection to the challenged testimony. It is well settled that a party cannot request a certain action of the trial court, stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001); *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). By intentionally relinquishing a known right, defendant waived the issue on appeal and any error was extinguished. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

## II.

Defendant next argues on appeal that the prosecution presented insufficient evidence to support two of his carjacking convictions. We disagree. We review sufficiency of the evidence claims de novo, determining whether the evidence, viewed in the light most favorable to the prosecution, warrants a rational trier of fact in finding that all the elements of the charged crime have been proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

## A.

First, defendant argues that the evidence presented at trial was insufficient to prove that he “took” Goddard and Cheryl’s cars considering that the cars were never out of their possession. We note, however, that defendant’s argument mistakenly relies on an outdated version of MCL 750.529a, which required a person to rob, steal, or take a motor vehicle from another person to be guilty of carjacking. The version of the statute that was in effect at the time of the charged offenses, MCL 750.529a, as amended by 2004 PA 128, effective July 1, 2004, simply requires that, to be guilty of carjacking, a person must use force or violence, use the threat of force or violence, or put fear in another person “in the course of committing a larceny of a motor vehicle.” MCL 750.529a(1). The statute defines “course of committing a larceny of a motor vehicle” as “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 motor vehicle.” MCL 750.529a(2). There is no requirement, under the current version of the statute, that the perpetrator actually retain possession of the vehicle. In this case, defendant pounded on Goddard’s car window with his gun and demanded that Goddard unlock the car door. Next, he approached Cheryl, pointed his gun at her, and demanded that she give him her car. Defendant only ran away from Goddard and Cheryl when they refused to cooperate with his demands. Viewed in the light most favorable to the prosecution, this evidence was sufficient for the jury to find that defendant used the threat of violence in an attempt to retain possession of Goddard and Cheryl’s cars.

### B.

Second, defendant argues that the evidence presented at trial was insufficient to establish his identity as the person who carjacked Cheryl. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecutor must prove defendant’s identity as the perpetrator beyond a reasonable doubt, *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime, including identity. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Kimberly Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

We believe that the evidence presented at trial, viewed in the light most favorable to the prosecution, was more than sufficient to establish defendant’s identity as the person who carjacked Cheryl. According to Bolyukh, defendant pulled out of the gas station parking lot in the BMW at approximately 10:30 p.m. The gas station is located near the intersection of Middlebelt Road and 12 Mile Road. Shortly thereafter, police officers observed the BMW within a few miles of the gas station, near the intersection of Middlebelt Road and 9 Mile Road. The carjackings involving Goddard and Cheryl, as well as Louk’s interaction with defendant, occurred within a block of the same intersection between 10:30 and 10:45 p.m. Although mere presence at the scene of the crime, at the time the crime occurred, is insufficient to establish commission of the crime, evidence of opportunity and presence at the crime scene may contribute to a finding of guilt. *People v Barrera*, 451 Mich 261, 295; 547 NW2d 280 (1996); *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002). Moreover, while Cheryl and Terry could not unequivocally identify defendant as the carjacker, Bolyukh, Goddard, Cheryl, and Terry all described the perpetrator as a tall, young, African-American male carrying a silver gun. Bolyukh and Goddard definitively identified defendant in a photographic lineup and at trial, and Louk assisted the police in arresting defendant. Further, police found a silver handgun in defendant’s pocket upon his arrest. We find that this evidence was more than sufficient to support defendant’s identity as the perpetrator.

Reversal is not warranted on the grounds of insufficient evidence.

### III.

Defendant finally argues on appeal that the cumulative effect of his trial counsel’s errors amounted to ineffective assistance of counsel. We disagree. Because the trial court was not presented with and did not rule on defendant’s claim of ineffective assistance of counsel, we are

left to our own review of the record in evaluating his assertions. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

Defendant first argues that his trial counsel was ineffective for failing to object more strenuously to Majed's testimony about two African-Americans stealing his car and for withdrawing the motion to strike the testimony. We disagree. As discussed *infra*, defense counsel immediately objected to the challenged testimony and, upon defense counsel's request, the prosecutor stipulated that Majed could not identify the people who stole his car and that the incident involving Majed's car should not be considered by the jury in this case. Further, it is apparent from the record that defense counsel withdrew his motion to strike to avoid highlighting for the jury Majed's reference to being thrown from a bridge. Thus, defense counsel's decision to withdraw the motion was apparently a matter of trial strategy, and we will not second-guess counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Next, defendant argues that his trial counsel was ineffective for failing to move for a directed verdict on the carjacking charges involving Goddard and Cheryl. Because there was more than sufficient evidence presented at trial establishing defendant's carjacking charges, as discussed *infra*, a motion for directed verdict would have been futile. Defense counsel is not ineffective for failing to argue frivolous or meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant further argues that his trial counsel was ineffective for failing to object to the introduction of identification evidence from a photographic lineup. We recognize that as a general rule, a physical lineup is the preferred method of allowing a witness to identify a suspect. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grounds *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004). Here, however, a police officer testified that a proper physical lineup was not possible due to the lack of available juveniles to place in the lineup. Under such circumstances, a photographic lineup was a permissible substitute for a physical lineup. *Id.* at 187 n 22. Moreover, considering the overwhelming amount of identity evidence properly admitted at trial, defendant cannot establish that defense counsel's failure to object to the photographic lineup was outcome determinative.

Defendant finally argues that his trial counsel was ineffective for conceding guilt on certain offenses. Counsel does not render ineffective assistance by conceding certain points at trial, and doing so may be an effective trial strategy. See *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). "An attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Mark Schultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978). Here, defense counsel's concessions regarding defendant's carjacking charges were consistent with his theory that

defendant was guilty of the lesser offense of felonious assault. As to conceding that defendant was guilty of CCW, we find that this was a reasonable trial strategy in light of the evidence presented on that charge. Conceding the obvious is a permissible trial tactic. *Wise, supra* at 98. Accordingly, we find that defendant has failed to overcome the presumption of sound trial strategy.

On appeal, defendant asks for a remand for further fact finding, but he did not comply with MCR 7.211, which provides a means for requesting a hearing in the trial court to develop evidence. Even on appeal, defendant has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Thus, we decline to order a remand.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Stephen L. Borrello  
/s/ Jane E. Beckering

**IN THE COURT OF APPEALS OF IOWA**

No. 7-895 / 06-1990  
Filed February 13, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**MICKEY LEE HARMON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, III, Judge.

Mickey Lee Harmon challenges the district court's refusal to allow him to withdraw his entire guilty plea. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Matthew Wilber, County Attorney, and Jon Jacobmeier and Tom Nelson, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

**VAITHESWARAN, J.**

Mickey Lee Harmon was allowed to withdraw his guilty plea to one of several criminal counts. On appeal, he challenges the district court's refusal to allow him to withdraw his entire plea.

***I. Background Proceedings***

Harmon was charged with attempted murder, two counts of assault on a peace officer with intent to cause serious injury, two counts of disarming a peace officer of a dangerous weapon, two counts of interference with official acts causing bodily injury, and two counts of assault on a peace officer causing bodily injury. During trial, the State and Harmon entered into a plea agreement. Harmon agreed to plead guilty to one count of assault on a peace officer with intent to cause serious injury, one count of disarming a peace officer of a dangerous weapon, two counts of interference with official acts causing bodily injury, and one count of assault on a peace officer causing bodily injury. The State, in turn, agreed to dismiss the remaining charges. The State also agreed any prison sentence on those charges would be served concurrently. With that exception, the State and Harmon agreed sentencing would be "open," leaving the sentencing court free to suspend or defer the sentence. The district court accepted the plea.

Harmon later filed a combined motion in arrest of judgment and application to withdraw the guilty plea. He asserted that

he entered into a plea agreement which improperly failed to disclose the material and substantial results of his plea, including the fact that said plea agreement included a plea to a felony, which was not disclosed or otherwise understood by [him] to be a forcible felony.

The State resisted on the ground the motion in arrest of judgment was untimely. At sentencing, the district court overruled the motion in arrest of judgment but determined it did not advise Harmon that the count of assault on a peace officer with intent to cause serious injury to which he pled guilty “was, in fact, a forcible felony.” The court also noted the prior discussion concerning open sentencing. “[T]o prevent manifest injustice,” the district court allowed Harmon to withdraw his plea to the forcible felony count.

Harmon’s counsel then urged the court to set aside the guilty plea to the remaining counts on the ground that the enticement for the pleas was based on the entire plea bargain. The court declined to do so and proceeded to sentence Harmon on the remaining counts. Harmon appealed.

## ***II. Analysis***

As a preliminary matter, we must address error preservation concerns. Although Harmon did not timely file his motion in arrest of judgment, he alternately applied to have the plea withdrawn. The State concedes error was preserved on this alternate application, as a plea may be withdrawn “any time before judgment.” See Iowa R. Crim. P. 2.8(2)(a).

Turning to the merits, Harmon frames the issue as follows: “whether or not a district court may allow withdrawal . . . on only one count of a multi-count plea agreement.” The issue as framed presumes that the district court acted appropriately in permitting withdrawal of Harmon’s plea to the forcible felony count. Therefore, we reject the State’s attempt to re-litigate that question. We also note there is authority fully supporting the district court’s decision to allow withdrawal of the plea to that count. See Iowa Code §§ 708.3A(1), 702.11, 907.3

(2005) (precluding a court from entering a deferred judgment or deferred sentence on a forcible felony); *State v. West*, 326 N.W.2d 316, 317 (Iowa 1982) (“[T]he voluntary and intelligent nature of the plea would be affected by any misstatement of the court placing in defendant’s mind ‘the flickering hope of a disposition on sentencing that was not possible.’” (citing *State v. Boone*, 298 N.W.2d 335, 338 (Iowa 1980))); *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980) (reversing a plea where “during the guilty plea proceedings the district court incorrectly indicated to the defendant that there was a possibility of a suspended sentence or a deferred judgment”).

The crux of this appeal is the district court’s decision to only permit a partial plea withdrawal. Iowa Rule of Criminal Procedure 2.8(10)(4) allows a defendant to withdraw “the plea” after it has been accepted, “to correct a manifest injustice.” The rule does not authorize a partial withdrawal of a plea and neither the State nor Harmon points to any case law that permits a partial withdrawal.<sup>1</sup> For this reason, we agree with Harmon that he should have been afforded the opportunity to withdraw his entire plea. Given the language of the

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<sup>1</sup> Our survey of case law from other states reveals varying approaches to this issue. See *People v. Rotroff*, 188 Cal. Rptr. 378, 382 (Cal. Ct. App. 1982) (holding court did not “disturb the balance of the bargain” by granting partial withdrawal of the plea); *Whitaker v. State*, 881 So. 2d 80, 82 (Fla. Dist. Ct. App. 2004) (holding trial court erred in granting partial withdrawal of plea, as negotiated plea deal was a package); *State v. Bisson*, 130 P.3d 820, 826 (Wash. 2006) (holding remedy of withdrawal of plea agreement limited to withdrawal of entire plea agreement, as agreement was indivisible package deal); *State v. Roou*, 738 N.W.2d 173, 178-181 (Wis. Ct. App. 2007) (examining totality of circumstances to decide whether defendant should have been allowed to withdraw entire plea, including whether breach of plea agreement was material and substantial, whether defendant would have pled guilty to one charge had he known of problem with other charge, and whether there was agreement not to reinstate original charges); *State v. Nelson*, 701 N.W.2d 32, 41 (Wis. Ct. App. 2005) (stating appropriate remedy depended on totality of circumstances, including whether defendant would obtain a windfall from breach of plea agreement).

rule, we find it unnecessary to decide whether Harmon received the benefit of the bargain. We also find it unnecessary to preserve or decide the alternate ineffective-assistance-of-counsel claims raised by Harmon.

**REVERSED AND REMANDED.**