

**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**

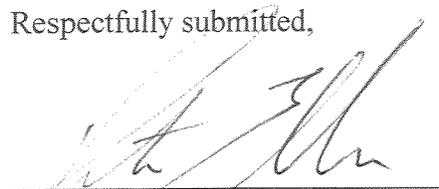
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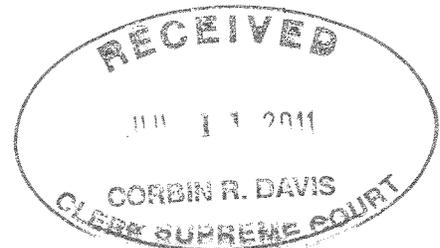
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**APPELLANT'S REPLY BRIEF**

Respectfully submitted,

  
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Dated: June 29, 2011



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## ARGUMENT

**I. THE APPELLEE ARGUES IN ITS BRIEF - FOR THE FIRST TIME – THAT MR. WILLIAMS SHOULD STAND CONVICTED OF ARMED ROBBERY BECAUSE HIS PLEA ESTABLISHED THE ELEMENTS OF ASSAULT WITH INTENT TO ROB ARMED. THE PROSECUTION MAY NOT RAISE ARGUMENTS FOR THE FIRST TIME BEFORE THIS COURT. FURTHER, THE APPELLEE’S ARGUMENT FAILS BECAUSE THERE IS NO AUTHORITY TO SUPPORT ENTERING A CONVICTION FOR AN OFFENSE THAT CARRY THE SAME PENALTY AS THE OFFENSE FOR WHICH THE ELEMENTS ARE ESTABLISHED. FINALLY, THE PROSECUTOR’S ARGUMENT FAILS BECAUSE THE PLEA DID NOT ESTABLISH THE ELEMENTS OF THE ALTERNATIVE CHARGE. THIS COURT SHOULD NOT CONSIDER THE PROSECUTION’S ARGUMENT OR, ALTERNATIVELY, SHOULD REJECT IT AS UNFOUNDED.**

The Prosecution raised an argument for the first time in its brief to this Court. The Prosecution maintains that Mr. Williams’ plea establishes the elements of assault with intent to rob while armed (“AWIRA”). The Prosecution further argues that because AWIRA was charged as an alternative count this Court may affirm Mr. Williams’ conviction for armed robbery.

(Appellee’s Brief at 24 – 27.)

This argument must fail. First, it is axiomatic that a party may not raise an argument for the first time in the Supreme Court. This applies to the Prosecution as much as it applies to any other party. *People v Hamacher*, 432 Mich 157; 168 (1989); *People v Oliver*, 417 Mich 366, 386 n 17 (1983). The prosecutor did not present this argument in the trial court, where the parties filed briefs both before and after oral argument. The prosecutor did not raise this argument in the Court of Appeals, either in response to Mr. Williams’ Application for Leave or in the Appellee’s brief. The Prosecution did not raise this argument in response to Mr. Williams’ Application for Leave to Appeal to this Court. The Prosecution’s argument should be considered waived.

*Hamacher, supra; Oliver, supra.*

Second, the Prosecution cites no case law that would support the proposed conviction in this case. In the cases cited by the Prosecution, the Court of Appeals approved the entry of a conviction for a **less severe** offense where the defendant admitted the elements of a more severe offense. (Appellee’s Brief at 26.)

In *People v Lafay*, 182 Mich App 528 (1990), as cited by the Prosecution, the Court held that a plea that admits the elements of receiving and concealing – a five year offense - may support a conviction for larceny in a building – a four year offense. The Court specifically stated that the ultimate conviction offense may be entered if it is a **lesser** crime than the offense to which the defendant establishes the elements.

The judge may take evidence on each element of the crime charged, even if the elements of the **lesser offense** are not made out by a defendant’s recitation of facts. This is true even if the crime pled to is not a lesser included offense of the crime charged. *Lafay*, at 532.

In *People v Hutcherson*, 96 Mich App 365 (1980), likewise, the Court approved conviction for the lesser offense of assault with intent to commit criminal sexual conduct (a ten year offense) where the defendant made out the elements of AWIRA (a life offense.)

Thus, the Prosecution has failed to cite authority approving the entry of a conviction that carries the same penalty as, or greater penalty than, the offense to which the defendant establishes the elements. In the instant case, Mr. Williams agreed to plead guilty to armed robbery. The plea failed because there was no larceny. It is not appropriate to enter a conviction for armed robbery because AWIRA is not a more severe offense than armed robbery.

Finally, Mr. Williams did not make out the elements of AWIRA.

To establish the elements of this offense, there must be an assault. In this case, there was no battery or attempted battery. Thus, only an “apprehension-type assault” might be established.

An “apprehension – type assault” is established where “the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe the he will do what is threatened.” *People v Reeves*, 458 Mich 236; 244 (1998).

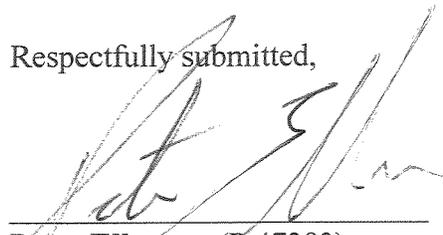
Mr. Williams never made a clear threat. He stated “you know what this is” while holding his hand under his coat. (Appellant’s Appendix at 38a – 40a, 42a) Even if there is a veiled threat here, Mr. Williams never engaged in “overt conduct” that would cause the victim to believe he would carry out any veiled, unspecified threat.

In *Reeves, supra*, on the other hand, the defendant put his hand in a bag, pointed it at the victim, and said “what’s more important, your job or you life?” The *Reeves* defendant specifically threatened the victim’s life and pointed a (feigned) weapon at the victim. This Court determined that the assault element was met. Mr. Williams’ behavior was never so threatening, overt or convincing to establish the assault element.

## RELIEF REQUESTED

**WHEREFORE**, for the reasons set forth above, the Defendant-Appellant respectfully requests that this Court refuse to consider the question of whether the plea established the elements of AWIRA thereby justifying entry of an armed robbery conviction or, alternatively, determine that the entry of a conviction pursuant to the Prosecution's theory is without basis.

Respectfully submitted,



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