STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROLAND ALBERT CLAMPITT,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 205590
Tuscola Circuit Court
LC Nos. 96-007033 FH
96-007034 FH
96-007035 FH

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

In lower court docket number 96-007033, defendant was convicted by a jury of larceny from a person, MCL 750.357; MSA 28.589, and larceny in a building, MCL 750.360; MSA 28.592. In lower court docket number 96-007034, defendant was convicted by the same jury of attempted larceny from a person, MCL 750.357; MSA 28.589 and MCL 750.92; MSA 28.287. And, in lower court docket number 96-007035, defendant was convicted by the same jury of armed robbery, MCL 750.529; MSA 28.797, larceny in a building and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a second-offense habitual offender, MCL 769.10; MSA 28.1082, to a term of two years' imprisonment for the felony-firearm conviction, such sentence to be followed consecutively by concurrent terms of twenty to forty years' imprisonment for the armed robbery conviction, ten to fifteen years' imprisonment for the larceny from a person conviction, four to six years' imprisonment for the larceny in a building convictions, and 5 to 7½ years' imprisonment for the attempted larceny from a person conviction. Defendant now appeals as of right. We affirm in part, vacate in part and remand.

Defendant's convictions arise out of a crime spree that defendant engaged in on the night of October 18 and early morning of October 19, 1996. Specifically, defendant's convictions in lower court docket number 96-007033 arise out of an incident in which defendant grabbed money out of a cash register at a Little Caesar's restaurant. In lower court docket number 96-007034, defendant's conviction arises out of an incident in which defendant attempted to grab money out of a cash register at a CMS Marathon store. And, in lower court docket number 96-007035, defendant's convictions arise

out of an incident at Bo's Village Peddler in which defendant forced two clerks at gun point to take money from their respective cash registers and give it to defendant.

At trial, defendant's defense was diminished capacity, i.e., that he was so high on cocaine that he could not form the requisite specific intent to commit those crimes requiring specific intent, particularly armed robbery.

On appeal, defendant first raises two grounds for his argument that he was denied the effective assistance of counsel.

To justify reversal under both the United States and Michigan Constitutions, a defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deny the defendant a fair trial. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Because no evidentiary hearing was conducted on this issue in this case, our review is limited to the extent that this claim is supported by details that are in the record. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996).

Specifically, defendant contends that counsel erred in failing to present any expert testimony to the jury concerning the defense of diminished capacity. Our review of the record indicates that defendant did obtain the appointment of a expert witness who evaluated defendant with respect to his defense of diminished capacity. However, defendant did not call his expert witness at trial. The prosecution did call this expert witness on rebuttal but the trial court precluded the witness from testifying when the witness revealed that he had not considered defendant's ingestion of cocaine as bearing on the issue of defendant's diminished capacity. On this record, we can only conclude that counsel's failure to call the expert witness was a matter of trial strategy. *People v Shively*, 230 Mich App 626, 628-629; 584 NW2d 740 (1998). Moreover, defense counsel elicited the testimony of numerous lay witnesses that supported defendant's defense of diminished capacity. We conclude that defendant has failed to sustain his burden of establishing ineffective assistance on this ground.

Alternatively, defendant contends that counsel erred during closing argument by conceding defendant's guilt to every crime charged except for armed robbery. Our review of the record indicates that with respect to the first incident at Little Caesar's restaurant, defense counsel argued that defendant was not guilty of larceny from the person but conceded that defendant was guilty of larceny in a building. With respect to the second incident at CMS Marathon, defense counsel argued that defendant was not guilty of attempted larceny from the person. And, with respect to the third incident at Bo's Village Peddler, defense counsel argued that defendant's consumption of cocaine rendered defendant unable to form the requisite specific intent for armed robbery but conceded that defendant was guilty of felony-firearm and larceny in a building. In light of the overwhelming evidence against defendant and the fact that armed robbery and larceny from the person were the most serious crimes with which defendant was charged, we will not second guess defense counsel's trial tactic of admitting guilt to lesser offenses. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Next, defendant argues that his convictions for larceny from the person and larceny in a building arising from the incident at Little Caesar's restaurant as well as his convictions for armed robbery and larceny in a building arising from the incident at Bo's Village Peddler violate double jeopardy.

We review this claim de novo. *People v Peerenboom*, 224 Mich App 195, 199; 568 NW2d 153 (1997). There are various protections flowing from the double jeopardy protections of the United States and Michigan constitutions. *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). In this case, defendant's double jeopardy claim invokes the protection against multiple punishments for the "same offense." *Id*. Thus, at issue is whether larceny from a person and larceny in a building or armed robbery and larceny in a building, when committed in the same criminal transaction, constitute the "same offense" for double jeopardy purposes. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). However, the factual double jeopardy test urged by defendant has been rejected by our Supreme Court. *People v Hurst*, 205 Mich App 634, 637; 564 NW2d 13 (1994). Rather, in a case involving multiple punishment for the same offense, the test is whether the Legislature intended to permit multiple punishment. *Denio, supra*. Under the Michigan Constitution, the Legislature's intent is determined by the traditional means of examining the subject, language and history of the statutes:

> "Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. For example, the crimes of larceny over $100, MCL 750.356; MSA 28.588, and larceny in a building, MCL 750.360; MSA 28.592, although having separate elements, are aimed at conduct too similar to conclude that multiple punishment was intended."
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> "A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions." [*Denio, supra* at 708 (quoting *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 [1984]).]

We likewise conclude that the crimes of larceny from a person and larceny in a building, although having separate elements, are aimed at conduct too similar, i.e., the protection of property, to conclude that multiple punishment was intended. *Denio, supra*; *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983). Thus, with respect to the incident at Little Caesar's restaurant, we conclude that defendant's convictions violate the double jeopardy protection of the Michigan constitution. In light of this conclusion, we need not consider defendant's argument with respect to the United States Constitution.

The social norms protected by armed robbery are primarily the protection of persons and secondarily the protection of property. *People v Hendricks*, 446 Mich 435, 449-450; 521 NW2d 546 (1994); *Wakeford, supra*. The crime of larceny over $100 is a felony that is punishable by imprisonment of up to five years while the crime of larceny under $100 is a misdemeanor. MCL 750.356; MSA 28.588. Larceny in a building is a felony that is punishable by imprisonment of up to four years. MCL 750.360; MSA 28.592 and MCL 750.503; MSA 28.771. Larceny from a person is punishable by imprisonment of up to ten years. MCL 750.357; MSA 28.589. Armed robbery is punishable by imprisonment for life or any term of years. MCL 750.529; MSA 28.797. Armed robbery has been described as a larceny from a person with the additional element of violence or intimidation. *People v Beach*, 429 Mich 450, 484, n 17; 418 NW2d 861 (1988). Larceny from a person is a necessarily included lesser offense of armed robbery while larceny from a building is a cognate lesser included offense of armed robbery. *Id*. Thus, it appears that the Legislature has taken conduct from the base statute of larceny, decided that the aggravating conduct of larceny from a person with violence and intimidation deserves additional punishment, and imposed it accordingly instead of imposing dual convictions. *Denio, supra*. Thus, with respect to the incident at Bo's Village Peddler, we conclude that defendant's convictions for armed robbery and larceny in a building violate the double jeopardy protection of the Michigan Constitution. In light of this conclusion, we need not consider defendant's argument with respect to the double jeopardy protection of the United States Constitution.

The appropriate remedy where a defendant has been convicted of multiple offenses in violation of double jeopardy is to vacate the conviction on the lower charge and grant the defendant sentence credit for the vacated conviction. *People v Harding*, 443 Mich 693, 720; 506 NW2d 482 (1993) (Brickley, J., with Griffin and Mallett, JJ., concurring). Thus, with respect to the incident at Little Caesar's restaurant, we vacate defendant's conviction for larceny from a building and order that defendant receive sentence credit toward his larceny from a person conviction for the time served for his larceny in a building conviction. With respect to the incident at Bo's Village Peddler, we vacate defendant's conviction for larceny from a building and order that defendant receive sentence credit toward his armed robbery conviction for the time served for his larceny in a building conviction. We remand in docket numbers 96-007033 and 96-007035 and order the trial court to make these corrections to the judgments of sentence and to transmit the corrected judgments of sentence to the Department of Corrections.

Finally, we conclude that the trial court did not abuse its sentencing discretion with respect to the sentences imposed for defendant's remaining convictions. *People v Hansford (After Remand)*, 454 Mich 320, 324; 562 NW2d 460 (1997).

In summary, we affirm defendant's convictions and sentences except as otherwise provided in this opinion.

Affirmed in part, vacated in part and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski