STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREQUONE JAMES,

Defendant-Appellant.

UNPUBLISHED
October 2, 2001

No. 223540
Wayne Circuit Court
LC No. 99-004090

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

The prosecutor charged defendant Trequone James with two counts of assault with intent to murder,[1] one count of carrying a concealed weapon (CCW),[2] and one count of possessing a firearm during the commission of a felony (felony-firearm).[3] The jury rejected both assault with intent to murder charges, instead convicting James of a single count of the lesser offense of felonious assault,[4] as well as CCW and felony-firearm. The trial court sentenced James to eighteen to forty-eight months in prison for the felonious assault conviction, eighteen to sixty months in prison for committing CCW, and two years in prison for the felony-firearm conviction. James appeals as of right, but we affirm.

I. Basic Facts And Procedural History

On March 27, 1999, Detroit Police Officer William Fickett and his partner, Officer Roy Harris, responded to a call reporting a disturbance at a Sunoco gasoline station located in Detroit. When they arrived at the Sunoco, Officer Fickett approached a 1990 Buick Skylark from the driver's side. Looking in the Buick, he saw James lying in the driver's seat, which was fully reclined. James was "making suspicious movements with his right hand," and Officer Fickett asked him for identification. James took out his wallet using only his left hand, leaving his right hand on the armrest of the car. Officer Fickett "noticed a firearm protruding from the seat and

[1] MCL 750.83.

[2] MCL 750.227.

[3] MCL 750.227b.

[4] MCL 750.82.

the armrest." So Officer Fickett leaned into the car to take the firearm, at which point he and James began to struggle for control of the gun. During the struggle, James had his finger on the trigger and pointed the gun "directly at [Officer Fickett's] face."

By this time Officer Harris had approached the Buick from the passenger side. He saw James point the gun at Officer Fickett, so Officer Harris fired one shot into the car. After Officer Harris fired into the car, Officer Fickett and James both left the car. Officer Fickett fell to the ground and James stood pointing the gun at Officer Fickett. Officer Harris then fired a second shot at James, who dropped his gun and ran to the other side of the Sunoco station. Officer Harris gave chase and apprehended James behind the Sunoco station.

Officer Harris was certain that he fired two shots at James, which was verified by an on-scene check of Officer Harris' weapon, which still contained fourteen of the sixteen bullets it could hold, and by the recovery of two spent shell casings. A witness, Dwight Hudson, claimed to have heard three shots fired, but believed that one shot was fired by James from inside the car. Officer Fickett recovered James's gun from near the driver's side of the Buick. James' blue leather jacket, which he was wearing during the altercation, had three bullet holes. A gunshot residue test indicated that whoever was wearing the jacket had fired a weapon but that a weapon was not fired at the jacket wearer from close range.

II. Double Jeopardy

A. Standard Of Review

James contends that the trial court committed error requiring reversal when it failed, sua sponte, to direct a verdict of acquittal on one of the two assault with intent to commit murder charges. He argues that the facts of this case only supported a single assault charge and that submitting two charges to the jury violated his right to be free from double jeopardy. James failed to preserve this issue for appeal by raising the issue in the trial court.[5] Thus, we review this issue for plain error affecting James' substantial rights.[6]

B. The Two Charges

The double jeopardy provision of the United States Constitution, US Const, Am V, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 15, protect individuals against being punished more than once for the same offense[7] and against being prosecuted more than once for the same offense, no matter whether the prosecution results in acquittal or conviction.[8] James' argument implicates his right to be free from multiple punishments for the same crime. In *People v Squires*,[9] this Court explained that

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[5] See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

[6] *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

[7] *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993).

[8] *People v Sturgis*, 427 Mich 392, 398; 397 NW2d 783 (1986).

[9] *People v Squires*, 240 Mich App 454, 456-457; 613 NW2d 361 (2000).

> the purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991). The constitutional protection against multiple punishments for the same offense is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature. Because the Legislature has the sole power to define crime and fix punishment, the Double Jeopardy Clause is not a limitation on the Legislature's power to establish punishment. *People v Fox (After Remand)*, 232 Mich App 541, 555-556; 591 NW2d 384 (1998).

We can assume for the sake of argument that the evidence supported only a single charge of assault with intent to murder because there was only a single, ongoing struggle between Officer Fickett and James.[10]

Nevertheless, James is not entitled to relief simply because the trial court submitted these charges to the jury. *People v Graves*,[11] in which our Supreme Court overruled its decision in *People v Vail*,[12] is dispositive in this case. According to *Graves*, "a defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury."[13] The jury did not convict James of two assault offenses and James does not claim that it was improper for the jury to consider a lesser felonious assault charge. The jury's actions cured whatever error the trial court caused by submitting two assault charges to the jury. Therefore, even if MCR 6.419 could be read to impose a duty on a trial court to grant a motion for a directed verdict on its own initiative, and we do not think the language of the court rule permits such an interpretation, the trial court did not err by failing to grant a directed verdict of acquittal in this case. There was no error affecting James' substantial rights in this respect.[14]

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[10] *People v Hooper*, 152 Mich App 243, 245-246; 394 NW2d 27 (1986); see also *People v Wakeford*, 418 Mich 95, 106-109, 111; 341 NW2d 68 (1983).

[11] *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).

[12] *People v Vail*, 393 Mich 460, 536; 227 NW2d 535 (1975).

[13] *Graves*, *supra* at 486-487.

[14] James also contends that his trial counsel was ineffective for failing to object to the trial court's decision to submit both assault charges the jury. However, he failed to present this issue for appeal. See MCR 7.212(C)(5). In any event, he must prove prejudice from his trial counsel's failure to object to the trial court's decision to submit both assault charges to the jury in order to win a new trial with this argument. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). James cannot prove prejudice for the same reasons we have rejected his contention that the trial court's failure to direct a verdict of acquittal sua sponte was error requiring reversal.

III. Felonious Assault Instructions

A. Standard Of Review

James next argues that the trial court committed error requiring reversal when, while reinstructing the jury after it had begun deliberating, the trial court did not repeat that felonious assault is a specific intent crime. He failed to preserve this issue for appeal by objecting to the instructions as given.[15] Thus, we also review this review this issue for plain error affecting James' substantial rights.[16]

B. Supplemental Instructions

MCL 768.29 requires the trial court to instruct "the jury as to the law applicable to the case . . . ."[17] "After jury deliberations begin, the court may give additional instructions that are appropriate."[18] James concedes that the trial court's initial instructions to the jury concerning felonious assault were correct. The narrow question in this portion of the appeal is whether the supplement instructions the trial court issued on felonious assault covered the requisite intent in a legally adequate manner.

James is correct in noting that felonious assault is a specific intent crime.[19] This means that the trial court had to instruct the jury that to convict James it had to find that he committed "an assault . . . with a dangerous weapon . . . *with the intent to injure or place the victim in reasonable apprehension of an immediate battery*."[20] In this case, when the jury sent a note to the trial court asking to be instructed on felonious assault for a second time, the trial court summoned the jury and said:

> [L]et me reinstruct you on felonious assault at this point.
>
> You may also consider the lesser included offense of felonious assault. That's also known as assault with a dangerous weapon. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. There are four elements. First, that the Defendant either attempted to commit a battery upon William Fickett or did an illegal act that caused William Fickett to reasonably fear and immediate battery.

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[15] *People v Smith*, 80 Mich App 106, 113; 263 NW2d 306 (1977); see also MCL 768.29 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.").

[16] See *Carines*, *supra*.

[17] See also MCR 6.414(F) ("After closing arguments are made or waived, the court must instruct the jury as required and appropriate . . . .").

[18] *Id*.

[19] See *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985), interpreting *People v Johnson*, 407 Mich 196, 210-211; 284 NW2d 718 (1979).

[20] *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (emphasis added).

> A battery is a forceful or violent touching of the person or something closely connected with the person. Second, that the *Defendants either intended to injure William Fickett or make William Fickett reasonably fear an immediate battery*. Third, at the time the Defendant had the ability to commit a battery, appeared to have the ability or thought he had the ability, and four, that the Defendant committed the assault with a dangerous weapon, in this case the handgun.
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> Those are the elements of felonious assault. . . .[21]

The trial court did not give a separate instruction concerning specific intent when reinstructing the jury on felonious assault.[22] However, in *People v Wilson*,[23] this Court held that a trial court's failure to instruct the jury on specific intent was not error requiring reversal as long as the trial court actually instructed the jury on the intent it had to find proven beyond a reasonable doubt under the elements of the offense. The trial court in this case plainly included the appropriate and legally accurate instruction concerning the specific intent necessary to commit felonious assault when reinstructing the jury. Thus, James is not entitled to relief on this basis.

IV. Continuance

A. Standard Of Review

Finally, James contends that the trial court committed error requiring reversal when it denied his motion for a continuance so that a defense witness, a doctor, could testify. On appeal, he phrases this as a question of constitutional magnitude, i.e., that the failure to grant the continuance denied him an opportunity to present his defense. However, in the trial court he phrased his argument in support of a delay as a routine motion for a continuance, not a constitutional matter. Thus, we review the trial court's decision to deny his motion for a continuance under the ordinary abuse of discretion standard of review.[24]

B. Relevant Factors

The trial attorneys in this case had somewhat of a problem when it came to keeping the trial court's schedule. The attorneys arrived in the courtroom sometime after 9:00 a.m. on August 30, 1999 for the third day of trial, prompting the trial court to remark:

> Both of you [attorneys] seem to have a laxidasical [sic] attitude towards courtroom procedure. I start at nine and I mean nine. I don't know why you

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[21] Emphasis added.

[22] See CJI2d 3.9.

[23] *People v Wilson*, 159 Mich App 345, 351-352; 406 NW2d 294 (1987), citing *People v Yarborough*, 131 Mich App 579, 581; 345 NW2d 650 (1983), overruled on other grounds by *Carines*, *supra* at 766.

[24] *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), mod 457 Mich 883; 586 NW2d 925 (1998).

called from District Court this morning, Mr. McCann [the prosecutor]. You need to come here. This is a capital jury trial. Mr. McCann, all last week you had a habit of disappearing and we can't find you. Now, I'm tired of not being able to start on time in this case.

I'm tired of being delayed. Now, we were delayed last week through no fault of anyone's, but the point is we're way behind schedule and most of the reason is because we can't find the two of you or you're looking for witnesses or your witnesses aren't here. I want to get started. There are to be no more delays. Now, what is the problem now? It's nine twenty-five.

McCann apologized and stated that he had been unable to respond to pages because his pager was broken and that he could not "do anything without witnesses . . . ." Defense counsel, Salle Erwin, interjected, saying:

And . . . that's my problem at this point. We had an essential witness here Friday afternoon. He is under subpoena. He's not here now and the Doctor is going to be here at three o'clock.

THE COURT: No, the Doctor is not going to be here at three o'clock or he is not going to testify. The Doctor is going to be here when you're ready for the Doctor to be called or he won't be a witness. Is that clear? Now, let me know when you're ready. I hope it's some time in the next millennium.

Fifteen minutes later, the trial court asked Erwin whether the doctor had arrived yet. She said that he had not arrived and reiterated that he would not be at court until 3:00 p.m. The trial court then delayed the start of trial until 10:10 a.m. so that two police officers testifying on behalf of the prosecution could arrive. At the close of the prosecutor's proofs, the trial court asked Erwin whether she had any witnesses to present on behalf of the defense. She replied, "Your Honor, we have, as the Court knows, a witness was on his way. Might the Court consider [this matter] after lunch?" The trial court responded, "That was two hours ago. Do you have any witnesses?" When Erwin said she had no other witnesses, the trial court told the jury that it had "heard all the testimony and evidence you're going to hear in this particular case," before allowing the jury to take a lunch break. After the jury left the courtroom, Erwin asked to make an offer of proof concerning the doctor's proposed testimony, saying:

If the Doctor was here to testify I was basically not going to go into copious detail with him other than his discharge summary where he talks about the number of bullets and where those bullets were located and one of the bullets –

THE COURT: You mean bullet wounds?

MS. ERWIN: Yes.

THE COURT: Okay.

> MS. ERWIN: The bullet wounds – one of the bullet wound entry was in the back of the left leg. That was supposedly the third bullet and that's what I would have been asking and going over the wound of my client.
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> THE COURT: All right. Again, this case has been set for trial. It was due to start Tuesday. This is now the following Monday. It's almost a week. It will be a week tomorrow so we're going to proceed as scheduled. You have the medical records and the Doctor, if you want to call him, should have been here previous to now, so we're going to proceed at this particular point in time. . . .

After lunch, the trial court did allow the defense to examine Antione Franklin, who allegedly owned the gun James used and was with James in the Buick at the time the two officers approached the car. He finished testifying at 2:49 p.m., approximately ten minutes before the doctor was supposed to arrive. However, the record neither reflects that Erwin asked the trial court to delay trial for those ten minutes, nor that the doctor ever arrived.

In *People v Echavarria,*[25] this Court articulated the five factors relevant to a trial court's decision to grant or deny a motion for a continuance:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision.

The facts of this case present a close call with respect to these first four factors. Presenting a defense is a constitutional right,[26] but was not explicitly stated as James' rationale for the continuance. We see nothing illegitimate about the defense decision to present the doctor as a witness. The record is insufficient to determine whether James was negligent in asserting this right in the sense that he had failed to make adequate preparations to procure this doctor's attendance at trial. According to Erwin, the doctor had been subpoenaed and had shown up at the previous day of trial on the preceding Friday. Why he was unable to testify that day is not perfectly clear. Further, we have no reason to conclude that this delay was a dilatory tactic.

On the basis of these facts alone, had James asked the trial court to wait only ten more minutes to see if the doctor would arrive, we would likely conclude that the wait was so short the trial court should have granted the continuance. Yet, James did not ask the trial court to consider granting the continuance at the end of the day. Rather, the motion came in the morning and then again at lunch, in advance of the time when Erwin anticipated the doctor would appear. From that perspective, it is understandable that the trial court might not agree to wait several additional hours for the witness.

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[25] *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

[26] See *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984).

More critical is the fact that *Echavarria* refers to a fifth factor: prejudice. When considering the prejudice question, it is clear that denying the motion for a continuance did not constitute an abuse of the trial court's discretion. Erwin's offer of proof indicates that the sole purpose of this doctor's testimony was to inform the jury that he had been shot three times during his altercation with police. James now claims that this testimony may have discredited the testimony of Officer Harris, who claimed that he only fired at James twice. However, the jury had already heard testimony creating a factual dispute over the number of times Officer Harris fired his weapon. Even if this doctor's testimony would have discredited Officer Harris, Officer Fickett testified that James pointed the gun at him, providing direct evidence of the assault. In reality, the doctor's testimony would have had almost no effect on the trial because the number of times Officer Harris fired his weapon was inconsequential to the elements the prosecutor had to prove in order for the jury to convict James for assaulting Officer Fickett. There simply was no evidence of prejudice that would require us to reverse in this instance.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck