

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH FOSTER,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 232038

Kent Circuit Court

LC No. 00-007876-FH

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of armed robbery, MCL 750.529, felonious assault, MCL 750.82, intentional discharge of a firearm at a dwelling, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to fifteen to sixty years' imprisonment on the armed robbery conviction, two to six years' imprisonment on the assault and discharge of a firearm convictions, thirty to ninety months' imprisonment on the felon in possession conviction, and two years' imprisonment on the felony firearm conviction to run consecutively with all other sentences. We affirm.

I. BASIC FACTS

The victim, Reynaldo Lopez, and a female acquaintance visited the home of another female friend, and Lopez subsequently left the home to buy some beer. Lopez ran into defendant and three other males, and Lopez invited them back to his friend's home. Lopez returned to the home about fifteen minutes after leaving to buy beer, and defendant and the three other males arrived at the home about forty-five minutes later. Defendant and the others then engaged in drinking, smoking marijuana, and shooting dice for money. Later, Lopez's brother arrived at the residence, and he and defendant went into a bathroom for approximately fifteen minutes. Lopez's brother then left the home. Defendant had purchased crack cocaine from Lopez's brother while in the bathroom. Defendant then returned to the dice game.

The female friend who lived at the home testified that Lopez was winning money in the dice game, and that defendant was very upset. She testified that defendant and Lopez argued during the dice game with defendant complaining about the money he was losing and about the cocaine bought from Lopez's brother that defendant asserted was "gushy." Lopez testified that he and defendant then went into the bathroom for a moment, and he showed defendant how to handle the cocaine by putting it on a plate to let it harden. Lopez and defendant then returned to the dice game. Lopez testified that he did not sell the cocaine to defendant, but he was aware that his brother had sold defendant "something." Lopez asserted that he had nothing to do with any drug transaction between his brother and defendant, and that defendant did not appear to be upset about the cocaine.

At some point in time, defendant, apparently upset about losing money in the dice game, went to the bathroom alone, and he then left the bathroom with a gun. Defendant, while walking and screaming at Lopez to give him his money back, fired the gun two to four times in the direction of Lopez but at the floor, and Lopez backed into a corner. Lopez testified that defendant told him to "run my pockets." Lopez at first refused to give defendant his money, and defendant then began beating Lopez in the head with the gun while demanding Lopez's money. Lopez then turned over his money to defendant, and defendant and the three other males left the home. Lopez testified that as defendant was leaving, he pointed his gun towards Lopez and pulled the trigger twice, but the gun just clicked. Lopez opined that defendant must have thought he had more bullets left.

Lopez's female acquaintance testified that defendant lost money to Lopez while shooting dice, that defendant demanded the money back, and that defendant then took the money back by force. Lopez testified that he won money shooting dice from not only defendant but the other three males who were also playing, which testimony was confirmed through the testimony of two of those males. Lopez also testified that one of the males also took money from him during the robbery.

The trial court instructed the jury as follows regarding a claim of right defense raised by defendant:

I instruct you that the crap game . . . was illegal. The winner of this game, apparently Reynaldo Lopez, did not obtain legal title to his winnings and the losers had a right to recover their [money] through legal proceedings in court.

Now to be guilty of the larceny element of robbery and therefore in order to be guilty of armed robbery, a person must . . . intend to steal. In this case there has been some evidence that the defendant took the property because he claimed the right to do so. If so, the defendant did not intend to steal.

Now when does such a claimed right exist? It exists if the defendant took the property honestly believing that it was legally his or that he had a legal right to have it. . . .

Defendant was subsequently convicted on all charges by the jury.

II. ANALYSIS

Ineffective Assistance of Counsel

Defendant first argues that his trial counsel was ineffective for failing to present a claim of right defense, and request jury instructions thereon, in relation to the armed robbery charge and the money defendant paid for illegal narcotics to Lopez's brother. Defendant argues that the facts supported such an instruction, where there was circumstantial evidence that defendant had a good faith belief that Lopez had been a participant in the "fraudulent" drug deal giving defendant the right to regain his money from Lopez rather than Lopez's brother who made the drug delivery. According to defendant, trial counsel should have raised the claim of right defense not only in relation to the gambling money but also as to the drug money. Defendant reasons that the jury might have acquitted him on armed robbery had it had the legal mechanism to do so in light of the fact that the actual amount taken in the robbery exceeded defendant's gambling losses to Lopez, leaving no defense concerning the additional robbery proceeds. We disagree.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther*¹ hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

In *People v Holcomb*, 395 Mich 326, 330-334; 235 NW2d 343 (1975), our Supreme Court addressed and agreed with a claim by the defendant that the jury was improperly instructed regarding his defense to an armed robbery charge. The defendant asserted that he had no intent to rob the victim but merely intended to seek return of his money that was paid for defective drugs. *Id.* at 331. The Supreme Court, rejecting the given jury instruction which provided that wrongful acts could not be excused or justified on the grounds of innocent intent, stated:

Felonious intent is a requisite element of armed robbery. This Court, in reversing a conviction in *People v Henry*, 202 Mich 450, 455; 168 NW 534 (1918), said:

“If the defendant in good faith believed that the money which he demanded was his money, and that he was entitled to its possession, he could not be guilty of either robbery or larceny in taking it, because there would be no felonious intent, ‘and if the defendant, for any reason whatever, indulged no such intent, the crime cannot have been committed.’ *People v Walker*, 38 Mich 156 [1878]; *State v Koerner*, 8 ND 292; 78 NW 981 [1899].”

[The defendant] testified that he went to [the victim’s] room “to ask for his money back”, he did not intend to rob [the victim]. (Emphasis supplied.)

If a jury believes [the defendant], it may not properly convict him of armed robbery. [*Holcomb*, *supra* at 332-333.]²

Here, we find that there was no evidence to connect the drug money to the money that was taken from Lopez during the armed robbery or to connect the drug transaction to Lopez, and defendant’s argument to the contrary is purely speculative. Moreover, defendant took all of Lopez’s money without distinction based on its source, some of which was gambling winnings from other individuals and not defendant. Therefore, it cannot be said that defendant acted in a good faith belief that the money taken in the robbery from Lopez was owed to defendant. There simply was no evidence that defendant believed that the money held by Lopez was the drug money he paid to Lopez’s brother for the cocaine, nor was there evidence that defendant thought that Lopez somehow owed him money for the bad cocaine. Furthermore, as admitted by defendant, there was no evidence regarding the amounts of money involved in the robbery, drug, and gambling transactions making it impossible to determine whether the drug money, had it been held or owed by Lopez, accounted for the remainder of the money taken during the robbery. In conclusion, there was no factual basis for a claim of right defense concerning the drug money, and thus, there was no ineffective assistance of counsel where any argument or instruction

² We note that a subsequent decision from this Court ruled contrary to *Holcomb* in *People v Hobbs*, 68 Mich App 239; 242 NW2d 535 (1976). In *Hobbs*, *id.* at 241, this Court rejected the defendant’s claim of right defense, where the defendant sought return of money paid for defective drugs. The *Hobbs* panel, ruling that the defendant’s claim was not legally tenable, stated that the “[t]he purchase of a controlled substance like cocaine does not create the usual contract rights that normally arise out of a sales transaction. The law will not recognize the attempt to enforce those rights.” *Id.* Based on our resolution of the case at bar, it is unnecessary to attempt to reconcile the two cases.

request by defense counsel would have been meritless. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Double Jeopardy

Defendant next argues that his convictions for armed robbery and felonious assault constituted a violation of the protection against double jeopardy. We disagree.

This issue was not preserved below; however, this Court reviews a double jeopardy issue regardless of whether a defendant has raised the issue before the trial court because it involves a significant constitutional issue. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). We review a double jeopardy issue de novo. *Id.* The *Colon* panel stated:

The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.” *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000). [*Colon*, *supra* at 62.]

Here, defendant is arguing multiple punishments for the same offense. The elements of armed robbery, MCL 750.529, are (1) an assault and, (2) a felonious taking of property from the victim’s person or presence, (3) while the defendant is armed with a dangerous weapon described in the statute. *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). The elements of felonious assault, MCL 750.82, are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Our Supreme Court in *People v Denio*, 454 Mich 691, 707-708; 564 NW2d 13 (1997), distinguishing the tests for double jeopardy under the United States and Michigan Constitutions, stated that under *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), if the same act or transaction constitutes a violation of two distinct statutory provisions, the federal test is whether each provision requires proof of a fact which the other does not. This test typically results in a double jeopardy violation where one is punished for a greater offense and a lesser included offense. *Denio*, *supra* at 707. If the *Blockburger* test is satisfied, a presumption arises that the Legislature did not intend to punish the defendant under both statutes. *Id.* However, the presumption is rebutted by a clear indication that the Legislature intended punishments under both statutes. *Id.*

The *Denio* Court further stated that “[t]his Court has rejected the *Blockburger* test in analyzing the Double Jeopardy Clause of the Michigan Constitution, and instead uses traditional means to determine the intent of the Legislature, such as the subject, language, and history of the statutes.” *Id.* at 708.

In *People v Yarbrough*, 107 Mich App 332, 334-336; 309 NW2d 602 (1981), this Court, addressing a double jeopardy issue involving armed robbery and felonious assault convictions, rejected the prosecutor’s argument that defendant committed two distinct assaults on the victim,

first by pointing a gun at the victim and secondly by using the gun to beat her about the head while stealing her purse. The *Yarbrough* panel stated:

The elements of armed robbery under MCL 750.529 . . . include an assault while being armed with a dangerous weapon. Thus, in an armed robbery, a felonious assault utilized to accomplish the larceny factually is included within the greater charge. The notion that the Legislature did not intend to punish such an assault as a separate offense where injury is inflicted but to provide for a greater penalty for armed robbery is supported by the following language from the armed robbery statute:

“If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years’ imprisonment in the state prison.”

This Court has held that assault is an included offense of armed robbery. *In summary, an assault should be punished as an offense separate from armed robbery only where it can clearly be established that the offenses occurred at separate times.* On the facts herein, defendant’s right against double jeopardy was violated by his convictions of both crimes. Therefore, his felonious assault conviction must be vacated. [*Yarbrough, supra* at 335-336 (citations omitted; emphasis added).]

Although *Yarbrough* was decided under *People v Jankowski*, 408 Mich 79; 289 NW2d 674 (1980), a case that applied the *Blockburger* test in the context of Michigan’s constitutional double jeopardy protection, we believe that its analysis concerning separate offenses and legislative intent is sufficient under *Denio* and should be applied here. Moreover, in *Colon, supra* at 63, this Court stated that there is no violation of double jeopardy if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other. The *Colon* panel indicated that assaults could be distinguished if the incidents were separate and distinct from each other. *Id.*

Turning to the case before us now, there were two legally distinct and separate assaults that occurred at different times. Regarding the armed robbery charge, defendant assaulted Lopez by pointing and firing a gun in his direction, followed by the pistol whipping, which forced Lopez to turn over the money. The armed robbery, and the necessarily included assault, were then completed and constituted a crime under Michigan law. However, defendant then proceeded to point the gun at Lopez and pull the trigger twice as he was leaving the residence. This act constituted a separate offense of felonious assault that was distinct from the assault that was committed in accomplishing the armed robbery; therefore, defendant’s double jeopardy rights were not violated.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray