STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO JENARD MARTIN,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 233792
Macomb Circuit Court
LC No. 99-003242-FC

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of assault with intent to commit murder, MCL 750.83, bank robbery, MCL 750.531, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to prison terms of 356 to 720 months for each of three assault with intent to murder convictions, 142 to 240 months for the bank robbery conviction, five years for each of the felony-firearm convictions, and forty to sixty months for the felon in possession of a firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to due process by the prosecutor's failure to disclose photographs of the damaged molding of a police car pursuant to a discovery order. *Brady v Maryland,* 373 US 83; 83 S Ct 407; 10 L Ed 2d 215 (1963). The record does not reveal the existence of a written discovery order. However, the trial court apparently orally ordered the prosecution to provide defendant with photographs taken by the Warren Police Department during the course of the investigation.[1]

There is no general constitutional right to discovery in a criminal case, *People v Elston,* 462 Mich 751, 765; 614 NW2d 595 (2000); however, due process requires the prosecutor to disclose evidence that is both favorable to the defendant *and* material to the determination of guilt or punishment, *People v Fink,* 456 Mich 449, 453-454; 574 NW2d 28 (1998). Accordingly,

[1] Although neither defense counsel nor the court specified what photographs the prosecution was to turn over to defendant, we conclude that the request and order for discovery included any and all photos the Warren Police Department was in possession of that were relevant to defendant's case. Accordingly the photos of the damaged molding of the police car would necessarily be included, since it was taken by Coraci, a Warren police officer.

a defendant has a due process right to exculpatory evidence in the prosecution's possession. *Brady*, 373 US 87-88. Because the disputed photographs were not favorable to defendant, the prosecutor's failure to disclose the photos during pretrial discovery, even in violation of a discovery order, would not have been a constitutional violation. See *id.*[2]

Next, defendant argues that his due process rights were violated because the prosecutor, during his rebuttal argument, improperly referenced defendant's failure to testify. We review claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant objects to the following comments by the prosecutor:

> My last comment to you simply is this: We do have an eyewitness to this case. Who not only saw everything, but knows everything. And you know who that is, that's the defendant. The details the defendant gave about the crime, about the dye exploding as he ran to the car, about parking on Watham, about running away, about shooting at the officers, those facts can only be known by the main eyewitness in this case, and that main eyewitness, the Defendant Martin, shared what he knew with the Detective Christian and Detective Galasso, and they, that's the end of the story.

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721.

A review of the prosecutor's statements in the context in which they were made reveals that the prosecutor was responding to arguments raised in defense counsel's closing argument. Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel. *Schutte, supra* at 721. The record indicates that defense counsel argued during his closing argument that the question the jury should be asking is who actually committed the robbery. Defense counsel went on to argue that neither bank teller, including the one defendant allegedly robbed, was able to identify defendant as the man who had robbed the bank, even though the tellers were eyewitnesses to the crime and the robber had only been a couple of feet away from them. Defense counsel proceeded to challenge the credibility of an in-court identification of defendant as the perpetrator. Defense counsel also argued that with the exception of this unreliable identification, no other eyewitness had been able to positively

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[2] Additionally, we note that defendant has presented no argument regarding how he was prejudiced by the admission of this evidence.

identify defendant as the bank robber. Defense counsel then questioned the accuracy of the officers' statements regarding the alleged confession defendant gave them. When viewed as a whole, we hold that the prosecutor's rebuttal comments were made in response to defense counsel's claim that there were no eyewitnesses and that defendant's confession to police was somehow invalid. Furthermore, contrary to defendant's assertion, the prosecutor's comments neither directly nor indirectly addressed the fact that defendant failed to testify.

Defendant also contends that his constitutional protection against double jeopardy was violated because he was convicted of being a felon in possession of a firearm *and* either assault with intent to murder or bank robbery. Although defendant did not raise the issue before the trial court, we will nonetheless consider the double jeopardy issue on appeal because it presents a significant constitutional question. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). However, because defendant failed to properly preserve this issue for appeal, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Id.* However, the Michigan Constitution affords broader protection than does the federal constitution. *People v Mackle*, 241 Mich App 583, 593; 617 NW2d 339 (2000).

In the context of multiple punishments for the same offense, the purpose of the double jeopardy protection is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). The protection is a limitation on the courts and prosecutors, and not on the Legislature's power to define crimes and fix punishments. *People v Denio*, 454 Mich 691, 709; 564 NW2d 13 (1997).

As to multiple punishments, violation of the federal double jeopardy protection depends on the elements of the offenses charged. Under the federal test, two separate offenses generally exist when each offense requires proof of at least one fact that the other offense does not. *United States v Dixon*, 509 US 688, 745; 113 S Ct 2849; 125 L Ed 2d 556 (1993); *Denio, supra* at 707. Yet, two offenses can have common elements and still be separate for double jeopardy purposes if the legislative intent that separate offenses be created is clear from the face of the statutes or the legislative history. *People v Harding*, 443 Mich 693, 707 (Brickley, J.), 735 (Cavanagh, C.J.); 506 NW2d 482 (1993). This Court must apply traditional rules of statutory construction to determine the intent of the Legislature. *Denio, supra* at 708. "Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct..., a court's task of statutory construction is at an end." *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998), quoting *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673, 74 L Ed 2d 535 (1983).

For purposes of the Double Jeopardy Clause of the Michigan Constitution, legislative intent is determined by traditional means such as examining the subject, language, and history of the involved statutes. *Denio, supra* at 708. "Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple

punishments." *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001), quoting *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984). In reviewing a double jeopardy challenge on multiple-punishment grounds under the Michigan Constitution, this Court considers: (1) whether one statute prohibits conduct violative of a social norm distinct from the norm protected by the other statute, and (2) the amount of punishment authorized by each statute, and whether the statutes are hierarchical or cumulative. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992).

Defendant argues that his convictions and sentences for assault with intent to commit murder and felon in possession of a firearm constitute multiple punishments for the single offense of using a gun to perpetrate a robbery in violation of the prohibition against double jeopardy. Defendant was convicted of three counts of assault with intent to murder for firing a gun at the police car that Officers Rushton and Marsee were riding in, and for firing a bullet that barely missed hitting an innocent bystander, James Layne. Contrary to defendant's assertion, at the time defendant shot at the officers and Layne, defendant was no longer using the gun to perpetrate the robbery. Instead, he was engaging in the separate and distinct offense of assault with intent to murder.

Under a Michigan constitutional analysis, the assault with intent to murder statute and the felon in possession statute each prohibit conduct violative of a social norm distinct from that protected by the other. The assault with intent to murder statute, MCL 750.83, provides:

> Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

On the other hand, the felon in possession statute, MCL 750.224f, provides, in relevant part:

> (1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:
> (a) The person has paid all fines imposed for the violation.
> (b) The person has served all terms of imprisonment imposed for the violation. (c) The person has successfully completed all conditions of probation or parole imposed for the violation…
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> * * *
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> (3) A person…in violation of this section is guilty of a felony, punishable by imprisonment for not more than five years, or a fine of not more than $5,000.00, or both.
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> (5) As used in this section, "felony" means a violation of a law of this state, or of another state, or of the United States that is punishable by imprisonment for 4 years or more, or an attempt to violate such a law.

The assault with intent to murder statute is designed to punish crimes that are injurious to others, regardless of whether a weapon or firearm is used, *Harrington, supra* at 429, while the felon in possession statute is designed to protect the public by keeping guns out of the hands of convicted felons, *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997). Unlike assault with intent to murder, the offense of felon in possession depends upon proof of possession of a firearm. In addition, felon in possession also requires proof that the defendant is a "felon" as defined by the statute, whereas there is no such requirement for convicting a defendant of assault with intent to murder. Also, while an assault is an essential element of assault with intent to murder, no such act is required for a felon in possession charge. Mere possession, without any other act, is enough. Thus, these are also two separate offenses under the federal test as well. Further, the felon in possession statute authorizes a maximum term of five years in prison *and/or* a fine for violating the statute. Conversely, the assault with intent to murder statute authorizes life imprisonment for a person found guilty of that crime. Based on these significant distinctions, this writer opines these two statutes are neither hierarchial nor cumulative. We hold, therefore, that the Legislature intended to permit defendant to be properly charged with, and convicted of, both assault with intent to murder, and an additional count of felon in possession of a firearm.

Defendant also argues that his convictions and sentences for bank robbery and felon in possession of a firearm violate federal and state constitutional prohibitions against double jeopardy because the crime of felon in possession is "subsumed" under the crime of robbery. Defendant was convicted of bank robbery for entering a Comerica Bank and presenting the bank teller with a note demanding money, while displaying a gun located inside his jacket. Once again, contrary to defendant's contention, the felon in possession statute and the bank robbery statute are designed to protect different interests and address distinct social norms. The bank robbery statute, MCL 750.531, provides, in relevant part:

> 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, bond or other valuables ... 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.

This statute is intended to protect those structures intentionally constructed to protect valuables. *People v Shipe*, 190 Mich App 629, 632; 476 NW2d 490 (1991). As we discussed above, the felon in possession statute is intended to protect the public by prohibiting the possession of firearms by convicted felons. Again, each of these statutes requires proof of facts that the other does not, and each prohibits conduct that violates distinct social norms. There is no requirement that a person who is found guilty of bank robbery be a felon, or that he be in possession of a firearm. In addition, like the assault with intent to murder statute, the bank robbery statute also authorizes life imprisonment, as opposed to the five year maximum or $5,000 fine authorized by the felon in possession statute. Based on the statutory language, we hold that the Legislature intended to permit defendant to be properly charged, and punished, for both bank robbery and felon in possession of a firearm. We hold, therefore, that defendant could be charged with these separate offenses in accordance with both the United States and Michigan constitutions.

Last, defendant maintains that his due process rights were violated because evidence admitted at trial was seized by the police during a warrantless search not fitting into any of the warrant exceptions. Defendant's pretrial motion to suppress the evidence was denied by the trial court. We review the trial court's factual findings in a ruling on a defendant's motion to suppress for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). To the extent that a trial court's ruling on a motion to suppress includes an interpretation of law or application of a constitutional standard to uncontested facts, our review is de novo. *Id.*

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *Illinois v McArthur*, 531 US 326, 330; 121 S Ct 946, 949; 148 L Ed 2d 838, 847 (2001); *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The lawfulness of a search or seizure depends upon its reasonableness. *US v Knights*, 534 US 112, 118-119; 122 S Ct 587; 151 L Ed 2d 497 (2001); *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). Generally, a search or seizure conducted without a warrant is unreasonable unless there exist both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). The prosecutor bears the burden of showing that a search was justified by a recognized exception. *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993).

One of the recognized exceptions to the warrant requirement is the automobile exception. *Kazmierczak, supra*, 461 Mich 418. The prosecution's main argument is that the warrantless search fell within the automobile exception. It is well established that the automobile exception to the warrant requirement permits warrantless searches or seizures of automobiles when there is probable cause to believe that evidence will be found in a lawfully stopped automobile or when an automobile is an instrumentality of a crime. *People v Anderson*, 166 Mich App 455, 478-479; 421 NW2d 200 (1988).

In this case, defendant was a passenger in the Volvo, which was used to effectuate his escape from the scene of the bank robbery, as well as the vehicle from which defendant shot at the police. Thus, we conclude that the vehicle searched by police was an instrumentality of not one, but two crimes – bank robbery and assault with intent to murder. As a result, the police had probable cause to believe that there was a fair probability that a search of the Volvo would uncover evidence of a crime. See *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999). "A search of an automobile when probable cause exists "is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999), quoting *United States v Ross*, 456 US 798, 809; 102 S Ct 2157; 72 L Ed 2d 572 (1982). Therefore, it was not unreasonable for the police to search the Volvo while still at the scene of the accident, since the facts were sufficient to justify the issuance of a warrant. This was evidenced by the officer's acquisition of a search warrant based on these facts later that same day. Accordingly, we hold that there was no clear error on the part of the trial court in denying defendant's motion to suppress the evidence found inside the Volvo.

Additionally, we note that the search would also have been reasonable under the search incident to arrest exception because the search occurred at the scene of the lawful arrest of the female driver of the vehicle. See *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363

(2000). Having probable cause to arrest the driver, it was permissible for the police to conduct an immediate search of the vehicle without a warrant. *Id.*

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper