STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 272174 Oakland Circuit Court
FADI K. KHALIFE, Defendant-Appellant.	LC No. 2005-201291-FC

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felonious assault, MCL 750.82, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 2 to 48 months' imprisonment for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. He will serve his sentences consecutively. We affirm.

I. FACTS

Defendant's conviction arises out of a shooting that occurred on February 5, 2005, at Greenfield Plaza in Oak Park. The victim, Corey Jennings, testified that he and Tony Nelson went to Greenfield Plaza to get a haircut. According to Jennings, the barbershop was very busy, so he and Nelson left after waiting for 15 minutes. Nelson testified that they went to Greenfield plaza so he could purchase a watch, but they left because the store was closed. As they were leaving the building, they saw Ramanuell Hicks, a mutual acquaintance, attempt to steal a women's cellular phone.

Jennings and Nelson testified that they quickly left the building because they did not want to be associated with Hicks. A silver SUV pulled up to them in the parking lot, and they immediately ran away. They stopped running when they saw defendant, one of the owners of Greenfield Plaza, get out of the SUV. Jennings and Nelson then continued to walk away until Jennings looked back and saw defendant pointing a silver gun at them. They then began to run away again. Jennings testified that he heard six shots fired and felt something painful in both legs. Nelson also testified that he heard six shots fired. After seeking medical help at a friend's house, Jennings was dropped off at a hospital for treatment.

II. EXCLUSION OF EVIDENCE

Defendant argues that he is entitled to a new trial because his constitutional rights to present a complete defense and to confront witnesses were violated when the trial court improperly excluded evidence about third parties who tried to shoot the victim, and when it impermissibly limited defendant's cross-examination of the victim by precluding defense counsel from asking the victim about enemies who may have wanted to hurt him.

A. Standard of Review

Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Likewise, "[a] trial court's limitation of cross-examination is reviewed for an abuse of discretion." *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). But when, as is the case here, a defendant asserts that his constitutional rights have been violated, our review is de novo because the issue raised is a question of law. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002); *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

B. Analysis

Defendant first argues that the trial court improperly excluded, as irrelevant, evidence that three months after the victim was shot a group of individuals went to the victim's home and tried to shoot him. We disagree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. All relevant evidence is admissible unless specifically excluded by the evidence rules. MRE 402.

Defendant's defense was that someone else shot the victim. Therefore, the fact that other people tried to shoot the victim could have had a tendency to make defendant's defense more probable. MRE 401. However, the attempted shooting took place three months after the victim was shot; therefore, evidence of that attempted shooting was irrelevant because it does not show that other individuals had a motive to harm the victim on the day that the shooting occurred. The passage of time between the two incidents is considerable and there was no evidence that the two incidents were linked. Upon de novo review, we conclude that the two incidents were too far apart in time to give credence to defendant's theory that someone else wanted to, and did in fact, shoot the victim on the day in question.

Defendant also argues that the trial court improperly limited his cross-examination of the victim by precluding defense counsel from asking whether the victim had enemies on the day of the shooting who may have been predisposed to hurting him. The trial court also limited defendant's cross-examination of the victim on the basis of relevance.

A criminal defendant has a constitutional right to present a defense and confront his accusers. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). While the right to present a defense is a fundamental due process right, it is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 819 (1984). Generally, a defendant may cross-examine at witness on any matter relevant to any issue in the case, *People v Federico*, 146 Mich App 776, 793; 381 NW2d 819 (1985), but neither the Confrontation

Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski*, *supra* at 138. Rather, the trial court has wide latitude to reasonably limit cross-examination based on concerns of prejudice, confusion of the issues, harassment, or questioning that is only marginally relevant. *Id*.

We agree with defendant that his line of questioning was relevant to proving his defense—that someone else shot the victim—because it would, depending on the answers the victim gave, allow defendant to show that his defense was plausible. See MRE 401. By excluding this line of questioning, the trial court inhibited defendant's ability to create reasonable doubt as to whether he indeed shot the victim. It is entirely plausible that the victim had enemies, besides defendant, who may have been motivated to shoot him that day. Therefore, we conclude that the trial court erred.

Nevertheless, reversal is not required because the error was harmless. See *People v Solomon* (*Amended Opinion*), 220 Mich App 527, 535; 560 NW2d 651 (1996). An error that constitutes a structural defect requires automatic reversal, but nonstructural error does not require reversal if it was harmless beyond a reasonable doubt. *People v Willing*, 267 Mich App 208, 223; 704 NW2d 472 (2005). "A constitutional error is harmless 'if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neda v United States*, 527 US 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

Here, the record contains ample evidence that defendant shot the victim, from which the jury could have found him guilty beyond a reasonable doubt absent the error. The victim positively and definitively identified defendant as the shooter, mere hours after he was shot. The victim had seen defendant at Greenfield Plaza many times and knew that he was one of the owners, which lends credibility to his identification. The victim also correctly identified the car defendant was driving during the shooting. An unfired bullet of the same type and caliber as the bullet removed from the victim's leg was found at Greenfield Plaza near where the victim was shot, from which the jury could have concluded that the shooting did take place at the mall. Defendant had wounds on his hands that were consistent with wounds incurred by shooting a semi-automatic weapon. Defendant lied and said that he was not at Greenfield Plaza when the shooting took place, when the surveillance videos revealed that, in fact, he was in his SUV in the mall parking lot during the shooting. He also asked police what he would be charged with if he had shot at the victim. Although the surveillance cameras did not tape defendant shooting at the victim, it is evident from the trial record that a reasonable jury could have found defendant guilty beyond a reasonable doubt even if the trial court had permitted defendant to question the victim about his enemies. See *Mass*, *supra* at 640 n 29. Therefore, defendant is not entitled to relief.

III. DOUBLE JEOPARDY

Defendant also argues on appeal that his convictions for felonious assault and felony-firearm violate the Double Jeopardy Clause of the Michigan Constitution. Const 1963, art 1, § 15. Again, we disagree.

A. Standard of Review

Generally, this Court reviews de novo a challenge under the double jeopardy clauses of the federal and state constitutions de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, because defendant did not preserve this issue below, the correct standard of review is plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

B. Analysis

"Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense." *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006); see also US Const, Am V; Const 1963, art 1, § 15. These provisions protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). In this case, this Court is presented with a double jeopardy challenge based on multiple punishments for the same offense. Our Supreme Court recently decided *People v Smith*, 478 Mich 292, 296, 324; 733 NW2d 351 (2007), in which it reinstated the test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), as the proper test to determine when multiple punishments are barred on double jeopardy grounds. In *Blockburger*, the United States Supreme Court opined that multiple punishments are authorized if "'each statute requires proof of an additional fact which the other does not . . . .'" *Id.* at 304, quoting *Gavieres v United States*, 220 US 338, 342; 31 S Ct 421; 55 L Ed 489 (1911).

In *Smith*, the defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b), with larceny as the predicate felony; two counts of armed robbery, MCL 750.529; and four counts of felony-firearm, MCL 750.227b. *Smith*, *supra* at 295. The defendant murdered two tire store employees and stole $2,000 in cash, plus the store's morning proceeds, both of the victims' wallets, and money from one of the victim's front pockets. *Id.* at 296. On appeal to this Court, the defendant argued that his convictions for both first-degree felony murder and armed robbery violated the Double Jeopardy Clause of the Michigan Constitution. *Id.* at 295. This Court concluded that there was no evidence that the defendant had committed the separate offenses of robbery and larceny and, therefore, found that the armed robbery convictions violated double jeopardy. *Id.* at 295; *People v Smith*, unpublished per curiam of the Court of Appeals, issued December 27, 2005 (Docket No. 257353). In its opinion, our Supreme Court reexamined the state's double jeopardy precedent for multiple punishments and explicitly overruled *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984).[1] *Smith*, *supra* at 295-296, 316, 324.

The *Smith* Court overruled *Robideau* because *Robideau* was based on two conclusions, one faulty and one no longer pertinent. *Smith*, *supra* at 314-316. The conclusion the Court found faulty was the *Robideau* Court's conclusion that Michigan's Double Jeopardy Clause

[1] The *Robideau* Court rejected the use of the *Blockburger* test and instead set forth "'general principles' to be used when assessing legislative intention." *Smith*, *supra* at 301, 312. Under these general principles, courts had to identify the type of harm the Legislature was trying to prevent and decide whether the Legislature intended multiple punishments when two statutes prohibited violations of the same social norm. *Robideau*, *supra* at 487

afforded defendant greater protection than the Federal Double Jeopardy Clause. *Id.* at 314-315. The conclusion that is no longer pertinent, in light of *People v Cornell*, 466 Mich 335, 353; 646 NW2d 127 (2002), is that the *Blockburger* test did not take into account Michigan's recognition of cognate lesser included offenses as lesser offenses. *Smith*, *supra* at 314.

In applying the *Blockburger* test to facts of the case, the *Smith* Court concluded that first-degree felony murder and the non-predicate armed robbery withstood constitutional scrutiny under the same-elements test because first-degree felony murder contains elements not included in armed robbery: homicide and malice intent. *Id*. at 318-319. Our Supreme Court also observed that armed robbery contains elements not necessarily included in first-degree felony firearm, specifically that the defendant took property from the victim's presence or person while armed with a weapon. *Id.* at 319.

In the case at bar, defendant was convicted of felonious assault and felony-firearm. The elements of felonious assault are: (1) assault on another person; (2) with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon; (3) without the intent to commit murder or inflict great bodily harm less than murder, but with the intent to injure or place the victim in reasonable apprehension of an immediate battery. MCL 750.82; *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of felony-firearm are: (1) attempt or commission of a felony; (2) while in the possession of a firearm. MCL 750.227b; *Davis*, *supra.* As in *Smith*, *supra* at 318-319, the two statutes do not contain the same elements. Felonious assault has the additional elements of assault and intent. MCL 750.82. Also, the felony-firearm statute requires mere possession of a firearm while the felonious-assault statute requires the assault to be perpetrated with a weapon. Compare MCL 750.227b with MCL 750.82. Therefore, we conclude that defendant's two convictions are for separate offenses and defendant's multiple punishments do not violate the double jeopardy clause.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette