STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOMACO SIMS,

Defendant-Appellant.

UNPUBLISHED
July 17, 2008

No. 274236
Berrien Circuit Court
LC Nos. 05-406865-FC;
2005-406866-FC

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Following a consolidated jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm, MCL 750.84, carrying a concealed weapon (CCW), MCL 750.227, felon in possession of firearm, MCL 750.224f, resisting and obstructing a police officer, MCL 750.81d(1), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and third-degree fleeing and eluding, MCL 257.602a(3). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 152 to 400 months' imprisonment for each of the two counts of assault with intent to do great bodily harm, 76 to 240 months for CCW, 76 to 240 months for felon in possession of firearm, 47 to 180 months for resisting and obstructing a police officer, two years for felony-firearm, and 76 to 240 months for fleeing and eluding; the felony-firearm sentence to be served first, all of the other sentences to be served consecutive to the felony-firearm sentence and concurrent to each other. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence.

I. Double Jeopardy

Defendant argues that because both of his convictions for assault with intent to do great bodily harm stemmed from the same continuous transaction, the second conviction violated constitutional double jeopardy protections against multiple punishments. We disagree.

Our state constitution states that, "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. The analogous provision in the federal constitution provides that, "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." US Const, Am V. As articulated by our Supreme Court in *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007) (internal citation omitted),

> The *Double Jeopardy Clause* affords individuals "three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." The first two protections are generally understood as the "successive prosecutions" strand of double jeopardy, while the third protection is commonly understood as the "multiple punishments" strand.

This case involves the "multiple punishments" strand of double jeopardy. In *People v Lugo*, 214 Mich App 699, 705-706; 542 NW2d 921 (1995) (internal citations omitted), this Court indicated:

> In the multiple punishment context, both the federal and state Double Jeopardy Clauses seek to ensure that the total punishment does not exceed that authorized by the Legislature. Because the power to define crime and fix punishment is wholly legislative, the Double Jeopardy Clauses are not a limitation on the Legislature, and the Legislature may specifically authorize penalties for what would otherwise be the "same offense." Cumulative punishment of the same conduct does not necessarily violate the prohibition against double jeopardy under either the federal system or the state system. The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes.
>
> Determination of legislative intent involves traditional considerations of the subject, language and history of the statutes. The court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent.

In this case, legislative intent may be determined by the language of the statute defining assault with intent to do great bodily harm less than murder, MCL 750.84, which provides:

> Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison [for] not more than 10 years, or by fine of not more than 5,000 dollars.

An assault in the context of an assault with intent to do great bodily harm has been defined as an attempt or threat with force or violence to do corporal harm to another. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The plain language of MCL 750.84 makes clear that every assault (or attempt or threat with force or violence to do corporal harm to another) with intent to do great bodily harm constitutes a felony. From the language of the statute, it is also apparent that the Legislature intended to authorize separate punishments for each completed assault with intent to do great bodily harm.

In *Lugo*, *supra* at 709, the defendant argued that it was improper for him to be convicted of both felonious assault and assault with intent to do great bodily harm because his actions

constituted one continuous assault. While officers were trying to arrest the defendant, the defendant picked up a broom and began swinging it wildly at them. *Id*. at 703. The defendant then struck the officers with the broom several times. *Id*. One of the officers fell backward and the defendant grabbed the officer's gun from his holster and shoved it into the officer's abdomen. *Id*. The defendant tried to pull the trigger of the gun, but the officer was able to knock the gun away before the defendant could shoot the gun. *Id*. at 704. The *Lugo* Court noted that if one crime is complete before another takes place, even if those offenses share common elements, there is no violation of double jeopardy. *Id*. 708. The Court ultimately held that "[b]ecause the act resulting in the felonious assault conviction was complete before the act leading to the assault with intent to do great bodily harm occurred, there is no violation of double jeopardy protections." *Id*. at 709. Although *Lugo* is dissimilar to this case because it involved two different crimes with common elements as opposed to the same crime committed twice, *Lugo* is instructive and persuasive. Where one assault is complete before another takes place, there are no double jeopardy violations. *Id*. at 708.

In this case, both assault offenses occurred while defendant was fleeing from Officer Dustin Blaskie. In December 2005, Officer Blaskie conducted a traffic stop and, at his request, the driver exited the vehicle. At that point, defendant, the only passenger in the vehicle, slid into the driver's seat and quickly drove away. Officer Blaskie got into his patrol car and followed. Defendant eventually jumped out of the vehicle and ran, causing Officer Blaskie to stop his patrol car and pursue defendant on foot. During the foot chase, when the officer was approximately 15 yards behind defendant, defendant turned while running and raised his right hand. Officer Blaskie then heard two or three bangs that sounded like gunshots. In response, the officer dove to the ground near the side of a house seeking cover. The officer threw down a can of mace that he was holding, pulled out his gun, and radioed for backup. Due to the gunfire, Officer Blaskie lost sight of defendant. After calling for back up the officer continued to search for defendant on foot. As he came around the corner of the house, defendant was nowhere in sight, so Officer Blaskie headed toward an alley near the garage. He stopped, peered about, and observed defendant through a gap in a nearby fence. Defendant was standing behind the fence, facing the officer. Both men drew guns. Defendant then fired two or three shots at Officer Blaskie. The officer fired two shots in return and dove for cover. The officer radioed another update and continued in pursuit of defendant.

Based on the testimony at trial, it is clear that defendant's first assault on Officer Blaskie was complete before the second assault occurred. Defendant shot at the officer, continued running so that the officer lost sight of him, waited for the officer behind a fence, and then shot at the officer again. Thus, there was a short lapse of time between the shootings. See *Lugo, supra*, where the lapse of time between assaults was presumably only seconds. Furthermore, both the prosecution and the defense in this case characterized the shootings as separate instances rather than one continuous sequence of events. In his statement to police, defendant offered different explanations for each of the two shootings, alleging separate causes for accidental discharge of his firearm, and he never objected to there being two assault charges against him rather than only one. Compare *People v Bulls*, 262 Mich App 618, 628-629; 687 NW2d 159 (2004) (holding that separate convictions for felony murder and assault with intent to rob while armed violated double jeopardy because the prosecution portrayed the facts of the case as a continuing sequence of events and not as separate incidents). Even though the two shootings occurred within a short period of time, they were separated by both time and space and,

therefore, constituted two separate, completed offenses. Accordingly, we find that defendant's two convictions for assault with intent to do great bodily harm do not violate the double jeopardy protections against multiple punishments.

II. Judgment of Sentence

Defendant also argues that his sentence for CCW cannot run consecutive to his sentence for felony-firearm because CCW cannot be a predicate felony for felony-firearm. We agree.

Sentences in Michigan are to run concurrently unless statutorily authorized. See *People v Gallagher*, 404 Mich 429, 439; 273 NW2d 440 (1979). The felony-firearm statute, MCL 750.227b(1), provides in part:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years.

One of the exceptions is for a violation of MCL 750.227. Therefore, pursuant to the felony-firearm statute, CCW cannot be the underlying felony. MCL 750.227b(1).

MCL 750.227b(2) provides statutory authority for requiring the sentence for felony-firearm to be served consecutive to any term of imprisonment imposed for the underlying felony. *People v Sawyer*, 410 Mich 531, 535; 302 NW2d 534 (1981). Since a CCW conviction cannot be the underlying felony for a felony-firearm conviction, MCL 750.227b(1), it necessarily follows that MCL 750.227b(2) does not authorize a CCW sentence to be served consecutive to a felony-firearm sentence. *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995). And, no other statutory authority authorizing a CCW conviction to be served consecutive to a felony-firearm conviction exists. Therefore, defendant's CCW sentence should run concurrently with his felony-firearm sentence. See *Id.* We remand this case to the trial court for correction of the judgment of sentence.

III. Effective Assistance of Counsel

Finally, defendant argues that he was deprived of the effective assistance of counsel because his trial counsel failed to request a jury instruction on the lesser offense of assault with a dangerous weapon, MCL 750.82. We disagree.

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

In this case, defendant was charged with two counts of assault with intent to murder, and the jury was instructed accordingly. The jury was also instructed on the elements of assault with

intent to do great bodily harm, but it was not instructed on the lesser offense of assault with a dangerous weapon.

All of the elements of a necessarily included lesser offense are contained in the greater offense. *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). Therefore, "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id*. at 357. But, cognate lesser offenses are different than necessarily included lesser offenses in that cognate lesser offenses share several elements and are of the same class and category as the greater offense, but contain some elements not found in the greater offense. *Id*. at 345. Accordingly, our Supreme Court has found that a jury may not be instructed on cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); MCL 768.32(1).

It is undisputed that assault with a dangerous weapon is a cognate lesser offense of assault with intent to murder because assault with a dangerous weapon contains an element that assault with intent to murder does not, i.e., the use of a dangerous weapon. *People v Walls*, 265 Mich App 642, 643-644; 697 NW2d 535 (2005). Therefore, because the jury could not be instructed on the cognate lesser offense of assault with a dangerous weapon, any request for the instruction would have been futile and counsel cannot be found ineffective for failing to make a futile motion. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Accordingly, defendant has failed to establish his claim of ineffective assistance of counsel.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering