STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2009
v	No. 280291 Berrien Circuit Court
ANTHONY KEITH MONK, Defendant-Appellant.	LC No. 2007-401091-FC

Before: Owens, P.J. and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and bank robbery, MCL 750.531. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent sentences of 168 to 504 months' imprisonment for the armed robbery, and 71 to 355 months' imprisonment for bank robbery. Defendant appeals as of right. We affirm.

The facts presented at trial established that defendant, completely covered in black clothing, winter gear and sunglasses, entered a Horizon Bank branch in St. Joseph Township, walked directly to one of its tellers, Aune Quenle, and demanded all of the cash in her drawer. Defendant had a shiny cylindrical object in his hand that bank employees believed was the barrel of a gun. Quenle proceeded to give defendant approximately $10,000 in primarily $50 and $100 bills; some of the money was paper-clipped or batched with rubber bands, and ten of the $50 bills were marked with recorded serial numbers. Defendant motioned to two other bank employees, Patricia Damico and Judy Michael, and ordered them to get behind the teller line and give him the money from the other drawers. They tried to comply with defendant's demands, but the drawers were empty. The robbery lasted only one to two minutes. Defendant was subsequently identified as the robber through surveillance videotapes, and from his possession and distribution of the bank's batched and marked bills. Defendant denied at trial that he was the robber, and alleged that a friend of his named "RT" had borrowed his truck the morning of the robbery and later gave defendant the marked bills. During sentencing, the trial court found that defendant perjured himself and scored offense variable (OV) 19, MCL 777.49, at ten points.

On appeal, defendant argues that his convictions for both armed robbery and bank robbery violate constitutional guarantees against double jeopardy, Const 1963, art 1, § 15; US Const, Am V, as they impose multiple punishments for the same criminal transaction. He also argues that the trial court abused its discretion when it scored ten points for OV 19.

Whether multiple punishments violate constitutional protections against double jeopardy is a question of law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). This type of double jeopardy claim also requires this Court to construe the applicable criminal statutes to determine whether the Legislature intended multiple punishments. *People v Ford*, 262 Mich App 443, 448-449; 687 NW2d 119 (2004). The test to determine if two punishments for the same incident or transaction violate double jeopardy under the Michigan and United States constitutions is the "same elements" test, set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). See *People v Smith*, 478 Mich 292, 295-296; 733 NW2d 351 (2007); *Ford*, *supra.* This test requires a reviewing court to "inquire[] whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment." *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). See also *People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997). If each offense "requires proof of an element the other does not," there is a presumption that the Legislature intended multiple punishments unless there is a clear expression of contrary legislative intent. *Ford*, *supra*.

The convictions for armed robbery and bank robbery, even when applied to the same criminal transaction, do not violate federal or state constitutional protections against double jeopardy. MCL 750.529, the armed robbery statute, and MCL 750.51, the bank robbery statute, each require proof of an element the other does not.

The armed robbery statute, MCL 750.529, states in relevant part:

> A person who engages in conduct proscribed under section 530 and who, in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon…is guilty of a felony punishable by imprisonment for life or for any term of years.

The cross-referenced section, MCL 750.530, proscribes the use of "force or violence against any person who is present" or the assaulting or placing of people in fear "in the course of committing a larceny." MCL 750.530(1). Acts included in the phrase "in the course of committing a larceny" include all acts that occur during a larceny's attempt or commission. MCL 750.530(2). An attempted or committed larceny by an armed individual, or by a person the victim reasonably believes is armed, is required under the statute. MCL 750.529; MCL 750.530. The statute does not expressly require that any property actually taken must be owned by the victim. Rather, property must just be taken from the victim or his presence in the course of a larceny. MCL 750.529; MCL 750.530. The armed robbery statute lacks a key element necessary to violate the bank robbery statute, the intent to steal property from "any building, bank, safe, vault or other depository of money . . . ." *Ford*, *supra* at 458.

In contrast, the bank robbery statute, MCL 750.531 states in relevant part:

> Bank, safe, vault robbery – 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…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.

Under the bank robbery statute, therefore, it is not necessary to prove a larceny actually occurred, and the statute does not require proof that a dangerous weapon was used, possessed, or reasonably believed to be used or possessed during the commission of the crime. MCL 750.531. See also *People v Vannoy*, 417 Mich 946; 332 NW2d 150 (1983) (Reversing this Court's determination that a defendant could not be charged under both statutes). The key is that the perpetrator possess a specific intent to commit a "larceny or any felony" while committing an act that is proscribed in the statute, such as to "threaten" or to "put in fear any person" for the purpose of stealing from a bank. MCL 750.531. The proscribed conduct is the threatening or injuring of another in order to take money; by "whatever means accomplished, the focus of the offense is on accessing a bank, safe, vault or other depository containing valuables for the purpose of stealing its contents." *Ford*, *supra* at 455.

Because the statute for bank robbery and the statute for armed robbery each require an element the other does not, no double jeopardy violation occurred in this case. The convictions for armed robbery and bank robbery emerging from a single criminal transaction must be affirmed.[1]

With respect to the trial court's scoring of OV 19 at ten points, we find that the trial court did not abuse its discretion and that resentencing is not required. The issue of the trial court's scoring of OV 19 is preserved and is reviewed under the abuse of discretion standard to determine if the score is supported by the evidence in the record. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The trial court's findings of fact will be reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005) (citations and internal quotation marks omitted).

Under MCL 777.49(c), a score of ten for OV 19 is warranted when "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." Our Supreme Court has held that this provision is to be interpreted broadly when assessing OV 19. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Among other acts, interference with law enforcement investigation and providing "perjured" testimony are valid bases to score OV 19 at ten points. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008); *Barbee*, *supra* at 288.

In the present case, defendant, while on the stand, denied that he committed the crime and testified he believed that his friend RT was the likely culprit. The trial court determined that this

[1] Defendant attempted to distinguish this Court's precedent in *Ford* from the facts of his case by noting that our holding in *Ford* was limited to cases where the facts demonstrated that one of the two crimes was completed before the other was executed. See *Ford*, *supra* at 459. This argument is irrelevant because it assesses whether or not multiple sentences for a single criminal transaction violate double jeopardy protections by looking at the facts of the case. Our Supreme Court expressly rejected this approach in *Smith*, *supra* at 296.

testimony was perjured and, therefore, interfered with the administration of justice. In addition to defendant's demeanor and testimony in court, the trial court based its conclusion on the following: 1) defendant did not tell the police about RT, and never mentioned RT until the trial; 2) the trial court's own viewing of the videotapes supported that defendant was in fact the robber; 3) defendant had marked and bundled bills from the bank in his possession; 4) out-of-court statements made by two men in prison with the defendant, David Sims and Christopher Moore, indicated defendant lied about RT; and 5) eyewitness testimony during trial supported defendant's guilt. The trial court did not "clearly err" in its conclusion that defendant perjured himself while testifying as his testimony was incredible. The facts in this particular case support the trial court's determination that OV 19 warranted a score of ten points. The trial court did not abuse its discretion.

Defendant also alleges that the trial court's reliance on the out-of-court statements of Sims and Moore was itself an abuse of discretion. It is permissible for a court to consider hearsay during sentencing; this "does not deprive the defendant of any constitutional right so long as the defendant is afforded an adequate opportunity to rebut any matter that he believes to be inaccurate." *People v Beard*, 171 Mich App 538, 548; 431 NW2d 232 (1988); *People v Uphaus*, 278 Mich App 174, 184; 748 NW2d 899 (2008). In this case, defendant had an opportunity to rebut the statements by Moore and Sims in a memorandum to the trial court. Defendant was also given the opportunity during sentencing to raise any issues. Further, a sentencing hearing is not a criminal trial; constitutional requirements, such as the right to confront adverse witnesses, are not applicable, and the rules of evidence do not apply to sentencing proceedings. MRE 1101(b)(3); *Uphaus*, *supra* at 183. Defendant's constitutional and due process rights, therefore, were not violated. Since the scoring of OV 19 at ten points did not constitute an abuse of discretion, the sentencing was within the guidelines and must be affirmed. MCL 769.34(10).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey