STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2010
v	No. 291434 Wayne Circuit Court
SEAN MAURICE CLEMONS, Defendant-Appellant.	LC No. 08-019335-FC

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of bank robbery, MCL 750.531, and unarmed robbery, MCL 750.530.[1] Because defendant was not denied due process of law with regard to the delay between the offense and his arrest or the admission of the MRE 404(b) evidence at trial, defendant was not denied his right to a fair trial with regard to the jury instructions presented, and did not suffer a double jeopardy violation, we affirm.

I

This case arises out of a bank robbery that occurred on September 28, 2000 at Bank One on Dequindre. Para Stewart was employed as bank teller at the bank and started work at approximately 11:00 a.m. on that day. Stewart got her cash drawer, set up her station, and called her first customer. According to Stewart, defendant came to her window. Stewart greeted defendant, but he did not respond. Instead, he handed her two slips of paper. One was a note that said, "Place large amount of money in four envelopes. I have a handgun and a bomb. Don't hit any type of alarm. If you do, you will endanger people's lives. Hurry up." The other was a deposit slip. Stewart testified that she did not want to alarm anyone in the bank and just wanted to get him out of the bank. Stewart stated that she fumbled around to find the button for the alarm under her counter and did activate it. Defendant told her, "Hurry up, hurry up, you don't want anyone to get hurt."

[1] Defendant was charged with one count of bank robbery, MCL 750.531, and one count of armed robbery, MCL 750.529. However, the jury found defendant guilty of bank robbery, MCL 750.531, and the necessarily included lesser offense of unarmed robbery, MCL 750.530.

Stewart gave defendant all the money in her till by placing it in an envelope and shoving it through her window. An audit of the drawer revealed that the amount given to defendant was $690. Defendant then stepped away from the window and then briskly walked out of the bank. Teri Papineau was the next customer in line at the bank and she saw defendant in line, at the counter, and leaving the window. Papineau walked up to the window that defendant had just left and Stewart told her not to approach or touch anything because she had just been robbed. Stewart stated that after defendant left the bank she yelled out that the bank had just been robbed. The bank called the police and management informed the customers present that the bank was locked down.

Both Stewart and Papineau gave police descriptions of defendant. Stewart testified that she never saw a gun or bomb. At trial, both Stewart and Papineau identified defendant as the person who robbed the bank. Police processed the scene and collected evidence. Using laser technology, police evidence techs were able to pull latent fingerprints off of the holdup note and deposit slip given to Stewart. At some point after the robbery, police entered the fingerprints into the Automated Fingerprint Identification System (AFIS) database.

Marlene Niedermeier is a Warren police officer. Niedermeier arrested defendant on May 6, 2006 on a charge completely irrelevant to the bank robbery. At that time, defendant was processed at the station. Defendant had a mug shot taken and he was fingerprinted on a computerized system. Those fingerprints were also entered into AFIS. Niedermeier testified that the AFIS system informed the latent print examiner that defendant's May 6, 2006 prints matched those collected off withdrawal slip from the September 28, 2000 bank robbery. Marcia McCleary, a Detroit police latent print examiner, testified that after the AFIS hit, her examination revealed that defendant's May 6, 2006 prints matched the withdrawal slip prints from the September 28, 2000 bank robbery.

Otha Craighead was a member of the Detroit police financial response team (formerly the armed robbery unit) and he learned of the fingerprint match sometime in May 2006. Craighhead testified that as a result of the match, on May 29, 2006, a felony warrant and felony complaint were issued for defendant on the September 28, 2000 bank robbery. Craighead went to the last known address the Detroit police department had for defendant, 19350 Greely in Detroit, but did not find defendant. Craighead then passed the case along to the police unit tasked with looking for persons on felony warrants. Craighead did not contact the Warren police to ask if they had a more recent address for defendant. Defendant was arrested for the September 28, 2000 bank robbery on November 29, 2008.

At trial, the trial court allowed the prosecution to present evidence that defendant committed robberies at a Bank One on Van Dyke in Detroit on October 11, 2000 and a Wendy's restaurant at 8 Mile and Mound in Warren on November 20, 2000. April Lee-Thomas testified that she was a teller at Bank One and was working on October 11, 2000 at approximately 2:40 p.m. and saw defendant lingering around for 15 to 20 minutes as he was filling out what appeared to be a withdrawal slip. Defendant then waited in line and approached her window and handed her a holdup note. The hold-up note read as follows: "Put hundreds and fifties in three envelopes. If not, I will start shooting people in the bank. Don't hit the alarm. Hurry up. Yes, I'm crazy." Lee-Thomas gave defendant money in an envelope and he left. Lee-Thomas identified defendant as the bank robber.

With regard to the Wendy's robbery on November 20, 2000, Warren police officer Debra Busch testified that she was dispatched to the Wendy's at approximately 9:20 p.m. after receiving a call that an armed robbery had occurred involving two men wearing masks with a handgun. When she and her partner arrived at the scene, they observed two people running away from the Wendy's that matched the description of the perpetrators. After pursuing him in the police car and then on foot, Busch testified they apprehended defendant and arrested him. Police did recover a handgun and cash after searching the area.

A jury convicted defendant of bank robbery, MCL 750.531, and unarmed robbery, MCL 750.530 for the September 28, 2000 bank robbery. Defendant now appeals as of right.

II

Defendant first argues that he was denied due process of law by the unjustified eight-year delay between the offense and defendant's arrest. Defendant raised this issue in a pretrial motion to dismiss that the trial court denied. "This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1999). The factual determinations of the trial court are reviewed for clear error, with the application of law to the facts reviewed de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

To a limited extent, procedural due process protects a defendant against delay between the commission of an offense and arrest or indictment for that offense. *United States v Lovasco*, 431 US 783, 798; 97 S Ct 2044, 52 L Ed 2d 752 (1977); *People v Cain*, 238 Mich App 95, 109; 605 NW2d 28 (1999). To merit reversal of a defendant's conviction, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a fair trial and the prosecution must have intended a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). To be substantial, the prejudice to the defendant must have meaningfully impaired his ability to defend against the charges such that the outcome of the proceedings was likely affected. *Id*. Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence. *Cain*, 238 Mich App at 109-110.

In this instance, defendant merely asserts "the eight year pre-arrest delay made it impossible for [defendant] to prepare a meaningful defense. Instead, the delay forced him to rely entirely on cross examination of the prosecution witnesses." Defendant claims that if arrested earlier, he would have been able to recall his whereabouts at the time and allowed him to consult with those people he was with at the time to establish an alibi defense. Defendant has failed to demonstrate that the loss of the testimony of himself or any other individuals resulted in any meaningful impairment to his defense. The fact that neither he nor potential witnesses could recall his whereabouts at the time the crimes occurred, standing alone, is insufficient to show defendant suffered actual and substantial prejudice from the prearrest delay, because defendant has failed to demonstrate any witnesses would have testified in a manner that would be helpful to his defense. The mere assertion that the witnesses might have provided exculpatory testimony is much too speculative to meet the threshold requirement of actual and substantial prejudice. *Cain*, 238 Mich App at 109-110. Further, defendant has presented no evidence that the prosecution intended a tactical advantage on this record. *Crear*, 242 Mich App at 166. Defendant has not shown error with regard to the prearrest delay.

III

Defendant next argues that he was denied his due process right to a fair trial by the court's admission of evidence of subsequent crimes when the highly prejudicial evidence was admitted without proper purpose. The trial court found the evidence that defendant committed robberies at a Bank One on Van Dyke in Detroit on October 11, 2000 and a Wendy's restaurant at 8 Mile and Mound in Warren on November 20, 2000 admissible under MRE 404(b) in a pretrial motion. The trial court found important the very short month and a half timeframe during which defendant is alleged to have committed all three robberies and admitted the evidence to show defendant's scheme, plan, or intent to commit robberies during this brief timeframe. Also, the trial court found that an issue of fact in this case was whether defendant was armed with a handgun at the time of the bank robbery and the MRE 404(b) evidence with regard to the Wendy's robbery was relevant on this question for the reason that a handgun was used in that robbery. The admissibility of bad acts evidence is within the trial court's discretion and this Court will reverse only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b)(1), the proponent of the evidence must show: (1) that the other acts evidence is for a proper purpose (other than to show character or propensity), (2) that the evidence is relevant to an issue of fact that is of consequence at trial, and (3) that, under MRE 403, the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Intent is identified as a proper purpose in MRE 404(b). Intent was at issue in this case. A plea of not guilty puts the prosecution to its proofs regarding all elements of the crime charged. *People v VanderVliet*, 444 Mich 52, 78; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Thus, the prosecutor had to prove intent and accordingly, the evidence was relevant to an issue of fact that was of consequence. The evidence was therefore admissible unless substantially more prejudicial than probative. *Sabin, supra*.

Here, with regard to the Bank One on Van Dyke in Detroit on October 11, 2000, that defendant intended to rob the bank in the charged crime, was made more probable by his participating in and having a similar intent in a markedly similar bank robbery within less than a month timeframe. With regard to the Wendy's robbery, while not a bank robbery, it was further evidence that defendant intended to rob establishments as part of a robbery crime spree during September and October 2000. Further, we agree with the trial court's assessment of the evidence that an issue of fact in this case was whether defendant was armed with a handgun at the time of the bank robbery and the MRE 404(b) evidence with regard to the Wendy's robbery was relevant on this question for the reason that a handgun was used in that robbery. On balance, it cannot be said that the trial court abused its discretion in determining that the evidence regarding the robberies at a Bank One on Van Dyke in Detroit on October 11, 2000 and at a Wendy's restaurant at 8 Mile and Mound in Warren on November 20, 2000 was more probative than prejudicial.

IV

Next, defendant argues that he was denied a fair trial and his right to a properly instructed jury by the trial court's instruction on flight/consciousness of guilt. Defendant contends that the instruction was inapplicable to the facts because there was no evidence that he was being chased or that he sped away in a fashion indicative of flight. Defendant objected to the trial court instructing the jury regarding flight arguing that there were no facts presented in the case regarding flight. The trial court denied defendant's objection stating as follows:

> Okay. That's an issue for argument and for the jury to determine as the prosecutor has had evidence of the need to search for the defendant, and maybe lack of detail on the fact that it was inability to find, rather than flight.
>
> I can't deny it if one of the attorneys wants it in, because it's a question of fact.

We review for an abuse of discretion the trial court's determination whether jury instructions apply to the facts of a case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Here, the trial court gave the following instruction to the jury:

> There has been some evidence that the defendant tried to run away, or hide after the alleged crime, or after he was accused of the crime, or when the police tried to arrest him. This evidence does not prove guilt. A person may run or may hide for innocent reasons, such as panic, mistake or fear. However a person may also hide because of consciousness of guilt. You may decide whether the evidence is true, and if true, whether it shows the defendant had a guilty state of mind.

The trial court's instructions mirrored the model jury instruction on flight, CJI2d 4.4, cited with approval in *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992). Fleeing the scene, leaving the jurisdiction, running from police, and escaping custody are all considered flight. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995), quoting 29 Am Jur 2d, Evidence, § 532. On this record, there is a question whether there was a sufficient evidentiary basis to justify the instruction. While there was testimony from Stewart and Papineau that after completing the robbery defendant stepped away from the window and briskly walked out of the bank, and that Craighead went to defendant's last known Detroit address to arrest defendant but did not find defendant, there was no testimony that defendant fled the scene, left the jurisdiction, ran from police, or otherwise escaped custody after the bank robbery. *Id*.

Even if we assume that this instruction was given in error on the basis that there was insufficient evidence of flight to establish consciousness of guilt, nevertheless, the giving of the instruction was not outcome determinative. *People v Lukity*, 460 Mich 484, 493-494; 569 NW2d 607 (1999). The jury heard the evidence and presumably understood the instruction which also indicated that the purported flight evidence did not necessarily prove guilt, and that persons could run or hide for innocent reasons. There is no reason to believe the jury placed too much weight on the evidence or the instruction, in light of the eyewitness testimony and fingerprint evidence. The trial court did not abuse its discretion. *Id*.

V

Finally, defendant argues that the double jeopardy clauses of the federal and Michigan constitutions were violated when he was convicted of unarmed robbery and bank robbery for the

same criminal act, and, as a result, the conviction and sentence for unarmed robbery must now be vacated. Defendant failed to preserve this issue for our review because he did not raise it in the trial court. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Unpreserved constitutional errors are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Nevertheless, a double jeopardy challenge generally presents a question of constitutional law that we review de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002).

The United States and Michigan Constitutions prohibit placing a defendant in jeopardy for the same offense twice. US Const, Am V; Const 1963, art 1, § 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The double jeopardy clause protects a defendant from multiple prosecutions as well as multiple punishments for the same offense. *Herron*, 464 Mich at 599. "The purpose of this prohibition, in a multiple-punishment context, is to prevent a court from imposing a greater sentence than that intended by the Legislature." *People v Baker*, ___ Mich App ___, ___; ___ NW2d ___ (2010), citing *Hawkins v Dep't of Corrections*, 219 Mich App 523, 526; 557 NW2d 138 (1996).

Our Supreme Court in *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), held that the "same elements" test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." Our Supreme Court explained,

> At the time of ratification [of Const 1963, art 1, § 15], we had defined the language "same offense" in the context of successive prosecutions by applying the federal "same elements" test. In interpreting "same offense" in the context of multiple punishments, federal courts first look to determine whether the legislature expressed a clear intention that multiple punishments be imposed. *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983); see also *Wayne Co. Prosecutor* [*v Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979)]. Where the Legislature does clearly intend to impose such multiple punishments, "'imposition of such sentences does not violate the Constitution,'" regardless of whether the offenses share the "same elements." *Id*. (citation and emphasis omitted). Where the Legislature has not clearly expressed its intention to authorize multiple punishments, federal courts apply the "same elements" test of *Blockburger* to determine whether multiple punishments are permitted. Accordingly, we conclude that the "same elements" test set forth in *Blockburger* best gives effect to the intentions of the ratifiers of our constitution. [*Id*. at 316.]

The *Blockburger* test focuses on the statutory elements of the offense, without regard to whether a substantial overlap exists in the proofs offered to establish the offense. *Id*. at 307; *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004). If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and there is no double jeopardy violation. *Smith*, 478 Mich at 307.

In this case, defendant was convicted of one count of bank robbery, MCL 750.531. MCL 750.531 defines bank robbery as,

> 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, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place, 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.

Defendant was also convicted of unarmed robbery, MCL 750.530(1). MCL 750.530(1) defines unarmed robbery as,

> A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

Defendant relies on *People v Campbell*, 165 Mich App 1; 418 NW2d 404 (1987). In *Campbell*, a jury convicted the defendant of bank robbery, MCL 750.531, and unarmed robbery, MCL 750.530, arising out of a robbery of a single bank teller, identical to the instant case. The *Campbell* panel applied the "social norms" test set forth in *People v Robideau*, 419 Mich 458, 484; 355 NW2d 592 (1984) and concluded "that the bank robbery statute and the armed and unarmed robbery statutes were all intended by the Legislature to prohibit conduct violative of the same societal norm." *Campbell*, 165 Mich at 6. The *Campbell* panel reasoned that bank robbery to the extent the offense did not address safecracking "was intended to protect people rather than funds or buildings." *Id*. The *Campbell* panel further opined that with respect to MCL 750.531, "[t]he language of the statute makes it clear that the prohibited conduct is the threatening or injuring of another in order to take money, not the actual stealing." *Id*. Thus, the Court held that the defendant was erroneously convicted of both bank robbery and unarmed robbery and vacated the defendant's conviction and sentence for the lesser offense of unarmed robbery. *Id*. at 7.

But defendant ignores the fact that in 2007 our Supreme Court specifically overruled the *Robideau* "social norms" test in favor of the *Blockburger* "same elements" test in *Smith*, 478 Mich 292. In the application of the *Blockburger* "same elements" test, it is of no consequence that the bank robbery statute prohibits multiple types of conduct including both (1) bank robbery including assaultive conduct against a person, and (2) bank robbery not including assaultive conduct against a person, or in other words, "safecracking" conduct only. This Court in *People v Ford*, 262 Mich App 443, 455; 687 NW2d 119 (2004), discussed the fact that no matter the conduct involved in a bank robbery, only one offense is created by the bank robbery statute:

> The plain language of the statute requires for its violation, by whatever means accomplished, the larcenous or felonious intent to access a bank, safe, vault, or other depository of money or valuables. In every case the statute does not require that property actually be stolen or that the offender be armed with a weapon. 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. This Court and our Supreme Court have held in other contexts that although a statute may be violated by multiple means, only one criminal offense is created.

Hence, the bank robbery statute does not require that property actually be stolen. *Id*. Furthermore, the bank robbery statute does not require an assault because it can be satisfied only by a perpetrator's "attempt to break, burn, blow up or otherwise injure or destroy any safe, vault or other depository of money, bonds or other valuables in any building or place . . . ." *Id*. This is referred to as the "safecracking" behavior analyzed in *Campbell*, 165 Mich at 6. Thus, the plain language of the bank robbery statute does not require either a felonious taking or an assault. MCL 750.531.

Again, the *Blockburger* same elements test focuses on the statutory elements of each offense, and if each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and there is no double jeopardy violation. *Smith*, 478 Mich at 307. The essential elements of unarmed robbery are: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). As we stated above, the plain language of the bank robbery statute is clear that it does not require either a felonious taking, or an assault, to be satisfied. Therefore, the unarmed robbery statute requires proof of elements that bank robbery does not. *Smith*, 478 Mich at 307.

With regard to the bank robbery statute, in all cases it requires that there be an intent to steal from a "building, bank, safe, vault or other depository of money, bonds, or other valuables" and it must be "in any building or place." MCL 750.531. In contrast, to establish a violation of the unarmed robbery statute, the felonious taking must be from a person or his presence and does not require proof of "any building or place," namely a bank or other depository institution being the target of the crime. Therefore, the bank robbery statute requires proof of an element that the unarmed robbery statute does not. *Smith*, 478 Mich at 307.

For these reasons, the *Blockburger* same elements test is satisfied because defendant's convictions are premised on the establishment of different sets of elements. See *Smith*, 478 Mich at 307. Defendant has not shown error.

VI

Because defendant was not denied due process of law with regard to the delay between the offense and his arrest or the admission of the MRE 404(b) evidence at trial, defendant was not denied his right to a fair trial with regard to the jury instructions presented, and did not suffer a double jeopardy violation, we affirm.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio