STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2012
v	No. 303332 Wayne Circuit Court
ERIC CAMMON, Defendant-Appellant.	LC No. 10-013129-FC

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 15 to 25 years for the assault with intent to rob conviction, 18 to 30 years for the assault with intent to commit murder conviction, one to five years for the felon-in-possession conviction, and one to four years for the felonious assault conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals of right and for the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

Defendant's convictions arise from an assault of Quincy Dandridge in the lobby of an apartment building. As Dandridge was sitting on the stairs and talking on his cell phone, defendant put a gun to the back of Dandridge's head and directed Dandridge to "Give it up." Defendant then hit Dandridge in the face with the barrel of the gun and again directed him to "Give it up." In an effort to distract defendant, Dandridge threw his cell phone and two bags of marijuana on the ground near defendant. According to Dandridge, defendant stated, "Just for that," and then shot Dandridge in the face. Dandridge saw defendant go toward the items that Dandridge had thrown on the ground, but Dandridge fled the scene and did not know if defendant actually took the items. At trial, defense challenged Dandridge's identification of defendant as the perpetrator.

Defendant's sole claim on appeal is that his multiple convictions and sentences for assault with intent to rob while armed and felonious assault violate the double jeopardy protections against multiple punishments for the same offense. Defendant contends that due to the continuing sequence of events and that lack of sufficient time between the two acts, the

Legislature did not intend for defendant to be convicted and sentenced twice for the same actions. Defendant did not raise this issue in the trial court, leaving the issue unpreserved. We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

The United States and Michigan Constitutions both protect against double jeopardy, which includes protection against multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15, which states: "No person shall be subject for the same offense to be twice put in jeopardy." The provision 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." *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008), quoting *People v Nutt*, 469 Mich 565, 574; 677 NW2d 677 (2004). The first two protections comprise the "successive prosecutions" strand of double jeopardy, 469 Mich at 575, while the third protection comprises the "multiple punishments" strand. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). The validity of multiple punishments is generally determined under the "same-elements test,"[1] which requires a reviewing court to examine multiple offenses to determine "whether each provision requires proof of a fact which the other does not." *Smith*, 478 Mich at 305. (Citation omitted). If the Legislature has clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless of whether the offenses have the same elements, but if the Legislature has not clearly expressed its intent, multiple offenses may be punished if each offense has an element that the other does not. *Id.* at 316.

The felonious assault statute, MCL 750.82, and the statute proscribing assault with intent to rob while armed, MCL 750.89, do not contain any language indicating that multiple punishments either were or were not intended. Therefore, it is proper to consider the elements of the offenses. *Ream*, 481 Mich at 240.

A comparison of the elements of felonious assault[2] and assault with intent to rob while armed[3] reveals that each offense has an element that the other does not. Felonious assault

[1] In *Smith* and *Ream*, our Supreme Court made clear that claims of double jeopardy are generally resolved by this Court utilizing the "same elements test," first set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). In *Ream*, our Supreme Court stated: " . . . in adopting Const 1963, art 1, § 15, the ratifiers of our constitution intended our double-jeopardy provision to be construed consistently with the interpretation given to the Fifth Amendment by federal courts at the time of ratification." *Ream*, 481 Mich at 239.

[2] The statute proscribing felonious assault, MCL 750.82, provides that "a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony[.]" "The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable

requires the use of an actual dangerous weapon, i.e., a gun, knife, iron bar, club, brass knuckles, or some other instrument used in a manner intended to inflict injury or to place the victim in reasonable apprehension of an immediate battery. In contrast, assault with intent to rob while armed requires a specific intent to rob or steal, an element not necessary to convict a person of felonious assault, but does not require the use of an actual dangerous weapon—the use of a feigned weapon is sufficient. Hence, each of the offenses requires proof of a fact that the other does not, notwithstanding a substantial overlap in the proof offered to establish the crimes. *Ream*, 481 Mich at 227-228. Because each of the offenses for which defendant was convicted contains an element that the other does not, they are not the "same offense" and accordingly, defendant may be punished for both.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher

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apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

[3] The statute proscribing assault with intent to rob and steal, MCL 750.89, provides that "[a]ny person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony[.]" "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). "Because this is a specific-intent crime, there must be evidence that the defendant intended to rob or steal." *Id.* (citation omitted).