STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON ROSE,

Defendant-Appellant.

UNPUBLISHED
September 15, 1998

No. 200794
St. Clair County
LC No. 96-001408 FH

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of receiving and concealing stolen firearms or ammunition, MCL 750.535b(2); MSA 28.803(2), accessory after the fact, MCL 750.505; MSA 28.773, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent prison terms of three to ten years and three to five years, respectively, for his convictions of receiving and concealing stolen firearms and accessory after the fact, and to a prison term of two years, consecutive to the others, for his conviction of felony-firearm. We affirm.

Defendant first argues that the trial court erred when it denied defendant's motion to suppress the handgun found in his bedroom, asserting that there was no warrant nor any valid exception to a warrantless search of his bedroom. We review a trial court's decision regarding the validity of consent to a search for clear error. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997). Our review of a trial court's decision on a motion to suppress evidence is de novo. *Id*.

Both the United States Constitution and the Michigan Constitution protect persons against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Searches conducted without the authority of a warrant are always unreasonable unless their exists both probable cause and an exigent circumstance that would establish an exception to the general warrant requirement. *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989). At a suppression hearing, the prosecution carries the burden of establishing that the search and seizure fell within a recognized exception to the warrant requirement. *Id*. Neither a warrant nor probable cause is required where the police obtain

consent to a search. *People v Catania*, 427 Mich 447, 453; 398 NW2d 343 (1986). However, when challenged, the prosecution carries the burden to establish that a person authorized to give consent did so unequivocally and specifically, and freely and intelligently. *Malone*, *supra* at 355-356. A decision respecting whether an officer had consent to enter and search is judged against an objective standard. *Goforth*, *supra* at 312. That is, would the facts available to the officer have warranted a reasonable person in believing that the consenting person had authority over the premises. *Id*.

In the present case, Robert Bartley, the apparent possessor of the residence, had given officers consent to enter and search the house in which the gun was discovered. He told the officers that they could search everywhere except defendant's bedroom. The police, at that point, then sought the consent of defendant. According to the police, defendant told them that if they wanted to search, they would have to talk to Bartley, and based on this statement, the police then went back to Bartley, who then gave them permission to search the entire house. We conclude, based on the testimony at the suppression hearing and at trial, that the trial court did not clearly err when it found that the police officers reasonably believed that they had obtained consent to search defendant's bedroom based on the apparent authority of Bartley to consent.

Defendant next argues that the trial court abused its discretion when it admitted a photograph of the crime scene of the armed robbery. Defendant maintains that the photograph did not have any relation to the charges against him and was unduly gruesome and prejudicial. We review a trial court's decision to admit photographic evidence for abuse of discretion. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). If a photograph is substantially necessary or instructive to show material facts and conditions, it is admissible. *Id*. Further, a photograph is not inadmissible merely because it is gruesome or shocking. *Id*. Rather, a trial court should preclude the admission of a photograph if it could lead the jury to abdicate its truth-finding function and convict on passion alone. *Id*.

In the present case, whether the gun was used in the robbery and whether there was an armed robbery at all were material to defendant's charge of accessory after the fact. The photograph demonstrated where projectiles from the nine millimeter gun had been found at the crime scene. The prosecution also presented evidence that the projectiles recovered matched the gun found in defendant's bedroom. The photograph, therefore, was marginally relevant in that it made it more probable that the weapon involved in the armed robbery and the one found in defendant's bedroom were the same. Moreover, even if we were to conclude that the trial court abused its discretion in admitting the photograph that depicted a pool of blood in the background and bloody footsteps, we nevertheless conclude that it was not so gruesome or shocking that it led the jury to abdicate its truth-finding function and convict on passion alone.

Defendant next argues that the trial court erred when it denied his motion to quash the felony-firearm charge on double jeopardy grounds. He maintains that because his convictions for accessory after the fact and felony-firearm were based on the same act, holding the gun, the two convictions resulted in multiple punishments for one offense. We disagree. We review double jeopardy issues de novo. *People v Price*, 214 Mich App 538, 542; 543 NW2d 49 (1995).

The Double Jeopardy Clauses, US Const, Amend V; Mich Const, art 1, §15, protect a defendant against, inter alia, multiple punishments for the same offense. *People v Robideau*, 419 Mich 458, 468; 355 NW2d 592 (1984). Recently, in *People v Mitchell*, 456 Mich 693, 695-696; 575 NW2d 283 (1998), our Supreme Court addressed the double jeopardy implications involved with application of the felony-firearm statute.

> Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the Courts, not the Legislature. *Brown v Ohio*, 432 US 161; 97 S Ct 1221; 53 L Ed 2d 187 (1977). Where "a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the 'same' conduct under *Blockburger v United States*, 284 US 299, 304, 52 S Ct 180; 76 L Ed 306 (1932), a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Missouri v Hunter*, 459 US 359, 368; 103 S Ct 673; 74 L Ed 2d 535 (1983). Where the issue is one of multiple punishment rather than successive trials, the double jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishment for the same offense. If so, there is no double jeopardy violation. *People v Robideau*, 419 Mich 458, 469; 355 NW2d 592 (1984). 1 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 102, p 285.

In *Mitchell*, our Supreme Court applied these principles and construed the felony-firearm statute, MCL 750.227b; MSA 28.424(2), as providing for an additional felony charge and sentence whenever a person possessing a firearm committed any felony other than those explicitly enumerated in the felony-firearm statute. *Id*., 698. The felony-firearm statute specifically excludes violations of four felonies -- § 223 (unlawful sale of a firearm), § 227 (carrying a concealed weapon), § 227a (unlawful possession of a firearm by licensee), and § 230 (alteration of identifying marks on a firearm). According to our Supreme Court, this list of exceptions is exclusive. *Id*. Therefore, because the offense of accessory after the fact is not within the list of excepted offenses, the trial court did not err in denying defendant's motion to quash the felony-firearm charge. See also *People v Beard*, 171 Mich App 538; 431 NW2d 232 (1988).

Defendant next argues that the trial court erred when it instructed the jury on the offense of receiving and concealing stolen firearms. However, defendant failed to raise this specific objection to the jury instructions in question and thus failed to preserve this issue for review. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). Because we find no error, let alone plain error, review of this issue has been forfeited. *People v Grant*, 445 Mich. 535, 551-552, 520 NW2d 123 (1994).

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White