STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHYLON LOUIS DILLARD,

Defendant-Appellant.

UNPUBLISHED
April 30, 1999

No. 204477
Ingham Circuit Court
LC No. 96-071184 FC

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424(1). Defendant was sentenced to 60 to 120 months in prison for the assault conviction, twenty-four months in prison for the felony-firearm conviction, and thirty to sixty months in prison for the CCW conviction. He appeals as of right. We affirm.

Defendant first argues that his convictions of assault with intent to do great bodily harm less than murder and CCW violated his constitutional rights by placing him in double jeopardy. We disagree. Whether a trial court correctly determined a double jeopardy issue is a question of law, which we review de novo. *People v White,* 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

The Double Jeopardy Clauses of the United States and Michigan Constitutions protect against multiple prosecutions and multiple punishments for the "same offense." US Const, Am V; Const 1963, art 1, sec 15; *People v Denio,* 454 Mich 691, 706; 564 NW2d 13 (1997). Here, defendant asserts that his convictions for assault with intent to do great bodily harm less than murder and CCW violate the double jeopardy clauses' guarantee against multiple punishments for the same offense. Whether two offenses constitute the "same offense" for double jeopardy purposes depends on the intent of the Legislature. *Denio, supra* at 706.

When analyzing the Double Jeopardy Clause of the United States Constitution, the test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) is applied.

According to the *Blockburger* test, two separate offenses exist if each offense requires proof of a fact that the other does not. *Blockburger, supra* at 304; *Denio, supra* at 707. The elements of assault with intent to do great bodily harm less than murder are 1) an attempt or offer with force or violence to do corporal harm to another, i.e. an assault, and 2) the intent to do great bodily harm less than murder. MCL 750.84; MSA 28.279; *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified 457 Mich 883 (1998). The CCW statute prohibits a person from knowingly carrying a dangerous weapon either concealed on his person or in any vehicle operated or occupied by the person. MCL 750.227; MSA 28.424(1). Assault with intent to do great bodily harm less than murder requires an assault, but CCW does not. Furthermore, CCW requires an offender to use a dangerous weapon, while assault with intent to do great bodily harm less than murder does not require the use of a weapon. Thus, because the offenses of assault with intent to do great bodily harm less than murder and CCW each contain at least one element that the other offense does not, the two offenses do not constitute the "same offense" for the purposes of the federal Double Jeopardy Clause. *Blockburger, supra* at 304; *Denio, supra* at 707. Therefore, defendant's convictions for assault with intent to do great bodily harm less than murder and CCW did not violate the Double Jeopardy Clause of the federal constitution.

The Michigan Supreme Court has rejected the use of the *Blockburger* test when analyzing the Double Jeopardy Clause of the Michigan Constitution. *Denio, supra* at 708. Instead, traditional means, such as the subject, language, and history of the statutes, are used to determine the intent of the Legislature. *Id.* Courts should consider whether each statute prohibits conduct violative of a social norm that is different from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors indicative of legislative intent. *Id.*; *People v Rivera*, 216 Mich App 648, 650-651; 550 NW2d 593 (1996).

As an assault statute, the purpose of the statute proscribing assault with intent to do great bodily harm less than murder is to punish crimes injurious to other people, regardless of whether a weapon is used. *People v Harrington*, 194 Mich App 424, 429; 487 NW2d 479 (1992). The purpose of the CCW statute is "to discourage quarreling persons from suddenly drawing and using concealed weapons." *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979). While the general intent of both statutes is to protect against injuries, the statutes are aimed at preventing different conduct and different types of harm. The assault statute focuses on protecting people from injury regardless of whether a weapon is used while the CCW statute focuses on preventing the unexpected use of a weapon. Also, as explained above, the elements of the two offenses are different in that the assault statute requires the commission of an assault, with or without a weapon, while CCW only requires the carrying of a concealed weapon. Furthermore, the statutes are neither hierarchical nor cumulative. Therefore, we conclude that defendant's convictions of assault with intent to do great bodily harm less than murder and CCW did not violate the Double Jeopardy Clause of the Michigan Constitution.

Defendant next challenges the jury selection process, in which the court removed three jurors for cause at the same time, claiming that this procedure violated his due process rights. However, defendant failed to object to the method of jury selection at trial. In fact, defense counsel apparently

assented to the dismissal and replacement of the three jurors during a bench conference, and later expressed his satisfaction with the jury. Thus, defendant waived this issue on appeal. *People v Schmitz*, 231 Mich App 521, 526; 586 NW2d 766 (1998).

Defendant next argues that the trial court erred by permitting the jury to hear evidence that he fled the scene of the shooting. We disagree. Defendant failed to preserve this issue for review by timely objecting to the admission of the evidence at trial. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Absent an objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). The evidence of defendant's flight from the scene of the shooting was not a plain error affecting substantial rights because "[i]t is well established in Michigan law that evidence of flight is admissible." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant next argues that the trial court erred by failing to instruct the jury on the lesser cognate offense of felonious assault, MCL 750.82; MSA 28.277, and by failing to specifically instruct the jurors that their verdict had to be unanimous with respect to any lesser offenses. However, defendant did not request such instructions or object to the instructions as they were given. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). Manifest injustice occurs when an erroneous or omitted instruction pertains to a basic or controlling issue in the case. *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

Here, defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278. Felonious assault is a cognate lesser included offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). Generally, a trial court is required to instruct the jury regarding a cognate lesser included offense if 1) the principal offense and the lesser offense are of the same class or category, and 2) the evidence adduced at trial would support a conviction of the lesser offense. *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996). However, where a defendant does not request a lesser included offense instruction, the trial court is not required to give the instruction sua sponte unless the defendant is charged with first-degree murder. *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975); *People v Casey*, 120 Mich App 690, 697; 327 NW2d 337 (1982). Thus, in the instant case, the trial court did not err in failing to sua sponte instruct the jury regarding felonious assault.

Furthermore, we find no merit in defendant's argument that the trial court failed to instruct the jury that its verdict must be unanimous with respect to all included offenses where the court properly instructed the jury on several occasions that its verdict must be unanimous.

Finally, defendant argues that he was denied a speedy trial as guaranteed by the Michigan and United States Constitutions. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MSA 28.1024. We disagree. Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A trial court's factual findings are reviewed under the clearly erroneous standard. *Id.* Questions of law are reviewed de novo. *Id.*

To determine if defendant was denied his right to a speedy trial, the following factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Barker v Wingo,* 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *Gilmore, supra* at 459. A delay of at least six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v O'Quinn,* 185 Mich App 40, 47; 460 NW2d 264 (1990). A delay that is under eighteen months requires a defendant to prove that he suffered prejudice. *People v Daniel,* 207 Mich App 47, 51; 523 NW2d 830 (1994).

In his motion for a new trial, defendant's appellate counsel asserted that defendant had been arrested on September 9, 1996, according to a docket entry in the lower court file. However, the September 9, 1996 docket entry indicates the date on which the warrant for defendant's arrest was issued. The record more accurately indicates that defendant was arrested on or about November 1, 1996, slightly more than six months before his May 9, 1997 trial.[1] Because the delay was less than eighteen months, defendant has the burden of demonstrating that he was prejudiced by the delay. *Daniel, supra* at 51. However, defendant has not suggested how he was prejudiced by the brief delay. Because defendant has demonstrated no prejudice as a result of the delay, we conclude that he was not denied his right to a speedy trial. *Id.*

Furthermore, defendant's argument that the 180 day rule, MCL 780.131(1); MSA 28.969(1)(1), was violated is without merit. The 180 day rule applies to persons incarcerated in a state penal institution, but not to persons detained in a county jail. *People v Wyngaard,* 151 Mich App 107, 112; 390 NW2d 694 (1986). Because defendant was detained in the Ingham County Jail prior to trial, the 180 day rule was inapplicable. *Id.*

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

[1] Defendant's motion for release on his own recognizance indicated that he was initially incarcerated on the instant offenses on November 1, 1996. On November 4, 1996, the court scheduled defendant's preliminary examination for November 15, 1996.