STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON O. SHORTER,

Defendant-Appellant.

UNPUBLISHED
April 25, 2000

No. 212134
Wayne Circuit Court
Criminal Division
LC No. 98-000322

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.549; MSA 28.797, felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of five to ten years for the armed robbery conviction and two to four years for the felonious assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We vacate defendant's conviction for felonious assault and affirm in all other respects.

Defendant and two other men walked into a store owned by the victim, Hoson Smith. Defendant held a gun to Smith's head and repeatedly demanded that she give him the money inside her cash register. The victim told defendant and his partners that she kept the money outside the register and pointed out its location. One of defendant's partners took the money and put it in his pocket. Although the victim's son was also present, the jury convicted defendant of armed robbery and felonious assault only as those charges related to Hoson Smith.

Defendant first argues that his dual convictions for armed robbery and felonious assault violate his state and federal rights against multiple punishment for the same criminal act. We agree.

To preserve this issue for appeal, defendant was required to raise it before the trial court. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because he failed to do so, this issue is unpreserved. We review unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). In this

situation, we will reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 774.

The following principles are applicable in analyzing the protection afforded by the Double Jeopardy Clause of the United States Constitution:

> "For over half a century we have determined whether a defendant has been punished twice for the 'same offense' by applying the rule set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). If 'the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.' *Ibid.* In subsequent applications of the test, we have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other." [*People v Denio*, 454 Mich 691, 707; 564 NW2d 13 (1997), quoting *Rutledge v United States*, 517 US 292, 297; 116 S Ct 1241; 134 L Ed 2d 419 (1996).]

If the *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), test is satisfied, then it is presumed the Legislature did not intend to punish the defendant under both statutes. *People v Denio*, 454 Mich 691; 564 NW2d 13 (1997). However, this presumption may be rebutted if there is a clear indication that the Legislature intended multiple punishment under both statutes. *Id.*

Applying the foregoing principles, we conclude, as have the parties,[1] that punishment under both MCL 750.529; MSA 28.797, for the armed robbery of Hoson Smith, and MCL 750.82; MSA 28.277, for the felonious assault of Hoson Smith arising out of the same episode, violates the federal double jeopardy protection against multiple punishments for the same offense, because felonious assault is a necessarily included lesser offense of armed robbery. Necessarily included lesser offenses encompass situations in which it is impossible to commit the greater offense without first having committed the latter. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). The elements of armed robbery are (1) an assault and (2) a felonious taking of property from the victim's person or presence (3) while the defendant is armed with a dangerous weapon described in the statute. *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). 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 apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "[T]he gravamen of the offense [of armed robbery] is the armed assault on a person when combined with the taking of money or property." *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983). Clearly, a defendant may not commit an armed robbery without necessarily committing a felonious assault. See *People v Yarbrough*, 107 Mich App 332, 336; 309 NW2d 602 (1981).[2] Therefore, under the *Blockburger* test, punishment for both armed robbery and felonious assault violate the federal double jeopardy protection against multiple punishments for the same offense, because felonious assault is a necessarily included lesser offense of armed robbery. See *Denio, supra*.

The Michigan Supreme Court has rejected the *Blockburger* test in analyzing the Double Jeopardy Clause of the Michigan Constitution. *Denio*, *supra* at 708. Instead, Michigan uses traditional means to determine the Legislature's intent, such as the subject, language, and history of the statutes in question. *Id.* As the Supreme Court has explained:

> "Statutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments. A court must identify the type of harm the Legislature intended to prevent. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments. For example, the crimes of larceny over $100, MCL 750.356; MSA 28.588, and larceny in a building, MCL 750.360; MSA 28.592, although having separate elements, are aimed at conduct too similar to conclude that multiple punishment was intended.
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> "A further source of legislative intent can be found in the amount of punishment expressly authorized by the Legislature. Our criminal statutes often build upon one another. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes. The Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions.
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> "We do not intend these principles to be an exclusive list. Whatever sources of legislative intent exist should be considered. If no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended." [*Denio*, *supra* at 708-709 (footnote omitted), quoting *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984).]

Turning now to the statutes at issue, it is clear that multiple punishments under both statutes for the same criminal act violate the state constitutional double jeopardy guarantee. First, the armed robbery statute and the felonious assault statute both prohibit inflicting violence on persons and work to safeguard personal integrity. See *Wakeford*, *supra* ("the primary purpose of the [armed robbery] statute is the protection of persons; the protection of property afforded by the statute is not significantly greater than that afforded by the statute prohibiting larceny from the person of another"); *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979) (the purpose of the felonious assault statute "is to discourage assaulting persons from inflicting more serious injuries upon one another"). The similarity of these statutes and the conduct at which they are aimed suggest that the Legislature did not intend multiple punishments under each for the same behavior. See *Denio*, *supra* at 708.

Moreover, it is clear that the armed robbery statute builds on the felonious assault statute and provides additional punishment for the aggravating circumstance present in armed robbery, thus indicating that the Legislature did not envision multiple punishments under the statutes. As discussed, armed robbery contains the elements of felonious assault, coupled with an aggravating circumstance,

i.e., the taking of property. In light of the additional element, armed robbery is punishable by imprisonment for life or for any term of years, MCL 750.529; MSA 28.797, whereas felonious assault is punishable by not more than four years' imprisonment and/or a fine of not more than $2,000, MCL 750.503; MSA 28.771, we may conclude that the Legislature started with felonious assault, decided that the aggravating conduct at play in armed robbery deserved additional punishment, and imposed the additional punishment accordingly, without intending to impose multiple punishments for dual convictions. See *Denio*, *supra*. The following language from the armed robbery statute supports this conclusion:

> If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. [MCL 750.529; MSA 28.797.]

In light of these considerations, we conclude that defendant's multiple punishments for armed robbery and felonious assault arising from the armed robbery of Hoson Smith violate both the federal and state constitutional guarantees against double jeopardy. Accordingly, we vacate defendant's conviction for felonious assault. See *People v Harding*, 443 Mich 693, 714 (Brickley, J.), 735 (Cavanagh, C.J.); 506 NW2d 482 (1993).

Next, defendant argues that he was denied a fair trial because the jury was prevented from reviewing transcripts of the testimony of two witnesses. However, defendant may not claim that the trial court's decision to deny the jury's request to review the testimony was erroneous because defendant failed to object at trial and, in fact, agreed to the denial. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Next, defendant argues that he was denied a fair trial because the jury foreperson violated the trial court's instructions and revealed that the jurors were split eleven to one in favor of conviction. We disagree. Because defendant failed to take any action in the trial court to preserve this issue, we will review it only for plain error that affected substantial rights. *Carines*, *supra*.

A trial court may not inquire into or attempt to discover the numerical division of the jury members because

> [s]uch an inquiry . . . carries the improper suggestion that the numerical division at the preliminary stage of deliberation is relevant to what the final verdict will, or should, be. By establishing one viewpoint as the "majority view", the inquiry "has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority". It places the trial court's imprimatur upon what was but a tentative result. [*People v Lawson*, 56 Mich App 100, 105; 223 NW2d 716 (1974).]

Under the circumstances of this case, we conclude that the foreperson's statement and the trial court's reaction did not constitute error requiring reversal. The trial court neither solicited the information regarding the numerical split nor affixed any special significance to the jury's state of disagreement, unlike the trial court in *People v Wilson*, 390 Mich 689; 213 NW2d 193 (1973).[3]

Upon learning of the split, the trial court chided the foreperson for disregarding its instructions and stated the jury had not deliberated for enough time considering the complexity of the case. Nothing in the trial court's statements could have led the jury to believe that the trial court had placed its imprimatur on the majority's opinion. Indeed, by instructing the jury that it had not spent enough time deliberating the case, the trial court implied that the majority had reached its decision prematurely and, in essence, directed all twelve jurors to approach the facts and their conclusions anew. The trial court's reaction to the foreperson's unsolicited revelation of the numerical split was neither erroneous nor prejudicial.

Finally, defendant argues that the trial court improperly instructed the jury that it could not make conclusions or inferences based on the evidence. Only the most tortured reading of the challenged instruction would admit to such an interpretation. Instead, the trial court merely reminded the jurors of the uncontroversial point that they were to base their decisions of guilt or innocence on the evidence presented at trial, and not on their personal opinions. See CJI2d 2.5. In any event, the trial court's statements reveal that defendant's attorney expressly agreed to the instruction. Defendant may not assign error to a matter his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant's convictions and sentences for armed robbery and felony-firearm are affirmed. Defendant's conviction for felonious assault is vacated.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin

[1] In his brief, the prosecutor confesses error in regard to this issue: "Plaintiff agrees that a conviction and sentence on counts I and II constitutes a violation of defendant's right against double jeopardy."

[2] In *Yarbrough*, *supra*, a panel of this Court held specifically that multiple punishments for armed robbery and felonious assault arising from a continuing assault during an armed robbery violated double jeopardy. *Id.* at 335-336. *Yarbrough* was decided under *People v Jankowski*, 408 Mich 79; 289 NW2d 674 (1980), a case that applied the *Blockburger* test in the realm of the state constitutional double jeopardy protection. See *Robideau*, *supra* at 482.

[3] In *Wilson*, *supra*, the Supreme Court reversed a criminal conviction where the jury foreperson told the trial court that the jury was unable to reach a unanimous verdict after deliberating for ninety minutes and the trial court asked the foreperson how the jury was divided. *Id.* at 690. When the foreperson informed the trial court that the split stood at eleven to one, the trial court replied, "Well, that is not very far from a verdict." *Id.* at 690-691. In reversing the conviction, the Court stated:

> It cannot be supposed that the jury is closer to agreement – in point of time – when it stands at 11 to 1 than when it stands at 8 to 4 or 6 to 6.

In fact, the disposition of a single juror to stand against all of his fellows indicates a stronger conviction upon his part than if the division were more equal. Experience tells us that the holdout juror, standing alone, is often more difficult to convince, and indeed may never be persuaded to agree with the majority.

It follows that the court's characterization of the jury as being "not very far from a verdict", was impermissibly coercive with respect to the single reluctant juror. At the same time, the comment would have had the unhappy effect of confirming the 11 majority jurors in their tentative agreement.

Whenever the question of numerical division of a jury is asked from the bench, in the context of an inquiry into the progress of deliberation, it carries the improper suggestion that the state of numerical division reflects the stage of the deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority. [*Id.* at 691-692.]