STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 1, 2011
v	No. 294140 Wayne Circuit Court
ROBERT LEE MCGHEE, Defendant-Appellant.	LC No. 08-009654-FH

Before: SHAPIRO, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant's convictions arise out of a robbery of a gas station that was captured on the gas station's video surveillance. A jury convicted defendant of armed robbery, MCL 750.529, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced, as a third habitual offender, MCL 769.11, to 18 to 50 years' imprisonment for his armed robbery conviction, two to ten years' imprisonment for his felon in possession of a firearm conviction, and ten years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

I. JURY INSTRUCTIONS

Defendant argues that the trial court erred in refusing to instruct the jury on the necessarily included offense of unarmed robbery because it was supported by a rational view of the evidence. We disagree. A trial court's decision whether to instruct the jury on a necessarily included lesser offense is reviewed de novo. *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005).

[1] Defendant was also charged with possession of marijuana, MCL 333.7403(2)(d). This charge was dismissed following the prosecutor's proofs because no evidence was presented that the substance was marijuana.

An instruction on a necessarily included offense should be given if a conviction for the greater offense would require the jury to find a disputed factual element which is not part of the lesser included offense and a rational view of the evidence would support the instruction. MCL 768.32(1); *Walls*, 265 Mich App at 644. Unarmed robbery is a necessarily included lesser offense of armed robbery, and the element distinguishing the offenses is the use of a weapon or an article used as a weapon. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). The elements of unarmed robbery are: (1) a felonious taking of property from another; (2) by force, violence, assault or putting in fear; (3) while unarmed. MCL 750.530; *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, and (3) while the defendant is armed with a weapon. MCL 750.529; *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). To constitute armed robbery, the robber must be armed with an article, which is in fact a dangerous weapon, or some article that is harmless, but is used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon. *People v Banks*, 454 Mich 469, 473; 563 NW2d 200 (1997). A subjective belief by the victim that a weapon exists is insufficient to satisfy the armed robbery statute. *Id.* at 472. However, MCL 750.529 was amended, effective June 3, 2004, to allow oral assertions regarding possession of a gun to be sufficient to prove the "armed" element of armed robbery. See *People v Chambers*, 277 Mich App 1, 8-9; 742 NW2d 610(2007).

In this case, defendant asked the trial court to instruct the jury on the charge of unarmed robbery on the basis that there was no evidence on the video of the robbery that defendant was holding a gun during the robbery. The trial court responded:

> You know, I was wondering why you were doing that, but that doesn't mean that there wasn't one there because he didn't see one in the tape.
>
> Nope. Not going to give unarmed robbery unless the People want me to. I cannot see any reason for doing so because she said there was a gun.

Defendant contends that a rational view of the evidence would support a finding that defendant committed unarmed robbery instead of armed robbery. Defendant argues that the testimony of Crystal Comini, the cashier at the gas station, that defendant was armed while he robbed the gas station was contradicted by the video tape of the robbery that he was not armed during the robbery and by the police officers testimony that the gun recovered from defendant's car was blue instead of silver. We disagree.

We conclude that a rational view of the evidence did not support an instruction on unarmed robbery. Comini testified that she saw defendant pointing a silver revolver at her when he told her to give him the money in the register. The video showed defendant taking something out of his right pocket and holding it in his right hand by his right side. Just because the gun was not clearly visible in the video does not mean that defendant was unarmed. His actions indicated that, at the very least, he was holding something in a manner to induce a reasonable belief that he was holding the gun. Moreover, police officers discovered a revolver in the blue van registered to defendant. Although the police officers described the color of the revolver as blue and not silver, the discovery of the revolver in defendant's vehicle provides further support for Comini's testimony since defendant at least had access to a revolver that he could have used to commit the

robbery. Taken together, there was significant evidence that defendant was armed for purposes of armed robbery. As a result, the trial court did not err in refusing to instruct the jury regarding unarmed robbery.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that he was denied the effective assistance of counsel because of a conflict of interest that arose when the trial court mandated that a lawyer from the Wayne County Public Defenders' Office represent defendant at trial after another lawyer from the same office withdrew because of a difference of opinion with defendant. We disagree. The determination of whether a defendant has been deprived of the effective assistance of counsel is a mixed question of fact and law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). We review the trial court's factual findings for clear error and review its constitutional determinations de novo. *Dendel*, 481 Mich at 124. As defendant did not establish a testimonial record regarding the ineffective assistance of counsel claim, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The Sixth Amendment right to counsel attaches at "the initiation of adversary judicial criminal proceedings." *Moore v Illinois*, 434 US 220, 231; 98 S Ct 458; 54 L Ed 2d 424 (1977). Once the Sixth Amendment right to counsel attaches, defendant has a right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 US at 688; *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A lawyer acting with a conflict of interest denies a defendant the effective assistance of counsel by breaching "the duty of loyalty, perhaps the most basic of counsel's duties." *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998), citing *Strickland*, 466 US at 692. However, to establish that a lawyer's conflict of interest has violated a defendant's right to the effective assistance of counsel and presume prejudice, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Smith*, 456 Mich at 557.

Defendant argues that defense counsel acted with a conflict of interest in this case because the trial court permitted a lawyer from defense counsel's office to withdraw and then required a lawyer from the same office to represent defendant. The Michigan Rules of Professional Conduct indicate a number of instances where a lawyer is prohibited from representing a client because a conflict of interest exists. A lawyer may not represent a client "if the representation of that client will be directly adverse to another client[.]" MCPC 1.7(a). "A lawyer who has formerly represented a client in a matter may not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." MCPC 1.9(a). A lawyer who has formerly represented a client in a matter or whose present or

former firm has formerly represented a client in a matter may not later use information relating to the representation to the disadvantage of the former client unless required or permitted by rule or the information has become generally known. MRPC 1.9(c)(1). A lawyer serving as a public officer or employee may not participate in any matter in which he participated personally and substantially while in private practice or nongovernmental employment. MRPC 1.11(c)(1). Under a Rule of Professional Conduct, while lawyers are associated in a firm, none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so under MRPC 1.7, 1.8(c), 1.9(a), or 2.2. MRPC 1.10.

In this case, defendant's prior counsel, Richard Cummins withdrew as an attorney for defendant because of a disagreement between Cummins and defendant. From the hearing on January 9, 2009, it appears the defendant wanted the case to go to trial, but Cummins did not want to take it to trial. The trial court allowed Cummins to withdraw, but only if the case was reassigned to someone else in the Wayne County Public Defenders' Office. The case was reassigned to David Lankford of the Wayne County Public Defenders' Office.

We conclude that there was no conflict of interest resulting from the withdrawal of Cummins and the appointment of Lankford, both from the Wayne County Public Defender's Office. Defendant has not shown that Lankford's representation of him was materially adverse to him or that Lankford used any information from Cummins to disadvantage Lankford. Defendant has further not demonstrated that Lankford worked on a substantially similar matter while a private attorney. Finally, defendant has not proven that the Wayne County Public Defenders' Office should be prohibited from representing defendant based on any of the conflict of interest rules.

Defendant relies on *State Appellate Defender v Saginaw Circuit Judge*, 91 Mich App 606; 283 NW2d 810 (1979), to argue that the trial court should have known that assigning an attorney from the same office as the first attorney who withdrew would potentially create a conflict of interest. In *State Appellate Defender*, however, the State Appellate Defender Office (SADO) was appointed to represent on appeal two brothers who were both separately convicted of killing the same man. *Id.* at 608. SADO moved to withdraw as appellate counsel for one of the brothers, but the trial court denied the motion. *Id.* This Court vacated the trial court's denial of the motion to withdraw, because it concluded that there was a strong possibility that a conflict of interest would appear on appeal. *Id.* at 610. This Court concluded that one brother might attack the voluntariness of his plea or recant his testimony that exonerated the other brother. *Id.* At the same time, the second brother would likely argue that the first brother admitted to committing the crime. *Id.* *State Appellate Defender* is distinguishable from the current case because there was an actual conflict of interest. SADO's representation of one brother could have been directly adverse to the representation of the other. Such a conflict of interest does not exist in this situation. There is no evidence that Lankford's representation adversely affected defendant.

Even if there was a conflict of interest, defendant has not shown that the conflict of interest adversely affected defense counsel's performance at trial. A party seeking disqualification of counsel based on a conflict of interest "bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004). Defendant and Cummins had a

disagreement regarding whether to take this case to trial. Defendant wanted the case to go to trial. His goal was achieved when Lankford represented him at trial. Moreover, defendant has failed to show how Lankford's representation was affected by the apparent conflict of interest. He has not shown that the conflict of interest affected his performance or that the outcome of the case would have been different.

III. PROSECUTORIAL MISCONDUCT

Defendant next posits that the prosecutor engaged in misconduct in charging defendant with possession of marijuana when he had no evidence that the substance found on defendant's person upon arrest was marijuana. We conclude that, because defendant moved to dismiss this charge at trial and the trial court granted the motion, this issue is moot. A moot case is one which seeks to obtain a judgment on a pretend controversy or on a matter which "when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), quoting *Ex Parte Steele*, 162 F 694 (1908). In this case, defendant's challenge to the charge of possession of marijuana is moot because the trial court dismissed the charge of possession of marijuana at trial on the basis of a lack of sufficient evidence and informed the jury that defendant was no longer charged with marijuana possession. Since the charge was dismissed, defendant has no available remedy, even if prosecutorial misconduct occurred.

IV. STANDARD 4 BRIEF

A. WARRANTLESS ARREST

Defendant contends that Dearborn police officers violated his Fourth Amendment rights to be free of unreasonable searches and seizures when they arrested him outside his home without probable cause or jurisdiction and, as a result, any evidence obtained from the arrest should have been suppressed. We disagree. As this issue was not preserved before the trial court, this Court reviews the issue for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant must establish that the error was plain, and that the error affected the outcome of the proceedings. *Carines*, 460 Mich at 763.

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution in this regard is generally construed to provide the same protection as the federal constitution. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009). Whether a search or seizure is reasonable depends upon the circumstances of each case. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). "To lawfully arrest a person without a warrant, a police officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Reese*, 281 Mich App 290, 294; 761 NW2d 405 (2008). "Probable cause is found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed." *People v Chapo*, 283 Mich App 360, 367; 770 NW2d 68 (2009). "The standard is an objective one, applied without regard to the intent or motive of the police officer." *Id.* Generally, evidence seized in violation of the Fourth

Amendment may not be admitted as evidence against a defendant. *People v Lyon*, 227 Mich App 599, 610; 577 NW2d 124 (1998).

We conclude that Dearborn police officers had probable cause to arrest defendant. They captured an image of defendant in the act of robbing the Marathon gas station through video surveillance. Based on that image, Dearborn police officers issued a bulletin giving a description of the suspect. Amy Lumley, who previously knew defendant, saw the bulletin and recognized defendant. Based on that, Lumley contacted the Dearborn police with defendant's name. Dearborn police officers went to defendant's house where they found a red Jeep Commander, which they also saw on the video. After setting up surveillance around defendant's house, they witnessed defendant coming out of his residence and could see that he was the same man who appeared on the video of the robbery. Based on this evidence, Dearborn police officers had probable cause to believe that a robbery was committed and defendant was the one who committed the robbery. Moreover, regardless of the arrest, Dearborn police officers obtained warrants to search the red Jeep Commander and the blue van. As a result, those searches were constitutionally permissible.

Defendant further argues that he was not lawfully arrested because the Dearborn police officers were outside their jurisdiction when they arrested defendant in Detroit and failed to work in conjunction with Detroit police officers. MCL 764.2a prohibits a police officer from acting outside his or her jurisdiction without acting in conjunction with police officers that have jurisdiction. *People v Hamilton*, 465 Mich 526, 530; 638 NW2d 92 (2002), rev'd on other grounds in *Bright v Ailshie*, 465 Mich 770, 775; 641 NW2d 587 (2002). A police officer may act outside his or her jurisdiction if he or she is in hot pursuit of a suspect. MCL 117.34. However, "[t]he purpose of MCL 764.2a… is not to protect the rights of criminal defendants, but rather to protect the rights and autonomy of local governments." *People v Clark*, 181 Mich App 577, 581; 450 NW2d 75 (1989). As a result, evidence obtained pursuant to a statutorily unlawful arrest that was constitutionally valid need not be suppressed. *Lyon*, 227 Mich App at 610-611.

In this case, defendant claims that he was improperly arrested in Detroit by Dearborn police officers who lacked jurisdiction to arrest him. According to the prosecution report,[2] Dearborn police officers informed the Detroit Police Department that they had custody of defendant and were going to execute a search warrant. Since defendant was in custody and other persons were cooperating, the prosecutor report indicated that the Detroit police did not send officers. It is arguable that the Dearborn police officers were acting in conjunction with Detroit police officers. In any event, assuming the Dearborn police officers violated the jurisdictional statute by failing to act in conjunction with the Detroit police officers, the arrest of defendant was supported by probable cause and was constitutionally valid. As a result, the evidence obtained pursuant to the constitutionally permissible arrest and the searches of defendant's

[2] This report does not appear in the lower court record, but was attached to defendant's standard 4 brief on appeal. It is the only evidence defendant offered that Dearborn police officers lacked jurisdiction when they arrested defendant.

vehicles made pursuant to the warrants need not have been suppressed and defendant is not entitled to a new trial.

B. DOUBLE JEOPARDY

Finally, defendant argues that his convictions for both felon in possession of a firearm and felony-firearm subjected him to double jeopardy. We disagree. Constitutional questions are reviewed de novo on appeal. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

"A person may not be twice placed in jeopardy for a single offense." US Const, Am V; Const 1963, art 1, § 15; *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). The prohibition against double jeopardy includes protection against multiple punishments for the same offense. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). "The power to define a crime and fix punishment is legislative, and the constitutional prohibition against double jeopardy is not a limitation on the Legislature." *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). Whether multiple punishments violate the prohibition against double jeopardy depends upon the intent of the Legislature. *Id.* at 450. Even if the crimes are the same, if the Legislature intended to authorize cumulative punishments, imposition of cumulative punishments does not violate double jeopardy. *Id.* at 451. The Michigan Supreme Court held that being convicted of both felon in possession of a firearm and felony-firearm does not violate double jeopardy protections because the Legislature, by not expressly listing felon in possession of a firearm in the exceptions to the definition of felony-firearm, intended for those convicted of felon in possession of a firearm to receive cumulative punishments under the felony-firearm statute. *Id.* at 452.

Defendant argues that this Court should disregard the majority opinion in *Calloway*, follow Justice Kelly's concurrence in *Calloway*, and conclude that double jeopardy would bar defendant's felony-firearm conviction if it was predicated on defendant's felon in possession of a firearm. *Calloway*, 469 Mich at 456-457 (Kelly, J., concurring). However, as noted previously, the majority in *Calloway* found that the legislature intended to cumulatively punish when it allowed felon in possession of a firearm to serve as a predicate for the crime of felony-firearm. *Id.* at 452. A decision of the Supreme Court is binding on this Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

Defendant also draws this Court's attention to an unpublished opinion from the Federal District Court for the Eastern District of Michigan in which a federal district court judge found that a defendant was entitled to habeas relief because "a conviction under both the felon in possession statute and the felony firearm statute constitutes multiple punishment for the same offense, and is therefore in violation of the Double Jeopardy Clause." *White v Howes*, unpublished opinion of the United States District Court for the Eastern District of Michigan, entered March 24, 2008 (Docket No. 06-10707). The Sixth Circuit Court of Appeals reversed the order of the District Court for the Eastern District of Michigan in *White v Howes*, 586 F3d 1025 (ED Mich 2009). Moreover, even absent reversal, this Court is not bound to follow the decision of a lower federal court. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009). Defendant's convictions did not subject him to double jeopardy.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly