

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN LEMURAE L STOKES,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 271714

Wayne Circuit Court

LC No. 05-009580-01

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(e), and two counts each of assault with intent to murder, MCL 750.83, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve terms of imprisonment of 225 to 360 months for each for criminal sexual conduct conviction, and the two counts of assault with intent to murder, and 32 to 48 months for each count of felonious assault. All of the sentences are to run concurrently. The court also sentenced defendant to serve terms of imprisonment of two years for each count of felony-firearm, those sentences to run concurrently with each other, but consecutive to the others. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence. This case is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor's theory of the case was that, in the early morning hours of September 5, 2005, defendant summoned two women to a house in Detroit, to accuse them of involvement in, and to extract information about, an earlier robbery of a separate drug house he maintained. Defendant threatened the women with a gun. He placed his gun in one victim's mouth and genital area and then doused both women with gasoline and set them on fire.

Defendant argues that his multiple assault convictions violated his right against double jeopardy, and that his convictions in connection with one of the victims should be dismissed on the ground that he was denied his confrontational rights by her purposeful avoidance of trial.

I. Double Jeopardy

"A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal." *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). Defendant admits that

this issue was not raised below. Our review, therefore, is limited to determining if there was plain error affecting substantial rights. See *People v Kulpinski*, 243 Mich App 8, 11; 620 NW2d 537 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The double jeopardy clauses of the federal and state constitutions prohibit a criminal defendant from being placed twice in jeopardy for a single offense. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994), citing US Const, Ams V, XIV; Const 1963, art 1, § 15. “The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes.” *Lugo, supra* at 706. “There is no violation of double jeopardy protections if one crime is complete before the other takes place, though the offenses share common elements or one constitutes a lesser offense of the other.” *Id.* at 708.

Here, there was one count of assault with intent to murder in connection with each victim, but both counts of felonious assault concerned only one victim. The evidence concerning that victim was that defendant repeatedly struck her with the butt of a handgun, then later with the butt of an AK-47, then placed the latter in her mouth and the former in her genital area. The trial court instructed the jury that one count of felonious assault stemmed from the alleged assault with a handgun, and the other from the alleged assault with the rifle, thus indicating that these were to be considered as separate assaults. Clearly, the assault with intent to murder took place when defendant later ignited the gasoline he had poured on the victim.

Defendant contends, incorrectly, that these assaults all occurred as a single course of conduct that culminated in the ignition of the gasoline on the victim. The assault with the handgun was complete before the assault with the rifle began, and both of those assaults were complete before defendant attempted murder by setting the gasoline-soaked victim on fire. Because each assault was complete apart from the others, separate convictions and sentences for each constituted no violation of defendant’s rights against double jeopardy. *Id.* at 708.

II. Right of Confrontation

Defendant argues that several of his convictions should be vacated because one of the victims did not testify at trial. Clearly, a victim need not testify in order for a charge to be prosecuted. *People v Morrow*, 214 Mich App 158, 163-164; 542 NW2d 324 (1995). Here, however, defendant also complains that the prosecutor cross-examined defendant with some of the witness’s testimony from the preliminary examination, and elicited from defendant that the witness had identified defendant as her assailant. According to defendant, this violated his rights under the Confrontation Clause. US Const, Am VI.

We generally review constitutional questions de novo. *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999). Defendant concedes that he did not raise this issue in the trial court. Therefore, we review for plain error affecting substantial rights. *Kulpinski, supra*.

Here, the victim was listed and endorsed for trial as a res gestae witness, but failed to appear. A prosecutor is obliged to provide reasonable assistance in locating a witness, but is not obligated to produce a res gestae witness. *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). Rather, the prosecutor is only required to provide “notice of known witnesses and reasonable assistance to locate witnesses on defendant’s request.” *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995), citing MCL 767.40a. Defendant admits that neither he nor his

counsel requested that the prosecutor produce or locate the witness. See MCL 767.40a(5). Further, if a witness is unavailable to testify at trial, her testimony given as a witness at an earlier hearing is admissible if the party against whom it is offered had the opportunity to cross-examine the witness during the prior proceeding. MRE 804(b)(1); *Crawford v Washington*, 541 US 36, 57; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Defendant fails to assert that the witness was not “unavailable” to testify, nor does he claim that he had no meaningful opportunity to cross-examine the witness during the preliminary examination. Accordingly, defendant has not demonstrated that the trial court erred when it admitted the preliminary examination testimony and no Confrontation Clause violation occurred.

III. Conclusion

Defendant’s convictions and sentences are affirmed. However, we note that for his criminal sexual assault, assault with intent to murder, and felonious assault convictions, the amended judgment of sentence lists the numbers of months for defendant’s maximum sentences in the column labeled to indicate years. The trial court made clear at sentencing that it intended to impose 360- and 48-month maximum sentences for these crimes. Accordingly, we remand this case to the trial court for the ministerial task of preparing an amended judgment of sentence that accurately reflects those maximum sentences.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder