

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 14, 2013

v

JOURDON JUSTIN BROWNING,
Defendant-Appellant.

No. 311035
Wayne Circuit Court
LC No. 11-010074-FC

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to rob while armed, MCL 750.89, carjacking, MCL 750.529a, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant first argues that the prosecutions, convictions, and sentences for both assault with intent to rob while armed and carjacking constitute a violation of the Double Jeopardy Clause of the Fifth Amendment because the two offenses constitute the “same offense.” We disagree.

An unpreserved double jeopardy claim will be reviewed for plain error “that affected the defendant’s substantial rights, that is, the error affected the outcome of the lower court proceedings.” *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Under this standard, reversal is only appropriate “if the plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.*

Defendant’s guarantee against double jeopardy was not violated by the prosecutions, convictions, and punishments for assault with intent to rob while armed and carjacking. A criminal defendant has the Fifth Amendment constitutional right to be protected against being placed twice in jeopardy. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). The guarantee against double jeopardy protects a defendant from “(1) . . . a second prosecution for the same offense after acquittal; (2) . . . a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.” *Id.*

Defendant specifically contends that his guarantee to the third protection – against multiple punishments for the same offense – was violated. The “same offense” test outlined in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), points a court’s inquiry to “whether the two separate statutes each include an element that the other does not.” *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998) (citing *Blockburger*, 284 US at 299). This test is satisfied if each offense requires “proof of a fact that the other does not.” *McGee*, 280 Mich App at 683. The Court in *McGee* also held that even if the offenses have the same elements, multiple punishments can still be imposed if “the Legislature clearly intended to impose multiple punishments.” *Id.* In short, there are two ways this Court can find that the guarantee against double jeopardy is not violated: first, if each offense has an element that the other does not; and, second, if the offenses are the same, but the Legislature has indicated a clear intent to impose multiple punishments.

The Court in *McGee* specifically evaluated whether assault with intent to rob while armed and carjacking constituted the same offense, or whether the Legislature intended for the imposition of multiple punishments. First, the Court held that the two offenses do *not* constitute the same offense because assault with intent to rob while armed requires the use of a dangerous weapon during an assault, while carjacking does not. *Id.* at 684. Further, assault with intent to rob while armed does not require the “larceny of a motor vehicle,” while carjacking does. *Id.* Thus, assault with intent to rob while armed and carjacking are not the same offense.

Second, the Court also held that even if there is a “substantial overlap between the proofs offered by the prosecution to establish the crimes,” the Legislature expressed clear intent to “separately punish a defendant convicted of both carjacking and assault with the intent to rob while armed, even if the defendant committed the offenses in the same criminal transaction,” by specifically authorizing “two separate convictions arising out of the same transaction.” *Id.*

Therefore, defendant’s guarantee against double jeopardy was not violated in the prosecutions, convictions, and punishments of assault with intent to rob while armed and carjacking.

Next, defendant argues that the prosecution failed to establish sufficient evidence to prove the element of identity for assault with intent to rob while armed, carjacking, CCW, and felony-firearm beyond a reasonable doubt because the identification testimony at trial was neither credible nor reliable. We disagree.

A claim of insufficient evidence in a criminal trial is reviewed de novo on appeal. *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011). In determining whether sufficient evidence was presented at trial to sustain defendant’s conviction, this Court must consider the “evidence in the light most favorable to the prosecutor” and determine whether a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

Sufficient evidence existed for a rational trier of fact to convict defendant of assault with intent to rob while armed, carjacking, CCW, and felony-firearm. Defendant contends that Nathan Bennett’s identification testimony was neither credible nor reliable because he was unable to identify defendant at the preliminary examination, and gave confusing testimony

regarding defendant's clothing on the day of the incident. Defendant focuses on Bennett's identification testimony, the inconsistencies in his statements, and the lack of corroboration of Bennett's story.

The elements of assault with intent to rob while armed include: "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Gibbs*, 299 Mich App 473, 490; 830 NW2d 821 (2013).

To satisfy their burden for carjacking, the prosecution must prove:

(1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. [*People v Davenport*, 230 Mich App 577, 579; 583 NW2d 919 (1998).]

The elements of felony-firearm: "are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. One must carry or possess the firearm when committing or attempting to commit a felony. Possession of a firearm can be actual or constructive, joint or exclusive." *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011) (footnotes omitted).

Lastly, the elements of CCW include proof that defendant carried a concealed weapon either on his person or in a vehicle without a license to carry the weapon. *People v Hernandez-Garcia*, 266 Mich App 416, 418; 701 NW2d 191 (2005), aff'd in part and vacated in part on other grounds 477 Mich 1039 (2007). The prosecution only needs to "establish that an accused had the intent to do the act prohibited – that is, to knowingly carry the weapon on one's person or in an automobile." *Id.* (internal citations omitted). "Identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

Defendant challenges Bennett's identification testimony as neither credible nor reliable. While Bennett's various statements regarding defendant's clothing appear conflicting, and his first positive identification of defendant only came at trial, "the credibility of identification testimony is a question for the trier of fact that we do not resolve anew." *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Instead, this Court must determine whether a rational jury could have identified defendant as committing all four offenses charged beyond a reasonable doubt. *Id.*

Viewing the facts in the light most favorable to the prosecution, the jury could have found beyond a reasonable doubt that defendant committed the four offenses charged. At trial, Bennett identified defendant as the person who attempted to carjack him in front of the party store. Bennett does admit that he was not able to identify defendant at the preliminary examination, and only knew who defendant was after the preliminary examination. There does appear to be some conflicting testimony regarding the clothing defendant was wearing the day of the incident. Bennett testified that he told police that his assailant had been wearing a "hoodie." However, Detroit Police Officer Lloyd Allen's report indicated Bennett told him that his assailant was an unknown black male with a purple shirt and jeans. Despite the potential

uncertainty of this identification, Bennett's testimony, coupled with the circumstantial evidence presented by the prosecution, could reasonably have lead a rational trier of fact to positively identify defendant as committing these offenses.

"Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *Kissner*, 292 Mich App at 527. Further, "it is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence. . . ." *Id.* A rational trier of fact could have determined, after evaluating the identification testimony given by Bennett and the circumstantial evidence implicating defendant, that the element of identity was proven beyond a reasonable doubt for all four offenses. Bennett testified that he shot the individual who attempted to carjack him once in the back. Bennett and witness Taina Martin both testified that the individual who was shot was crawling on the ground towards Plymouth Street. Then, Barry Barton and Paul Krencewicz identified defendant as the individual with a gunshot wound to his back who jumped into their truck as they approached the party store.

The police investigators were also able to identify evidence that corroborated Bennett's testimony. First, Bennett made a statement to Officer Allen regarding his assailant's clothing – a purple shirt and jeans – which positively identified defendant's clothing. Second, Detroit Police Officer Latrelle McNairy observed a blood trail at the crime scene that was consistent with Bennett's story that defendant crawled by the apartment building, and then out to the street. Third, Detroit Police Officer Myron Watkins identified defendant as the individual with the gunshot wound to the back when he responded to the gas station where defendant was being treated by EMS. Lastly, Sergeant James England testified that although there was only one useable print on the revolver that did not belong to defendant or Bennett, this fact does not preclude the possibility that defendant handled the weapon because there were some unusable prints on the weapon.

Given this circumstantial evidence presented by the prosecution, along with the identification testimony of Bennett, a rational trier of fact could have found sufficient evidence to prove the element of identity beyond a reasonable doubt for all four offenses charged.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro