

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC BETTS,

Defendant-Appellant.

UNPUBLISHED

March 2, 2006

No. 257257

Wayne Circuit Court

LC No. 04-005256-01

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of mayhem, MCL 750.397, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to concurrent terms of eight to twenty years' imprisonment for each conviction. He appeals as of right. We affirm.

Defendant first argues that his dual convictions for mayhem and assault with intent to do great bodily harm less than murder violate double jeopardy protections. We review this constitutional question of law de novo.

Whether multiple punishments may be imposed when different criminal statutes cover the same conduct depends on whether the Legislature intended to impose multiple punishments. *People v Ford*, 262 Mich App 443, 449; 687 NW2d 119 (2004). To determine Legislative intent, we look at whether the offenses violate the same social norms as well as the amount of punishment authorized for each offense. *Id.* at 450, citing *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984).¹ In general, statutes protecting different social norms can be

¹ In Michigan, the "same-elements" test enunciated in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932), is used to determine whether a defendant was subjected to successive prosecutions for the same offense. *People v Nutt*, 469 Mich 565, 575-576; 677 NW2d 1 (2004). Under the *Blockburger* test, a court focuses on the statutory elements of the offense. *Nutt, supra* at 576. If each offense requires proof of a fact that the other does not, then the *Blockburger* test is satisfied, even if there is a substantial overlap in the proofs. *Id.* Citing *Robideau, supra*, our Supreme Court has specifically declined to extend the *Blockburger* test to double jeopardy issues involving multiple punishments. *Id.* at 575 n 11, 595 n 30. In the

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viewed as separate and amenable to allowing multiple punishments. *Ford supra* at 456. If there is no conclusive evidence of Legislative intent, the rule of lenity requires us to conclude that separate punishments were not intended. *Id.* at 450.

The offense of mayhem is not part of the hierarchy of assault offenses established by the Legislature in MCL 750.81 *et seq.*, and contains a different unit of prosecution. Unlike the assault offenses, actual maiming is required under MCL 750.397. See *People v Ward*, 211 Mich App 489, 493; 536 NW2d 270 (1995) (distinguishing MCL 750.397 from assault with intent to maim under MCL 750.86). Applied to the instant case, a mayhem conviction required proof that defendant, with malicious intent to maim or disfigure, actually destroyed the victim's eye. See MCL 750.397. The offense is intended to punish actual maiming of a person. *Ward, supra*.

By comparison, assault with intent to do great bodily harm, MCL 750.84, does not require an injury of any kind. The elements are "(1) an assault, i.e., 'an attempt or offer with force or violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), quoting *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922). The defendant must have intended a serious injury of an aggravated nature. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), citing *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986). Thus, although both offenses punish crimes against persons, are class D felonies, and authorize maximum sentences of ten years, MCL 777.16d and MCL 777.16s, they do not protect the same social norm. Instead, mayhem is intended to punish the infliction of a disfiguring mutilation that is permanent, while assault with intent to do great bodily harm generally protects against the intent to cause a serious injury with regard to whether an injury is actually inflicted. Consequently, we conclude that convictions for both mayhem and assault with intent to do great bodily harm less than murder do not violate double jeopardy protections.

Defendant next argues he is entitled to resentencing because four offense variables were incorrectly scored. The challenges involving offense variables (OV) 9 and 12 are moot, however, because the trial court reduced the score for each of those offense variables to zero when defendant moved for resentencing. The trial court properly denied resentencing because the scoring errors did not affect the guidelines sentence range. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). We uphold the trial court's score of 15 points for OV 1 and five points for OV 2 because the trial court could properly find by a preponderance of the evidence that defendant possessed and used a weapon as provided in MCL 777.31(1)(b) and MCL 777.32(1)(c). *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). The trial court was permitted to consider all evidence before it, including the trial evidence, in calculating the scores for these variables. *People v Dewald*, 267 Mich App 365, 380; 705 NW2d 167 (2005), lv pending. Defendant's reliance on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is misplaced, because *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d

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multiple punishment context, this Court has applied the *Blockburger* test as a rule of statutory construction. *Ford, supra* at 448, 457.

278 (2004); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

Defendant's remaining issues are raised in propria persona. Defendant argues that the trial court erred in sentencing him as an habitual offender, fourth offense, MCL 769.12, because he did not have proper notice of the charge and was not found guilty of this charge by a jury. Because defendant never raised this issue in the trial court, it is unpreserved, and our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Even if the absence of a written proof of service from the lower court file constituted plain error, this omission did not affect defendant's substantial rights. *Carines, supra*. When a defendant receives actual notice, the failure to file the proof of service is harmless because it does not prejudice the defendant's ability to respond to an habitual offender charge. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999). Here, the record discloses that defendant received actual notice of the habitual offender charge.

There is no merit to defendant's claim that he had a right to have a jury decide if he had prior convictions under *Blakely, supra*. In *Blakely*, the United States Supreme Court reaffirmed its holding in *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." See *Dewald, supra* at 379. Under MCL 769.13(5), the existence of the prior convictions was a matter for the trial court to decide.

Defendant next argues the trial court erred by amending the judgment of sentence after a hearing on July 30, 2004, to specify that defendant was sentenced as an habitual offender and to reflect that restitution was ordered in the amount of \$35,048. Contrary to his argument, the record does not indicate that the trial court considered an amendment to the judgment of sentence at the hearing. In any event, the trial court was not required to conduct a resentencing hearing before amending the judgment to reflect that defendant was sentenced as an habitual offender. Unlike *People v Thomas*, 223 Mich App 9, 16-18; 566 NW2d 13 (1997), the record here does not show that the trial court was acting under any misconception of the law at defendant's original sentencing. Rather, the trial court amended the judgment to accurately reflect the habitual offender sentences imposed at the sentencing hearing. This ministerial modification did not require a resentencing hearing. *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997).

A trial court is required to order restitution when sentencing a defendant for a felony. MCL 769.1a(2) and MCL 780.766(2). At sentencing, the court ordered restitution as a condition of parole while defendant was present; however, the exact amount of restitution was unknown at that time. Only the loss sustained by the victim as a result of the offense is considered in determining the amount of restitution. MCL 780.767(1). A defendant cannot argue that he was denied due process if he does not request an evidentiary hearing regarding the amount of restitution. *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997). Nevertheless, the court ordered an evidentiary hearing to determine the amount of restitution. At the hearing, defense counsel expressly waived defendant's presence and, after reviewing the victim's medical bills submitted by the prosecution, stipulated to the amount of restitution. Defendant does not challenge defense counsel's effectiveness in this regard and may not now challenge the restitution order on appeal. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

Next, the record does not support defendant's argument that he was never properly charged with mayhem and assault with intent to do great bodily harm. Criminal prosecutions may be initiated by filing an information. *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001). The information is predicated on a complaint and warrant. *Glass, supra*. Here, the warrant, complaint, and information contained the charges.

Finally, our review of mistakes apparent from the record does not find the requisite deficient performance and prejudice necessary to establish a claim of ineffective assistance of counsel. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Donald S. Owens