

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 12, 2012

v

SHERI ANN GRESS,

Defendant-Appellant.

No. 300528
Wayne Circuit Court
LC No. 09-005427-FH
09-005498-FC

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Pursuant to a plea and sentence agreement, defendant pleaded guilty to several offenses in two separate files. In LC No. 09-005427-FH, she pleaded guilty to possession of cocaine, MCL 333.7403(2)(a)(v). In LC No. 09-005498-FC, she pleaded guilty to armed robbery, MCL 750.529, kidnapping, MCL 750.349, extortion, MCL 750.213, assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to rob while armed, MCL 750.89, and felonious assault, MCL 750.82. She was sentenced to concurrent prison terms of 10 to 20 years each for the armed robbery, kidnapping, extortion, assault with intent to do great bodily harm, and assault with intent to rob convictions, 1 to 15 years for the felonious assault conviction, and one to six years for the possession of cocaine conviction. She appeals by delayed leave granted, challenging the validity of her felonious assault and assault with intent to rob convictions. We affirm.¹

¹ We reject the prosecution's claim that defendant waived any claim of error by tendering an unconditional guilty plea. The general rule is that an unconditional guilty plea waives any claim pertaining to the capacity of the state to prove the defendant's factual guilt, but does not waive a claim that "implicates the very authority of the state to bring the defendant to trial, that is, where the right of the government to prosecute the defendant is challenged." *People v New*, 427 Mich 482, 495-496; 398 NW2d 358 (1986). This Court has held that an unconditional guilty plea does not waive a double jeopardy challenge. *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000); *People v White*, 212 Mich App 298, 305; 536 NW2d 876 (1995). However, our Supreme Court has held that a double jeopardy claim can be waived "if the court must rely on evidence outside the guilty plea record to determine the merits of [the] claim." If "analysis of

On appeal, defendant argues that her convictions of assault with intent to rob while armed and felonious assault, in addition to the armed robbery conviction, violates her double jeopardy protections. A double jeopardy challenge presents a question of law that is reviewed de novo on appeal. *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009).

The United States and Michigan Constitutions both preclude double jeopardy. US Const, Am V; Const 1963, art 1, § 15. The constitutional prohibition against double jeopardy provides three separate protections: “(1) it protects against a second prosecution for the same offense after acquittal, (2) it protects against a second prosecution for the same offense after conviction, and (3) it protects against multiple punishments for the same offense.” *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). “The first two protections are generally understood as the “successive prosecutions” strand of double jeopardy, while the third protection is commonly understood as the “multiple punishments” strand.” *People v Bobby Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007).

The protection against multiple punishments for the same offense “is to protect the defendant from having more punishment imposed than the Legislature intended.” *People v Ford*, 262 Mich App 443, 447-448; 687 NW2d 119 (2004). It is “a restriction on a court’s ability to impose punishment in excess of that intended by the Legislature.” *People v Fox (After Remand)*, 232 Mich App 541, 556; 591 NW2d 384 (1998). In *Garland*, 286 Mich App at 4-5, this Court explained:

To determine whether a defendant has been subjected to multiple punishments for the “same offense,” we must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. Where the Legislature clearly intends to impose such multiple punishments, there is no double jeopardy violation. Where the Legislature has not clearly expressed an intention to impose multiple punishments, the elements of the offenses must be compared using the *Blockburger* [*v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932),] test.

Under the *Blockburger* test, if each offense “requires proof of a fact which the other does not” then there is no violation of double jeopardy. [Citations omitted.]

The statutes at issue, MCL 750.529 (armed robbery), MCL 750.89 (assault with intent to rob while armed), and MCL 750.82 (felonious assault) do not contain any language indicating that multiple punishments either were or were not intended. See, e.g., MCL 750.227b(2) (stating that the punishment for a felony-firearm conviction “is in addition to the sentence imposed for the conviction of the” underlying felony), and MCL 750.349(4) (a conviction for kidnapping does not prohibit the defendant from being charged with, convicted of, or sentenced for any other

evidence outside the guilty plea record is not required,” the issue is not waived. *People v Denio*, 454 Mich 691, 705-706 n 16; 564 NW2d 13 (1997). In this case, it is not necessary to consider evidence outside the guilty plea record to analyze defendant’s claim.

crime arising from the incident). Therefore, it is proper to consider the elements of the various offenses.

Armed robbery is a robbery committed while the defendant is or claims to be armed with a dangerous weapon.² MCL 750.529. An unarmed robbery occurs when the defendant uses force or violence against a person while in the course of committing a larceny of money or other property. MCL 750.530(1). The elements of armed robbery are (1) the defendant was engaged in the course of committing a larceny of any money or other property,³ (2) the defendant used force or violence against a person who was present or assaulted or put the person in fear, and (3) the defendant, in the course of committing the larceny, possessed a real or feigned dangerous weapon or represented that he or she possessed a dangerous weapon. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).

Assault with intent to rob while armed is an assault committed with the intent to rob and steal while armed with a dangerous weapon. MCL 750.89. The elements of the offense are (1) the defendant committed an assault with force and violence, (2) the defendant had the intent to rob or steal, and (3) the defendant was armed with a real or feigned dangerous weapon. MCL 750.89; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

Felonious assault is an ordinary assault committed while the defendant is armed with a dangerous weapon. MCL 750.82(1); *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). The elements of the offense 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). Unlike armed robbery and assault with intent to rob while armed, the defendant must be armed with an actual dangerous weapon, i.e., a gun, knife, iron bar, club, brass knuckles, or some other instrument used in a manner intended to inflict injury. MCL 750.82(1); *People v Brown*, 406 Mich 215, 221; 277 NW2d 155 (1979). The use of a feigned weapon or a claim that the defendant is armed is not sufficient.

² The armed robbery statute does not require actual possession of an actual dangerous weapon. It applies where a person “represents orally or otherwise that he or she is in possession of a dangerous weapon[.]” MCL 750.529.

³ The phrase “in the course of committing a larceny” is statutorily defined as including “acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.” MCL 750.530(2). Based on this language, this Court held that a conviction of armed robbery may be predicated on an attempted larceny, not just on a completed larceny. *People v Williams*, 288 Mich App 67, 72-73; 792 NW2d 384 (2010), lv gtd 489 Mich 856 (2011). In light of this holding, defendant argues that double jeopardy is implicated because armed robbery is a “transactional offense.” We note that in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), the Court “abandoned the ‘same-elements’ test in favor of a ‘same transaction’ test” for claims involving the “successive prosecutions” strand of double jeopardy, but *White* was overruled and the same-elements test was reinstated by *Nutt*, 469 Mich at 568.

In *Chambers*, this Court held that convictions of armed robbery and felonious assault are not precluded by double jeopardy in an incident involving a single victim “because they are not the ‘same offense’ given that . . . each offense has an element that is not required for the other.” *Chambers*, 277 Mich App at 9 (footnote omitted). Specifically, “armed robbery requires proof of an element not required to establish a felonious assault, i.e., actions in the course of committing a larceny,” while “felonious assault require[s] proof of an element not *required* to establish an armed robbery, i.e., the use of a dangerous weapon.” *Id.* at 8-9 (emphasis in original). For the same reasons, armed robbery and assault with intent to rob while armed are not the same offense. Armed robbery requires that the defendant be engaged in the course of committing (or attempting to commit) a larceny, whereas assault with intent to rob while armed requires only that the defendant have the intent to commit a larceny, not that she act on that intent. Further, assault with intent to rob while armed requires that the defendant actually be armed with a real or feigned dangerous weapon, whereas armed robbery does not; the simple representation that the defendant has a weapon is sufficient. Therefore, defendant has not shown a violation of her double jeopardy rights.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto