STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2013
v	No. 307813 Oakland Circuit Court
MARKUS KENTAY VARY, Defendant-Appellant.	LC No. 2011-237399-FH

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree fleeing or eluding, MCL 257.602a(3), and driving without a valid operator's license, MCL 257.301. The court sentenced defendant as an habitual offender, second offense, MCL 769.10, to a prison term of 1 to 7-1/2 years for the fleeing or eluding conviction and to 90 days in jail for the driving conviction, with credit for 237 days served against each sentence. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence.[1]

Defendant's convictions arise from his flight from the police after the police attempted to stop his vehicle on suspicion that he was driving a stolen vehicle. Defendant was prosecuted in a prior case for unarmed robbery and carjacking for offenses that preceded defendant's flight from the police. Defendant was acquitted of those charges. Before the trial in the instant case,

[1] Plaintiff correctly observes that the judgment of sentence erroneously identifies defendant's conviction for count two as driving while license suspended, MCL 257.904(b). Although defendant was originally charged with that offense, count two was amended before trial, without objection, to instead charge defendant with operating a vehicle without a valid operator's license, MCL 257.301, and defendant was convicted of the latter offense. However, the judgment of sentence lists count 2 as "DWLS" and contains the statutory citation for driving while license suspended. Although defendant does not raise this issue on appeal, because MCL 257.904(3)(b) provides for an enhanced penalty upon a second conviction for driving with a suspended license and defendant was not actually convicted of that offense, we remand this case for the ministerial task of correcting the judgment of sentence to accurately reflect that the conviction offense for count two is operating a vehicle without a valid operator's license, contrary to MCL 257.301.

defendant brought a motion to dismiss, arguing that the charges were precluded by his constitutional protections against double jeopardy and by res judicata. The trial court denied the motion.

Defendant's sole issue on appeal concerns whether his acquittal of unarmed robbery and carjacking in the prior case precluded his subsequent prosecution in this case for fleeing or eluding and driving without a valid operator's license. Whether defendant's prosecution was barred by the constitutional protection against double jeopardy is a question of constitutional law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). The application of a legal doctrine, including res judicata, is also a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The Double Jeopardy Clauses, US Const, Am V, and Const 1963, art 1, § 15, protect a person from being twice placed in jeopardy for the same offense. The prohibition against double jeopardy provides three related protections for criminal defendants. The first two, protection against a second prosecution for the same offense following an acquittal, and protection against a second prosecution for the same offense after a conviction, are sometimes collectively referred to as the protection against "successive prosecutions." The third protection is protection against multiple punishments for the same offense imposed in a single proceeding. *Nutt*, 469 Mich at 574-575. This case involves the protection against successive prosecutions.

In *Nutt*, the Court rejected the "same transaction test" for determining whether successive prosecutions involved the "same offense" and overruled *People v White*, 390 Mich 245; 212 NW2d 222 (1973), and its progeny. The Court noted that "the idea that crimes arising from the same criminal episode constitute the same offenses for double jeopardy purposes has been consistently rejected by the United States Supreme Court. *Nutt*, 469 Mich at 578. The Court explained that *White* "imported into Michigan's double jeopardy provision a mandatory *joinder* rule that finds no place in either the text of the provision or in its jurisprudential history." *Id.* at 596 n 1. The proper test for determining whether two offenses are the same offense such that a successive prosecution is barred on double jeopardy grounds is the *Blockburger*[2] or "same elements" test. *Id.* at 596. The test "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Id.* at 576 (citation and internal quotations omitted).

Defendant's argument concerns his prior acquittal of carjacking and his subsequent prosecution for third-degree fleeing or eluding. The carjacking statute, MCL 750.529a, states:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

[2] *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes 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 motor vehicle.

The fleeing or eluding statute, MCL 257.602a, states, in pertinent part:

> A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

Each offense requires proof of a fact that the other does not. For example, carjacking requires proof of larceny of a motor vehicle, which is not required for third-degree fleeing or eluding. And fleeing or eluding requires a signal by a police officer, which is not a requirement for carjacking. Defendant points to the definition in MCL 750.529a(2), which indicates that a carjacking encompasses acts "in flight or attempted flight after the commission of the larceny." Although that inclusion may have been relevant under the same transaction test, it has no bearing on the same elements test that governs the double jeopardy analysis under *Nutt*. Because each crime requires proof of a fact that the other does not, they are not the same offense for purposes of the protection against double jeopardy.

Defendant also claims that his prosecution in this case violates principles of res judicata. The term "res judicata" generally refers to "claims preclusion, which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action." *People v Gates*, 434 Mich 146, 154 n 7; 452 NW2d 627 (1990). Defendant relies on *Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994), for the principle that res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. As explained in that case, the doctrine requires that "(1) the first action be decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id*. at 376. "The doctrine bars all matters that with due diligence should have been raised in the earlier action." *Estes*, 481 Mich at 499. However, in *Nutt*, 469 Mich 595-596 n 31, our Supreme Court rejected the concept of mandatory joinder of offenses. The court rule governing joinder of offenses, MCR 6.120, indicates that joinder is "appropriate" if offenses are related, such as where they are based on the same transaction or a series of connected acts. But that rule is permissive, not mandatory. Thus, it did not preclude defendant's prosecution in this case. The trial court did not err in rejecting defendant's argument that res judicata barred the instant prosecution.

Affirmed, but remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens