

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY SMITH,

Defendant-Appellant.

UNPUBLISHED

May 8, 2012

No. 304193

Calhoun Circuit Court

LC No. 11-000060-FC

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (physical injury), assault with intent to commit CSC involving penetration, MCL 750.520g(1), and interfering with electronic communications, MCL 750.450(5)(a). The trial court sentenced defendant to prison terms of 180 to 360 months for the CSC I conviction, 67 to 120 months for the assault with intent to commit CSC conviction, and 253 days for the interfering with electronic communications conviction. Defendant appeals as of right. We affirm.

On August 14, 2010, the victim's mother gave defendant permission to go to her house while she was working in order to take a shower. Defendant and the victim watched some television together before the victim went to her room to take a nap. Defendant repeatedly opened the victim's bedroom door and interrupted her nap with various questions. Defendant eventually entered the victim's bedroom wearing only boxers and a t-shirt. Defendant got on top of the victim, told her to be quiet, and put his fingers down her throat so far that she was unable to breathe. Defendant then told the victim to remove her pants, and she complied. When the victim began yelling and screaming, defendant put his hand over her mouth. Defendant then instructed the victim to remove her underwear, and she again complied. At this point, the victim told defendant that she could not breathe. Defendant stated that he would remove his hand from her mouth if the victim would stay quiet. The victim shook her head "yes" and sat up. She quickly grabbed her telephone and attempted to call her mother, but defendant took the phone from her. Defendant then threw the victim back on the bed and began touching her genitals with his fingers. The victim continued to scream and kick at defendant and was eventually able to free herself and escape to a neighbor's house.

Defendant argues that his convictions for CSC I and assault with intent to commit CSC within the context of the same offense violate constitutional protections against multiple punishments for the same offense. Although defendant did not raise this argument below, we will nonetheless review the issue for plain error affecting substantial rights because it presents a significant constitutional question. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

The Double Jeopardy Clauses of the United States and Michigan Constitutions protect defendants against successive punishments for the same offense and multiple punishments for the same offense. *People v Ford*, 262 Mich App 443, 447; 687 NW2d 119 (2004). The purpose of the double jeopardy protections against multiple punishments is to protect the defendant from receiving more punishment than intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003). If the Legislature expressed a clear intention to impose multiple punishments, the constitutional protections against double jeopardy are not offended. *People v Smith*, 478 Mich 292, 324; 733 NW2d 351 (2007). When there is no clear legislative intent, to determine if the convicted offenses violated the multiple punishment strand of the Double Jeopardy Clause, it is appropriate to apply the test of *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *Smith*, 478 Mich at 296, 316.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. *Blockburger*, 284 US at 304 (internal citations and quotations omitted).

The two elements of assault with intent to commit CSC involving penetration are simply (1) an assault, and (2) an intent to commit CSC involving sexual penetration. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). “Sexual penetration” is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL 750.520a(r). Assault with intent to commit CSC involving sexual penetration is a specific intent crime. *People v King*, 210 Mich App 425, 427; 534 NW2d 534 (1995).

The essential elements of the CSC I statute under which defendant was charged, MCL 750;520b(1)(f), are that the defendant “(1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration.” *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). The CSC offense is a general intent crime proved by showing the defendant committed a proscribed sexual act; a defendant’s specific intent is not at issue. *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997).

Here, looking at the abstract, statutory elements of the CSC I and assault with intent to commit CSC offenses with which defendant was charged, we hold that defendant’s convictions

and sentences for the offenses do not violate defendant's double jeopardy protections. MCL 750.520b(1)(f) requires proof of a sexual penetration. Sexual penetration is not an element of MCL 750.520g(1). MCL 750.520g(1) requires proof of the defendant's intent to commit CSC. The defendant's intent is not an element of MCL 750.520b(1)(f). Accordingly, because each offense contains an element that the other does not, defendant's convictions and sentences for CSC I and assault with intent to commit CSC do not violate defendant's constitutional protections against double jeopardy.

Affirmed.

/s/E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher