STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED June 19, 2012
v ALBERT MERLE HUTCHINSON, Defendant-Appellant.	No. 302709 Wayne Circuit Court LC No. 10-009149-FH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to commit second-degree criminal sexual conduct (CSC II), MCL 750.520g(2), and fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1). Defendant was sentenced as a third habitual offender, MCL 769.11, to three years' probation with one year in the county jail. Defendant appeals as of right. We affirm his convictions and sentence, and remand for a ministerial correction of the judgment of sentence.

I. SUFFICIENCY OF THE EVIDENCE

A. Assault with Intent to Commit CSC II.

Defendant first argues that the evidence was insufficient to support his conviction of assault with intent to commit CSC II. Specifically, and while noting that the trial court premised this conviction on defendant's action in pulling down the victim's pants, defendant contends there was no evidence that he intended to touch the victim's groin. We disagree.

When deciding a claim of insufficient evidence, an appellate court "'must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the offense were proved beyond a reasonable doubt.'" *People v Nowack,* 462 Mich 392, 399-400; 614 NW2d 78 (2000), quoting *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended in part 441 Mich 1201 (1992). "'Circumstantial evidence and the reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). "Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable [fact-finder] in the face of whatever contradictory evidence

the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). "All conflicts in the evidence must be resolved in favor of the prosecution." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Assault with intent to commit CSC II requires proof of the following elements: (1) an assault; (2) the specific intent to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or sexual gratification; and (3) aggravating circumstances, such as the use of force or coercion. MCL 750.520(g)(2); MCL 750.520c; MCL 750.520.a; *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). An assault can occur when there is either an attempt to commit a battery, or there is an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). "'[B]attery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.'" *Id.*, quoting *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1988). An aggravating circumstance exists, e.g., if "the actor intended to do an act which would have caused personal injury to the victim and the actor intended to use force or coercion to accomplish the sexual contact." *People v Lasky*, 157 Mich App 265, 271; 403 NW2d 117 (1987).

Here, the victim testified that defendant attempted to induce her to have sex by asking for sex and then showing and offering her Vicodin in exchange for sex. After the victim rejected his advances, defendant began touching her right breast with his left hand. When the victim told defendant to stop, he complied for a moment, but then yanked her pants down to her ankles. Defendant also asked the victim to engage in oral sex. The victim became scared and went into her trailer. She told a friend about defendant's actions and asked the friend to call the police.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the trial court to conclude that defendant specifically intended to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or sexual gratification. *Evans*, 173 Mich App at 634. As defendant does not challenge the other elements of his conviction, we conclude that the evidence was sufficient to convict defendant of assault with intent to commit CSC II.

Defendant argues that the trial court erred in crediting inconsistent testimony of the victim, an admitted Vicodin addict, while discounting the testimony of defendant, thus making the verdict against the great weight of the evidence. We disagree.

In reviewing the great weight of the evidence, a new trial is warranted only if the "evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Generally, conflicting evidence or credibility issues do not provide sufficient grounds for a new trial. *Id.* at 643, quoting *United States v Garcia,* 978 F2d 746, 748 (CA 1, 1992). When testimony is in direct conflict, the question of credibility should ordinarily be left for the fact finder. *Id.* at 642. Absent exceptional circumstances, such as when the testimony contradicts indisputable physical facts or laws, defies physical realities, is patently incredible or inherently implausible, or has been seriously impeached in a case marked by uncertainties and discrepancies, this Court must give deference to the fact-finder's determinations. *Id.* at 643-644.

Although there were some inconsistencies in the victim's testimony and it contrasted with defendant's version of events, the trial court assessed her testimony as being credible. The evidence was adequate and allowed the trial court to find defendant guilty beyond a reasonable doubt. Further, the evidence did not preponderate so heavily against the verdict that it would be a serious miscarriage of justice to allow the verdict to stand. *Lemmon*, 456 Mich at 642**.**

B. CSC IV.

Defendant also contends there was insufficient evidence to convict him of CSC IV. While noting that the trial court premised this conviction on defendant's action in touching the victim's breast, he argues that there is no evidence that he overcame the victim through the actual application of physical force. This argument is without merit.

MCL 750.520e(1)(b) provides that a person is guilty of CSC IV if he or she "engages in sexual contact with another person," and "[f]orce or coercion is used to accomplish the sexual contact." "'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose." MCL 750.520a(q). "Force or coercion includes, but is not limited to," circumstances where a person overcomes the victim "through the actual application of physical force or physical violence." MCL 750.520e(1)(b)(i).

The victim testified that, all of a sudden, defendant began "touching her boobs and everything." Defendant used his left hand to touch her right breast then pulled her pants down, even after she told him not to touch her. Viewed in a light most favorable to the prosecution, the evidence supports an inference that defendant forcibly touched the victim's breast, and forcibly pulled down her pants, and thus supports a conviction under MCL 750.520e(1)(b)(i).

II. DOUBLE JEOPARDY

Next, defendant argues that his double jeopardy rights were violated because the trial court convicted him of two offenses arising out of the same act. Defendant claims that the two offenses of which he was convicted have the same facts and elements and are, essentially, one crime. Consequently, he argues that he received multiple punishments for a single offense. We disagree.

In general, this Court reviews a double jeopardy claim de novo. *People v Ford*, 262 Mich App 443, 446; 687 NW2d 119 (2004). But because defendant did not preserve this constitutional issue by raising it at trial, review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 762-763.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). The Michigan Constitution provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." Const 1963, art 1, § 15. This provision is "essentially identical" to its federal counterpart, and was

intended to be "construed consistently with the corresponding federal provision." *People v Nutt*, 469 Mich 565, 575, 594; 677 NW2d 1 (2004).

The federal and state double jeopardy provisions protect against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Ford*, 262 Mich App at 447-448; *Nutt*, 469 Mich at 574. The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant from having more punishment imposed than the legislature intended. *Ford*, 262 Mich App at 447-448. Whether the Michigan Legislature intended to impose multiple punishments is generally determined by the application of the so-called *Blockburger* or "same elements" test. *Ford*, 262 Mich App at 448. This test, which is set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), "'focuses on the statutory elements of the offense. If each offense 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.'" *Nutt,* 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975). See also *People v Smith*, 478 Mich 292, 315-316; 733 NW2d 351 (2007). Determinations of legislative intent involve traditional considerations of the subject, language, and history of the statutes**.** *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995).

Assault with intent to commit CSC II and CSC IV are legally distinct offenses and do not share the same elements. Each offense requires proof of an element that the other does not. *Nutt*, 469 Mich at 576. A conviction for CSC IV requires that sexual contact be achieved. MCL 750.520e(1). By contrast, "[a]n actual touching is not required" to support a conviction for assault with intent to commit CSC II. See *Snell*, 118 Mich at 755. Similarly, assault with intent to commit CSC II is a specific intent crime, which CSC IV is not. See *Lasky*, 157 Mich App at 272. And unlike CSC IV, assault with intent to commit CSC II requires in this context the presence of the aggravating circumstance of a use of force or coercion to cause personal injury. *Lasky*, 157 Mich App at 271 ("The fourth element of assault with intent to commit criminal sexual conduct in the second degree will be established if the actor intended to do an act which would have caused personal injury to the victim and the actor intended to use force or coercion to accomplish the sexual contact"); see also MCL 750.520c (aggravating circumstances establishing CSC II include, among others, that "the actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact"). By contrast, "[p]ersonal injury to the victim is not an element of fourth-degree criminal sexual conduct." *Lasky*, 157 Mich App at 271. The two crimes thus satisfy the *Blockburger* test, "notwithstanding a substantial overlap in the proof offered to establish the crimes." *Nutt*, 469 Mich at 576.

Further, double jeopardy "protects against multiple punishments for the *same* offense." *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008) (emphasis added). The purpose of this protection is to protect a defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Grazhidani*, 277 Mich App 592, 598; 746 NW2d 622 (2008). Here, although defendant argues that he committed only one offense, the record demonstrates that he committed two factually distinct offenses. The evidence at trial revealed, among other things, that defendant touched the victim's breast against her will. The victim told defendant not to touch her, and he stopped briefly. The offense thus was complete at the time. Subsequently, defendant forcibly pulled the victim's pants down to her ankles. "There is no

violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other." *Lugo,* 214 Mich App at 708-709, citing *People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986).

Accordingly, we hold that defendant's convictions do not violate the double jeopardy protection against multiple punishments for the same offense.

III. MINISTERIAL CORRECTION

Defendant notes that the trial court found him guilty of CSC IV through the use of force, which would seem to indicate a violation of MCL 750.520e(1)(b). But defendant points out that the statutory citation on the judgment of sentence for the CSC IV conviction refers to MCL 750.520e(1)(a), which instead requires that the victim be a person between the ages of 13 and 16.

The record reflects that the citation on the judgment of sentence is a typographical error. The Register of Actions for this case indicates that defendant was initially charged with committing CSC IV through the use of force or coercion. There is nothing in the record indicating that defendant was charged with CSC IV on any grounds other than the use of force or coercion (or that the victim was between ages of 13 and 16). Finally, the trial court's disposition of the case following a bench trial explicitly references the use of force or coercion. Because of the typographical error, we direct the trial court to make the ministerial correction of the judgment of sentence to reflect the proper statutory citation of MCL 750.520e(1)(b).

IV. CONCLUSION

We affirm defendant's convictions and sentence, and remand for the ministerial correction of the judgment of sentence to reflect that the proper statutory citation for the CSC IV conviction is MCL 750.520e(1)(b). We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra