STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIE JAMES MCGRAW,

Defendant-Appellee.

UNPUBLISHED
April 18, 2000

No. 216243
Washtenaw Circuit Court
LC No. 97-008727-FH

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault and infliction of serious injury (aggravated assault), MCL 750.81a; MSA 28.276(1), and assaulting an employee of a place of confinement, MCL 750.197c; MSA 28.394(3). The trial court sentenced defendant to one year in the county jail for the aggravated assault conviction and, as an habitual offender under MCL 769.11; MSA 28.1083, to three years and four months to eight years' imprisonment for the assault against an employee of a place of confinement conviction. Defendant appeals as of right. We affirm.

Defendant argues that the evidence was insufficient to find him guilty beyond a reasonable doubt of assault on an employee of a place of confinement. We disagree.

In reviewing a sufficiency of the evidence claim, we view the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising therefrom may constitute sufficient proof of the elements of the offense. *People v Terry*, 217 Mich App 660, 663; 553 NW2d 23 (1996); *People v Williams*, 173 Mich App 312, 318; 433 NW2d 356 (1988).

To support a conviction of assault of an employee of a place of confinement, the prosecution must prove beyond a reasonable doubt that the defendant: (1) was lawfully imprisoned in a place of confinement, (2) assaulted an employee of the place of confinement through the use of violence, and (3) knew that the person assaulted was such an employee. *Terry*, *supra* at 662; *Williams*, *supra* at 318.

With regard to the first element, the parties stipulated that defendant was legally incarcerated at Washtenaw County Jail at the time of this incident.

With regard to the second element, defendant contends that he did not have the specific intent to assault the complainant. "Assault" is defined as "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *Terry, supra* at 662. The consummation of an assault is a battery. *Id.* Intent is an element of both assault and battery and must be proved. *Id.*

In this case, the prosecution was required to prove that defendant intended to bite the corrections officer. The evidence showed that after defendant refused to return to his cell, a corrections officer approached defendant and told him to calm down. Other correction officers were called upon to assist. These officers gave defendant oral commands to return to his cell, but defendant aggressively refused. Defendant then went to the floor and, as the other officers tried to apply leg irons and handcuffs, defendant resisted by fighting, kicking, squirming, and trying to get away from them. During the struggle, defendant bit the left leg of one of the corrections officers. The bite went through the officer's pants and ripped a flap of skin and a flap of fatty tissue, both of which were lying to the side. The muscle was exposed and the leg was bleeding. The record reveals that although defendant was in a heightened state of agitation during the incident, he was not randomly clamping his mouth open or closed, nor clenching his teeth. Defendant also made a growling sound immediately before he bit Glover. This evidence, viewed in a light most favorable to the prosecution, was sufficient to support a finding beyond a reasonable doubt that defendant intentionally bit the officer. Because biting a person is a battery, which is a consummated assault, biting falls within the prohibitions of the statute. See *Terry, supra*.

With regard to the third element, the prosecution presented evidence that at the time of the incident, the victim was an employee of the place of confinement, employed by the Washtenaw County Sheriff's Department. Additionally, at the time of the incident, the officer was dressed in a sheriff department uniform that included a brown shirt with sheriff department patches, name tag, badge, uniform brown pants, and boots. Viewing the evidence in a light most favorable to the prosecutor, we find that a rational trial of fact could find beyond a reasonable doubt that defendant was guilty of assault on an employee of a place of confinement.

Defendant also argues that the evidence was insufficient to support his conviction for aggravated assault. Again, we disagree.

To support a conviction of aggravated assault, the prosecution must prove beyond a reasonable doubt that defendant assaulted the victim without any weapon and inflicted "serious or aggravated injury" upon the person of the victim without intending to commit the crime of murder and without intending to inflict great bodily harm less than the crime of murder. *People v Brown*, 97 Mich App 606, 610; 296 NW2d 121 (1980). Serious or aggravated injury includes substantial physical injury or injury that necessitates immediate medical treatment or causes disfigurement, impairment of health or impairment of any bodily part. *Id*. at 611.

First, as already discussed above, the evidence was sufficient to find beyond a reasonable doubt that defendant intentionally assaulted the officer. Second, the evidence at trial indicated that defendant bit the officer on his right inner thigh just above the knee. The bite went though the officer's pants and ripped a flap of skin and a flap of fatty tissue from the leg. The muscle was exposed and the leg was bleeding. The officer went to the hospital for treatment and was off from work for two days. The wound was a little larger than the size of a quarter. Over one year after the incident occurred, the officer has a scar on his leg from the wound that consists of a black circle with two marks inside of the circle that resemble teeth. This evidence was sufficient to allow a reasonable person to conclude that defendant inflicted a serious or aggravated injury on the victim. *Brown, supra* at 611.

Finally, defendant argues that his convictions for both assault on an employee of a place of confinement and aggravated assault violate the constitutional prohibition against double jeopardy because both offenses are assaultive in nature and because both offenses arose out of the same transaction, that is, a single bite to the officer's leg. Although defendant did not raise the claim below, this Court may consider constitutional issues raised for the first time on appeal. *People v Peerenboom,* 224 Mich App 195, 199; 568 NW2d 153 (1997); *People v Zinn,* 217 Mich App 340, 344; 551 NW2d 704 (1996). This Court reviews issues of double jeopardy de novo. *Peerenboom, supra* at 199.

"The guarantee against double jeopardy protects against multiple prosecutions and multiple punishments for the 'same offense.'" *People v Denio,* 454 Mich 691, 706; 564 NW2d 13 (1997). The constitutional prohibition against multiple punishment for the same offense is a restriction on the trial 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). Thus, even if the crimes are the same, a double jeopardy challenge based on multiple punishment will not succeed if it is evident that the Legislature intended to authorize the cumulative punishments. *Id*. Accordingly, "[t]he intent of the Legislature is the determining factor . . . ." *Denio, supra* at 706.

Determination of legislative intent involves traditional considerations of the subject, language and history of the statutes authorizing the charging of the offenses at issue. *Denio, supra* at 708. Additionally, the court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors indicative of legislative intent. *Id.* Where there is no conclusive evidence of legislative intent, the rule of lenity mandates that separate punishments were not intended. *Id.* at 708-709.

The legislative intent in enacting assault statutes, such as MCL 750.81a; MSA 28.276(1), was to punish crimes against persons. *People v Lugo,* 214 Mich App 699, 708; 542 NW2d 921 (1995). The legislative intent in enacting MCL 750.197c; MSA 28.424(3), however, was to elevate assaults on corrections employees from misdemeanors to felonies because of a belief that the misdemeanor status of the offense inadequately protected corrections staff from prisoner assaults. *People v Boyd,* 102 Mich App 112, 115; 300 NW2d 760 (1980). Therefore, the social norms that each statute seeks to protect, protecting the general public against assaults as opposed to protecting corrections employees from assaults by prisoners, are different from each other. "Also, the two statutes authorize greatly differing

levels of punishment." *Peerenboom, supra* at 201. Aggravated assault is a misdemeanor punishable by imprisonment for not more than one year, while assault of an employee of a place of confinement is a felony punishable by imprisonment for not more than four years. MCL 750.81a; MSA 28.276(1), MCL 750.197c; MSA 28.394(3), MCL 750.503; MSA 28.771. "The statutes are also located in different chapters of the Penal Code, meaning that they are not hierarchical or cumulative." *Peerenboom, supra* at 201. Aggravated assault is located in the Penal Code chapter devoted to assaults, while assault on an employee of a place of confinement is located in the chapter devoted to escapes and rescues. Finally, the elements of the offenses differ inasmuch as assault on an employee of a place of confinement does not require that serious or aggravated injury is inflicted and aggravated assault does not require that the defendant be a prisoner and the victim be a corrections employee. Based upon these four factors, defendant's convictions under MCL 750.81a; MSA 28.276(1) and MCL 750.197c; MSA 28.394(3) did not violate double jeopardy protections against multiple punishments. *Denio, supra* at 706-709; *Fox, supra* at 556.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff