STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 6, 2000
v	No. 215670 Kent Circuit Court
MICHAEL WAYNE MOORE, Defendant-Appellant.	LC No. 98-000254-FC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), second-degree criminal sexual conduct, MCL 750.520c(1)(f); MSA 28.788(3)(1)(f), and assault with intent to do great bodily harm less than murder, MSA 750.84; MSA 28.279. The trial court, applying a third-offense habitual offender enhancement under MCL 769.11; MSA 28.1082, sentenced defendant to concurrent terms of 17-1/2 to 60 years for the first-degree CSC conviction, fifteen to thirty years for the second-degree CSC conviction, and ten to twenty years for the assault conviction. We affirm.

Defendant first argues that his convictions for second-degree criminal sexual conduct and assault with intent to do great bodily harm less than murder violated his double jeopardy protections because they were part of the offense of first-degree criminal sexual conduct. He argues that those convictions and sentences amounted to multiple punishments for a single crime. He argues that there was one single, continuous sexual assault in this case and that separating that one criminal transaction into separate and distinct crimes was improper. We disagree. This issue presents a question of law that we review de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

The conviction for second-degree criminal sexual conduct was proper. 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." *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). A crime of first-degree criminal sexual conduct is completed after "sexual penetration has occurred by any one of the enumerated circumstances." *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986). In this case, the testimony established an

act of partial vaginal penetration, following which defendant ordered the victim to manually stimulate him. This was a separate and distinct act, constituting second-degree criminal sexual conduct.

There are numerous cases that support the proposition that each act of penetration or contact is punishable as a separate offense even if occurring during one continuous criminal transaction. See *Dowdy, supra.* See also *People v Jones,* 144 Mich App 1; 373 NW2d 226 (1985), where the defendant was convicted of separate counts of first-degree and second-degree criminal sexual conduct arising out of sexual acts committed under circumstances involving an armed robbery. See also *People v Rogers,* 142 Mich App 88, 92; 368 NW2d 900 (1985), where multiple acts of penetration, occurring during one criminal event, supported multiple convictions.

The conviction for assault with intent to do great bodily harm less than murder was also proper. There are three protections afforded by the Double Jeopardy Clause, Const 1963, art 1, § 15 and US Const, Am V. *People v Torres,* 452 Mich 43, 64; 549 NW2d 540 (1996).

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. [*Id.*, quoting *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled on other grounds sub nom *Alabama v Smith,* 490 US 794 (1989).]

It is the multiple punishment aspect of double jeopardy that is at issue in this case. In order to determine whether defendant's convictions and sentences constituted multiple punishment for the same offense, we must determine whether the Legislature intended to impose cumulative punishment under the circumstances. *Lugo, supra* at 706. In order to make the necessary determination, this Court must consider:

> (1) whether one statute prohibits conduct violative of a social norm distinct from the norm protected by the other statute, and (2) the amount of punishment authorized by each statute, and whether the statutes are hierarchical or cumulative. [*People v Harrington,* 194 Mich App 424, 428; 487 NW2d 479 (1992), (citations omitted).]

See also *People v McClain,* 218 Mich App 613, 615-616; 554 NW2d 608 (1996).

Utilizing the aforementioned analysis, we reject defendant's argument that the principles of double jeopardy were violated in this case. Defendant was convicted under MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) for the act of penetration. That statute provides:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. . . .

Defendant was convicted under MCL 750.520c(1)(f); MSA 28.788(3)(1)(f) for forcing the victim to manually stimulate his penis. That statute provides:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. . . .

The first-degree criminal sexual conduct statute is designed to protect against nonconsensual sexual penetrations. *People v Ward,* 206 Mich App 38, 42; 520 NW2d 363 (1994). The second-degree criminal sexual conduct statute is designed to protect against nonconsensual sexual contact. *Id.* Assault and resultant physical injuries are not necessary elements to sustain a conviction under either statute. Coercion, without the application of force, along with any personal injury will support a conviction under MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) and MCL 750.520c(1)(f); MSA 28.788(3)(1)(f) if the requisite sexual penetration or contact is also present. Furthermore, personal injury under the criminal sexual conduct statutes is not limited to physical injuries. Mental anguish or a resulting pregnancy may suffice for the personal injury element. MCL 750.520a(j); MSA 28.788(1)(j); *People v Asevado*, 217 Mich App 393, 395-396; 551 NW2d 478 (1996). Thus, physical injury is not a necessary component of the criminal sexual conduct statutes and those statutes are not designed solely to protect against it. By contrast, the assault statute at issue here, MCL 750.84; MSA 238.279, is aimed at "punishing crimes injurious to other people," *Harrington, supra* at 429, regardless of whether there is sexual contact or penetration, and it focuses on the intent to inflict physical injury. It is therefore clear that the statutes at issue protect different social norms.

In addition, the criminal sexual conduct statutes and the assault statute are not hierarchical but instead evidence an intent to impose cumulative punishment, since they do not involve a situation where a baseline penalty is increased because of aggravating circumstances. See *Walker, supra* at 313. See also *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984) (statutes are hierarchical where "one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute").

Because distinct social norms are protected by each statute and because the statutes are not hierarchical, there was no double jeopardy violation as a result of defendant's convictions.

Next, defendant argues that the prosecutor knowingly solicited false testimony from a witness and failed to correct that false testimony. Defendant did not raise this issue below. Therefore, reversal is warranted only if a plain (i.e., clear or obvious) error occurred that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error. Indeed, our review of the record reveals no evidence that the prosecutor knowingly solicited false testimony. The mere fact that the witness' trial testimony was inconsistent with his prior statements does not lead to a conclusion that the prosecutor solicited false testimony. There is no evidence that the prosecutor sought to have the witness testify falsely or that the prosecutor even knew

which version of the witness' story was true. See *People v Knight*, 122 Mich App 584, 592-593; 333 NW2d 94 (1983).

Similarly, defendant's unpreserved arguments that the prosecutor wrongfully withheld discovery and provided an edited version of a statement by the witness is unsupported by the record. The record demonstrates that a few days before trial, the witness gave a statement to a police detective, who wrote down the statement contemporaneously with the interview. The handwritten statement was given to both the prosecutor and defendant. At trial, the prosecutor ascertained that the statement had also been tape recorded, and there is no evidence that the prosecutor gained this knowledge prior to trial. The recording was not transcribed. The trial court gave defense counsel an opportunity to listen to the tape during a recess in the trial, and defense counsel was given the right to recall the witness to the stand after listening to the tape. He chose not to do so. According to his post-trial motion, he also declined a copy of the recording during trial. After defendant was convicted, defense counsel moved the trial court to order production of a copy of the tape and a transcript of the tape, apparently for potential appellate purposes. Defendant's claim that the prosecutor wrongfully withheld the tape has no merit under these circumstances. Defendant has established no plain error under *Carines, supra* at 763-764. Nor has defendant established that the outcome of the proceedings would have been different even if he had received the tape immediately after the witness made the statement. Accordingly, reversal is inappropriate under *Carines*. *Id.*

Finally, defendant argues that defense counsel was ineffective for failing to investigate the witness' taped statement. Based on our review of the record, we find that counsel was not ineffective. Counsel requested and was granted an opportunity to listen to the tape during trial. We do not agree that counsel was ineffective because he did not recall the witness to the stand or use the tape in any manner after being given the opportunity to listen to it.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Here, defendant has failed to make the requisite showing. In fact, his basic premise, that his counsel failed to investigate the tape, is not supported by the record. Moreover, defendant has failed to demonstrate that the result of his trial may have been different if his counsel had recalled the witness to the stand, after listening to the tape, or if he had otherwise used the tape at trial.[1] Indeed, before becoming aware of the tape, counsel had already vigorously attempted to discredit the witness by pointing out numerous inconsistencies between the witness'

prior statements and his trial testimony. Accordingly, reversal is unwarranted. See *Stanaway, supra* at 687-688.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] Defendant requests a remand to explore the possibility that counsel's failure to use the tape at trial affected the outcome of the proceedings. However, on September 23, 1999, this Court denied defendant a remand on this basis, and we decline to revisit this decision.