

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

WILLIAM WESLEY DEVINE,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

November 22, 2005

No. 256185

Livingston Circuit Court

LC No. 03-013877-FH

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Defendant was charged with third-degree criminal sexual conduct (CSC-III) MCL 750.520d(1)(b) (force or coercion), and assault with intent to penetrate, MCL 750.520g(1). After a jury convicted defendant of both charges, defendant moved to vacate his conviction for assault with intent to penetrate on the grounds that convictions on both counts violated his right against double jeopardy. The trial court granted defendant's motion. For the CSC-III conviction, the trial court sentenced defendant, as a third-offense habitual offender, MCL 769.11, to 5 to 30 years in prison. Defendant appeals as of right his conviction. Plaintiff cross-appeals the trial court's double jeopardy ruling. We affirm.

Defendant first argues that the trial court erred when it allowed the prosecutor to elicit testimony from the victim regarding a threat she heard of through her boyfriend. Defendant contends that admission of this testimony was improper because (1) there was no evidence linking defendant to the threat and (2) the probative value of the testimony was outweighed by its potential for unfair prejudice. We disagree.

At trial, the prosecutor questioned the victim about the impact made on her by a threat that was related to her by her boyfriend. The victim testified that being informed of the threat made her unwilling to testify because she was afraid for herself and her daughter. Defendant objected on the basis of hearsay and relevance. The prosecutor argued that the testimony was offered to establish the victim's credibility.

Because defendant did not specify the same grounds for challenge that he asserts on appeal, he has not preserved the claim raised on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved evidentiary errors for plain error affecting a

defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In contending that the prosecution was required to establish a link between the threat and defendant, defendant relies on *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851(1996), in which our Supreme Court held that “A *defendant's* threat against a witness is generally admissible. It is conduct that can demonstrate consciousness of guilt.” (Emphasis added.) However, in *Sholl*, the prosecution offered evidence of a threat made by the defendant to prove the defendant's consciousness of guilt. In this case, on the other hand, the prosecutor offered testimony about a threat made by *someone* to show that the witness was credible when she testified despite the fear caused in her by the threat. The prosecutor was not required to show a link between defendant and the threat when the evidence was offered for this purpose.

Defendant also argues that the evidence should have been excluded under MRE 403 because its probative value was outweighed by its potential for unfair prejudice. We disagree. The victim's credibility was particularly probative in light of the evidence that the victim invited defendant into her home after the victim and defendant had been drinking and when there was little other corroborating evidence. The testimony about the threat caused no unfair prejudice to defendant because there was no evidence or even suggestion that the threat was linked to him. Defendant has failed to show a plain error in the admission of the victim's testimony about the threat.¹

On cross appeal, plaintiff argues that the trial court erred in determining that his convictions for CSC-III and assault with intent to commit criminal sexual penetration violated double jeopardy protections. We disagree. “A double jeopardy challenge presents a question of law that we review de novo.” *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The federal and state guarantees of protection against double jeopardy are basically identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004). “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).

Plaintiff asserts that there was no double jeopardy violation in this case because the assault was a distinct act that was completed before the penetration occurred. In support of its position, plaintiff relies on *People v Swinford*, 150 Mich App 507, 511; 389 NW2d 462 (1986), in which the defendant engaged in a car chase with the victim ultimately running her off the road. The defendant exited his car, and approached the victim. *Id.* He then “pulled the [victim] to the back seat of the car and proceeded to commit various acts of criminal sexual conduct. After threatening to kill her, the [defendant] drove away in his car.” *Id.* The defendant was

¹ Furthermore, any error that may have arisen as a result of the unlimited admission of the disputed evidence could have been easily cured by a cautionary instruction pursuant to MRE 105. *People v Bahoda*, 448 Mich 261, 291 n 61; 531 NW2d 659 (1995). When defendant failed to request such an instruction, we cannot find error requiring reversal. *Id.*

convicted of assault with intent to commit criminal sexual conduct involving penetration and first-degree criminal sexual conduct. *Id.* On appeal, the defendant argued that these convictions violated his right against double jeopardy. *Id.* at 515. This Court disagreed and determined that the defendant was convicted of the assault charge based on his actions during the car chase and the criminal sexual conduct charge arose out of the defendant's actions after the cars had come to a stop. *Id.* at 515-516. This Court stated, "Since each offense occurred separately, defendant was not subject to double jeopardy." *Id.* at 516.

Plaintiff also relies on *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002), in which the defendant broke into the victim's home and, over the course of 1 ½ hours, alternated between ransacking the house looking for money and demanding that the victim tell him where the money was hidden. Each time the victim answered that he did not have any money, the defendant inflicted some form of physical torture on him. *Id.* The defendant ultimately bound the victim's wrists and ankles and tied the victim to the leg of a table. *Id.* This Court determined that defendant's convictions of assault with intent to commit murder and assault with intent to do great bodily harm less than murder did not violate double jeopardy guarantees. *Id.* at 64. In so doing, it stated that "the incidents composing these crimes were separate and distinct." *Id.* at 63-64.

This case is distinguishable from both *Swinford* and *Colon*. Here, the victim testified that defendant pressured her into the bedroom, pushed her on the bed, tried to kiss her, and pinned her arms down before he penetrated her. There was no gap in time between the assault and the penetration to clearly delineate the end of one crime and the beginning of the next. Rather, the assault merged into the penetration making the acts contiguous.

Plaintiff also relies on *Lugo*, *supra*. However, *Lugo* is also distinguishable from this case. In *Lugo*, an officer conducting an investigation went to the defendant's place of employment to question the defendant. *Id.* at 702-703. When the officer asked the defendant for identification, the defendant pushed the officer against a door. *Id.* at 703. The officer stated that he was going to place the defendant under arrest for assaulting a police officer. *Id.* The defendant responded by attempting to push the officer out the door. *Id.* After a second officer arrived, the first officer again advised the defendant that he was under arrest. *Id.* Then defendant began striking both officers. *Id.* After the officers sprayed the defendant with pepper spray, the defendant began striking both officers with a broomstick. *Id.* When the first officer fell to the ground, the defendant grabbed the officer's gun and shoved it under his bulletproof vest. *Id.* This Court determined that the first two assaults on the first officer were separated by the officer placing defendant under arrest. *Id.* at 708. It further determined that the defendant's assaults with a broomstick were of two separate officers. *Id.* Finally, it determined that, after the defendant dropped the broomstick, he committed a separate assault with intent to do great bodily harm with the gun. *Id.* at 709. This court rejected the defendant's argument that these actions constituted "one continuing assault." *Id.*

A significant aspect of *Lugo* that distinguishes it from this case is that the assaults occurred within the context of the unique relationship between police officers and a civilian. Specifically, each of defendant's assaults was separated by the officers' attempts to assert their authority over the defendant. The defendant's first two assaults were separated by the officer's first attempt to arrest the defendant. The defendant's subsequent two assaults were separated by two officer's joint effort to arrest the defendant. The final assault, with a gun, occurred after the

defendant stopped beating both police officers and seized one of their guns. These facts are distinguishable from the facts of this case where a single male in one contiguous act overcame a female by force to achieve penetration.

Plaintiff also relies on *People v Hill*, 257 Mich App 126, 128; 667 NW2d 78 (2003), in which the defendant was convicted of possession of explosive or combustible substances with intent to use unlawfully, MCL 750.210(2)(a) and placing offensive or injurious substances in or near real or personal property, MCL 750.209(1)(b). In *Hill*, the defendant, who intended to rob a gas station with an accomplice, entered the gas station carrying a small container of gasoline. *Id.* at 129. Then, while the accomplice pointed a sawed-off shotgun at the station clerk, the defendant sprayed gasoline from the container onto the bulletproof glass window. *Id.* This Court held that the act satisfying the conviction for possession of explosive substances with unlawful intent was completed when the defendant carried the gasoline while entering the gas station with the requisite criminal intent. *Id.* at 150-151. The second, separate, and distinct act of spraying the gasoline inside the gas station established the conviction of causing damage to property. *Id.* Therefore, this Court concluded that there was no double jeopardy violation. *Id.* at 151.

Hill is also distinguishable from this case. The act of carrying gasoline with unlawful intent, while it was contiguous with the act of spraying the gasoline, was not related to that act the way the assault in this case was related to the penetration. When the defendant in *Hill* entered the gas station carrying the gasoline, he had not yet engaged the victim. Thus, if the defendant had turned to walk out, he could still have been charged with carrying the gasoline with unlawful intent despite the fact that the victim was never aware of the potential threat posed. In contrast, defendant in this case could not have penetrated the victim against her will without overcoming her in some fashion. Defendant overcame the victim with physical force (hence the charge under 750.520d(1)(b)) by pushing her down on the bed and pinning her arms. Thus, the struggle not only immediately preceded, but also was an integral part of the penetration that followed.

Because defendant's assault and the penetration of the victim were contiguous and the assault was an integral part of the penetration achieved by force, we conclude that trial court did not err in determining that there was a double jeopardy violation and vacating defendant's conviction of assault with intent to commit sexual penetration.

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly