# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 28, 2008 |
| v<br><br>ARTHUR JAMES STEVENS,<br><br>Defendant-Appellant. | No. 279242<br>Wayne Circuit Court<br>LC No. 06-011812-01 |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>ARTHUR JAMES STEVENS,<br><br>Defendant-Appellant. | No. 279243<br>Wayne Circuit Court<br>LC No. 06-013754-01 |

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

In Docket No. 279242, defendant appeals as of right his jury trial convictions for two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b) (penetration with a victim who is at least 13 years of age but less than 16 and the defendant is a member of the same household as the victim) and one count of second-degree CSC, MCL 750.520c(1)(b) (sexual contact with a victim who is at least 13 years of age but less than 16 and the defendant is a member of the same household as the victim). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 356 months to 50 years' imprisonment for each first-degree CSC conviction and 10 to 15 years' imprisonment for the second-degree CSC conviction. We affirm.

In Docket No. 279243, defendant appeals as of right his jury trial convictions for assault with intent to commit great bodily harm less than murder, MCL 750.84, first-degree child abuse, MCL 750.136b(2) (knowingly or intentionally causing serious physical or mental harm to a child), and second-degree child abuse, MCL 750.136b(3) (knowingly or intentionally committing an act that is cruel to a child). Defendant was sentenced, as a second habitual

offender, MCL 769.10, to six to ten years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction, 10 to 15 years' imprisonment for the first-degree child abuse conviction, and two to four years' imprisonment for the second-degree child abuse conviction. We affirm.

## I. Facts

In lower court case number 06-013754-01, defendant was charged with two counts of child abuse and one count of assault with intent to commit great bodily harm less than murder arising out of one incident where defendant was alleged to have "whipped" his young daughter ("the victim") for talking to boys. In lower court case number 06-011812-01, defendant was charged with three counts of CSC arising out of two incidents where defendant allegedly sexually assaulted the victim. The victim was 13 to 14 years old during all incidents in question. These two cases were consolidated for trial and on appeal.

## II. Double Jeopardy

Defendant first argues that, because his convictions for assault, first-degree child abuse and second-degree child abuse arose from a singular assaultive act, his convictions violate the double jeopardy clause because they constitute multiple punishments for the same offense. We disagree.

Generally, "[a] double jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). However, an unpreserved constitutional error warrants reversal only when it amounts to plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule," a defendant must establish that: (1) an error occurred, (2) "the error was plain," and (3) the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* at 763.

Both the United States and Michigan Constitutions "prohibit placing a defendant twice in jeopardy for a single offense." *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). These provisions protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Nutt, supra* at 574. In this case, this Court is presented with a double jeopardy challenge based on multiple punishments for the same offense. The "same-elements test" set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) is the proper test to determine whether multiple punishments are barred on double jeopardy grounds. *People v Smith*, 478 Mich 292, 296, 324; 733 NW2d 351 (2007). In *Blockburger*, the United States Supreme Court opined that multiple punishments are authorized if each statute requires proof of an additional fact that the other does not. *Blockburger, supra* at 304.

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). This Court has defined the intent to do great bodily harm as "an intent to do serious injury of an aggravated nature." *Id.* A person is guilty of first-degree child abuse if the

person knowingly or intentionally causes serious physical or serious mental harm to a child. MCL 750.136b(2). A person is guilty of second-degree child abuse if the person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. MCL 750.136b(3)(c).[1] "Cruel" is defined by the child abuse statute as "brutal, inhuman, sadistic, or that which torments." MCL 750.136b(1)(b).

First, a comparison of the elements of assault with intent to commit great bodily harm less than murder and first-degree child abuse reveals that each requires proof of a fact that the other does not. First-degree child abuse requires causing serious harm to a child; assault with intent to commit great bodily harm less than murder does not. The assault charge requires proof of an assault; first-degree child abuse does not. Thus, defendant's convictions for assault with intent to commit great bodily harm less than murder and first-degree child abuse are for separate offenses under *Blockburger*, and his punishments do not violate the double jeopardy clause.

Next, a comparison of the elements of assault with intent to commit great bodily harm less than murder and second-degree child abuse reveals that each requires proof of a fact that the other does not. Second-degree child abuse requires committing a cruel act to a child; the assault charge does not. The assault charge requires proof of an assault; second-degree child abuse does not. Accordingly, defendant's convictions for assault with intent to commit great bodily harm less than murder and second-degree child abuse are for separate offenses under *Blockburger*, and his punishments do not violate the double jeopardy clause.

Finally, a comparison of first- and second-degree child abuse reveals that each requires proof of a fact that the other does not. First-degree child abuse requires causing serious harm to a child; second-degree child abuse does not. Second-degree child abuse requires committing a cruel act; first-degree child abuse does not. Although defendant argues that second-degree child abuse is a necessarily included lesser offense[2] of first-degree child abuse (on the basis that an act that is likely to cause serious physical or mental harm to a child is necessarily cruel), he presents no supporting authority. Likewise, we did not discover any authority supporting the proposition that second-degree child abuse is a necessarily included lesser offense of first-degree child abuse or holding that convictions for first- and second-degree child abuse arising out of the same assaultive act violate the double jeopardy clause.[3] Accordingly, defendant's convictions for first-

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[1] Second-degree child abuse can also be committed when (a) the person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm to a child or (b) the person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results. MCL 750.136b(3)(a) and (b). In the case at bar, the jury was instructed solely with regard to the alternative involving committing a cruel act; thus, the other two ways in which to commit second-degree child abuse are disregarded for purposes of analyzing this issue.

[2] Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense; in other words, a necessarily included lesser offense is a crime for which it is impossible to commit the greater offense without first having committed the lesser. *Brown, supra* at 146 n 2.

[3] The language of the child abuse statute lends further support against defendant's position. Not only does first-degree child abuse not include a cruelty element, it also does not require the

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and second-degree child abuse are for separate offenses under *Blockburger*, and his punishments do not violate the double jeopardy clause.

III. Jury Instruction

Next, defendant claims that the trial court erred with respect to its instruction on the elements of assault with intent to commit great bodily harm less than murder. However, defendant did not request an instruction or object to the challenged instruction, but rather, he affirmatively expressed approval of the challenged instruction. Defendant's affirmative statement indicating his satisfaction with the court's instruction constitutes express approval of the instruction and waives review on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (one who waives his rights may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error).

IV. Ineffective Assistance of Counsel

Next, defendant argues that he was provided ineffective assistance of counsel because his attorney did not object to the aforementioned allegedly erroneous jury instruction. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[C]ounsel's performance must be measured against an objective standard of reasonableness" and without "benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Contrary to defendant's assertion, the court did not instruct the jury that a specific intent to cause a mere mental injury, rather than a physical one, would satisfy the intent element of the assault charge. Rather, the court instructed the jury that, to convict defendant, it needed to find

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defendant to have committed an affirmative act. The omission of the word "act," in the first-degree child abuse subsection, while included in the second-degree child abuse subsection, indicates that first-degree child abuse can be committed by an omission. MCL 750.136b(3)(c), the second-degree child abuse subsection at issue, requires the defendant to have knowingly or intentionally *committed an act*. This further refutes defendant's position, because first-degree child abuse can be committed (via an omission) without necessarily committing second-degree child abuse under subsection (c).

that he possessed a specific intent to commit a *physical* injury that could seriously and permanently harm the *physical or mental* health or function of the body. The court's reference to mental injury concerned only the "health or function of the body" portion of the instruction; the portion of the instruction requiring "physical injury" remained intact. Although the court's instruction may have served to complicate the definition of "great bodily harm," it was not inconsistent with the definition of great bodily harm provided in *Brown*, *supra*. See *Brown*, *supra* at 147 (defining great bodily harm as "an intent to do serious injury of an aggravated nature"). Because there was no instructional error, counsel was not ineffective for failing to object to the challenged instruction. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995) (stating that a failure to pursue a meritless objection does not constitute ineffective assistance of counsel).

## V. OV 10

Finally, defendant claims that the trial court erred in assessing him 15 points for offense variable (OV) 10. We disagree.

This Court reviews a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold the trial court's scoring decision if there is any evidence in the record to support it. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

OV 10 is scored for exploitation of a vulnerable victim. MCL 777.40. A trial court may score 15 points for OV 10 if "predatory conduct was involved." MCL 777.40(1)(a). "Predatory conduct means 'preoffense conduct directed at a victim for the primary purpose of victimization.'" MCL 777.40(3)(a). In assessing 15 points for OV 10, the trial court noted its belief that defendant exploited the victim, and defendant's conduct toward the victim was "extremely predatory and sort of like a spider with her in his net."

The victim testified that defendant (1) took off her pants and underwear and performed what he called a "checking" of her vagina, by sticking his finger and a Q-tip into her vagina, apparently to determine whether she was still a virgin, (2) took off her pants and underwear, used clippers to clip the hair surrounding her vagina and licked her vagina, and (3) took off all of her clothes and whipped her all over her body with an object, leaving bleeding welts and approximately 25 scars. No defense witnesses were presented to rebut the victim's testimony. Indeed, the victim's mother and the nurse who examined the victim corroborated the victim's version of events and defendant's DNA was found in the victim's vagina.

The crux of OV 10 is the exploitation of a vulnerable victim. *People v Cannon*, 481 Mich 152, 157; 749 NW2d 257 (2008). The evidence here supports a finding of exploitation. The victim was only 13 to 14 years old during the incidents in question, and the incidents were perpetrated by her father. In the "checking" incident, defendant committed a criminal sexual penetration of his young daughter under the guise of performing something of a medical examination. Furthermore, defendant took the victim to the basement for all three incidents, with both sexual assaults occurring in the basement bathroom. No one was in or around the basement during the incidents. "[T]he timing of the assault (when no other persons were present) and its location (in the isolation and seclusion of the basement) are evidence of

preoffense predatory conduct." *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003) (finding predatory conduct where the defendant approached his girlfriend's nine-year old daughter, who was alone in the basement folding clothes, and committed a sexual assault). Because there was sufficient evidence of predatory conduct, the trial court did not abuse its discretion in assessing 15 points for OV 10.

Affirmed.

/s/ Kurt T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens