

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 24, 2012

v

SHAWN DELANO BROWN,
Defendant-Appellant.

No. 300939
Calhoun Circuit Court
LC No. 2010-001368-FC

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for manslaughter, MCL 750.321, and second-degree child abuse, MCL 750.136b(3). The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to 100 to 360 months' imprisonment for voluntary manslaughter, and 36 to 96 months' imprisonment for second-degree child abuse. The sentences are to be served concurrently. Defendant's convictions do not violate his double jeopardy rights because the two crimes contain different elements. We therefore affirm.

On appeal, defendant argues that his convictions for both voluntary manslaughter and second-degree child abuse violate the double jeopardy provisions of the Michigan and United States Constitutions. Defendant failed to properly preserve the double jeopardy question for appeal; accordingly, his claim is reviewed for plain error that affected his substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

To determine if two offenses are the "same" for double jeopardy purposes, we examine whether the Legislature intended the creation of two distinct offenses. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). To discern legislative intent, we apply the *Blockburger* test. *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); *People v Ford*, 262 Mich App 443, 448; 687 NW2d 119 (2004). "In general, the *Blockburger* test 'inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.'" *Ford*, 262 Mich App at 448 (quotation omitted).

We find second-degree child abuse and voluntary manslaughter are separate offenses and conviction for both does not violate double jeopardy prohibitions. Considering the elements of each offense, second-degree child abuse occurs when any of the following apply:

(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 or serious mental harm to a child. (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. (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results. [MCL 750.136b(3).]

The elements of voluntary manslaughter are defined by common law. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Voluntary manslaughter is an intentional act; an essential element of the crime is the “intent to kill or commit serious bodily harm.” *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Additionally, the prosecution must show: “(1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions.” *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005).

When compared to voluntary manslaughter, second-degree child abuse is unique because it protects a specific class of victim—those under the age of 18¹—and aims to punish a specific class of perpetrator—parents, guardians, and those with custody of, or authority over the child. MCL 750.136b(1)(a); MCL 750.136b(1)(d). Unlike child abuse, voluntary manslaughter requires actual harm and actual intent to cause harm; specifically, the victim of voluntary manslaughter must die and defendant must intend death or great bodily harm. Furthermore, the circumstances surrounding voluntary manslaughter—that it occur in the heat of passion arising from adequate provocation without time to cool off—are not required for a conviction of child abuse. In this case, because child abuse and voluntary manslaughter are not the “same offense,” there is no double jeopardy violation and we need not consider defendant’s argument that both offenses arose from the same continuing sequence of events. We conclude the Legislature intended to create two distinct offenses subject to separate punishments.

Defendant also challenges the scoring of offense variable (OV) 10, MCL 777.40, at ten points by arguing he did not exploit the victim, who was his infant son. However, as defendant concedes, scoring OV 10 at 0 points would not alter the minimum sentence guidelines range. Where a scoring error does not alter the appropriate guidelines range, resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003). Therefore, even if defendant is correct that OV 10 was improperly scored, resentencing is not required.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

¹ MCL 750.136b(1)(a) defines “child” to be an unemancipated person who is less than 18 years of age.