STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL JASON PRESTON,

Defendant-Appellant.

UNPUBLISHED
January 16, 1998

No. 195537
Recorder's Court
LC No. 95-006315

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, and receiving and concealing stolen property over $100 (RCSP), MCL 750.535; MSA 28.803. Defendant was sentenced to eight to twenty years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. On appeal, defendant raises two issues. First, defendant asserts that the trial court improperly denied his motion to suppress evidence obtained pursuant to an illegal arrest. Second, defendant argues that his convictions for both UDAA and RCSP violate the multiple punishments prong of the Double Jeopardy Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We affirm.

I

Defendant first claims that the trial court improperly denied his motion to suppress evidence obtained pursuant to an illegal arrest. We disagree. We review the trial court's ruling on a motion to suppress evidence for clear error. *People v Coscarelli*, 196 Mich App 724, 728; 493 NW2d 525 (1992). A warrantless arrest on a public street is proper if the police have probable cause for the arrest. MCL 764.15(d); MSA 28.874(d); *People v Romano*, 181 Mich App 204, 216; 448 NW2d 795 (1989). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). If the arrest is unlawful, evidence obtained pursuant to the arrest is inadmissible as fruit of the poisonous tree. *Romano*, *supra*.

The trial court stated that it believed from the testimony it had heard that there was adequate probable cause to arrest defendant. To the extent its decision was based on an evaluation of the arresting officer's credibility, this Court will not resolve that issue anew. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Thus, we decline defendant's invitation to find the arresting officer's testimony unbelievable.

We conclude that probable cause was established by the testimony of the arresting officer. After responding to the scene, the officer spoke with the owner of the stolen vehicle and witnesses who saw the crime. The officer testified that some of these witnesses, including witnesses who did not testify at trial, provided the officer with information about the appearance of the person who drove away in the vehicle. When the stolen vehicle reappeared in the area while the officer was working on his report, the officer followed the vehicle, which rapidly drove away from the officer. When the driver and passenger in the stolen vehicle jumped out of the car, the officer was able to see that the driver matched the description of the person the witnesses had identified, and the officer was able to determine the clothing the driver was wearing. After an unsuccessful foot chase, the officer returned to the stolen car and soon thereafter saw defendant walking down the road, wearing the same type of clothing as the driver, matching the general description the officer had obtained from witnesses as well as from his own observations. Defendant was sweating and out of breath. At this point, the officer had probable cause to arrest defendant for possessing stolen property as the driver of the stolen vehicle because a reasonably cautious person could conclude defendant had committed this crime. This alone would justify defendant's arrest, subsequent fingerprinting, and his statement to the police. We believe there was also probable cause to arrest defendant for taking the vehicle from the victim's driveway as well based on the information witnesses provided to the officer, even if these witnesses did not testify at trial. Thus, the trial court did not commit clear error in denying defendant's motion to suppress.

II

Defendant next argues that his convictions for both UDAA and RCSP violate the federal and state constitutional provisions against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. He asserts that convicting him of both offenses constitutes multiple punishments for the same offense, one of the prohibitions of the Double Jeopardy Clauses.[1] *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Hurst*, 205 Mich App 634, 636; 517 NW2d 858 (1994). We disagree.

While defendant did not object to his convictions on double jeopardy grounds in the trial court, appellate review is appropriate because defendant raises a significant constitutional issue. *People v Passeno*, 195 Mich App 91, 95; 489 NW2d 152 (1992). Defendant's claim of a double jeopardy violation is a question of law that we review de novo on appeal. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996)

The issue of whether two convictions involve the same offense for purposes of the protection against multiple punishments is solely one of legislative intent. *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986); *People v Pena*, 224 Mich App 650, 657; 569 NW2d 871 (1997). Under the federal test, two separate offenses generally exist when each offense requires proof of at least one fact that the other offense does not. *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180;

76 L Ed 306 (1932); *People v Harrington*, 194 Mich App 424, 427; 487 NW2d 479 (1992). "However, two offenses can have common elements and still be separate for double jeopardy purposes if the legislative intent that separate offenses be created is clear from the face of the statutes or the legislative history." *Harrington, supra* at 427-428.

In Michigan, our Supreme Court has rejected the federal *Blockburger* test in analyzing the Double Jeopardy Clause of the Michigan Constitution. *Denio, supra* at 708. The Michigan Constitution provides broader protection than does its federal counterpart. *Harrington, supra* at 428. Under the Michigan Constitution, two criteria should be examined in reviewing a double jeopardy challenge on multiple punishment grounds. *Id.*; *People v Johnson*, 176 Mich App 312, 313-314; 439 NW2d 345 (1989). First, we examine whether one statute prohibits conduct violative of a social norm distinct from the norm protected by the other statute. *Harrington, supra*; *Johnson, supra*. When two statutes prohibit violation of the same social norm, even if in a somewhat different manner, it may be concluded that the Legislature did not intend multiple punishments. *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984). However, statutes prohibiting conduct that violates distinct social norms can generally be viewed as separate and as permitting multiple punishment. *Id*. The key is to identify the type of harm or conduct the Legislature intended to prevent. *Id*.

Second, we consider the amount of punishment authorized by each statute and whether the statutes are hierarchical or cumulative. *Harrington, supra*; *Johnson, supra* at 314. Comparing the elements of the offenses is a useful tool, *Harrington, supra*, and "[w]here one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes," *Denio, supra*, quoting *Robideau, supra* at 487.

In examining the first criterion regarding whether one of the statutes in question prohibits conduct violative of a social norm distinct from the norm protected by the other statute, we recognize that both UDAA and RCSP involve property offenses. *Hurst, supra* at 638; *People v Ainsworth*, 197 Mich App 321, 326; 495 NW2d 177 (1992). However, the RCSP statute is somewhat different from the UDAA statute in that the RCSP statute prohibits conduct that violates the social norm against *theft* of property, *Ainsworth, supra,* while the UDAA statute is designed to deter trespassory taking and use of property, but does not involve actual theft, *People v Hendricks*, 446 Mich 435, 444 n 15, 449; 521 NW2d 546 (1994) ("Conviction of UDAA clearly does not require proof of . . . [an] intent to take the property permanently"). Accordingly, based upon the first criterion, it appears that separate punishments for each offense at issue in the present case may have been within the intent of the Legislature.

This conclusion is buttressed by the second criterion, an examination of whether the UDAA and RCSP statutes are hierarchical or cumulative and the amount of punishments authorized by the two statutes. The elements of RCSP over $100 are that (1) the property is stolen, (2) the property has a fair market value of over $100, (3) the defendant bought, received, possessed, or concealed the property with knowledge that the property was stolen, and (4) the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). The offense of UDAA contains the following elements: (1) possession of a vehicle, (2) driving the vehicle away, (3) the

act is done willfully, and (4) the possession and driving away must be done without authority or permission. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff'd 446 Mich 435; 521 NW2d 546 (1994).

Comparing the elements of the offenses, we discern no hierarchical or cumulative relationship between the statutes under the Michigan test. As compared to RCSP, UDAA does not require as one of its elements that the motor vehicle be stolen, i.e., an intent to permanently take the property from its owner. *Hendricks*, 446 Mich at 444 n 15; *People v Murph*, 185 Mich App 476, 481; 463 NW2d 156 (1990), modified with respect to sentencing (On Rehearing), 190 Mich App 707; 476 NW2d 500 (1991). Further, UDAA requires that the item wrongfully taken be a motor vehicle, an element not required for RCSP. *Hendricks*, 446 Mich at 444 n 15. Each offense requires proof of a fact that the other does not.[2] Neither statute builds upon the other in a hierarchial or cumulative fashion.

In addition, both the UDAA statute and the RCSP statute provide for equal imprisonment penalties of up to five years. MCL 500.413; MSA 28.645; MCL 500.535(1); MSA 28.803(1).[3] In reviewing the offenses, it cannot be said that one offense constitutes a base statute on which the other statute builds, thereby indicating that the Legislature did not intend multiple punishments. *Denio, supra* at 708, quoting *Robideau, supra* at 487.[4] Defendant's double jeopardy challenge is without merit.

We affirm.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young, Jr.

[1] We note that our analysis of this issue is limited to multiple punishments at a single trial. We do not address the issue regarding multiple punishments in separate trials, which implicates the double jeopardy protection against successive prosecutions. Accord *People v Denio*, 454 Mich 691, 707 n 18; 564 NW2d 13 (1997).

[2] Thus, there is also no double jeopardy violation under the federal *Blockburger* test.

[3] We acknowledge that the RCSP statute provides that a fine of $2,500 may also be imposed, but we do not conclude that this is a "hierarchical, harsher penalty based on the presence of aggravating factors." *Denio, supra* at 712.

[4] We also note that the UDAA statute, MCL 500.413; MSA 28.645, and the RCSP statute, MCL 500.535; MSA 28.803, are found in different chapters of the Penal Code, UDAA being in the "Motor Vehicles" chapter and RCSP being in the "Stolen or Embezzled Property" chapter. This difference has been persuasive to this Court in recent cases in which this Court determined that offenses contained in separate chapters of the Penal Code indicated a hierarchy did not exist and that the multiple punishments prong of the double jeopardy clause was not implicated. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996); *Harrington, supra* at 428-429.