STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 246265 Mecosta Circuit Court
JUSTIN LEE HOLLIDAY, Defendant-Appellant.	LC Nos. 01-004723-FC 01-004724-FC

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant entered a conditional nolo contendere plea to assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and assault with intent to do great bodily harm, MCL 750.84, as a fourth habitual offender, MCL 769.12. He entered an unconditional nolo contendere plea to third-degree criminal sexual conduct, MCL 750.520d(1)(b), as a third habitual offender, MCL 769.12. Defendant was sentenced to concurrent terms of 152 months to 30 years on the assault convictions and 240 months to 30 years on the CSC III conviction. This Court granted leave to appeal. We affirm defendant's convictions but remand for correction of the judgment of sentence in Docket No. 01-004724-FC. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant challenged being charged for both assault with intent to do great bodily harm ("assault GBH") and assault with intent to commit CSC ("assault CSC"), asserting that this violated the proscription against putting him twice in jeopardy for the same offense. US Const, Am V; Mich Const 1963, art 1, § 15. He maintains that this was a single ongoing assault supported by two theories – the intent to do great bodily harm and the intent to commit CSC. Essentially defendant argues the "single transaction" theory of double jeopardy recently rejected by our Supreme Court in *People v Nutt*, ___ Mich ___; 677 NW2d 1 (2004).

Barring other indicia of legislative intent, the presumption under the federal constitution is that the Legislature intended separate punishments for two offenses when each offense requires proof of at least one distinct fact, i.e., when the offenses have at least one distinct element. See *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). This is the test adopted by our Supreme Court in *Nutt.*

The specific intent elements of assault GBH and assault CSC differ. Thus, under the federal test, the crimes are presumptively subject to multiple punishments. This is one indication

that multiple punishments were intended under the Michigan test. Another such indication is that one statute does not incorporate the other and coextensively, does not impose increasing punishment based on aggravating circumstances. Although both offenses involved an assault, and assault generally is intended to protect people from physical harm, we note that assault GBH is under Chapter XI of the Penal Code, entitled "Assaults", whereas assault CSC is under Chapter LXXVI of the Penal Code, entitled "Rape." Thus, the structure of the statutes indicates that the Legislature wanted to separately protect against assaults aimed only at physically harming someone and assaults aimed at accomplishing a rape. Accordingly, we conclude that imposing separate punishments for assault GBH and assault CSC did not violate any double jeopardy protections.

Defendant correctly asserts that his judgment of sentence for CSC III erroneously indicates that he was sentenced as a fourth habitual offender. Although he pleaded to habitual offender fourth with respect to the two assault charges, he pleaded to habitual offender third with respect to the CSC III charge. Defendant is entitled to correction of the judgment of sentence.

Affirmed, but remanded for correction of defendant's judgment of sentence in Docket No 01-004724-FC. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray