

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO REYNOLDS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2002

No. 226322

Wayne Circuit Court

LC No. 99-004124

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO REYNOLDS,

Defendant-Appellant.

No. 226323

Wayne Circuit Court

LC No. 98-013602

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82, and assault with intent to commit armed robbery, MCL 750.89. He was sentenced to one to four years' imprisonment for the felonious assault conviction and four years, six months to twenty years' imprisonment for the assault with intent to commit armed robbery conviction. Defendant appeals as of right. We affirm in part and reverse in part.

The victim admitted consuming alcohol at a party. At the party, the victim met defendant, the son of a friend, when the friend asked the victim to drive him home. The victim agreed. When they arrived at their destination, defendant left the vehicle, supposedly to obtain money to pay the victim for the ride. When he returned, defendant pulled a knife from his pants, stabbed the victim in the neck and back area, and demanded her vehicle. The victim took the car keys and fled to a home where she broke a window trying to alert the home owners. The police were called. Defendant was found walking in the area of the incident with another man. The victim was treated at the scene for her injuries and returned to the party. Defendant's

mother testified that the victim smoked crack cocaine at the party and did not mention the stabbing when she returned to the party, allegations that the victim denied.

Defendant first argues that there was insufficient evidence presented to convict him of felonious assault and assault with intent to commit armed robbery. We disagree. When evaluating a challenge to the sufficiency of the evidence, a reviewing court must examine the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Defendant does not challenge the individual elements of the offenses. Rather, defendant alleges that there was insufficient evidence because of the contradictory testimony given by the victim, the lack of physical evidence because the knife was never found, and the victim's impairment because she was high on alcohol and crack cocaine. Questions of credibility and intent are properly resolved by the trier of fact, *In re Forfeiture of \$25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996), and deference must be given to the trier of fact's determination. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Defendant concludes that the victim's testimony and identification were tainted based on alcohol and drug consumption as evidenced by her contradictory and inconsistent statements to police at the time of the incident and her testimony at trial. However, the actions of police did not corroborate defendant's theory. Police did not observe any drug or alcohol impairment and allowed the victim to drive her vehicle from the scene after being treated by medical personnel. Furthermore, the victim adamantly denied that she was intoxicated or high, testifying that she had consumed a "pint of gin all day." While the victim's testimony at trial did not mirror her statement to police, the trial court concluded that her testimony and identification of defendant as her assailant was credible. Giving deference to the trial court's assessment of the victim's credibility, defendant's challenge to the sufficiency of the evidence on this basis is without merit. *Lemmon, supra*.

Defendant next argues that his convictions for felonious assault and assault with intent to commit armed robbery violate the double jeopardy protections provided by the United States Constitution, US Const, Am V, and Michigan Constitution, Const 1963, art 1, § 15. We agree. We will review this issue, although it was not raised in the trial court, because it involves a significant constitutional question. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). A double jeopardy challenge presents a question of law that we review de novo. *People v Kulpinski*, 243 Mich App 8, 12; 620 NW2d 537 (2000). The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. In the present case, defendant alleges that this safeguard was violated when he received multiple punishments for the same offense. "Where multiple punishment is involved, the Double Jeopardy Clause acts as a restraint on the prosecutor and the Courts, not the Legislature." *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998), citing *Brown v Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Accordingly, this Court must determine whether the Legislature authorized multiple punishments by examining the subject, language, and history of the statutes. *Id.* at 696. If the Legislature intended to authorize multiple punishment, there is no double jeopardy violation. *Id.* Statutes prohibiting conduct that is violative of distinct social norms are generally considered separate and amenable to allowing multiple punishment. *People v DeLeon*, 177 Mich App 306, 308; 441 NW2d 85 (1989). Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, it can generally be concluded that the Legislature did not intend multiple punishment. *People v Johnson*, 176 Mich App 312, 314; 439 NW2d 345 (1989).

When the Legislature establishes a hierarchy of offenses, contingent upon the presence or absence of aggravating factors, this structure indicates an intention to permit only a single appropriate offense and conviction. *People v Campbell*, 165 Mich App 1, 5; 418 NW2d 404 (1987). Legislative intent can also be determined by the amount of punishment authorized by the Legislature. If conduct from a base statute is increased in penalty for aggravated conduct, the Legislature did not intend, in all likelihood, punishment for both statutes. *DeLeon, supra*. When no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended. *People v Robideau*, 419 Mich 458, 488; 355 NW2d 592 (1984). There is no double jeopardy violation if one crime is completed before the other crime takes place, even where the offenses share common elements or where one offense is a lesser offense of the other. *Lugo, supra* at 708.

The elements of felonious assault are an assault, with a dangerous weapon, committed with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The purpose of the felonious assault statute is to discourage assaulting persons from inflicting even more serious injuries upon one another because of the involvement of a weapon. *People v Shelton*, 93 Mich App 782, 785; 286 NW2d 922 (1979). The penalty imposed for felonious assault may not exceed four years imprisonment or a fine of \$2,000 or both. MCL 750.82(1). The elements of assault with intent to commit armed robbery are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant is armed when the act is committed. *People v Cotton*, 191 Mich App 377, 478 NW2d 681 (1991). This crime is intended to protect persons from assaultive takings by means of a dangerous weapon. See, e.g., *People v Shipe*, 190 Mich App 629, 632; 476 NW2d 490 (1991). The penalty imposed for this offense is life or any term of years. MCL 750.89. Both offenses are categorized within the statutory crime provisions governing assault.

We conclude that the Legislature did not authorize multiple punishment where the statutes at issue address conduct violative of the same social norms, assaultive crimes against persons. *DeLeon, supra*. The convicted offenses arose out of the same criminal episode and involved laws intended to prevent the same or similar harm or evil. The Legislature established a hierarchy of offenses for assault crimes, and the assault with intent to commit armed robbery offense contains an aggravating factor not found in felonious assault, the intent to rob. The penalty for the aggravated conduct, the intent to rob, results in the imposition of a higher penalty. Because we conclude that the Legislature did not intend multiple punishment for the statutory crimes at issue arising out of one transaction and involving one victim, the conviction for felonious assault violates double jeopardy protection. When a multiple punishment double jeopardy violation has occurred, the remedy is to affirm the conviction of the higher charge and vacate the lower conviction. *People v Herron*, 464 Mich 593, 609; 628 NW2d 538 (2001). Accordingly, we vacate the conviction and sentence for felonious assault.

Affirmed in part, reversed in part, and remanded to vacate the conviction and sentence for felonious assault. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray