

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALVIN RICHMOND,

Defendant-Appellant.

UNPUBLISHED

January 28, 2010

No. 289335

Washtenaw Circuit Court

LC No. 06-001697-FC

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant entered a plea of no contest to charges of torture, MCL 750.85; assault with a dangerous weapon, MCL 750.82; and unlawful imprisonment, MCL 750.349b. He was sentenced to 150 months to 20 years for the torture conviction, 29 to 48 months for the assault conviction, and 114 to 180 months for the unlawful imprisonment conviction. We granted defendant's delayed application for leave to appeal, and now affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the prosecutor overcharged him by pursuing a charge of torture rather than a charge for assault with intent to commit great bodily harm. He suggests that the latter charge was the more specific of the two, and that therefore it had to be the crime charged. We disagree.

We review the prosecutor's decision for an "abuse of power," examining whether the prosecutor acted in contravention of the constitution or the law. *People v Barksdale*, 219 Mich App 484, 487; 556 NW2d 521 (1996). "The prosecution is given broad charging discretion. The prosecutor has discretion to bring any charges supported by the evidence." *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004) (citations omitted). However, when two statutes encompass the same subject matter, and one is general while the other is specific, the latter will control. *People v Ford*, 417 Mich 66, 79; 331 NW2d 878 (1982). Coextensively, this rule is not applicable when two statutes do not cover the same subject matter. *Id.*

The subject crimes do not cover the same subject matter. The assault crime requires a showing that a person assaulted another with intent to do great bodily harm less than murder. See MCL 750.84. Torture does not require an assault. That crime requires great bodily injury *or* severe mental pain or suffering. See MCL 750.85. Moreover, torture does not require an intent

to do great bodily harm; rather, the intent must be to cause cruel or extreme physical or mental pain and suffering. Finally, torture requires an additional element, i.e., the victim must be within the perpetrator's custody or control. Since these statutes do not encompass the same subject matter, there was no abuse of power in charging defendant with torture.

Moreover, there was a sufficient factual basis for the crime of torture. The victim suffered a great bodily injury – brain damage. Also, the victim was in defendant's custody and control. For more than two hours, defendant precluded others from getting help on threat of death. Finally, there was evidence giving rise to an inference that defendant's intent was to inflict cruel or extreme physical or mental pain and suffering on the victim. During this period, the victim was suffering from a severe head injury, but defendant precluded any medical care. Moreover, during this period defendant rubbed the victim's stomach; "played" with his genitals; kissed him; pulled down his pants; smacked his buttocks; asked for Vaseline and threatened to rape the victim; and threw ice water on his stomach. We conclude that this evidence was sufficient to establish an intent to cause cruel and extreme suffering.

Affirmed.

/s/ Pat M. Donofrio

/s/ Patrick M. Meter

/s/ Christopher M. Murray