IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

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No. 21095

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STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

RONALD DEAN RUMMER,
Defendant Below, Appellant

_____

Appeal from the Circuit Court of Wood County
The Honorable Arthur N. Gustke, Judge
Criminal Indictment No. 90-F-133

AFFIRMED

_____

Submitted: January 26, 1993
Filed: May 25, 1993

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JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE NEELY dissents and reserves the right to file a dissenting opinion.

CHIEF JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense." Syllabus Point 1, Conner v. Griffith, 160 W. Va. 680, 238 S.E.2d 529 (1977).

2. "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syllabus Point 8, State v. Zaccagnini, 172 W. Va. 491, 308 S.E.2d 131 (1983).

3. "A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." Syllabus Point 7, State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992).

4. "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth

in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses." Syllabus Point 8, State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992).

5. W. Va. Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W. Va. Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles.

6. "Where a person accused of committing a crime makes a voluntary statement which is declared inadmissible in the State's case-in-chief due to a violation of the accused's prompt presentment rights pursuant to West Virginia Code § 62-1-5 [1965] and West Virginia Rule of Criminal Procedure 5(a), the statement may be admissible solely for impeachment purposes if the accused takes the stand at his trial and offers testimony inconsistent with the prior voluntary statement." Syllabus Point 3, State v. Knotts, 187 W. Va. 795, 421 S.E.2d 917 (1992).

7. "'In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.' Syllabus Point 3, as amended, State v. Casdorph, 159 W. Va. 909, 230 S.E.2d 476 (1976)." Syllabus Point 3, State v. Spence, 182 W. Va. 472, 388 S.E.2d 498 (1989).

Miller, Justice:

This is an appeal from the final order of the Circuit Court of Wood County, entered September 13, 1991, sentencing the defendant, Ronald Dean Rummer, to two concurrent terms of imprisonment upon his conviction by a jury of two counts of sexual abuse in the first degree. The defendant contends that both sentences arose from the same transaction and that they therefore constitute unconstitutional double jeopardy. He also cites as error the trial court's admission at trial of his out-of-court statements to police and the admission of the prosecuting witness's out-of-court identification of the defendant. Because we find no error below, the judgment of the trial court is affirmed.

The charges against the defendant arose from an incident that occurred in the early morning hours of June 21, 1991. C.D.,[1] a twenty-one-year-old woman, had spent the earlier part of the evening riding around Parkersburg with friends in a friend's car. At approximately 1:00 a.m., as C.D. and her friends neared C.D.'s home, C.D. informed her friends that she wanted to go home. This led to a minor argument with her friends because they desired to continue driving. Therefore, C.D. was let out of the car approximately eight blocks from her home.

[1]As this case involves a sensitive matter, we shall follow our traditional practice and refer to the victim by initials. See State v. Peyatt, 173 W. Va. 317 n.4, 315 S.E.2d 574 n.4 (1983).

After taking leave of her friends, C.D. began to walk home. As she was walking, she became aware of a vehicle following her at a very slow rate of speed. C.D. noticed that the driver of the vehicle was hunched over as he drove and appeared to be balding. Gradually, the vehicle passed C.D. and turned the corner. Shortly thereafter, C.D. became aware of a man following her on foot. She became concerned and increased her pace, but he followed even faster. As C.D. turned towards the man again, he caught her and roughly grabbed her. C.D. yelled and told him to leave her alone. He put one hand between her legs and began rubbing roughly. He attempted to put his other hand up C.D.'s shirt, and grabbed her breasts through her shirt. C.D. tried to escape, but fell to the ground. The man fell on top of her and again roughly fondled her breasts through her shirt with both hands. She finally pushed him off of her and got up and ran to a nearby pay phone.

Upon reaching the pay phone, C.D. first dialed 9-1-1 and informed the police of the attack and her location, and a policeman was immediately dispatched to take her statement. She then phoned her mother, who lived nearby, and her mother drove to meet her.

C.D.'s mother arrived within minutes, and, as C.D. and her mother waited for the police to arrive, C.D. noticed the vehicle that had earlier followed her pass by. Shortly thereafter, a policeman, Officer Parsons, arrived. Officer Parsons asked C.D. if she wanted to file a complaint, and she agreed to do so. He asked C.D. to sit in his police cruiser and give a statement. She did so, and began

telling the officer the details of the assault. She told him that the man who assaulted her was wearing white pants and a white shirt with red or pink stripes.

While she was sitting in the police car giving her statement to Officer Parsons, C.D. noticed the car that had earlier followed her again pass by. When she told this to Officer Parsons, he gave chase to the car. After pursuing it for several blocks, he was able to stop the car. He then asked C.D. to advise him if the driver, the lone occupant of the car, was the man who attacked her. After approaching the car, C.D. identified the man as her attacker.

After the defendant was identified by C.D., Officer Parsons obtained his name and address and allowed him to leave the scene. The following day, a Detective Kenneth Miller telephoned the defendant and asked him to come by the police station and make a statement. Prior to the defendant's arrival, Detective Miller obtained a warrant for the defendant's arrest. Upon his arrival at the police station, the defendant was read his Miranda rights,[2] and he waived them. He then gave a tape recorded statement during which he denied any knowledge of the incident. He also denied knowing C.D. in any way. Thereafter, the defendant was arrested by Detective Miller, and was presented to a magistrate. The record does not reveal how much time elapsed between the defendant's arrival at the police station and his presentment before the magistrate.

[2]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At trial, the defendant testified that he had, in fact, followed C.D. in his car and later approached her on foot and asked her to go out with him. Although he admitted putting his arm around her waist, the defendant denied touching her breasts or sex organ. He asserted that he left her upon her request that he do so. He contended that he was familiar with C.D., whom he suggested was a prostitute. He also asserted that he had "picked up" C.D. several weeks before the incident, and that they had had sexual intercourse at that time.

C.D. testified in rebuttal that she did not know the defendant and had never seen the defendant socially. She testified that the only time she may have seen the defendant was several years before the incident when she worked in a drive-through store. The State also called Detective Miller to testify regarding the defendant's statement given at the police station in which he denied knowing C.D. The defendant's earlier objection to the use of this statement was heard at an in camera hearing, and the objection was denied.

At the conclusion of the trial, the defendant was found guilty by the jury of two counts of sexual abuse in the first degree. By order entered September 13, 1991, the trial court sentenced the defendant to two concurrent sentences of not less than one year nor more than five years imprisonment in the penitentiary.

I.

Double Jeopardy

With regard to the defendant's double jeopardy claim, he contends that his two convictions for first degree sexual abuse were improper because only one offense was committed. This conclusion is based upon the premise that the touching of the victim's breasts and her sex organ occurred within a brief period of time and should be considered one act. The defendant asserts that, under these circumstances, he is receiving multiple punishments for the same offense, a situation prohibited under the Double Jeopardy Clause of both our State and the federal constitutions.

Our double jeopardy principles have been patterned after the United States Supreme Court's interpretation of the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution.[3] Our general pronouncement of the scope of our Double Jeopardy Clause, contained in Section 5 of Article III of the West Virginia Constitution,[4] is set out in Syllabus Point 1 of Conner v. Griffith, 160 W. Va. 680, 238 S.E.2d 529 (1977):

> "The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after

[3]The applicable provision of the Fifth Amendment states: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[4]Section 5 of Article III of the West Virginia Constitution contains this double jeopardy language: "Nor shall any person, in any criminal case, . . . be twice put in jeopardy of life or liberty for the same offence."

> conviction. It also prohibits multiple punishments for the same offense."

The foregoing Syllabus Point is derived from North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).[5]

In State v. Zaccagnini, 172 W. Va. 491, 308 S.E.2d 131 (1983), we discussed in detail those cases decided by the United States Supreme Court which dealt with criminal statutes that were claimed to violate double jeopardy principles through the imposition of multiple punishments for the same offense. We pointed out in Zaccagnini that the beginning point for such an analysis is the test set out in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). We summarized the Blockburger test in Syllabus Point 8 of Zaccagnini:

> "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

We further recognized in Zaccagnini that the Blockburger test was not only a rule of statutory construction, but was also

[5]In Conner v. Griffith, supra, we quoted this language from North Carolina v. Pearce, 395 U.S. at 717, 89 S. Ct. at 2076, 23 L. Ed. 2d at 664-65: "'[The Double Jeopardy Clause] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" 160 W. Va. at 682, 238 S.E.2d at 530.

recognized by the United States Supreme Court to be a means of identifying legislative intent where such intent is unclear. We cited the following statement from Albernaz v. United States, 450 U.S. 333, 340, 101 S. Ct. 1137, 1143, 67 L. Ed. 2d 275, 282 (1981), in Zaccagnini:

> "'The Blockburger test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.'" 172 W. Va. at 502, 308 S.E.2d at 142. (Citation omitted).

The Supreme Court in Albernaz elaborated on the Blockburger test's role in determining legislative intent in a double jeopardy analysis when it quoted this language from note 17 of Iannelli v. United States, 420 U.S. 770, 785, 95 S. Ct. 1284, 1293-94, 43 L. Ed. 2d 616, 627 (1975):

> "'The test articulated in Blockburger v. United States, 284 U.S. 299, [52 S. Ct. 180, 76 L. Ed. 306] (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, Blockburger requires that courts examine the offenses to ascertain "whether each provision requires proof of a fact which the other does not." Id., at 304, [52 S. Ct. 180, 76 L. Ed. 306]. As Blockburger and other decisions applying its principle reveal . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" 450 U.S. at 337-38, 101 S. Ct. at 1141-42, 67 L. Ed. 2d at 281.

In Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), the Supreme Court considered the aspect of double

jeopardy relating to multiple punishments for the same offense in regard to two Missouri statutes. One statute related to the felony of robbery with the use of a deadly weapon. The other statute provided that any person who committed any felony with the use of a deadly weapon was guilty of armed criminal action. The latter crime provided for a penalty of not less than three years, in addition to any punishment provided by law for the underlying felony committed by the use of a deadly weapon.

The Missouri Court of Appeals[6] concluded that, under these statutes, the imposition of two sentences upon a defendant who had committed the crime of armed robbery violated the double jeopardy prohibition against multiple sentences for the same offense.[7] After granting certiorari, the United States Supreme Court established that the Missouri Court of Appeal's legal interpretation of the Double Jeopardy Clause was not binding upon it and concluded:

> "[S]imply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in Whalen [v. United States, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)] is not a constitutional rule requiring courts to negate clearly expressed legislative intent." 459 U.S. at 368, 103 S. Ct. at 679, 74 L. Ed. 2d at 543-44.

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[6]The Missouri Supreme Court did not issue an opinion in Hunter because it denied review.

[7]State v. Hunter, 622 S.W.2d 374 (Mo. App. 1981).

We have recently discussed and applied these double jeopardy principles in State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992), where we upheld separate convictions under both our sexual offense statute and W. Va. Code, 61-8D-5(a) (1991), where the same conduct formed the basis for both convictions. In Gill, the child's custodian had committed several sex acts on her in violation of W. Va. Code, 61-8B-3(a)(2) (1984), our first degree sexual assault statute. The State also charged and convicted the defendant under W. Va. Code, 61-8D-5(a), which relates to sexual offenses committed by a parent, guardian, or custodian of a child. The defendant claimed that he was being punished twice for the same act.

In Gill, we recognized the Supreme Court's acknowledgment that the legislature has the power to define crimes and determine their punishment. We quoted this language from Ohio v. Johnson, 467 U.S. 493, 499, 104 S. Ct. 2536, 2541, 81 L. Ed. 2d 425, 433 (1984): "'Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, . . . the question under the Double Jeopardy Clause whether punishments are "multiple" is essentially one of legislative intent[.]' (Citations omitted)." 187 W. Va. at 141, 416 S.E.2d at 258. (Footnote omitted).

In Gill, we also discussed Missouri v. Hunter, supra, and the later case of Garrett v. United States, 471 U.S. 773, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985). In those cases, the Supreme Court expressly recognized that where the legislature intended to make the same conduct the subject of two criminal acts and, therefore,

separately punishable, this could be done even though under the Blockburger test, the crimes would constitute the same offense:

> "'Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature--in this case Congress--intended that each violation be a separate offense. . . .
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> * * *
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> "'. . . We have recently indicated that the Blockburger rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.' (Citations omitted)." 187 W. Va. at 142, 416 S.E.2d at 259.

After discussing the foregoing United States Supreme Court cases, we summarized their principles in Syllabus Points 7 and 8 of Gill, supra:

> "7. A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.
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> "8. In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses."

Thus, the cited Syllabi from Gill begin with an analysis of the relevant criminal provisions to determine if a legislative

intent to require separate punishments can be discerned. If there is no clear legislative intent, then an analysis under the Blockburger-Zaccagnini test concerning the elements of proof should be made.

Our conclusion in Gill was that the language in W. Va. Code, 61-8D-5(a), stating that "[i]n addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection," was sufficiently explicit to demonstrate that the legislature intended to create a separate parent-custodial sexual misconduct offense in addition to our general sexual offense statutes.[8] Thus, two separate punishments were permissible under double jeopardy principles even though they arose from the same act.[9]

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[8]In Syllabus Point 9 of State v. Gill, supra, we said:

> "W. Va. Code, 61-8D-5(a) (1988), states, in part: 'In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]' Thus, the legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians, W. Va. Code, 61-8D-5, is a separate and distinct crime from general sexual offenses, W. Va. Code, 61-8B-1, et seq., for purposes of punishment."

[9]State v. Gill obviously modifies Syllabus Point 4 of State v. Reed, 166 W. Va. 558, 276 S.E.2d 313 (1981): "Double jeopardy prohibits multiple punishment for the same offense, therefore under our criminal sexual conduct statute, W. Va. Code, 61-8B-1 et seq. [1976], a single sexual act cannot result in multiple criminal convictions." The issue in Reed centered on whether double jeopardy "bars the conviction for a lesser offense when the accused has been convicted of the greater offense." 166 W. Va. at 565-66, 276 S.E.2d at 319.

We have also discussed double jeopardy considerations in relation to sexual offenses in several other cases. In State v. Carter, 168 W. Va. 90, 282 S.E.2d 277 (1981), the defendant had been convicted of two counts of first degree sexual assault. The first count related to oral intercourse and the second to anal intercourse. We reviewed the definition of "sexual intercourse" contained in W. Va. Code, 61-8B-1(7) (1986), which provided, in relevant part, "penetration, however slight, of the female sex organ by the male sex organ, or involving contact between the sex organs of one person and the mouth or anus of another person," and came to this conclusion:

> "The use of the word 'or,' which is a conjunction, expresses the legislative intent that sexual intercourse can be committed in each of the various alternative ways, with each type of prohibited contact constituting a separate offense. From this, it is apparent that the Legislature chose to broadly define the term 'sexual intercourse' so that it would cover a variety of sexual encounters." 168 W. Va. at 92, 282 S.E.2d at 279-80. (Footnote omitted).[10]

In Carter, although we did not utilize the Blockburger-Zaccagnini test, the same result would have been reached

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[10]In State v. Carter, 168 W. Va. at 93, 282 S.E.2d at 280, we made this comment:

> "Most courts which have had occasion to construe similar sexual offense statutes [to our own] have reached the same conclusion. Hamill v. Wyoming, 602 P.2d 1212 (Wyo. 1979); Padilla v. State, 601 P.2d 189 (Wyo. 1979); cf. State v. Hill, 104 Ariz. 238, 450 P.2d 696 [(1969)]; State v. Ware, 53 Ohio App. 2d 210, 372 N.E.2d 1367 (1977), aff'd, 63 Ohio St. 2d 84, 406 N.E.2d 1112 (1980); Commonwealth v. Romanoff, 258 Pa. Super. 452, 392 A.2d 881 (1978)."

under it as interpreted by the United States Supreme Court and accepted by us in Gill. Under the Blockburger-Zaccagnini test, we would have analyzed legislative intent by determining if there was any clear expression of such intent. In the absence of any clear expression of such intent, we would have applied the Blockburger-Zaccagnini test to the elements of the crimes. It is clear that the offense of first degree sexual assault as set out in W. Va. Code, 61-8B-3(a) (1991),[11] does not, on its face, contain any clear statement of legislative intent with regard to separate punishments, as was the case in Gill. However, applying a Blockburger-Zaccagnini analysis to W. Va. Code, 61-8B-3(a), we note that among the components of first degree sexual assault is the term "sexual intercourse." "Sexual intercourse" is defined in W. Va. Code, 61-8B-1(7), and consists of three alternative acts: (1) "penetration, however slight, of the female sex organ by the male sex organ," or (2) "contact between the sex organs of one person and the mouth . . . of another person," or (3) contact between the sex organs of one person and . . . the anus of another person."

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[11]W. Va. Code, 61-8B-3(a), provides:

> "A person is guilty of sexual assault in the first degree when:
> "(1) Such person engages in sexual intercourse or sexual intrusion with another person and, in so doing:
> "(i) Inflicts serious bodily injury upon anyone; or
> "(ii) Employs a deadly weapon in the commission of the act; or
> "(2) Such person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is eleven years old or less.

Clearly, by statutory definition, the elements of the crime of first degree sexual assault through sexual intercourse can be committed by three distinct acts or methods.[12] Under the Blockburger-Zaccagnini test, each of the crimes "requires proof of an additional fact which the other does not." Syllabus Point 8, in part, State v. Zaccagnini, supra. In the context of "sexual intercourse," the female sex organs, the mouth, and the anus are each distinct and separate matters of proof, any one of which is sufficient to prove the crime. If a defendant commits both unlawful oral and anal intercourse, as occurred in Carter, the defendant has committed two separate offenses.[13]

In both State v. Peyatt, 173 W. Va. 317, 315 S.E.2d 574 (1983), and State v. Trail, 174 W. Va. 656, 328 S.E.2d 671 (1985), we applied the Blockburger-Zaccagnini analysis and found no double jeopardy violations. In Peyatt, we affirmed a sexual assault conviction and an incest conviction arising from the same act. In

[12]The Supreme Court of California reached the same result in People v. Perez, 23 Cal. 3d 545, 553, 153 Cal. Rptr. 40, 44, 591 P.2d 63, 68 (1979), where it concluded: "A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act."

[13]The same analysis would apply to the term "sexual intrusion," which is also used in W. Va. Code, 61-8B-3, our first degree sexual assault statute. See note 11, supra. "Sexual intrusion" is defined in W. Va. Code, 61-8B-1(8), as "any act between persons not married to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party."

Trail, we affirmed convictions for abduction with intent to defile and first degree sexual assault arising out of the same incident. In neither case did we elaborate on the Blockburger-Zaccagnini test as a means of identifying legislative intent to create separate offenses. Had we done so, the end result would have been the same.

In the instant case, we deal with two convictions of first degree sexual abuse. First degree sexual abuse is defined in W. Va. Code, 61-8B-7(a) (1984),[14] and utilizes the term "sexual contact." This term, like the term "sexual intercourse," is defined in W. Va. Code, 61-8B-1, which states, in pertinent part:

> "'Sexual contact' means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party."

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[14]W. Va. Code, 61-8B-7(a), states, in pertinent part:

> "(a) A person is guilty of sexual abuse in the first degree when:
> "(1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or
> "(2) Such person subjects another person to sexual contact who is physically helpless; or
> "(3) Such person, being fourteen years old or more, subjects another person to sexual contact who is eleven years old or less."

Again, we note the legislative use of the word "or" throughout this definition, which, under our rules of statutory construction, is clearly designed to separate the various acts that may constitute "sexual contact." As we stated in State v. Taylor, 176 W. Va. 671, 346 S.E.2d 822 (1986) (a case involving our stolen property statute, W. Va. Code, 61-3-18 [1923]):

> "Each of the forbidden acts set forth in the statute is separated by the disjunctive 'or,' i.e., 'buy or receive' or 'aid in concealing' or 'transfer.' We have customarily stated 'that where the disjunctive "or" is used, it ordinarily connotes an alternative between the two clauses it connects.' Albrecht v. State, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984), citing State v. Elder, 152 W. Va. 571, 577, 165 S.E.2d 108, 112 (1968)." 176 W. Va. at 675, 346 S.E.2d at 825-26.

Although this is the first occasion we have had to discuss the double jeopardy aspect of "sexual contact," we find that its statutory pattern is substantially similar to that of "sexual intercourse," which we discussed in regard to double jeopardy principles in State v. Carter, supra. Applying the Blockburger-Zaccagnini test to the instant case, we find that the principal element of W. Va. Code, 61-8B-7, which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W. Va. Code, 61-8B-1(6), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles.

When we look to other jurisdictions that have dealt with double jeopardy challenges to their sexual contact statute, we find that they have reached a result similar to the one we reach today. The Court of Appeals of New Mexico addressed facts almost identical to those presented here in State v. Williams, 105 N.M. 214, 730 P.2d 1196 (1986). In that case, the defendant was convicted of two counts of criminal sexual contact. The convictions resulted from unlawfully touching his victim's breasts and genital area during a time span of less than five minutes. The relevant statute stated that "[c]riminal sexual contact is intentionally touching or applying force without consent to the unclothed intimate parts of another who has reached his eighteenth birthday* * * * For purposes of this section 'intimate parts' means the primary genital area, groin, buttocks, anus or breast." 105 N.M. at 216, 730 P.2d at 1198, citing N.M. Stat. Ann. § 30-9-12 (1984). The Court of Appeals held that the intent of the New Mexico legislature was to protect the victim from intrusions to each enumerated part, and, therefore, that "[s]eparate punishments are sustainable where evidence shows distinctly separate touchings to the different parts." 105 N.M. at 217, 730 P.2d at 1199.

Although State v. Williams, supra, did not involve any lengthy analysis of United States Supreme Court double jeopardy decisions, such an analysis was recently undertaken by the New Mexico Supreme Court in Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991). In Swafford, the New Mexico court recognized some confusion in its double jeopardy decisions, reviewed recent United States Supreme Court

cases that had construed Blockburger, and came to this conclusion:

> "Taking as our cue the repeated admonitions of the Supreme Court that the sole limitation on multiple punishments is legislative intent, Grady v. Corbin, [495 U.S. 508, 517, 110 S. Ct. 2084, 2091, 109 L. Ed. 2d 548, 561 (1990)]; Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535 [542] (1983), we adopt today a two-part test for determining legislative intent to punish. The first part of our inquiry asks the question that Supreme Court precedents assume to be true: whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes. The second part focuses on the statutes at issue to determine whether the legislature intended to create separately punishable offenses. Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial." 112 N.M. at 13, 810 P.2d at 1233.

This approach is entirely consistent with that which we have evoked and discussed in our double jeopardy analysis herein.

The Court of Appeals of Utah in State v. Suarez, 736 P.2d 1040 (Utah App. 1987), was also faced with a situation like the one in this case. There, the defendant was charged with two counts of forcible sexual abuse in violation of Utah Code Ann. § 76-5-404 (1982). The defendant had placed his mouth on the victim's breasts and touched her genitals in the same transaction. The applicable statute, Utah Code Ann. § 76-5-404(1) stated:

> "'(1) A person commits forcible sexual abuse if, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, the actor touches the anus or any part of the genitals of another, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another,

> with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.' (Emphasis added)." 736 P.2d at 1042.

Although both charges were defined in the same section, the Court of Appeals emphasized that the charges were separated by the conjunctive "or," just as they are in the instant case. Therefore, the Utah court found that the "[d]efendant's argument is flawed in that he first placed his mouth on the victim's breasts, the taking of indecent liberties, and then placed his hand on her vagina. These are separate acts requiring proof of different elements and constitute separate offenses." 736 P.2d at 1042.

The Court of Appeals of Maryland in State v. Boozer, 304 Md. 98, 497 A.2d 1129 (1985), was confronted with an appeal by the State from a trial court's dismissal of a fourth degree sexual assault charge against a defendant. The State had previously charged the defendant with unlawfully engaging in a sexual act with a person age fourteen and four or more years younger than he. The State subsequently entered a nolle prosequi to that charge and issued a new statement of charges alleging that the defendant had unlawfully attempted to have vaginal intercourse with the fourteen-year-old victim. Both charges were based upon the same incident, and both charges were based upon the same statute describing fourth degree sexual assaults. Md. Ann. Code art. 27, § 464C. However, a separate article of the Maryland Code provided definitions for "sexual act" and "vaginal intercourse," and the Court of Appeals held that, because

the two were separately defined, they constituted separate crimes and were not the same for double jeopardy purposes.[15]

The Supreme Court of Kentucky in Hampton v. Commonwealth, 666 S.W.2d 737 (Ky. 1984), dealt with a situation where a defendant was charged with first degree sodomy and first degree sexual abuse. The charges arose from an incident where the defendant performed fellatio on the victim and caused the victim to perform the same act on him either simultaneously or continuously. The Supreme Court of Kentucky held that "the separate charge of sexual abuse is based not on incidental contact, but on a separate act of sexual gratification. The fact that the two sexual acts occurred either simultaneously or nearly so is irrelevant." 666 S.W.2d at 739. Therefore, both charges stemming from the same transaction did not violate double jeopardy principles.

Other courts have held that charges of sexual assault in the first degree and sexual assault in the third degree may be brought for conduct occurring in the same transaction because they require proof of facts independent of each other. State v. Mezrioui, 26 Conn. App. 395, 602 A.2d 29 (1992). It has also been held that a dentist

[15]The Boozer court further stated:

> "The courts of this country have had little difficulty in concluding that separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction." 304 Md. at 105, 497 A.2d at 1132.

who subjects a female patient to four incidents of unlawful sexual contact while she was under the effects of nitrous oxide during the course of a root canal procedure could be convicted of four counts of sexual abuse in the first degree. People v. Yankowitz, 169 A.D.2d 748, 564 N.Y.S.2d 488 (1991). See also Perez, supra; State v. Smith, 276 S.C. 484, 280 S.E.2d 56 (1981); State v. Eisch, 96 Wis. 2d 25, 291 N.W.2d 800 (1980). Cf. United States v. DeCorte, 851 F.2d 948 (7th Cir. 1988); Robinson v. Lockhart, 823 F.2d 210 (8th Cir. 1987); United States v. Solomon, 753 F.2d 1522 (9th Cir. 1985); United States v. Anderson, 851 F.2d 384 (D.C. Cir. 1988), cert. denied, 488 U.S. 1012, 109 S. Ct. 801, 102 L. Ed. 2d 792 (1989). See generally Project, Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal, 80 Georgetown L.J. 1308 (1992).

Finally, we find unpersuasive the argument that first degree sexual abuse under W. Va. Code, 61-8B-7(a), should be considered like a battery since it involves an unlawful touching of various parts of the body. Our battery statute, W. Va. Code, 61-2-9(c) (1978), makes no attempt to delineate the crime either by the portions of the body touched, as does our sexual abuse statute, or by the number of blows struck. Consequently, the traditional double jeopardy analysis of a battery through legislative intent would fail to reveal any intention to create a separate crime based upon separate blows.[16]

[16]This type of analysis might well be used in a sexual abuse case where the defendant touched both of the victim's breasts at the same time. The term "sexual contact" in W. Va. Code, 61-8B-1(6), uses the phrase "or the breasts of a female."

As we have pointed out, our sexual abuse statute, through its specific enumeration of the different ways in which sexual abuse can be accomplished, shows a legislative intent to separately punish sexual abuse to different parts of the body.

Courts that have discussed the battery question have not attempted a double jeopardy analysis based upon legislative intent. Instead, they conclude without any detailed analysis that multiple blows struck during the same battery are not separate crimes. See, e.g., Weatherly v. State, 733 P.2d 1331 (Okla. App. 1987). Cf. People v. Berner, 42 Colo. App. 520, 600 P.2d 112 (1979) (where the batteries are separated in time, two crimes are deemed to have occurred).

It is clear from the foregoing cases that most jurisdictions that have addressed whether a legislature intended to distinguish separate sexual crimes by listing different methods of sexual assault or abuse have found that the legislature did intend to so distinguish. We also conclude that the West Virginia legislature, in establishing the crime of sexual abuse in the first degree under W. Va. Code, 61-8B-7(a), intended to make separate offenses of each of the various methods to commit the crime outlined in W. Va. Code, 61-8B-1(6). Therefore, the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode.

II.

PROMPT PRESENTMENT

The defendant further asserts that the trial court erred in allowing the use of the defendant's statement to Detective Miller to impeach his testimony. We note that the defendant voluntarily agreed to appear at the police station and answer questions upon Detective Miller's request. Detective Miller had obtained a warrant for the defendant's arrest prior to the defendant's arrival at the police station. The defendant freely waived his Miranda rights and was not coerced in any way into making his statements. Furthermore, the defendant did not confess to the crime.

At trial, however, the defendant attempted to persuade the jury that C.D. was a prostitute with whom he had recently had sexual intercourse. While the defendant admitted to following C.D. both by car and by foot on the night of the incident, in his statement to Detective Miller, the defendant denied knowing C.D. When the State attempted to impeach his testimony through the use of the statement given to Detective Miller, the defendant objected and an in camera hearing was conducted. At the conclusion of the hearing, the defendant again objected to the use of his statement, alleging that such use violated our "prompt presentment" rule.

Our prompt presentment rule is stated in W. Va. Code, 62-1-5:

> "An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the

> arrested person without unnecessary delay before a justice [magistrate] of the county in which the arrest is made. When a person arrested without a warrant is brought before a justice [magistrate], a complaint shall be filed and a warrant issued forthwith. The officer executing the warrant shall make return thereof to the justice [magistrate] before whom the defendant is brought."[17]

We interpreted the prompt presentment rule in Syllabus Point 2 of State v. Humphrey, 177 W. Va. 264, 351 S.E.2d 613 (1986):

> "Our prompt presentment rule contained in W. Va. Code 62-1-5 [1965], and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered."

Applying Humphrey to the instant case, it seems clear that the prompt presentment rule was "triggered" upon the defendant's arrival at the police station because the police had sufficient probable cause for his arrest. In fact, they had already obtained an arrest warrant. Nonetheless, there is no evidence in the record detailing the length of time that Detective Miller questioned the defendant. Nor is there any testimony concerning the length of time that elapsed between the defendant's arrival at the police station and his presentment before a magistrate. Assuming, however, that the delay in presentment was unreasonable, we note that the defendant's statement was unquestionably voluntary. No allegation of coercion is alleged. The defendant drove to the police station on his own

[17]Rule 5(a) of the West Virginia Rules of Criminal Procedure contains parallel language to W. Va. Code, 62-1-5.

at Detective Miller's request and waived his Miranda rights prior to answering the detective's questions.

Under these facts, we find that even if the defendant was subjected to an unnecessary delay prior to his presentment to a magistrate, the State could properly use his statement to impeach his testimony at trial. This is because a voluntary statement made by a defendant that is inadmissible in the State's case-in-chief due to violations of the prompt presentment rule is nevertheless admissible solely for impeachment purposes. As we stated in Syllabus Point 3 of State v. Knotts, 187 W. Va. 795, 421 S.E.2d 917 (1992):

> "Where a person accused of committing a crime makes a voluntary statement which is declared inadmissible in the State's case-in-chief due to a violation of the accused's prompt presentment rights pursuant to West Virginia Code § 62-1-5 [(1965)] and West Virginia Rule of Criminal Procedure 5(a), the statement may be admissible solely for impeachment purposes if the accused takes the stand at his trial and offers testimony inconsistent with the prior voluntary statement."

See also Syllabus Point 4, State v. Goodmon, 170 W. Va. 123, 290 S.E.2d 260 (1981); Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

In this case, because the statement made by the defendant was voluntary, and was used only to impeach his testimony at trial, the lower court committed no error on this point.

III.

SUGGESTIVE IDENTIFICATION

The defendant also asserts that the trial court erred in denying his motion to suppress evidence of C.D.'s out-of-court identification of him on the night of the incident. The defendant claims that the prior identification of him by C.D. was so suggestive by Officer Parsons that it tainted C.D.'s identification of him at trial.

It has been said that almost any time a one-on-one confrontation between a crime victim and a crime suspect is arranged by the police, such a procedure inherently suggests to the victim that the suspect is the perpetrator of the crime. The Seventh Circuit Court of Appeals stated in United States ex rel. Kirby v. Sturges, 510 F.2d 397, 403 (7th Cir.), cert. denied, 421 U.S. 1016, 95 S. Ct. 2424, 44 L. Ed. 2d 685 (1975):

> "Without question, almost any one-on-one confrontation between a victim of a crime and a person whom the police present to him as a suspect must convey the message that the police have reason to believe him guilty. The psychological factors [present] create a real risk of misidentification in such circumstances. . . . [One must] start then from the premise that significant suggestion is inherent in the use of any showup[.]" (Citations omitted).

See also Foster v. California, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed .2d 402 (1969); Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). Thus, in this case, we conclude that the

identification of the defendant in his vehicle by the victim at the request of the police was unduly suggestive.

Upon finding the police confrontation procedure used in the defendant's identification to be suggestive, we have followed the rationale of Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). See also Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). These cases hold that even though the initial identification of the defendant was found to be unduly suggestive, it may still be admitted under the totality of the circumstances. By that it was meant that circumstances surrounding the witness's contact with the defendant at the time of the crime were such that the witness was able to form a sufficiently reliable independent basis for the identification other than the suggestive identification.

We summarized the test to be utilized in determining the totality of the circumstances in Syllabus Point 3 of State v. Spence, 182 W. Va. 472, 388 S.E.2d 498 (1989):

> "'In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the

confrontation.' Syllabus Point 3, as amended, State v. Casdorph, 159 W. Va. 909, 230 S.E.2d 476 (1976)."[18]

Here, the trial court held an in camera proceeding prior to trial and evaluated the Biggers factors and found the victim's identification of the defendant to be reliable based upon the totality of the circumstances, particularly the witness's view of the defendant during the crime.[19] The evidence at the in camera hearing disclosed that the victim observed a car driving at a slow rate of speed as she was walking on the sidewalk adjacent to a public street in Parkersburg. The area was well lighted not only with street lights, but from lights from a car lot. She observed that the driver of the car was hunched over the steering wheel and was bald. Subsequently, she became aware of footsteps behind her and turned and observed the defendant. She increased her pace and turned again to observe that the defendant was closer and he grabbed her. She struggled with him and fell to the ground landing on her back with the defendant on top of her. She had sufficient opportunity to observe the defendant under adequate lighting.

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[18]We explained in State v. Spence, supra, that the bracketed portion of the Syllabus was designed to cover the point made in Manson v. Braithwaite, supra, which was "'that the same criteria should also apply in determining whether the out-of-court identification itself should be suppressed.'" 182 W. Va. at 477, 388 S.E.2d at 503, quoting State v. Boyd, 167 W. Va. 385, 395, 280 S.E.2d 669, 678 (1981).

[19]In State v. Watson, 164 W. Va. 642, 264 S.E.2d 628 (1980), we stated in Syllabus Point 1: "'A defendant must be allowed an in camera hearing on the admissibility of a pending in-court identification when he challenges it because the witness was a party to pre-trial identification procedures that were allegedly constitutionally infirm.' Syllabus Point 6, State v. Pratt, 161 W. Va. 530, 244 S.E.2d 227 (1978)."

Another factor to be considered is that the victim's attention was directed only to the defendant as he approached her and in the ensuing struggle. It is clear that she gave her undivided attention to the defendant. This is borne out by her accurate description of the defendant and his clothing that she gave to the police when they arrived within one-half hour of the event. Finally, on confronting the defendant in his car, which the police had stopped a short distance from the scene of the crime, the victim had no difficulty identifying the defendant. Therefore, we agree with the trial court's determination that there was a reliable independent basis for the victim's identification of the defendant other than the suggestive one-on-one identification in his car, and we find no reversible error on this ground.

IV.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Wood County is affirmed.

Affirmed.