FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	**CRIMINAL CASE NO. 18-0013**
Plaintiff,	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT II AS IT IS MULTIPLICITOUS AND VIOLATES THE CONSTITUTIONAL PROTECTION FROM DOUBLE JEOPARDY**
v.	
JEFFRY MANARANG FERNANDEZ	
Defendant.	

I. INTRODUCTION

This matter came before the Court on May 16, 2018 on Defendant's Motion to Dismiss. Defendant Jeffry Manarang Fernandez was present and was represented by Assistant Public Defender Heather Zona. The Commonwealth was represented by Assistant Attorney General Teri Tenorio.

Based on a review of the filings, oral arguments, and applicable law, the Court **GRANTS** the Defendant's Motion to Dismiss.

II. BACKGROUND

On January 30, 2018 the Commonwealth charged Defendant by information with: (1) Sexual Abuse of a Minor in the First Degree in violation of 6 CMC § 1306(a)(2) and 6 CMC § 1461(a)(1)(A); and, (2) Sexual Assault in the First Degree in violation of 6 CMC § 1301(a)(1) and 6 CMC § 1461(a)(1)(A).

On April 5, 2018, Defendant filed his Motion to Dismiss, arguing that charging him with *both* Sexual Abuse of a Minor in the First Degree *and* Sexual Assault in the First Degree is

multiplicitous and violates constitutional prohibitions on double jeopardy. The Commonwealth filed its opposition on May 16, 2018, the morning of the motion hearing on this matter. Defendant did not file a reply. The Court heard arguments on this motion on May 16, 2018. This matter is currently set for a jury trial on August 20, 2018.

III. DISCUSSION

Double jeopardy, or punishing an individual twice for one offense, is prohibited under both the United States Constitution and the Commonwealth Constitution. U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."); NMI Const. art. I, § 4(e) ("No person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution."). As the Commonwealth's Double Jeopardy Clause is modeled after the U.S. Constitution, Commonwealth courts turn to federal case law on this issue so that "the Commonwealth Constitution's double jeopardy provision provides at least the same protection granted defendants under the federal Double Jeopardy Clause." *Commonwealth v. Peter*, 2010 MP 15 ¶ 5 (quoting *Commonwealth v. Crisostomo*, 2007 MP 7 ¶ 13). Thus, the United States Constitution provides a floor, rather than a ceiling, for the protections granted to defendants in the Commonwealth.

The Double Jeopardy Clause protects defendants from: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) *multiple punishments for the same offense*." *Peter*, 2010 MP 15 ¶ 5 (citing *Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 5) (emphasis added). To determine whether a defendant would be subject to multiple punishments for the same offense, courts first "determine whether the legislature intended to impose multiple sanctions for the same conduct." *Id*. (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). If the legislature did not intend to impose multiple sanctions for the same

conduct, courts instead apply the test outlined in *Blockburger v. United States*, 284 U.S. 299 (1932). *Peter*, 2010 MP 15 ¶ 6.

Under *Blockburger*, "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 a fact which the other does not." *Blockburger*, 284 U.S. 299, 304 (1932) (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)). However, *Blockburger* "is not controlling when the legislative intent is clear from the face of the statute or legislative history." *Garrett v. United States*, 471 U.S. 773, 779 (1985) (citations omitted).

Thus, the Court will first turn to whether the Legislature intended to impose multiple punishments for the same offense. Then, the Court will turn to the *Blockburger* analysis, if necessary, before turning to any potential remedies.

A. The Legislature Did Not Intend to Impose Multiple Punishments For the Same Offense

First, the Court must look to whether the Legislature intended to impose multiple punishments for the same offense. If the Legislature intended "to impose multiple punishments, imposition of such sentences does not violate the constitution." *Missouri v. Hunter*, 459 U.S. 359, 386 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344 (1981)). Any "doubt will be resolved against turning a single transaction into multiple offenses." *Bell v. United States*, 349 U.S. 81, 84 (1955).

Courts "give statutory language its plain meaning." *Commonwealth v. Minto*, 2011 MP 14 ¶ 34 (quoting *Marianas Eye Inst. v. Moses*, 2011 MP 1 ¶ 11). The language of criminal provisions "shall be read within their context and shall be construed according to the common and approved usage of the English language." 1 CMC § 104(b). In addition, criminal provisions "shall be construed according to the reasonable construction of their terms, with a view to effect the plain meaning of its object." 1 CMC § 104(d). Courts "should avoid interpretations of a statutory

provision which would defy common sense [or] lead to absurd results." *Minto*, 2011 MP 14 ¶ 34 (quoting *Commonwealth Ports Auth. v. Hakubotan Saipan Enter.*, 2 NMI 212, 224 (1991)).

The Commonwealth Supreme Court "presumes that 'where two statutory provisions proscribe the same offense, [the] legislature does not intend to impose two punishments for that offense.'" *Peter*, 2010 MP 15 ¶ 10 (quoting *Rutledge v. United States*, 517 U.S. 292, 297 (1996)). "There is an assumption that [the Legislature] ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Id.* (citing *Hunter*, 459 U.S. at 366) (internal quotation marks omitted). In other words, the Legislature may impose multiple punishments for the same criminal conduct, "and where that intent is clear, the imposition of multiple punishments imposed in the same proceeding does not run afoul of the Double Jeopardy Clause." *Id.* Even if there are facts pointing towards legislative intent, such as different sentencing schemes, this is insufficient as the Court needs "*clear* legislative intent." *Commonwealth v. Quitano*, 2014 MP 5 ¶ 45 (emphasis in original).

The Court turns to the statutes to determine whether the Legislature intended to impose multiple punishments for the same offense. In Count I, Defendant is charged with Sexual Abuse of a Minor in the First Degree, in violation of 6 CMC § 1306(a)(2). In Count II, Defendant is charged with Sexual Assault in the First Degree, in violation of 6 CMC § 1301(a)(1).[1]

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[1] Both counts also cite to 6 CMC § 1461(a)(1)(A), which provides a definition for "domestic violence," and to 6 CMC § 4102, which describes mandatory sentencing.

6 CMC § 1306(a)(2), Sexual Abuse of a Minor in the First Degree, provides that the offense is committed if the offender: "being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian." 6 CMC § 1301(a)(1), Sexual Assault in the First Degree, provides that the offense is committed if: "the offender engages in sexual penetration with another person without consent of that person." On the face of the statutes, there is nothing to indicate that the Legislature sought to impose multiple punishments for the same offense. *See Commonwealth v. Hocog*, 2015 MP 19 ¶ 23 (finding no legislative intent to impose cumulative punishment for Sexual Abuse of a Minor in the First Degree and Incest where there was nothing in the statutes themselves, nor in the legislative intent, "indicating legislative intent to impose cumulative punishment").

The Commonwealth Supreme Court addressed the plain language of 6 CMC § 1301(a), Sexual Assault in the First Degree, and 6 CMC §§ 1306-1309, the statutes defining and punishing Sexual Abuse of a Minor, in *In re Commonwealth*, 2015 MP 7 ¶ 16. According to the Commonwealth Supreme Court, "Nothing in [Section 1301(a)] indicates an offender cannot be charged for Sexual Assault in the First Degree if the victim is a minor . . . [T]he plain language of §§ 1306-1309 does not indicate Sexual Abuse of a Minor is the only sex offense that can be charged when the victim is a minor." *Id.*

Public Law 12-82 enacted Sections 1306 and 1301. In Public Law 12-82, the Legislature found that the Commonwealth's sexual assault and sexual abuse statutes needed revision, to include "different levels of crime, such as Sexual Abuse of a Minor in the First Degree, Sexual Abuse of a Minor in the Second Degree, and so forth. Each of the new crimes proscribes different conduct, and provides more severe penalties for conduct which is more harmful and offensive to public safety." PL 12-82. Nothing in Public Law 12-82 showed an intention to impose multiple punishments for

the same offense. Since the Legislature did not show intent to impose multiple punishments for the same offense, the Court will now turn to whether *Blockburger* prohibits charging the Defendant with both Sexual Assault and Sexual Abuse of a Minor.

B. The *Blockburger* Test Shows That Sexual Abuse of a Minor In the First Degree and Sexual Assault in the First Degree Are the Same for Purposes of Double Jeopardy

Defendant argues that Count II, Sexual Assault in the First Degree, is a lesser-included offense of Count I, Sexual Abuse of a Minor in the First Degree, and that these offenses are the same for purposes of double jeopardy. Mot. to Dismiss at 9. Under *Blockburger*, "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 a fact which the other does not." *Blockburger*, 284 U.S. at 304; *see also Hocog*, 2015 MP 19 ¶ 22; *Commonwealth v. Quitano*, 2014 MP 5 ¶ 43; *Peter*, 2010 MP 15 ¶ 6. "This analysis requires [the Court] to engage in a 'textual comparison of the pertinent statutes' to determine if the lesser-included elements are 'a subset of the charged offense[s].'" *Quitano*, 2014 MP 5 ¶ 43 (quoting *Commonwealth v. Kaipat*, 4 NMI 300, 303 (1995)). Thus, the Court will "focus on the elements required for each offense." *Id.* (citing *Peter*, 2010 MP 15 ¶ 6).

In *Hocog*, the defendant was charged with both Sexual Abuse of a Minor in the First Degree in violation of 6 CMC § 1306(a)(2) and Incest in violation of 6 CMC § 1311(a). The Commonwealth Supreme Court compared the elements of Sexual Abuse of a Minor in the First Degree with the elements of Incest, finding that "each of the three elements of Incest are also elements of Sexual Abuse of a Minor in the First Degree as charged, Incest is a lesser-included offense." *Hocog*, 2015 MP 19 ¶ 24.

Here, Count I alleges that: (1) Defendant is over the age of eighteen, (2) Defendant engaged in sexual penetration, (3) with the alleged minor victim, and (4) that the Defendant is the "natural parent, step-parent, adopted parent, or legal guardian" of the alleged minor victim. Information at 1.

Count II alleges that: (1) Defendant engaged in sexual penetration with the alleged victim (2) without her consent. Information at 1. Defendant argues that Count II is a lesser-included offense of Count I, since Count II "requires no proof beyond what is required for conviction" of Count I. Mot. to Dismiss at 10. However, Count II requires proof of lack of consent. 6 CMC § 1301(a)(1) ("[T]he offender engages in sexual penetration with another person without consent of that person.").

Defendant directs the Court to *Yearty v. State*, 805 P.2d 987 (Alaska Ct. App. 1991), for the proposition that the lack of a "consent" element in Sexual Abuse of a Minor in the First Degree is recognition of the fact that minors under a certain age are unable to consent to sexual activity. Mot. to Dismiss at 10. In *Yearty*, the Court of Appeals of Alaska examined Alaska's statutes for Sexual Abuse of a Minor and Sexual Assault, noting that "[t]hese statutes plainly involve different elements: for [Sexual Assault], the state must prove the victim's lack of consent; for [Sexual Abuse of a Minor], lack of consent need not be shown but the victim's age" and the defendant's age must both be established. 805 P.2d at 994. Statutes criminalizing Sexual Assault and Sexual Abuse of a Minor both serve to "protect victims from socially unacceptable sexual contacts." *Id.* "The sexual assault statute, focusing on potential victims regardless of age, achieves this purpose by requiring that the victim's lack of consent be affirmatively proved. The sexual abuse of a minor statute, focusing more narrowly on children, achieves the same purpose by substituting the child's age (and the age of the defendant) for proof of lack of consent." *Id.*

Under Public Law 12-82, which enacted both Sexual Abuse of a Minor and Sexual Assault, the Legislature was clearly concerned with age differences between offenders and victims, revising an older Sexual Abuse of a Child statute that "[made] no distinction between different types of conduct that an offender might engage in; nor [did] it draw any distinction based on the respective ages of the offender and victim." PL 12-82. The definition of "without consent" outlined in 6 CMC § 1301(10) does not include age as a possible definition. The Legislature's focus on a victim's age

shows its intent to use a victim's age as a way to show that a victim did not consent to sexual contact, since a minor victim *could not* consent due to his or her age. *Yearty*, 805 P.2d at 994.

Here, all of the elements of Sexual Assault in the First Degree—that the Defendant engaged in sexual penetration with the alleged victim *without her consent*—are all present in Sexual Abuse of a Minor in the First Degree, with the lack of consent in Sexual Assault matching up with the age requirement in Sexual Abuse of a Minor. Thus, charging both Sexual Assault in the First Degree and Sexual Abuse of a Minor in the First Degree would expose the Defendant to multiple punishments for the same offense. *Hocog*, 2015 MP 19 ¶ 24.

C. Remedy

The Commonwealth Double Jeopardy Clause is "patterned after the Double Jeopardy Clause of the U.S. Constitution." *Peter*, 2010 MP 15 ¶ 5 (quoting *Commonwealth v. Crisostomo*, 2007 MP 7 ¶ 13). Although the federal "Double Jeopardy Clause may protect a defendant against cumulative punishments on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution." *Ohio v. Johnson*, 467 U.S. 493, 500 (1984). In addition, "the Commonwealth Constitution's double jeopardy provision provides at least the same protection granted defendants under the federal Double Jeopardy Clause." *Peter*, 2010 MP 15 ¶ 5 (quoting *Crisostomo*, 2007 MP 7 ¶ 13). Protections under the Commonwealth Constitution may not be any less than those provided under the United States Constitution, but instead may exceed the protections provided by the United States Constitution.

Multiplicitous charges inject a defect into the proceedings. "Multiplicity refers to multiple counts of an indictment which cover the same criminal behavior." *United States v. Johnson*, 130 F.3d 1420, 1424 (10th Cir. 1997) (citing *United States v. Morehead*, 959 F.2d 1489, 1505 (10th Cir.

1992)).[2] Multiplicity, while "not fatal to an indictment" does expose a defendant to potential Double Jeopardy violations through "the threat of multiple sentences for the same offense." *Id.* (quoting *Morehead*, 959 F.2d at 1505).

Courts have discretion in choosing a remedy for multiplicitous charges, either pre- or post-trial. "A decision of whether to require the prosecution to elect between multiplicitous counts before trial is within the discretion of the trial court." *United States v. Johnson*, 130 F.3d at 1426. Post-trial, trial courts must exercise their "discretion to vacate one of the underlying convictions." *Ball v. United States*, 470 U.S. 856, 864 (1985). This Court has in the past dismissed multiplicitous charges because of due process violations. *See Commonwealth v. Kapileo*, Traffic Case No. 12-01675 (NMI Super. Ct. June 28, 2013) (Published Sept. 1, 2015) (Order Granting Motion to Dismiss Counts IV and V Due to Double Jeopardy, and Denying Motion to Dismiss Count III). This Court has also declined to allow the Commonwealth to add multiplicitous charges. *See Commonwealth v. Li*, Traffic Case No. 15-00616 (NMI. Super. Ct. Sept. 15, 2015) (Order Denying Commonwealth's Leave to Amend Information as to Count II Since This Count Would Add A Multiplicitous Charge).

The Commonwealth argues that the issue of multiplicitous charging should be resolved at the sentencing phase. "[T]he prosecution has broad discretion in bringing criminal cases." *United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990) (citing *Ball v. United States*, 470 U.S. 856, 859 (1985)). However, the Court has "discretion in deciding whether to require the prosecution to elect between multiplicitous counts especially 'when the mere making of the charges would prejudice the defendant with the jury.'" *Id.* (quoting *United States v. Reed*, 639 F.2d 896, 904 n.6

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[2] The citation, information, and indictment are all types of charging documents. Law enforcement officers generally issue citations. BLACK'S LAW DICTIONARY 221 (Abridged 9th Ed). Prosecutors generally issue informations. BLACK'S LAW DICTIONARY 668 (Abridged 9th Ed.). Grand juries generally issue indictments. BLACK'S LAW DICTIONARY 662 (Abridged 9th Ed.).

(2d Cir. 1981)). The alleged offenses both arise out of the same alleged act or transaction. Allowing multiplicitous charges gives the impression that the Defendant allegedly committed multiple offenses or that the Defendant allegedly committed the same offense more than once, especially with this particular set of alleged facts. Without more information, the Court declines to deviate from its previous approach of dismissing multiplicitous counts.

Defendant argues that the Court should dismiss Count II as it is the more general offense of the two charges, while Count I is more specific. If a defendant is charged with both a specific and general offense covering the same conduct, the more specific of the offenses should remain as the general offense is subsumed by the specific offense. *People v. Murphy*, 127 Cal. Rptr. 3d 78, 86 (Cal. 2011); *State v. Cleve*, 980 P.2d 23, 33 (N.M. 1999). Thus, the Court dismisses Count II, Sexual Assault in the First Degree.

IV. CONCLUSION

Accordingly, the Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED this 23rd day of May, 2018.

JOSEPH N. CAMACHO
Associate Judge