**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 24, 1999**

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-2618**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**IN THE INTEREST OF JUAN JESUS S.,**
**A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**JUAN JESUS S.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

ANDERSON, J. In this appeal, Juan Jesus S. contends that possession of a switchblade knife in violation of § 941.24, STATS., is a "lesser-included offense" of possession of a dangerous weapon, other than a firearm, on school property in violation of § 948.61(2), STATS., and that the finding of delinquency on both charges violates the double jeopardy provisions of

the federal and state constitutions. Because we conclude that the charges are not multiplicitous, we affirm.

Juan and another student had a confrontation in the cafeteria of Kettle Moraine High School. As an associate principal approached, he heard the other student say, "[Y]ou pulled a knife on my brother, go ahead pull one on me." The associate principal separated the boys and took Juan to an office where he had him empty his pockets. When Juan emptied his pockets he produced a switchblade knife. Waukesha county sheriff deputies were called to the school and took Juan into custody. He was charged in a delinquency petition with possession of a switchblade knife in violation of § 941.24, STATS., and possession of a dangerous weapon, other than a firearm, on school property in violation of § 948.61(2), STATS.[1]

Juan filed a motion to dismiss on the grounds that the two counts are multiplicitous and violated his rights under the provisions of the state and federal constitutions preventing multiple punishment for a single offense. The juvenile court denied the motion reasoning that although the two offenses are identical in fact, they are different in law. The court held that there are different elements for the two counts and therefore they are not multiplicitous. Juan was found guilty of both counts after a trial on stipulated facts and he appeals.

[1] Section 941.24(1), STATS., provides, "Whoever … possesses or goes armed with any knife having a blade which opens by pressing a button, spring or other device in the handle or by gravity or by a thrust or movement is guilty of a Class A misdemeanor."

Section 948.61(2)(a), STATS., provides, "Any person who knowingly possesses or goes armed with a dangerous weapon on school premises is guilty of a Class A misdemeanor."

On appeal, Juan argues that where there is a "lesser-included offense" challenge and one of the statutes "establishes alternative elements for a single crime," the court is to look to the facts contained in the charging document to determine whether one count is a "lesser-included offense" of the other. Using this analysis, Juan asserts that the term "dangerous weapon" provides for alternative means of violating § 948.61(2)(a), STATS., and in the delinquency petition the only dangerous weapon is a switchblade knife. Therefore, according to Juan, he has been charged with possession of a switchblade knife on school grounds, and it is utterly impossible to commit this offense without also committing the "lesser-included offense" of possession of a switchblade.

Multiple convictions for the same offense violate the double jeopardy protections of the state and federal constitutions. *See* ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992). Determining whether multiple charges violate constitutional protections presents a question of law to be reviewed de novo. *See* ***State v. Anderson***, 219 Wis.2d 740, 747, 580 N.W.2d 329, 332 (1998).

We analyze claims of multiplicity using a two-pronged test: first, whether the charged offenses are identical in law and fact; and second, if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count. *See* ***id***. at 747, 580 N.W.2d at 333. The Wisconsin Supreme Court most recently applied this test in ***Anderson***.

Under the first prong of the analysis, if the offenses are identical in law and fact, the charges are multiplicitous in violation of the double jeopardy clauses of the federal and state constitutions. *See* ***id***. at 748, 580 N.W.2d at 333. The analysis is the same whether we are reviewing a "lesser-included offense"

challenge (multiple charges brought under different statutory sections) or a "continuous offense" challenge (multiple charges brought under one statutory section). *See* ***id***. As explained in ***State v. Lechner***, 217 Wis.2d 392, 576 N.W.2d 912 (1998), our focus changes with respect to the particular challenge raised.

> In a "lesser-included offense" challenge, the factual situations underlying the offenses are the same, so our focus is on whether the offenses are also identical in law. In a "continuous offense" challenge, the course of conduct is alleged to have constituted multiple violations of the same statutory provision, so our focus is not on statutory definitions but on the facts of a given defendant's criminal activity.

***Id.*** at 403 n.7, 576 N.W.2d at 918 (citations omitted).

Our primary inquiry is whether the criminal statutes define one offense as a lesser-included offense of the other. *See* ***id.*** at 404, 576 N.W.2d at 919. The determination of whether one offense is a lesser-included offense of another is controlled by the "elements-only" test set out in § 939.66(1), STATS., which codified ***Blockburger v. United States***, 284 U.S. 299 (1932). *See* ***Lechner***, 217 Wis.2d at 405, 576 N.W.2d at 919. Where the same act constitutes a violation of two distinct statutory provisions, the test under the Double Jeopardy Clause is whether each provision requires proof of a fact which the other does not. *See* ***id***. Under this test, two offenses are different in law if each statutory crime requires proof of an element which the other does not require for conviction. *See* ***id.*** Only then can it be said that the legislature has promulgated separate, distinct offenses providing for multiple convictions and punishments. *See* ***id***.

To assist in this inquiry, a side-by-side comparison of the elements of both offenses is helpful. There are four elements for the possession of a dangerous weapon, other than a firearm, on school property:

> First, that the defendant possessed an object.
>
> Second, that this object was a dangerous weapon.
>
> Third, that the defendant possessed a dangerous weapon on school premises.
>
> Fourth, that the defendant knew that he possessed a dangerous weapon and knew that he was on school premises.

WIS J I—CRIMINAL 2179. There are only two elements for possession of a switchblade knife:

> The first element requires that the defendant possessed a knife.
>
> The second element requires that the knife have a blade which opens by pressing a button, spring, or other device in the handle or by gravity or by a thrust or movement.

WIS J I—CRIMINAL 1340.

Applying the "elements-only" test to the offenses involved in this case, we conclude that possession of a switchblade knife is not a lesser-included offense of possession of a dangerous weapon, other than a firearm, on school property. A conviction for possession of a switchblade knife does not require proof that the juvenile possessed the switchblade knife on school premises or that the juvenile knew that he or she possessed a dangerous weapon and was on school premises. Similarly, a conviction for possession of a dangerous weapon, other than a firearm, on school property does not require proof that the defendant possessed a knife having "a blade which opens by pressing a button, spring, or other device in the handle or by gravity or by a thrust or movement."

Since possession of a switchblade knife is not a "lesser-included offense" of possession of a dangerous weapon on school property, we presume

that the legislature intended to permit cumulative punishments for both offenses. ***Lechner*** sets forth the analysis that is employed:

> This presumption is rebutted only if other factors clearly indicate a contrary legislative intent. Factors that may indicate a contrary legislative intent regarding multiple punishment include the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishment.

***Lechner***, 217 Wis.2d at 407, 576 N.W.2d at 920 (citations omitted).

In this case, none of these factors indicates a legislative intent contrary to allowing convictions for both offenses charged. This resolution is compelled by the nature of the proscribed conduct. Possession of a switchblade is a weapon-specific crime; whereas, possession of a dangerous weapon on school property is a location-specific crime. The goal of § 941.24, STATS., is to ban possession of a specific type of weapon.[2] The goal of § 948.61, STATS., is much more ambitious. It seeks to provide all the students of this state with a safe and secure environment that promotes learning. Finally, both charges are classified as Class A misdemeanors.

For the foregoing reasons, we conclude that prosecution for both offenses does not violate the federal and state constitutional prohibitions against double jeopardy. Therefore, we affirm.

*By the Court.*—Order affirmed.

[2] We note that § 941.24(2), STATS., expresses a second goal, the surrender of all switchblades to peace officers.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.