COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1083-CR **Cir. Ct. No. 2011CF91**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GAVIN O. ATTOE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Gavin Attoe appeals judgments of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 Attoe pled no contest to two counts of physical abuse of a child. At the plea hearing, the parties relied on the complaint as a factual basis for the pleas. In this appeal Attoe argues that the complaint is inadequate to show a factual basis for either count.

¶3 Attoe first argues that the complaint does not provide a factual basis for count one. The charge was physical abuse of a child by intentionally causing great bodily harm, contrary to WIS. STAT. § 948.03(2)(a) (2013-14).[1] The parties agreed at the plea hearing that the injury underlying that count was fractures of the victim's femur, and that the conduct by Attoe was his having responded to an act of the child victim by grabbing the victim's leg and forcing it into an abnormal position.

¶4 The general criminal definitions include definitions for three types of bodily harm. The types are, in order of increasing severity, bodily harm, substantial bodily harm, and great bodily harm. WIS. STAT. § 939.22(4), (14), and (38). The definition of "great bodily harm" is: "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14).

¶5 The parties appear to agree that the fractures forming the basis for count one do not satisfy any of the specific forms of injury described in that definition. Therefore, if these fractures qualify as great bodily harm, they must do so as "other serious bodily injury."

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶6 Attoe argues that the victim's bone fractures cannot constitute an "other serious bodily injury" under this definition because bone fractures are already one of the forms of injury specified in the definition of a lesser form of bodily harm, "substantial bodily harm," as defined in WIS. STAT. § 939.22(38). In essence, Attoe is arguing that if a fracture does not meet one of the *specific* conditions in the definition of "great bodily harm" involving risk of death, disfigurement, and so on, then that fracture can *never* be classified as great bodily harm, but is limited to being only substantial bodily harm.

¶7 We do not agree with Attoe's argument. We see no language in the definition of either "great" or "substantial" bodily harm that can reasonably be read as providing that kind of limit. It is clear that a certain amount of overlap between these definitions is expected. For example, both fractures and burns are part of the definition of substantial bodily harm, but those types of injuries can easily have effects that are specifically named in the definition of great bodily harm, such as risk of death, disfigurement, or loss of function. In other words, the legislature surely understood that some fractures and burns will meet both definitions.

¶8 Similarly, just because all fractures meet the definition of substantial bodily harm, that does not imply that a particular fracture cannot be serious enough to qualify as an "other serious bodily injury" for purposes of being great bodily harm. Attoe provides no sound linguistic or policy explanation for why a specific fracture could not properly be considered both a substantial bodily harm, based on that definition, and great bodily harm, by virtue of its seriousness. Not *every* fracture will rise to the level of being an "other serious bodily injury," but some will.

¶9 Attoe next argues that even if *some* specific fractures can be considered serious injuries, and thus satisfy the definition of great bodily harm, there is an insufficient factual basis *in this case* to conclude that the fractures alleged in count one qualify as a serious bodily injury. In other words, he argues that the factual basis was insufficient because his alleged conduct did not constitute the crime to which he pled.

¶10 However, a close reading of this argument shows that it, like his first one, is based mainly on a question of statutory interpretation. Attoe argues that the phrase "other serious bodily injury" must be read as including only injuries that "rise to the level of creating a substantial risk of death, causing serious or permanent disfigurement, or which cause a permanent or protracted loss or impairment of the function of any bodily member or organ." According to Attoe, this is necessary so as to distinguish between those fractures that are substantial bodily harm merely by being fractures, and those that have some additional quality that makes them great bodily harm.

¶11 We disagree with Attoe's argument for two reasons. First, Attoe's interpretation would leave the phrase "other serious bodily injury" with no meaning. He appears to be arguing that an injury is not serious unless it meets one of the other criteria for great bodily harm. However, if an injury meets one of those criteria, there is never a reason to consider whether it qualifies as an "other serious bodily injury," and that phrase would be reduced to surplusage. *See* ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997) (it is a basic rule of statutory construction that no part of a statute is to be rendered surplusage).

¶12 Second, Attoe's argument appears to be based on an assumption that the specific criteria stated in the great bodily harm definition are the only measurements by which one can distinguish a merely routine fracture from one that meets the definition of great bodily harm. We disagree with this assumption because we believe that a fracture can rise to the level of being "serious" even without meeting the specific criteria for great bodily harm. The phrase "serious bodily injury" does not appear to be defined for purposes of this statute, and the pattern jury instruction does not provide a definition. *See* WIS JI—CRIMINAL 914. In the absence of a specific definition, a jury will apply the ordinary meaning of the term. And, doing so, we are satisfied that the complaint against Attoe states a sufficient factual basis to conclude that the fractures alleged in count one could be found to be "serious bodily injury."

¶13 We turn next to count four. Attoe argues that count four lacks a sufficient factual basis in the complaint. In that count Attoe pled no contest to physical abuse of a child by intentionally causing bodily harm to a child by conduct which created a high probability of great bodily harm. *See* WIS. STAT. § 948.03(2)(c). At the plea hearing, the parties agreed that the injury underlying count four was a bruise to the victim's face, and the conduct was Attoe having dropped the victim two to three feet into her baby tub after he became dizzy and lost his sight, and the bruise was caused by him accidentally squeezing her head as he blacked out.

¶14 Attoe argues that the complaint is insufficient to show a factual basis for count four for two reasons. First, Attoe argues that the description of his conduct, as taken from his own statements, fails to show that he acted with intent to cause bodily harm, but instead the injuries occurred as the result of an accident.

¶15 The circuit court rejected Attoe's argument. The circuit court noted that a jury is not required to accept Attoe's statement of how and why the injury happened. We agree that a jury could accept Attoe's statement that the bruise was caused by his squeezing without also accepting his self-serving statement that he was "blacking out" at the time. On appeal, Attoe does not offer a refutation of this circuit court rationale, and we accept it as sound.

¶16 Attoe's second argument regarding count four is that the complaint fails to allege a factual basis to show that his conduct created a high probability of great bodily harm. We disagree. The dropping of the victim into the baby tub and the squeezing of her head support an inference that there was a high probability of great bodily harm.

¶17 Finally, Attoe argues that his pleas were not entered knowingly, voluntarily, and intelligently because he did not understand that there were lesser statutory gradations of harm, and that a jury could be instructed on lesser included offenses. We reject this argument because it was not raised in his postconviction motion. Attoe's motion did not include any claim based on his lack of understanding, but instead focused only on whether the facts alleged in the complaint satisfy the statutory definitions of the crimes. We usually do not address issues that are raised for the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we see no reason to do that in this case.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.