COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2432-CR **Cir. Ct. No. 2012CF1759**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JAMA I. JAMA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. The State appeals the circuit court's order vacating three of five jury verdicts against Jama I. Jama. Following a jury trial, the court set aside a verdict finding Jama guilty of one count of sexual intercourse without

consent, in violation of WIS. STAT. § 940.225(3), and two counts of burglary, in violation of WIS. STAT. § 943.10.[1] The court let stand guilty verdicts on one count of theft and one count of sexual intercourse with a person who is so intoxicated as to be incapable of giving consent, in violation of § 940.225(2)(cm). The State argues that the circuit court erred in setting aside the three verdicts. We agree that the circuit court erred in setting aside the verdict on the § 940.225(3) sexual assault count. However, we uphold the circuit court as to the burglary counts. We therefore reverse only as to the § 940.225(3) sexual assault count. We remand for the circuit court to reinstate the guilty verdict on that count and for further sentencing proceedings.[2]

Background

¶2 According to evidence at trial, on the night in question, H.H. was highly intoxicated when she left a bar in downtown Madison and began to walk home to her apartment. A man H.H. did not know approached her and assisted her in getting home. H.H. had no memory of entering her apartment building, but a security camera in the lobby recorded the man, later identified as Jama, helping H.H. enter her building.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. We cite the current version for ease of reference. There have been no pertinent changes to the statutes since the time of the crimes alleged against Jama.

[2] The State asks for "sentencing" on remand. We note that the circuit court previously sentenced Jama on the WIS. STAT. § 940.225(2)(cm) sexual assault count and the theft count. The parties do not address how the circuit court should proceed as to sentencing, or resentencing, on remand. Therefore, if there is some dispute in that regard, the parties will need to take it up with the circuit court.

¶3 H.H. also did not remember entering her apartment. Rather, her first pertinent memory after her initial encounter with Jama was being struck on the back of the head once inside her apartment. H.H. was rendered unconscious by the blow, her intoxication, or some combination of the two. The next thing H.H. remembered was waking up on the floor of her apartment, near her apartment door, naked from the waist down.

¶4 After waking, H.H. found a condom wrapper that had not been in her apartment earlier. In addition, H.H.'s underwear was found to contain sperm that was later determined to be a DNA match to Jama. Finally, H.H. reported items stolen from her apartment that were later recovered from Jama's apartment and from Jama's brother's car.

¶5 The State charged Jama with five crimes:

Count 1: second-degree sexual assault, based on sexual intercourse with a person who is so intoxicated as to be incapable of giving consent, in violation of WIS. STAT. § 940.225(2)(cm);

Count 2: third-degree sexual assault, based on sexual intercourse with a person without that person's consent, in violation of § 940.225(3);

Count 3: burglary with intent to commit a felony (here, sexual assault);

Count 4: burglary with intent to steal; and

Count 5: misdemeanor theft.

The jury found Jama guilty on all counts. As already noted, the circuit court set aside the verdicts on Count 2, sexual intercourse without consent, and Counts 3 and 4, the burglary counts. We reference additional facts in the discussion below.

Discussion

¶6 We begin our analysis with Counts 1 and 2, the sexual assault counts. We then turn to the burglary counts.

A. The Sexual Assault Counts

¶7 Broadly speaking, the State argues that the circuit court's decision to set aside the verdict on one of the sexual assault counts was based on erroneous reasoning relating to consent. For the reasons that follow, we agree. We also reject an argument that Jama makes for upholding the circuit court on the alternative basis of multiplicity.

1. Nature Of The Sexual Assault Counts

¶8 As noted, the two sexual assault counts against Jama were second-degree sexual assault, based on sexual intercourse with a person who is so intoxicated as to be incapable of giving consent, in violation of WIS. STAT. § 940.225(2)(cm), and third-degree sexual assault, based on sexual intercourse with a person without that person's consent, in violation of § 940.225(3). More specifically, the statute defines these two sexual assault crimes as follows:

> **(2)** SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:
>
> ….
>
> (cm) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person *incapable of giving consent* if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.
>
> ….

> **(3)** THIRD DEGREE SEXUAL ASSAULT. Whoever has sexual intercourse with a person *without the consent* of that person is guilty of a Class G felony. Whoever has [certain types of aggravated] sexual contact … with a person *without the consent* of that person is guilty of a Class G felony.

Section 940.225 (emphasis added). In the remainder of this opinion, we generally refer to these two crimes as the "§ 940.225(2)(cm)" offense or count and the "§ 940.225(3)" offense or count.

¶9 The sexual assault statute provides a special definition of consent: "'Consent,' as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact." WIS. STAT. § 940.225(4).

2. Circuit Court's Reasons For Setting Aside The Verdict On The WIS. STAT. § 940.225(3) Count

¶10 The circuit court concluded that the WIS. STAT. § 940.225(2)(cm) count and the § 940.225(3) count were "mutually exclusive," meaning that a guilt finding on both counts was logically inconsistent. The court stated:

> By finding Defendant guilty of Second Degree Sexual Assault as well as Third Degree Sexual Assault, the jury necessarily found that [H.H.] possessed two distinct and mutually inconsistent mental states at the time of the single sexual act. Specifically, the jury necessarily found that [H.H.] was both competent and not competent to make an informed decision regarding consent. Such verdicts are legally inconsistent and mutually exclusive.

The circuit court also concluded that the evidence was insufficient to find guilt on the § 940.225(3) count because H.H. testified that she had no memory of pertinent events, including no memory of whether she gave consent to sexual intercourse. For these reasons, the court set aside the jury's guilty verdict on this count.

3. Why We Reject The Circuit Court's Reasoning—There Is No Mutual Exclusivity Problem, And The Evidence Was Sufficient On The WIS. STAT. § 940.225(3) Count

a. Mutual Exclusivity

¶11 As to mutual exclusivity, we are presented with a straightforward question of statutory interpretation, which is a question of law for de novo review. *See* ***State v. Beasley***, 165 Wis. 2d 97, 99, 477 N.W.2d 57 (Ct. App. 1991). Unlike Jama and the circuit court, we see no logical inconsistency in guilty verdicts on both a WIS. STAT. § 940.225(2)(cm) offense and a § 940.225(3) offense. On the contrary, such verdicts are consistent because, by the statute's plain language, sexual intercourse with a victim who is so intoxicated as to be "incapable of giving consent" under § 940.225(2)(cm) will always be sexual intercourse "without the consent" of the victim under § 940.225(3). As the State aptly puts it, "there is no consent when a victim is unable to consent."

¶12 Jama's position, which the circuit court apparently adopted, seems to rest on the view that the term "without … consent" in WIS. STAT. § 940.225(3) and the definition of "consent" in § 940.225(4) work together to require proof that the alleged victim, in the words of the definition, is "competent to give informed consent." Stated differently, proof of absence of consent under § 940.225(3) necessarily requires proof that the victim was capable of giving consent. This reasoning is flawed.

¶13 It is true that only a person competent to give consent can give the consent needed within the meaning of the sexual assault statute. But nothing in the definition of "consent" in the sexual assault context requires proof of such competence.

¶14 The reason the sexual assault statute defines consent is so that a fact finder can determine whether *consent is absent*. If there is no consent from "a person who is competent to give informed consent," then there is no consent within the sexual assault context. To state the obvious, "consent" is absent when an alleged sexual assault victim does not give any indication of consent, regardless whether the victim is competent or incompetent to consent. Proof that a competent victim did not consent is just one way that the State may prove that sexual activity occurred without consent.[3]

¶15 Jama argues that ***United States v. Gaddis***, 424 U.S. 544 (1976), and ***Heflin v. United States***, 358 U.S. 415 (1959), support a conclusion that second-degree and third-degree sexual assault are "mutually exclusive" crimes. We disagree. ***Gaddis*** and ***Heflin*** do not address the concept of inconsistent verdicts, nor do they address consent issues. Rather, those two cases address Congress's intent as to multiple convictions under alternative provisions in a federal bank robbery statute. *See* ***Gaddis***, 424 U.S. at 545-46, 547-50; ***Heflin***, 358 U.S. at 416, 419-20.[4]

[3] We observe that, even if we agreed with the view that WIS. STAT. § 940.225(3) and (4) require proof of competence to give informed consent, the jury here was not so instructed. Rather, the jury was told that sexual intercourse is "without consent" so long as the victim "did not freely agree" to it. Thus, if we were to adopt the circuit court's and Jama's view, other issues would arise, such as whether any error in the jury instructions was harmless. *See* ***State v. Williams***, 2015 WI 75, ¶¶48, 51-63, 364 Wis. 2d 126, 867 N.W.2d 736, *petition for cert. filed* (U.S. Oct. 7, 2015) (No. 15-6918).

[4] If Jama instead means to suggest that these federal cases support his multiplicity claim, addressed below, we still disagree. We see nothing in the cases that assists our multiplicity analysis of the sexual assault crimes at issue here.

b. Sufficiency Of The Evidence For The WIS. STAT. § 940.225(3) Count

¶16 As we have noted, the circuit court concluded that the evidence was insufficient to find guilt on the WIS. STAT. § 940.225(3) count. Both the circuit court and Jama reason that the insufficiency relates to the without consent element. We are uncertain whether part of their reasoning relates to a lack of evidence that H.H. was competent to consent. If this is their reasoning, we disagree. As we have explained, proof of absence of consent does not require proof that the victim was competent to consent and, therefore, there is no insufficiency problem in that regard.

¶17 What is clear is that the circuit court and Jama believe that there was no evidence of H.H.'s lack of consent because H.H. testified that she had no memory of pertinent events, including no memory of whether she gave consent to sexual intercourse. We disagree.

¶18 The sufficiency of the evidence standard has been repeated often and need not be fully set forth here. An apt summary is this: "When we review a challenge to the sufficiency of the evidence to support a guilty verdict, we uphold the verdict unless the evidence, viewed most favorably to the conviction, including all reasonable inferences drawn in favor of the verdict, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt based on the evidence." ***State v. Page***, 2000 WI App 267, ¶9, 240 Wis. 2d 276, 622 N.W.2d 285 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 504, 507, 451 N.W.2d 752 (1990)).

¶19 Looking to the evidence here, the inference of guilt is supported by (1) H.H.'s memory of being struck on the back of the head once inside her

apartment; (2) her recollection of awakening on the floor by her apartment door to find that she was naked from the waist down; and (3) DNA testing showing a match between Jama and sperm found in H.H.'s underwear. This evidence, along with the other evidence we have already summarized in the Background section, easily supports a finding that Jama had sexual intercourse with H.H. without H.H.'s consent.

4. Jama's Multiplicity Argument

¶20 Thus far, we have addressed and rejected the circuit court's reasoning for setting aside the jury's guilty verdict on the WIS. STAT. § 940.225(3) count. Jama, however, offers an alternative basis on which to uphold the circuit court's decision vacating his subsection (3) conviction. Jama argues that his two sexual assault convictions are multiplicitous in violation of the Double Jeopardy Clause. We reject Jama's multiplicity argument.

a. Methodology For Addressing Multiplicity Claims

¶21 Jama's multiplicity claim presents a question of law that we review de novo. *See* ***State v. Ziegler***, 2012 WI 73, ¶38, 342 Wis. 2d 256, 816 N.W.2d 238. The supreme court has described our two-pronged methodology for such claims as follows:

> We review multiplicity claims according to a well-established two-pronged methodology. First, the court determines whether the offenses are identical in law and fact using the "elements-only" test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Under the "elements-only" test, two offenses are identical in law if one offense does not require proof of any fact in addition to those which must be proved for the other offense. Still, offenses identical in law are not necessarily identical in fact. Two offenses, which are legally identical, are not identical in fact if the acts allegedly committed are

> sufficiently different in fact to demonstrate that separate crimes have been committed.
>
> The results of the "elements-only" test determine the presumption under which we analyze the second prong of our methodology. If the offenses are identical in law and fact, a presumption arises that the legislature did not intend to authorize cumulative punishments. The State may rebut that presumption only by a clear indication of contrary legislative intent.
>
> Conversely, if the offenses are different in law or fact, the presumption is that the legislature intended to permit cumulative punishments. At this juncture, we are no longer concerned with a double jeopardy violation but instead a potential due process violation. If the offenses are different in law or fact, the defendant has the burden of demonstrating that the offenses are nevertheless multiplicitous on grounds that the legislature did not intend to authorize cumulative punishments. If the defendant succeeds, he or she has a legitimate due process claim.
>
> To discern legislative intent under the second prong of our methodology, we analyze the following four factors: (1) all applicable statutory language; (2) the legislative history and context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct.

Id., ¶¶60-63 (citations omitted).

¶22 Thus, to summarize, under the first prong, we apply the ***Blockburger*** "elements-only" test. *See* ***Ziegler***, 342 Wis. 2d 256, ¶60. The result of that test determines whether we presume that the legislature authorized cumulative punishments or instead presume that the legislature did *not* authorize cumulative punishments. ***Id.***, ¶¶61-62. Under the second prong of the test, the applicable presumption may be rebutted by evidence of contrary legislative intent. ***Id.***

b. Application Of Multiplicity Methodology

¶23 Jama's multiplicity argument focuses on the first prong of multiplicity methodology, the ***Blockburger*** elements-only test. Jama relies on

case law explaining that offenses are identical in law if it is "utterly impossible" to commit one offense without also committing the other offense. *See, e.g.*, ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986); ***State v. Selmon***, 175 Wis. 2d 155, 162, 498 N.W.2d 876 (Ct. App. 1993). According to Jama, only one of the two sexual assault convictions can stand because it is utterly impossible to commit the WIS. STAT. § 940.225(2)(cm) offense without also committing the § 940.225(3) offense.

¶24 Stated differently, Jama's entire multiplicity argument hinges on the proposition that every time a perpetrator has "sexual contact or sexual intercourse" with a person "who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent" and does so with the requisite knowledge and purpose (a WIS. STAT. § 940.225(2)(cm) offense), that perpetrator is also necessarily having "sexual intercourse" or specified types of aggravated "sexual contact" with a person without that person's consent (a § 940.225(3) offense).

¶25 The flaw in Jama's multiplicity argument is that he discusses only the consent-related elements of the two crimes. Jama ignores the requisite acts. That is, Jama fails to compare the "sexual contact or sexual intercourse" element of the WIS. STAT. § 940.225(2)(cm) offense with the "sexual intercourse" or specified types of aggravated "sexual contact" element of the § 940.225(3) offense. Comparing these elements, it is readily apparent that a person can violate § 940.225(2)(cm) without also violating § 940.225(3). For example, a person can violate § 940.225(2)(cm) by touching a woman's breasts with the requisite knowledge and purpose, but that act would not suffice as a predicate act under § 940.225(3).

¶26 Accordingly, Jama's only multiplicity argument is flawed. We discuss the matter no further.

B. Burglary Counts

¶27 We turn to the burglary counts. Consistent with the burglary statute, the jury was instructed that, in order to find Jama guilty of the burglary counts, it had to find that Jama "entered the dwelling without the consent of" H.H. *See* WIS. STAT. § 943.10(1m); WIS JI—CRIMINAL 1421 & 1424. Consent for purposes of burglary is defined differently than it is defined for purposes of sexual assault crimes. "Without consent" in the burglary context is defined simply as "no consent in fact." *See* WIS. STAT. § 939.22(48). Lack of consent under § 939.22(48) can be established in other ways that we need not address here.

¶28 In setting aside the verdicts on the burglary counts, the circuit court again relied on a mutual exclusivity analysis. Briefly stated, the circuit court concluded that the jury's finding that H.H. was incompetent to consent to sexual activity was inconsistent with its finding, for purposes of the burglary charges, that H.H. did not consent to entry into her apartment. The absence of consent, so the reasoning goes, necessarily requires proof that the victim was capable of giving consent.

¶29 We reject this analysis for essentially the same reason discussed earlier in this opinion. A victim can be both incapable of giving consent as defined in the sexual assault statute and also simply fail to give consent in fact under WIS. STAT. § 939.22(48). Nothing about the burglary statute, the definition of consent in that context, or the corresponding jury instructions required proof of competence to consent as a prerequisite to proving lack of consent.

¶30 However, in vacating the burglary convictions, the circuit court also relied on insufficiency of the evidence. We agree with this analysis.

¶31 To begin, the State does not direct our attention to any evidence indicating that Jama's entry into H.H.'s apartment *building* was without H.H.'s consent. Rather, the State's theory at trial, and what the jury would have understood from the instructions, was that what mattered was whether H.H. consented to Jama's entry into her apartment *unit*. Indeed, the prosecutor conceded, apparently based on the surveillance camera footage shown to the jury, that H.H. consented to Jama's entry into her building. After that apparently consensual entry into the building, there is no evidence, video or otherwise, of what happened until Jama was inside H.H.'s apartment. All the jury learned was that H.H. recalled being struck on the back of the head *after* she was inside her apartment.

¶32 Thus, viewing the evidence in a light most favorable to the verdict, we see nothing to support a reasonable inference that Jama entered H.H.'s apartment without her consent. Such a finding would be pure speculation.

¶33 On appeal, the State all but concedes the lack of evidence showing that H.H. did not consent to Jama's entry into her apartment. The State takes a different approach. It argues that what matters is whether H.H. consented to Jama's entry into her apartment *for the purpose of* the crimes committed. The State asserts:

> Although HH may have given Jama consent to come into the entrance to her apartment for the purpose of helping her get inside, she did not consent to his entry for the purposes of raping and robbing her. Since HH was knocked unconscious as soon as Jama entered the premises, HH could not have given him consent to enter for the purposes of stealing or committing a sexual assault.

¶34 Putting aside the fact that the evidence does not show how soon Jama struck H.H. after entering the apartment, and further putting aside the fact that this lack-of-consent theory does not comport with how the jury was instructed, the theory is obviously flawed. The fact that victims, conscious or not, never consent to allow someone entry *for the purpose of* committing a crime against them means that the State's theory would convert many non-burglary crimes into burglary crimes. Take, for example, retail theft. Burglary is defined, in part, as entry without consent with intent to steal. *See* WIS. STAT. § 943.10(1m). Under the State's theory, what is currently misdemeanor retail theft would qualify as felony burglary because store owners never consent to entry for purposes of stealing from them. Given this absurd result, it is not surprising that the State fails to produce case law support for its theory.

¶35 Accordingly, we reject the State's attempt to persuade us with a different sufficiency of the evidence theory.

Conclusion

¶36 For the reasons above, we reverse the part of the circuit court's order setting aside the jury's guilty verdict on the WIS. STAT. § 940.225(3) sexual assault count but affirm the part of the court's order setting aside the verdicts on the burglary counts. We remand for the circuit court to reinstate the verdict on the § 940.225(3) sexual assault count and for further sentencing proceedings.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.