COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2520-CR **Cir. Ct. No. 2006CF6014**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEJANDRO LUIS RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: FREDERICK C. ROSA and CLARE L. FIORENZA, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Alejandro Luis Rodriguez appeals from a judgment entered after a jury found him guilty of causing great bodily harm to Cristal T. with intent to cause her great bodily harm, in violation of WIS. STAT. § 940.19(5).

He also appeals from an order denying his motion for postconviction relief. Rodriguez asserts that the evidence was insufficient to support the jury's verdict. We affirm.

BACKGROUND

¶2 The State filed an information charging Rodriguez with causing great bodily harm to Cristal T. with intent to cause her great bodily harm. Rodriguez demanded a jury trial. The evidence, which Rodriguez does not dispute, showed that he beat Cristal T. and as a result she sustained a broken nose, swollen eyes and lips, a left corneal abrasion, bruising and scratching on her hands, arms, wrists, and chest, and a concussion. She repeatedly lost consciousness during the attack and, at the end of the incident, she was covered in blood and required treatment at a hospital. The jury found Rodriguez guilty as charged.

¶3 In postconviction proceedings, Rodriguez asserted that his trial attorney performed ineffectively by failing to request jury instructions on lesser-included battery offenses. The circuit court denied the motion, and this appeal followed.[1]

DISCUSSION

¶4 On appeal, Rodriguez expressly abandons his challenge to the effectiveness of his trial attorney. He frames his appellate issue as solely a claim

[1] The Honorable Frederick C. Rosa presided over the trial. The Honorable Robert A. Hawley conducted the postconviction hearing, although the Honorable Clare L. Fiorenza entered the written order denying Rodriguez's motion for postconviction relief.

that the evidence was insufficient to prove that he caused Cristal T. great bodily harm.

¶5 When we review the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). Moreover, this court need not concern itself with evidence that might support other theories of the crime. ***Id.***, 153 Wis. 2d at 507–508, 451 N.W.2d at 758. Rather, we consider only whether the theory of guilt accepted by the fact-finder is supported by sufficient evidence. ***Id.***, 153 Wis. 2d at 508, 451 N.W.2d at 758.

¶6 WISCONSIN STAT. § 940.19 provides, in pertinent part:

> **(1)** Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.
>
> **(2)** Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.
>
> **(4)** Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony.

> **(5)** Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.[2]

¶7 "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4). At the time of the offense in this case, "substantial bodily harm" was defined as "bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth." WIS. STAT. § 939.22(38) (2005-06).[3] "Great bodily harm" is defined as "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) (emphasis added).

¶8 Rodriguez argues that none of Cristal T.'s individual injuries fit within the specific examples of harm listed in the statutory definition of "great bodily harm." He acknowledges that the statutory definition includes the phrase "other serious bodily injury." Nonetheless, he believes that the aggregate of harm he inflicted on Cristal T. cannot constitute great bodily harm because her

[2] The maximum term of imprisonment upon conviction of a Class E felony is fifteen years, the maximum term of imprisonment upon conviction of a Class H felony is six years, and the maximum term of imprisonment upon conviction of a Class I felony is three years and six months. WIS. STAT. § 939.50(3)(e),(h)-(i). A person convicted of a Class A misdemeanor may be jailed for a maximum of nine months. WIS. STAT. § 939.51(3)(a).

[3] Rodriguez battered Cristal T. on November 4, 2006. The legislature later amended the statutory definition of "substantial bodily harm" in WIS. STAT. § 939.22(38), to include a petechia. *See* 2007 WI Act 127, § 3 (effective April 4, 2008). The amendment is not relevant to our analysis.

individual injuries correspond to injuries listed in WIS. STAT. § 939.22(38), as examples of "substantial bodily harm."

¶9 The interpretation of a statute is a question of law that we review *de novo*. ***State v. Volk***, 2002 WI App 274, ¶34, 258 Wis. 2d 584, 602, 654 N.W.2d 24, 32. We are, however, bound by prior published Wisconsin decisions that construe applicable statutory language. *See* ***State v. White***, 2004 WI App 237, ¶7, 277 Wis. 2d 580, 584–585, 690 N.W.2d 880, 882.

¶10 Our interpretation of the relevant statutory language here is governed by well-settled authorities holding that "'the phrase, 'or other serious bodily injury' was designed as an intentional broadening of the scope of the statute to include bodily injuries which were serious, although not of the *same type or category* as those recited in [WIS. STAT. § 939.22(14)].'" ***State v. Ellington***, 2005 WI App 243, ¶7, 288 Wis. 2d 264, 273, 707 N.W.2d 907, 911, citing ***La Barge v. State***, 74 Wis. 2d 327, 332, 246 N.W.2d 794, 796 (1976) (emphasis in ***Ellington***). Moreover, we recognized in ***Ellington*** that "the phrase 'serious bodily injury' is of 'ordinary significance.'" ***Id.***, 2005 WI App 243, ¶8, 288 Wis. 2d at 274, 707 N.W.2d at 911, citing ***Cheatham v. State***, 85 Wis. 2d 112, 122–123, 270 N.W.2d 194, 199–200 (1978) (two sets of quotation marks omitted). Further, the phrase is "'well understood by any jury of ordinary intelligence.'" ***Ibid.*** (citation and one set of quotation marks omitted).

¶11 Accordingly, the State need not present proof that a victim's injuries match any of the injuries listed in WIS. STAT. § 939.22(14), in kind, type, or category before a jury may find that a defendant inflicted great bodily harm. Rather, a jury may find that a victim suffered great bodily harm if the jury

concludes that the victim suffered injury that is "serious," defining the term as it is ordinarily understood.

¶12 Rodriguez argues that ***La Barge*** and ***Cheatham*** are outdated and that the analysis in ***Ellington*** is therefore "suspect" because it relies on those outdated authorities. ***La Barge*** and ***Cheatham***, Rodriguez points out, predate the creation of battery offenses requiring proof that the defendant caused another person "substantial bodily harm." *See* 1993 Wis. Act 441, §§ 1, 4 (effective May 10, 1994) (creating battery offenses requiring proof that defendant caused substantial bodily harm). When the supreme court decided ***La Barge*** and ***Cheatham***, the statutory scheme for battery included misdemeanor battery, which required proof that the defendant inflicted "bodily harm," and felony battery, which required proof that the defendant inflicted "great bodily harm." *See* WIS. STAT. § 940.20, 940.22 (1975-76); WIS. STAT. § 940.19 (1977-78). In Rodriguez's view, when the legislature created an intermediate level of battery requiring proof that the defendant caused another person "substantial bodily harm," the legislature necessarily also intended to narrow the definition of "great bodily harm."

¶13 Rodriguez's position is unsupported by either amendments to the statutory definition of "great bodily harm" or by legislative history, and he fails to articulate exactly how this court should ultimately define "great bodily harm." He suggests, however, that this court should in some way tie the meaning of "other serious bodily injury" to the specific examples of great bodily harm listed in WIS. STAT. § 939.22(14).

¶14 We cannot adopt Rodriguez's position, for several reasons. First, we have expressly rejected the contention that "the legislature intended the phrase

'other serious bodily injury' to assume the coloration of the list of specific injuries that precede it." ***Ellington***, 2005 WI App 243, ¶7, 288 Wis. 2d at 273, 707 N.W.2d at 911. We concluded instead that the legislature did not intend to narrow the broad scope of the clause. ***Ibid.*** We have no authority to modify our language in ***Ellington***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189–190, 560 N.W.2d 246, 256 (1997).

¶15 Second, the legislature has not removed the phrase "other serious bodily injury" from the definition of "great bodily harm." "[W]here a legislative act has been construed by [an appellate] court, the legislature is presumed to know that in the absence of the legislature explicitly changing the law, the court's construction will remain unchanged." ***Blazekovic v. City of Milwaukee***, 225 Wis. 2d 837, 845, 593 N.W.2d 809, 812 (Ct. App. 1999). Had the legislature intended to narrow the statutory definition of "great bodily harm," the legislature could easily have modified the phrase "other serious bodily injury" in WIS. STAT. § 939.22(14). Because the legislature has not done so, this court must conclude that the words "other serious bodily injury" have the same broad meaning that they had when the supreme court considered the phrase in ***La Barge*** and ***Cheatham***.

¶16 Third, "it is not easy as a matter of law to draw the line of demarcation between 'great bodily harm'" and other levels of bodily harm. *See* ***Flores v. State***, 76 Wis. 2d 50, 58, 250 N.W.2d 720, 724 (1977), *overruled on other grounds by* ***State v. Richards***, 123 Wis. 2d 1, 10–11, 365 N.W.2d 7, 11 (1985). The ***Flores*** court explained that "in many cases the situation will fall into a twilight zone" that the jury must resolve. ***Id.***, 76 Wis. 2d at 59, 250 N.W.2d at 724.

¶17 A reasonable jury could conclude that Rodriguez caused Cristal T. "great bodily harm" as defined by current law. She suffered numerous injuries, including a broken nose, a corneal abrasion, and a concussion; both of her eyes were swollen, and her left eye was swollen shut; she repeatedly lost consciousness during the attack; she was covered in blood when the incident ended; and she required hospitalization. The jury was entitled to conclude that she sustained "serious bodily injury." *See* ***La Barge***, 74 Wis. 2d at 335, 246 N.W.2d at 798 (concluding that numerous stab wounds and blood loss requiring hospital treatment constitute serious bodily injury).

¶18 Rodriguez states that the jury was "ignorant of the crimes of lesser batteries" and that knowledge of the statutory battery scheme was "withheld" from the jury in his case. He suggests that the jury could not determine that he caused great bodily harm because it was not instructed about battery offenses requiring proof of causing substantial bodily harm. These are arguments that the jury was improperly instructed. Because Rodriguez insists that he challenges only the sufficiency of the evidence in this appeal, he fails to explain how he wants this court to address his critique of the jury instructions. More importantly, Rodriguez waived such arguments when he did not raise them during the jury instruction conference. *See* WIS. STAT. RULE 805.13(3). "We have no power to review waived error of this sort." ***LaCombe v. Aurora Med. Group, Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 777, 683 N.W.2d 532, 534.

By the Court.—Judgment and order affirmed.

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