COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP451-CR **Cir. Ct. No. 2010CF25**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE J. WICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: EDWARD E. LEINEWEBER and WILLIAM ANDREW SHARP, Judges. *Affirmed*.

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

¶1 PER CURIAM.[1] Kyle Wicks appeals a judgment convicting him of both second-degree sexual assault of an unconscious victim and third-degree sexual assault. He contends that the multiple convictions were improperly based upon a single course of conduct, in violation of his rights under the double jeopardy and due process clauses of the United States Constitution. For the reasons discussed below, we disagree and affirm.

BACKGROUND

¶2 The two sexual assault charges at issue in this case were based upon testimony that Wicks initiated intercourse with a woman who had fallen asleep on a couch. The woman awoke during the assault and felt Wicks' penis in her anus before she turned around and sat up.

STANDARD OF REVIEW

¶3 We will independently determine whether a particular set of facts shows that an individual's double jeopardy rights have been violated, or that multiple punishments have been imposed without due process. ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

DISCUSSION

¶4 Multiplicity questions can arise under the double jeopardy clause or the due process clause when a single criminal episode or course of conduct is charged as multiple counts. ***Id.***, ¶¶33-34. The test for whether multiple counts are

[1] The Honorable Edward E. Leineweber presided over trial and entered the judgment of conviction. The Honorable William Andrew Sharp entered the order denying Wicks' postconviction motion.

permissible begins with a determination of whether the charged offenses are identical in law and fact. ***Id.***, ¶¶22, 43 (citing ***Blockburger v. United States***, 284 U.S. 299 (1932)). Charged offenses are different in law if each requires proof of an element that the other does not. ***Id.***, ¶22. Charged offenses are different in fact if they are separated in time or place, require separate acts of volition within a course of conduct, or are otherwise of a significantly different nature. *See* ***State v. Anderson***, 219 Wis. 2d 739, 748-49, 580 N.W.2d 329 (1998).

¶5 If two counts are identical in both law and fact, they qualify as the "same offense" and the double jeopardy clause bars conviction on both counts. ***Davison***, 263 Wis. 2d 145, ¶¶33, 43. Conversely, if two counts are not identical in either law or fact, the double jeopardy clause is not implicated and a presumption arises that the legislature intended to provide multiple punishments. ***Id.***, ¶33, 44. However, the defendant can overcome that presumption and establish a due process violation with clear evidence of a contrary legislative intent. ***Id.***, ¶33, 45-46.

¶6 We begin by considering whether the offenses at issue here are the same in law. A conviction for second-degree sexual assault of an unconscious victim requires proof that the defendant has sexual contact or intercourse with someone who the defendant knows is unconscious, while a conviction for third-degree sexual assault requires proof that the defendant has sexual intercourse with someone without consent. WIS. STAT. § 940.225(2)(d) and (3)[2]; WIS JI—CRIMINAL 1213; WIS JI—CRIMINAL 1218A.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 Wicks argues that, since an unconscious person is incapable of giving consent, a person who commits a second-degree sexual assault of an unconscious person necessarily also commits a third-degree sexual assault, without any showing of an additional element. However, the Wisconsin Supreme Court has expressly rejected the argument that the unconsciousness element under WIS. STAT. § 940.225(2)(d) is the equivalent of a lack of consent. Rather, the court ruled that consent is simply not an issue under that statute. ***State v. Sauceda***, 168 Wis. 2d 486, 495-96, 485 N.W.2d 1 (1992). We conclude that ***Sauceda*** controls the outcome of the different elements test here. Because the charged offenses were different in law, there was no double jeopardy violation in convicting Wicks of both.

¶8 We now turn our attention to whether the legislature intended multiple punishments.

¶9 Legislative intent as to multiple punishments may be gleaned from statutory language, legislative history and context of the statute, the nature of the proscribed conduct, and the appropriateness of multiple punishments for the conduct at issue. ***Davison***, 263 Wis. 2d 145, ¶50. Typically, such evidence will focus on whether the legislature has defined one of the offenses as a lesser-included offense of the other under WIS. STAT. § 939.66, precluding dual convictions. *See* ***Davison***, 263 Wis. 2d 145, ¶¶51-77.

¶10 Here, the statutory language indicates an intent to allow different punishments for the offenses of second-degree sexual assault of an unconscious person and third-degree sexual assault by providing the distinct elements of unconsciousness for one offense and lack of consent for the other.

¶11 As to legislative history, we note that WIS. STAT. § 939.66 expressly defines lower degrees of homicide, battery, and sexual assault of a child as lesser-included offenses of, respectively, higher degrees of homicide, battery, and sexual assault of a child. WIS. STAT. § 939.66(2), (2m), (2p). The statute also expressly defines the abuse of an at-risk individual as a lesser-included offense of sexual assault of an unconscious person. WIS. STAT. § 939.66(6). In that context, the legislature's failure to define third-degree sexual assault as a lesser-included offense of any second-degree sexual assault, much less second-degree sexual assault of an unconscious person, is conspicuous, and also supports the conclusion that separate punishments were intended.

¶12 Regarding the nature of the proscribed conduct and the appropriateness of multiple punishments, we agree with the State that different interests are protected by the two statutes. An unconscious person is particularly vulnerable because he or she is unable to communicate a lack of consent, unable to take any action to prevent the assault, and potentially unable to identify the assailant or even recognize that an assault has occurred. In contrast, a conscious person who is subjected to nonconsensual sexual activity is likely to be aware of the violation of his or her person. In the present case, it is appropriate to punish Wicks both for his willingness to take advantage of a vulnerable victim, and for the pain and sense of violation that the victim actually experienced while awake during the assault.

¶13 We conclude that Wicks has not overcome the presumption that the legislature intended multiple punishments to be available in circumstances such as these. Therefore, we find no due process violation.

By the Court.—Judgment and order affirmed.

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