COURT OF APPEALS
DECISION
DATED AND RELEASED

February 25, 1996

No. 96-2670-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JACK D. THOMAS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Reversed.*

MYSE, J. The State of Wisconsin appeals an order dismissing six of the seven counts of intentionally aiding and abetting hunting deer out of season, contrary to § 939.05(2), STATS., and WIS. ADM. CODE § NR 10.01(3)(e), and six of the seven counts of intentionally aiding and abetting shining deer while in the possession of a firearm, contrary to §§ 939.05(2) and 29.245(3)(a), STATS. Thomas was also charged with seven counts of failing to tag a deer which are not at issue in this appeal. The State argues that the charges are not multiplicitous and should not have been consolidated. Because each charge represented a separate activity, the charges are not multiplicitous and we reverse the order.

The facts are undisputed. During the night of December 28, 1995, Thomas and two other men went hunting for deer. The men drove in a pickup truck shining the fields for deer. Upon spotting the deer, the men would fire directly from the pickup truck and then mark the spot with a stake in the road so they could find the poached deer later. This poaching went on from approximately 7 p.m. to 11 p.m. The group killed seven deer in this time, six of which were shot by the defendant. The men then picked up the seven poached deer, transported them to a farm and slaughtered them.

From the above facts, Thomas was charged with seven counts each of intentionally aiding and abetting in the shining of deer, intentionally aiding and abetting in the hunting of deer out of season, and intentionally aiding and abetting in the failure to tag a deer. Thomas argued that six of the counts for shining and six of the counts for hunting were multiplicitous and moved to dismiss them. The trial court agreed the charges were multiplicitous and dismissed the counts, leaving one count of shining and one count of hunting to be prosecuted. The State now appeals.

Charging a single offense as multiple counts violates the double jeopardy clause of the state and federal constitutions. ***State v. Rabe***, 96 Wis.2d 48, 61, 291 N.W.2d 809, 815 (1980). This court independently reviews questions of constitutional fact which require the "application of constitutional principles to the facts as found." ***State v. Hirsch***, 140 Wis.2d 468, 470, 410 N.W.2d 638, 639 (Ct. App. 1987). Therefore, we review the issues presented in this appeal without deference to the trial court's determination.

Wisconsin uses a two-prong test to determine whether charges are multiplicitous. ***Id.*** at 471, 410 N.W.2d at 639. First, the court must determine whether the offenses are "identical in law and fact." ***Id.*** (quoting ***Rabe***, 96 Wis.2d at 63, 291 N.W.2d at 816). If so, the charges are multiplicitous and may not be charged as separate offenses. Second, even if the charges are different in law and fact, they may still be multiplicitous if the legislature intended the charges to be brought as a single count. ***Hirsch***, 140 Wis.2d at 471-72, 410 N.W.2d at 639-40. The overall test is one of "fundamental fairness or prejudice to the defendant." ***State v. Eisch***, 96 Wis.2d 25, 34, 291 N.W.2d 800, 805 (1980).

Our first inquiry is whether the offenses are identical in law and fact. This court concludes that the counts, as additional counts of the same offense, are identical in law. The offenses, however, are different in fact. In determining whether charged acts are different in fact, Wisconsin applies the "additional fact" test. ***Rabe***, 96 Wis.2d at 63, 291 N.W.2d at 816. Under this test, each count requires proof of an additional fact which the other count or counts do not. ***Id.*** When the alleged additional "facts are either separated in time or are of a sufficiently different nature," they satisfy the additional fact test. ***Eisch***, 96 Wis.2d at 31, 291 N.W.2d at 803.

Turning to the counts for intentionally aiding and abetting the shining of deer, Thomas contends that the shining of deer is an ongoing, continuous activity. This court disagrees. The statute provides: "No person may use or possess with intent to use a light for shining deer or bear while the person is hunting deer or bear or in possession of a firearm, bow and arrow or crossbow." Section 29.245(3)(a), STATS. The statute defines "shining" as the "casting of rays of a light on a field, forest or other area for the purpose of illuminating, locating or attempting to illuminate or locate wild animals." Section 29.245(1)(d), STATS.

Under the statute, each act of shining is a separate and distinct activity. Once a person casts rays of light onto a field or forest with the requisite intent, he is guilty of shining. This activity is not ongoing as it concludes every time the light is turned off or new area is illuminated. Thomas contends that the State's theory leads to an absurdity in that if a person illuminates a field which contains fifty deer, then there can be fifty counts of shining. This is not so. The number of animals illuminated is not an element of the statute. Rather, the statute focuses solely upon the defendant's conduct in casting rays of light onto fields, forests or other areas to locate or illuminate wild animals.

The next inquiry is whether the legislature intended the shining counts to be brought as a single count. When determining legislative intent for multiplicity purposes, this court examines four factors: "(1) the language of the statute; (2) the legislative history and the context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct." ***State v. Tappa***, 127 Wis.2d 155, 165, 378 N.W.2d 883, 887 (1985). The statute itself does not describe the intended unit of prosecution. The statute also does not provide for any gradation in penalty for numerous offenses. *See* §

29.99, STATS. The lack of gradations in a statute is viewed as indicating the legislature's intent to have separate offenses charged. ***State v. Grayson***, 172 Wis.2d 156, 164, 493 N.W.2d 23, 27 (1992).

The context of the statute and the appropriateness of the multiple punishment both indicate a legislative intent to permit multiple charges. The statute is designed to protect the State's wildlife by preventing the shining of animals. Individuals will not be deterred from shining deer if four hours of shining warrants only a single count. Since the statute is designed to prevent illegal hunting, to consolidate numerous incidents of shining into a single count would undercut the purpose of the statute. Further, the nature of the proscribed conduct warrants multiple punishments. Each incident of shining deer is a distinct, separate activity. With each new shining incident, a defendant is exhibiting a new intent to violate the statute requiring a new count. *See* ***id.*** at 165, 493 N.W.2d at 28. Therefore, because the shining counts are not multiplicitous, the trial court erred in dismissing the six counts of intentionally aiding and abetting the shining of deer.

We also conclude that the counts for intentionally aiding and abetting in the hunting of deer are not multiplicitous. Once again, the additional fact test must be applied. Thomas argues that he did not hunt seven times, rather, he simply aided in the killing of seven deer during a single hunt. "Hunting" is statutorily defined to include "shooting, shooting at, pursuing, taking, catching or killing any wild animal or animals ...." Section 29.01(8), STATS. Applying the language of the statute, we conclude that Thomas was not engaged in a single hunt. Once an animal has been killed, caught, or even shot at, a hunt has taken place. Thomas argues that hunting is a continuous activity subject only to a single count. While hunting activities may be ongoing in nature, each time Thomas shot, killed, or otherwise satisfied the definition of hunting under § 29.01(8), he engaged in a separate hunt of a different animal at a different time in a different place.

In this case, Thomas aided in seven hunts. Thomas personally shot six deer and assisted in the shooting of the seventh. Each time Thomas pointed his rifle and fired at an animal, he hunted it. After each firing, Thomas had the option to return home but instead decided to hunt again. Each hunt, although similar factually, was substantially different to satisfy the additional element test. After each kill, a stake would be placed in the road so the group

could relocate the poached deer later. The three men would then locate additional deer conceivably some time later as the entire incident took approximately four hours. The sighting and shooting of or at a different deer at a different time is sufficient to satisfy the additional fact test. *See* ***Eisch***, 96 Wis.2d at 31, 291 N.W.2d at 803.

For the same reason the legislature did not intend the shining counts to be brought as a single count, this court concludes that the legislature did not intend the hunting counts to be brought as a single count. Because the seven counts of intentionally aiding and abetting in hunting deer and the seven counts of intentionally aiding and abetting in the shining of deer while in the possession of a firearm are not multiplicitous, the order dismissing the six counts of each is reversed.

By the Court.—Order reversed.

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