COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1535-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEMMICK D. HOLMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Kemmick D. Holmes appeals from a judgment of conviction and an order denying him postconviction relief. He claims that the trial court erred in concluding that he was not denied effective assistance of counsel because his trial lawyer did not object to charges that Holmes considers

multiplicitous. Consequently, Holmes believes that his right against double jeopardy was violated. In addition, he claims that the trial court erred in concluding that his convictions were based upon sufficient evidence. We affirm.

¶2 Holmes was charged with possession of cocaine with intent to deliver, contrary to WIS. STAT. § 961.41(1m)(cm)1, and delivery of cocaine, contrary to § 961.41(1)(cm)1.[1] At trial, two officers testified that, pursuant to police surveillance, they observed Holmes speaking to a female on a sidewalk and then spit something into his hand that "appeared to be a corner cut baggy with some off-white, chunky substance." Next, officers watched as the female took money out of her purse. At that point, the officers came out of hiding and approached Holmes, who then fled.[2] As the police officers chased Holmes, they observed him spit out more objects, which were eventually recovered. The parties later stipulated that these objects were three baggies containing cocaine.

¶3 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The defendant was also charged and convicted of obstructing an officer, in violation of WIS. STAT. § 946.41(1). He does not appeal this conviction, however.

assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. *See* ***id.***, 466 U.S. at 687. If a defendant falters on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. *See* ***id.***, 466 U.S. at 697. We analyze Holmes's ineffective-assistance-of-counsel claim in light of this standard.[3]

A. Double Jeopardy

¶4 The Double Jeopardy Clause, embodied in both the Fifth Amendment of the United States Constitution and article 1, section 8 of the Wisconsin Constitution, protects, among other things, against multiple punishments for the same offense.[4] *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 515, 509 N.W.2d 712, 717 (1994) (citation omitted). A two-pronged test is utilized to determine whether the charge is multiplicitous. First, the court inquires as to whether the charges are identical in law and fact. ***State v. Lechner***, 217 Wis. 2d 392, 404, 576 N.W.2d 912, 918–919 (1998). "The determination whether offenses are different in law or whether one offense is a lesser-included offense of another is controlled by the 'elements only' test set out in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932)." ***Id.***, 217 Wis. 2d at 405, 576 N.W.2d at 919. Second, the court must then consider whether the legislature intended that multiple punishments could be imposed. *See* ***id.***, 217 Wis. 2d at 402–403, 576 N.W.2d at 918. Whether an individual's constitutional right to be free from double jeopardy

[3] The trial court properly denied Holmes's postconviction motion without a hearing because "the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996) (citation omitted).

[4] The Double Jeopardy Clause of the United States Constitution provides, in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. Similarly, article I, § 8 of the Wisconsin Constitution provides: "[N]o person for the same offense may be put twice in jeopardy of punishment."

has been violated is a question of law that this court reviews de novo. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 332 (1998).

1. Identical in Law

¶5 Charges are the same in law if one is a lesser-included of the other. *See* ***State v. Stevens***, 123 Wis. 2d 303, 321–322, 367 N.W.2d 788, 797 (1985). The test under the double jeopardy clause is whether each crime requires for conviction proof of an additional element that the other does not require. *See* ***Blockburger***, 284 U.S. at 304; *see also* ***Lechner***, 217 Wis. 2d at 405, 576 N.W.2d at 919.[5] When comparing the elements of WIS. STAT. § 961.41(1m)(cm)1, possession of cocaine with intent to deliver, with those of § 961.41(1)(cm)1, delivery of cocaine, it is clear that neither crime is a lesser-included of the other: Possession with intent to deliver requires the element of possession while delivery requires the element of delivery.[6] In addition, this court has already held that "it is possible to deliver a substance without ever having possessed it." ***State v.***

[5] The "elements only" test, set forth in ***Blockburger v. United States***, 284 U.S. 299 (1932), was codified under WIS. STAT. § 939.66, which states in pertinent part:

> **Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> **(1)** A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

[6] Possession of cocaine with intent to deliver requires proof of four elements: (1) the defendant possessed a substance; (2) the substance was cocaine; (3) the defendant knew or believed that the substance was cocaine; and (4) the defendant intended to deliver cocaine. *See* WIS JI—CRIMINAL 6035. On the other hand, delivery of cocaine requires proof of three elements: (1) the defendant delivered a substance; (2) the substance was cocaine; and (3) the defendant knew or believed that the substance was cocaine. *See* WIS JI—CRIMINAL 6020.

Clemons, 164 Wis. 2d 506, 512, 476 N.W.2d 283, 285 (Ct. App. 1991). Therefore, the two crimes are not identical in law.

2. Identical in Fact

¶6 Nor are these crimes identical in fact. Here, the delivery charge related to the initial attempted transaction with the woman, while the possession with intent charge related to the additional possession of the three baggies Holmes spit out as the police chased him.[7] The fact that cocaine comes from the same supply, however, does not make the offenses the same in fact. *See* ***Stevens***, 123 Wis. 2d at 322, 367 N.W.2d at 798.

3. Legislative Intent

¶7 When the offenses are not the same in law or fact, we presume that the legislature intended cumulative punishments. *See* ***Anderson***, 219 Wis. 2d at 752, 580 N.W.2d at 335. This presumption is rebutted only by a clear indication to the contrary. *See* ***id.***, 219 Wis. 2d at 751, 580 N.W.2d at 335. Legislative intent is determined by examining the statutory language, legislative history and context, nature of the proscribed conduct and appropriateness of multiple punishment. *See* ***id.***, 219 Wis. 2d at 751–752, 580 N.W.2d at 335.

[7] Holmes contends that the State cannot charge possession with intent to deliver in this case because it is possible that Holmes had nothing left to possess after his delivery on the sidewalk, making the crimes identical in fact. Holmes asserts that the State cannot prove he did not actually attempt to deliver all the cocaine he possessed, i.e., the three corner-cut baggies of cocaine, because police neither overheard the terms of the sale nor observed the drug transaction through its completion. This argument fails because the jury was entitled to find that, when the woman took her money out after being shown only one baggie, she was doing so to purchase only one baggie of cocaine. A reviewing court will consider the evidence and all reasonable inferences in the light most favorable to the verdict. *See* ***State v. Pankow***, 144 Wis. 2d 23, 30, 422 N.W.2d 913, 914 (Ct. App. 1988).

¶8 In this case, none of these factors demonstrates a legislative intent to prohibit separate punishments for WIS. STAT. § 961.41(1m)(cm)1 and WIS. STAT. § 961.41(1)(cm)1. To the contrary, the Wisconsin Legislature has expressly stated its strong intention to treat drug offenses severely:

> Persons who illicitly traffic commercially in controlled substances constitute a substantial menace to the public health and safety. The possibility of lengthy terms of imprisonment must exist as a deterrent to trafficking by such persons. Upon conviction for trafficking, such persons should be sentenced in a manner, which will deter further trafficking by them, protect the public from their pernicious activities, and restore them to legitimate and socially useful endeavors.

WIS. STAT. § 961.001(1r).[8] Here, we have two offenses involving two separate victims: Holmes's initial customer on the sidewalk and future potential customers. "[A]s a general rule, where different victims are involved, the legislature intends to allow a corresponding number of punishable crimes." ***Lechner***, 217 Wis. 2d at 417, 576 N.W.2d at 924. The legislature clearly intended cumulative punishments in this case. Holmes has failed to overcome this presumption. Therefore, Holmes's double jeopardy challenge fails.

¶9 Since we have determined that the charges in this case are not multiplicitous, we consequently find that trial counsel was not ineffective for failing to bring such an objection.

[8] Holmes argues that the legislature's attempt to "cast[] a wide net to facilitate the successful prosecution of drug related offenses is *not* synonymous however with an intent to permit multiple punishments for single violations." Holmes also contends that, because both statutes are intended to protect the same public interest, the legislature did not intend multiple punishments. These arguments do not amount to a "clear indication" of contrary legislative intent, as required by ***State v. Anderson***, 219 Wis. 2d 739, 751, 580 N.W.2d 329, 335 (1998), to rebut the presumption that the legislature intended cumulative punishments.

B. Insufficient Evidence

¶10 Holmes also argues that there was insufficient evidence from which the jury could find that the substance he delivered was cocaine.[9] Specifically, Holmes asserts that the State failed to prove that what the police saw the defendant spit into his hand during the sidewalk transaction was cocaine. We will not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state 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).

¶11 A criminal conviction may rest entirely on circumstantial evidence, even if the circumstantial evidence supporting the conviction also supports an equally reasonable theory of innocence. *See* ***Poellinger***, 153 Wis. 2d at 507–508, 451 N.W.2d at 758. Here, Holmes admitted by stipulation that the baggies he discarded while the police chased him contained cocaine. The jury could reasonably find that the similarly-packaged substance he spit into his hand on the sidewalk was also cocaine. Thus, the circumstantial evidence presented at trial was sufficient to support Holmes's conviction for delivery of cocaine.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

[9] Defense concedes that the State sufficiently proved count two, possession with intent to deliver cocaine, contrary to WIS. STAT. § 961.41(1m)(cm)1.