COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP745-CR **Cir. Ct. No. 2013CF1441**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY LAMONT JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Anthony Lamont Johnson appeals a judgment of conviction entered following a jury trial and an order denying his motion for postconviction relief. He argues that his convictions for strangulation and

suffocation in violation of WIS. STAT. § 940.235(1) (2015-16)[1], and for battery in violation of WIS. STAT. § 940.19(1), are multiplicitous, and requests that this Court vacate his battery conviction. Because we conclude that neither offense is included in the other under WIS. STAT. § 939.66(1), we affirm.

Following a jury trial, Johnson was convicted of ten offenses arising from his violent, controlling acts against three female victims during the fall of 2013. Counts five and seven, strangulation/suffocation and battery (also referred to as "simple battery"), involved the same victim, S.P., and were part of the same incident.[2] At sentencing, the circuit court imposed two and one-half years of initial confinement followed by three years of extended supervision on count five. On count seven, the court imposed a consecutive six-month jail term.

Johnson filed a postconviction motion alleging that his convictions on counts five and seven resulted in multiple punishments for the same conduct in violation of the proscription against double jeopardy. The circuit court denied the motion, concluding that the convictions were not identical in law or fact and thus, were not multiplicitous. Johnson appeals.

Johnson maintains that his convictions for strangulation and battery run afoul of WIS. STAT. § 939.66, which provides: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both." Under subsection (1), an "included crime" is one "which does not require

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] As to S.P., Johnson was also convicted of count six, false imprisonment, in violation of WIS. STAT. § 940.30, and count ten, substantial battery, in violation of WIS. STAT. § 940.19(2). Only Johnson's convictions on counts five and seven are at issue in this appeal.

proof of any fact in addition to those which must be proved for the crime charged." § 939.66(1). According to Johnson, the battery is an included crime of strangulation or vice versa.[3] We review independently whether one crime is included in another. ***State v. Rundle***, 166 Wis. 2d 715, 722, 480 N.W.2d 518 (Ct. App. 1992).

WISCONSIN STAT. § 939.66(1) codifies the "elements only" test set out in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). ***State v. Lechner***, 217 Wis. 2d 392, 405, 576 N.W.2d 912 (1998). "Under the elements only test, the lesser offense must be statutorily included in the greater offense and contain no element in addition to the elements constituting the greater offense." ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986). The elements only test "focuses on the language of the statutes defining the offenses, rather than on the charging documents or the specific facts of the case." ***State v. Nelson***, 146 Wis. 2d 442, 448, 432 N.W.2d 115 (Ct. App. 1988). "We place the statutes defining the offenses 'side by side' to differentiate and compare the elements of the crimes." ***Nelson***, 146 Wis. 2d at 449 (quoting ***Carrington***, 134 Wis. 2d at 265-66).

[3] Though at times Johnson's brief asserts that strangulation is included in the crime of battery, his argument makes most sense if construed the other way around. For example, Johnson argues that "strangulation is included in simple battery because it is utterly impossible to commit strangulation without also committing simple battery." That is actually an argument that simple battery is included in the offense of strangulation. Johnson then argues at length why in determining whether strangulation is included within battery, it does not matter that strangulation, a felony, is a "greater" offense than simple battery, a misdemeanor. For purposes of our analysis, it does not matter which offense is alleged to be the included crime, or whether the included offense must be a "lesser" crime because we conclude that neither offense is included in the other.

Under the elements only test, WIS. STAT. § 940.19(1) battery and WIS. STAT. § 940.235 strangulation and suffocation are not included offenses because each crime has an element or elements the other does not. The elements of simple battery are (1) the defendant caused bodily harm to the victim, (2) the defendant intended to cause bodily harm to the victim or another person, (3) the defendant caused bodily harm without the consent of the victim, and (4) the defendant knew that the victim did not consent. WIS JI—CRIMINAL 1220 (2015). *See also* ***State v. Reynolds***, 206 Wis. 2d 356, 366, 557 N.W.2d 821 (Ct. App. 1996). The elements of strangulation and suffocation are (1) the defendant impeded the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of the victim, and (2) the defendant did so intentionally. WIS JI—CRIMINAL 1255.

Battery is not an included offense of strangulation because the former requires proof of the victim's nonconsent and the defendant's knowledge of that nonconsent. *Cf*. ***State v. Vassos***, 218 Wis. 2d 330, 332, 579 N.W.2d 35 (1998) (because simple battery requires proof of a victim's nonconsent, it is not an included offense of felony battery under WIS. STAT. § 939.66(1); simple battery, is, however, an included offense of felony battery under § 939.66(2m)).[4] Strangulation does not require proof of a victim's nonconsent or the defendant's knowledge of that nonconsent. By the same token, simple battery does not require

[4] In ***State v. Richards***, 123 Wis. 2d 1, 6, 9-10, 365 N.W.2d 7 (1985), the court held that as a matter of law, simple battery was not a lesser-included offense of aggravated battery under WIS. STAT. § 939.66(1), because the former required proof that the person harmed did not consent, whereas the latter did not contain a nonconsent element. In response, the legislature enacted § 939.66(2m), which added as a new category of included offenses "[a] crime which is a less serious or equally serious type of battery than the one charged." *See* ***State v. Vassos***, 218 Wis. 2d 330, 338 n.8, 579 N.W.2d 35 (1998).

proof that the defendant impeded the victim's normal breathing or circulation of blood, or that the defendant intended to do so. Therefore, strangulation is not an included offense of simple battery.

Johnson contends that it is utterly impossible to commit the crime of strangulation/suffocation without necessarily committing the crime of simple battery. Relatedly, he argues that in the instant case, the factual basis for the two offenses is identical. Johnson's argument ignores what we stated previously and now repeat: in determining whether a crime is an included offense under WIS. STAT. § 939.66(1), Wisconsin uses the elements only test, which "is concerned only with the legal elements of the crime and not with the peculiar facts of the case at bar." ***State v. Verhasselt***, 83 Wis. 2d 647, 664, 266 N.W.2d 342 (1978). In ***Verhasselt***, the court withdrew "[a]ny implication" in prior case law "that the facts of a case determine whether a crime is a lesser included offense," stating: "When determining whether a crime is a lesser included offense under sec. 939.66(1), the determinative factor is the statutorily defined elements of the respective crimes." ***Id***.

In addition to concluding that Johnson's offenses were not identical in law, the postconviction court also determined they were not identical in fact because they were "significantly different in nature" and "were two separate volitional acts." To the extent the State suggests we should conclude the offenses were not multiplicitous because they were different in fact, we decline to engage in this analysis. Rather, because we have concluded the offenses are different in law, Johnson would need to overcome the presumption that the legislature intended multiple punishments. ***State v. Davison***, 2003 WI 89, ¶¶44, 46, 263 Wis. 2d 145, 666 N.W.2d 1. This presumption can only be rebutted by clear evidence to the contrary. ***State v. Derango***, 2000 WI 89, ¶30, 236 Wis. 2d 721, 613 N.W.2d 833.

The postconviction court determined and the State argues that Johnson has not put forth evidence to overcome the presumption in favor of permitting two separate punishments for the two statutory violations. *See* ***Davison***, 263 Wis. 2d 145, ¶50 (stating the four-factor test for determining legislative intent in a multiplicity case). In his reply brief, Johnson asserts that the offenses are identical in law and fact and therefore, the State carries the burden to rebut the presumption against multiple punishments. For reasons previously stated, we determine that it is Johnson's burden. Though Johnson touches on the four factors in his reply brief, his arguments do not begin to constitute clear evidence rebutting the presumption that the legislature intended multiple punishments.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).