COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3405-CR **Cir. Ct. No. 97CF000306**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALLACE B. BASKERVILLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Judgment affirmed; order reversed and cause remanded with directions.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Wallace Baskerville appeals a judgment of conviction and an order denying his postconviction motion. Baskerville raises a number of issues on appeal. Although we affirm the circuit court's denial as to

most issues, we reverse the order and remand for further proceedings on one issue relating to multiplicity.

¶2 A jury found Baskerville guilty of one count of mayhem and one count of aggravated battery, along with other crimes. The charges arose from an incident in which Baskerville was alleged to have twice slashed the face of Robert Adams.

¶3 Baskerville argues that the evidence was insufficient to support the verdict. We affirm a verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In his argument, Baskerville points to conflicting statements made by the victim Adams, and to evidence that was inconsistent with the verdict. Baskerville fails to discuss the evidence in the light most favorable to the jury's verdicts.

¶4 The evidence at trial included testimony by Adams that he and Linda Napgezek were at Baskerville's apartment, and indicating that Baskerville gave Adams and Napgezek some pills, which they took and then lost consciousness. Adams testified that he awoke to a punch to his face, and then felt a burning sensation on his face, where one of the cuts was located. Adams stated that he then left the apartment. Adams testified he believed it was Baskerville who cut him, because Napgezek was the only other person at the apartment and Adams believed she was unconscious. A crime lab specialist testified that a swab of a stain on Baskerville's hand contained blood that DNA analysis showed matched Adams's type, and testified that only one in a million people would match Adams's DNA blood type. A knife recovered from Baskerville's apartment

contained traces of human blood. There was other evidence, but this testimony, if believed by the jury, was sufficient to conclude that it was Baskerville who committed the crimes.

¶5 Baskerville also argues that the court erred by denying his motions for postconviction discovery.[1] To obtain postconviction discovery, the defendant must show a reasonable probability that, if the evidence had been disclosed earlier, the result at trial would have been different. ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999). Baskerville sought discovery of a variety of medical records of Linda Napgezek. At trial, his theory of defense was that Napgezek slashed Adams, her boyfriend at the time. Testimony at trial described past acts or threats of violence Napgezek committed against Adams or his property. Baskerville argues that the requested records would have shown the jury additional facts about Napgezek's violent history and past, outside of her relationship with Adams.

¶6 Assuming that the requested medical records would indeed show a longstanding pattern of violence by Napgezek, we conclude that this evidence would not have produced a different result at trial. The jury was already aware of at least some violent acts or threats by her. Furthermore, we doubt this type of historical evidence would significantly influence the jury's verdict as to what happened in this particular incident because the jury was also presented with the testimony of several witnesses that related specifically to this incident. That evidence, partly described above, presented a strong case that Baskerville

[1] The State asserts that the written order denying the motions is not of record. However, it is contained in the record as item no. 101.

intentionally drugged Adams and Napgezek, intended to commit a sexual assault on Napgezek, and then attacked Adams when Adams began to regain consciousness. In addition, Baskerville's own testimony included a farfetched story about other intruders allegedly in his apartment that night.

¶7 Baskerville also sought postconviction discovery in the form of DNA testing of blood on Napgezek's blue jeans. His argument appears to be that this evidence would be exculpatory if the testing reveals Adams's blood on Napgezek's jeans, because it would tend to show that Linda Napgezek committed the crimes. The State responds that the absence of testing permitted Baskerville's attorney to argue to the jury that it was Adams's blood, and that he did so. This is true. Testing carried with it the risk that defense counsel could not make this argument.

¶8 In addition, the State argues that the probative value of blood on Napgezek's jeans was reduced by her testimony that Baskerville dragged her on the floor in the room where the crimes occurred and, therefore, there was a ready explanation for the presence of Adams's blood on Napgezek's jeans even if she did not commit the crimes. We agree, in light of these facts and the evidence described above, that DNA testing of the blood on Napgezek's blue jeans would not have produced a different result at trial.

¶9 Baskerville next argues that he was denied his right to postconviction counsel. This is an issue that has previously been decided. During briefing on appeal, the State moved for a remand to the circuit court for a determination of whether Baskerville had waived his right to postconviction counsel. We granted that motion and, upon review of the circuit court's findings,

we concluded that Baskerville had waived his right to counsel. We denied his two motions for reconsideration. We decline to revisit the issue in this opinion.

¶10 Baskerville next argues that the aggravated battery and mayhem charges were improperly multiplicitous because aggravated battery is a lesser-included offense of mayhem, and the two slashes were part of one course of conduct that could not properly be separated into two charges. It does not appear that Baskerville raised this issue at any time during trial, although he did raise it in his postconviction motion. The circuit court concluded that the charges were not multiplicitous because mayhem has elements that are not required for aggravated battery.

¶11 We first address the question of waiver. The State has not argued, in the trial court or on appeal, that Baskerville waived the issue. Instead, the State argues the merits of the issue directly. However, because the issue was not raised at trial, it was waived, and can be addressed only as ineffective assistance of counsel. ***State v. Koller***, 2001 WI App 253, ¶¶39-44, 248 Wis. 2d 259, 635 N.W.2d 838. Neither party has addressed the issue in terms of ineffective assistance. However, regardless which framework for review is used, the State's arguments on appeal fail to defeat Baskerville's multiplicity claim.

¶12 The applicable law on multiplicity is set forth in ***Koller***. ***Id.***, ¶¶28-38. The first part of the test is whether the offenses are identical in law and fact. ***Id.***, ¶29. Offenses are not identical in law or in fact if each of the offenses requires proof of an element or fact that the other does not. ***State v. Derango***, 2000 WI 89, ¶¶29-30, 236 Wis. 2d 721, 613 N.W.2d 833. A defendant cannot properly be

convicted of both an offense and a lesser-included offense based on the same act. *See* WIS. STAT. § 939.66 (1995-96).[2]

¶13 To analyze the present case, we set forth the elements of the two charges at issue. Aggravated battery has two elements: (1) the defendant caused great bodily harm, and (2) the defendant intended to cause either substantial bodily harm or great bodily harm. WIS. STAT. § 940.19(5) (1995-96). Mayhem has three elements: (1) the defendant cut or mutilated one of certain body parts, (2) the cutting or mutilation caused great bodily harm, and (3) the defendant intended to disable or disfigure the person. WIS. STAT. § 940.21 (1995-96); WIS JI—CRIMINAL 1246. The second element of mayhem does not appear in the statute, but was added to the pattern jury instruction in response to case law. *See* Comment to WIS JI—CRIMINAL 1246.

¶14 The circuit court concluded that mayhem requires proof of facts or elements that go beyond aggravated battery. We agree with that conclusion. However, that conclusion, by itself, does not rebut Baskerville's argument. To establish that aggravated battery is not a lesser-included offense, it must also be shown that aggravated battery requires proof of some additional fact or element not required for mayhem.

¶15 We conclude that if the State proves two of the elements of mayhem, it has also necessarily proved both elements of aggravated battery. When the State proves that a cutting or mutilation causes great bodily harm for purposes of mayhem, it has also proved that the defendant caused great bodily harm for the

[2] The date of the offense was December 6, 1997.

purpose of convicting on aggravated battery. When the State proves intent to disable or disfigure for the purpose of convicting on mayhem, it has also proved intent to cause great bodily harm for the purpose of convicting on aggravated battery because part of the definition of "great bodily harm" is injury 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) (1995-96). Thus, although mayhem requires a third element not contained in aggravated battery, there is no third element of aggravated battery that separates it from mayhem. The applicable test requires that *each* offense have some fact or element different from the other. Without that additional fact or element, aggravated battery is a lesser-included offense of mayhem.

¶16 For Baskerville's multiplicity argument to succeed, he must prevail on both parts of his argument: that one of the charged offenses is a lesser-included offense of the other, and that there was only one course of conduct not separable into two charges. That is because, if there were two distinct volitional acts, Baskerville might properly be convicted under one statute for one of the acts, and under the other statute for the other act. Therefore, we next turn to whether the offenses are identical in fact.

¶17 On appeal, the State simply argues that there were two separate acts because there were two cuts. However, the State fails to apply controlling law that provides the test for whether offenses are identical in fact. Acts are identical in fact unless they are separated in time or are of a significantly different nature. *See* ***Koller***, 248 Wis. 2d 259, ¶31. Even the same types of acts may be charged separately if each act required a new volitional departure in the defendant's course of conduct. ***Id.*** A brief time separating acts may be sufficient. ***Id.*** It is the

State's burden to prove the facts that support separate offenses, although the required burden of proof may be an open question. ***Id.***, ¶¶34, 38. Multiplicity is an issue resolved by the court, not the jury. ***Id.***, ¶¶35-36.

¶18 Applying these principles to Baskerville's case, the key question is whether the State has proved that the second cut to Adams's face was "a new volitional departure." Our review of the record reveals there is little evidence on this factual topic. The only eyewitness who testified about the attack was Adams. Adams testified that he was awakened from unconsciousness by a punch to the face, and then felt a burning sensation across his face that turned out to be one of the cuts. However, he further testified that he recalled no sensation of a second cut, and was not aware of the presence of the second cut until later. We find no forensic evidence that appears to shed light on the question. Adams testified to having also been stabbed in the back as he was fleeing the apartment but we find no evidence indicating that those injuries would satisfy the "caused great bodily harm" element. In other words, even if the stabbing to the back would be considered a new volitional departure from the face wounds, that does not help the State, because the back wounds are insufficient evidence to support a conviction on either mayhem or aggravated battery.

¶19 Analysis of this issue is further complicated by the testimony that Adams gave at the preliminary hearing. As we stated above, the issue of multiplicity is decided by the court rather than the jury. We see no reason why a court would be unable to consider the evidence at the preliminary examination, in addition to the evidence at trial. At the preliminary examination, Adams's testimony showed a recollection of two separate slashes, possibly separated by a brief pause.

¶20 This creates a potential conflict between Adams's two accounts. It could be inferred from Adams's trial testimony, and particularly from his lack of recall of a second cut, that the two cuts occurred so close in time and manner that there was not a new volitional departure by Baskerville. That is, the two cuts might have been the result of one continuous motion or two motions separated by a very short time. On the other hand, Adams's testimony at the preliminary hearing might, if explained, support an inference of a new volitional departure. Ideally, the clearest record would have been produced at trial by asking Adams about his earlier testimony. This would have given Adams the opportunity to clarify his trial testimony.

¶21 Under these circumstances, we conclude the proper course is to remand to the circuit court to give Baskerville the opportunity to attempt to establish that his trial counsel was ineffective by failing to raise the multiplicity issue during trial. As we discussed above, Baskerville waived the multiplicity issue by not raising it at trial, and therefore it should be addressed in the framework of ineffective assistance. We remand because neither the circuit court nor the parties previously addressed the issue in that context, and the State's arguments on appeal are insufficient to show that an ineffective assistance claim would be meritless.

¶22 The legal standard for ineffective assistance is well established. In short, the defendant must show that counsel's performance was deficient and that he suffered prejudice as a result. ***Koller***, 248 Wis. 2d 259, ¶¶6-10. We note that, on remand, Baskerville cannot show prejudice by simply arguing that the trial testimony fails to establish two separate acts. This is true because multiplicity is not a jury issue, but a question for the trial court, and the trial court is not limited to considering evidence produced at trial. We cannot determine from our review

of the preliminary hearing testimony what Adams would have said at trial had he been questioned about the interval, if any, between the two cuts. Thus, it appears likely that Adams's testimony on this point will be required on remand.

¶23 In addition, even if the charges are identical in law and fact, a court may now be required to further consider whether the legislature nevertheless intended multiple punishments. *See* ***State v. Davison***, 2003 WI 89, ¶¶35-36, 263 Wis. 2d 145, 666 N.W.2d 1. ***Davison*** was not addressed by the parties on appeal and, therefore, is not something we have attempted to analyze in this opinion.

¶24 Baskerville next argues that his trial counsel was ineffective in several ways. He argues first that his attorney failed to pursue certain witnesses. Those witnesses did not testify at the postconviction hearing and, therefore, Baskerville has failed to demonstrate prejudice. It is unknown whether calling these witnesses would have been helpful to his case. He argues that his attorney should have moved to strike certain jurors for cause, but he does not identify the jurors or the cause. Baskerville argues that his attorney failed to use peremptory strikes on some prospective jurors. Any prejudice on this point is speculative. Baskerville argues that his attorney failed to conduct meaningful pretrial discovery regarding the blood on Napgezek's jeans and the pills Adams and Napgezek took. However, Baskerville has not shown how discovery on these points would have produced evidence that would have affected the result at trial.

¶25 Baskerville makes additional arguments regarding ineffective assistance of counsel and other subjects. We do not address them individually, but we are satisfied they have no merit.

¶26 To summarize, we affirm the circuit court's denial of the postconviction motion, except as to the multiplicity issue discussed above in paragraphs 10 to 23. Accordingly, we affirm the judgment of conviction, but reverse the order and remand for further proceedings consistent with those paragraphs. If, on remand, the circuit court grants relief to Baskerville, it shall modify the judgment of conviction to reflect the relief granted.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).