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DISTRICT II

December 29, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1293-CR State of Wisconsin v. Nicholas D. Uszler (L.C. #2017CF722)

Before Neubauer, Reilly and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nicholas D. Uszler appeals from a judgment entered after a jury found him guilty of second-degree sexual assault of a child and incest with a child by a stepparent, contrary to WIS. STAT. §§ 948.02(2) and 948.06(1m) (2017-18).[1] He also appeals from an order denying his postconviction motion. Uszler raises a single issue: Whether second-degree sexual assault of a child contrary to § 948.02(2) is a lesser-included offense of first-degree repeated sexual assault

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of a child contrary to WIS. STAT. § 948.025(1)(b).[2] He says it is not and that the trial court therefore erred in giving the lesser-included instruction for second-degree sexual assault of a child to the jury. To correct this purported error, he asks that we vacate the second-degree sexual assault of a child conviction and remand for a new trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20). Because second-degree sexual assault of a child is a lesser-included offense of first-degree repeated sexual assault of a child as charged, and because the trial court did not err in instructing the jury as to the lesser-included offense, we affirm.

Uszler married H.D.U.'s mother, K.A.U., in November 2010 when H.D.U. was nine years old. He later adopted H.D.U. in October 2013. On May 28, 2017, H.D.U., then sixteen, reported to her mother that Uszler had sex with her on multiple occasions beginning when she was eleven years old. K.A.U. confronted Uszler and also reported H.D.U.'s allegations to the Sturtevant Police Department. In her written statement, which was admitted into evidence at trial, K.A.U. stated H.D.U. had reported that Uszler "had been having sex [with] her since she was 11" and that Uszler "admitted to me over the phone that what [H.D.U.]" had reported was true.

On May 30, 2017, Uszler voluntarily went to the Sturtevant Police Department, admitted the allegations, and provided a written statement in which he "confess[ed] to having sexual contact with [H.D.U.] on several occasions since 2012 to present." Uszler's written statement was introduced and admitted into evidence at trial. The State charged Uszler with one count of

[2] Uszler does not challenge his conviction for incest with a child by a stepparent, and we therefore do not discuss that count further.

repeated first-degree sexual assault of a child contrary to WIS. STAT. §§ 948.025(1)(b) (hereinafter the "repeated acts charge" or the "repeated acts statute") and 939.50(3)(b). The State alleged Uszler had sexually assaulted H.D.U. at least three times in violation of WIS. STAT. § 948.02(1)(am), (b), or (c).[3]

The State filed an Amended Information on the scheduled trial date, narrowing the relevant time period for the repeated acts charge from May 2012 through March 2017 to May 2012 through June 2013. The State's amendment was based on H.D.U.'s birthdate (June 7, 2001) and its having charged Uszler with repeated acts of sexual assault of a child pursuant to WIS. STAT. § 948.025(1)(b), which, as relevant here, requires that the alleged victim "has not attained the age of 12 years."[4] *See* WIS. STAT. §§ 948.025(1)(b) and 948.02(1)(b).

At trial, H.D.U. testified that Uszler began touching her when she was ten years old, that the touching progressed to oral sex, and that penetration, which she clarified meant "[Uszler's] penis went inside my vagina," first occurred when she was eleven. She testified the vaginal intercourse began on "a Saturday night in the spring" and that she and Uszler had been watching a television show called "Under the Dome." H.D.U. further testified that similar behavior

[3] A violation of WIS. STAT. § 948.025(1)(b) occurs where an actor "commits 3 or more violations" of WIS. STAT. § 948.02(1)(am), (1)(b), or (1)(c), and the age and nature of sexual conduct at issue—sexual contact or sexual intercourse—varies depending on which of these three specific statutes apply. Based on the identified time period—prior to H.D.U.'s twelfth birthday—the State's allegation as to the repeated acts charge was necessarily based on Uszler having committed multiple purported violations of § 948.02(1)(b) ("Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony."). Because there are multiple ways in which an actor can violate § 948.025(1)(b), our analysis in addressing the question of whether second-degree sexual assault of a child is a lesser-included offense focuses specifically on the statutes at issue here: §§ 948.025(1)(b) and 948.02(1)(b) and (2).

[4] H.D.U. turned twelve on June 7, 2013.

"happened quite a few times when I was eleven[,]" that sexual contact with Uszler occurred around the time she began sixth grade when she was eleven, and that the sexual contact occurred "[a]lmost every night." She also testified that she recalled a specific night when Uszler entered her room and began touching her breasts, "[p]ut his hand over [her] vagina again," and then penetrated her vagina "[w]ith his fingers."

On cross-examination, defense counsel asked H.D.U. if she would be surprised if the show "Under the Dome" first aired in 2013. H.D.U. responded that she would not be surprised and confirmed there had been sexual contact between her and Uszler prior to watching "Under the Dome." On redirect, the State asked H.D.U. if she was "confused about the age [she was] when these events occurred[,]" to which she responded: "No. Now the television show maybe. But I really do remember it being Under the Dome."

Uszler testified at trial—admitting that he confessed to police and had signed a written statement. However, Uszler also testified that H.D.U.'s accusations were untrue, that he did not have sexual contact with H.D.U., and that he had never had penis to vagina contact with her. When asked why he had previously admitted the accusations were true, Uszler explained there were "[a] lot of reasons." His reasons included wanting to put "horrible" rumors about his wife and daughter to rest, pressure from his wife to confess, and wanting to show his daughter the seriousness of her accusations. He also explained that the "[o]nly thing [he] worried about [was his family's] welfare …. Making kind of [a] sacrifice."

Like H.D.U., Uszler also testified about the show "Under the Dome." According to Uszler, he and H.D.U. watched "Under the Dome" sometime "later in 2013." Defense counsel thereafter sought to introduce the original air date for "Under the Dome"; however, the court

sustained the State's hearsay objection. While the court offered Uszler a "reasonable continuance" to determine how he might properly introduce the original air date of "Under the Dome," Uszler declined. The original air date for "Under the Dome" was therefore never admitted into evidence.

The State asked the trial court to instruct the jury on second-degree sexual assault of a child, arguing it was a lesser-included offense to the repeated acts charge. Uszler objected on the grounds that second-degree sexual assault of a child was *not* a lesser-included charge because the elements differ from those required for the repeated acts charge. The trial court ultimately agreed with the State and instructed the jury as to both the repeated acts charge and second-degree sexual assault of a child based on the theory of sexual intercourse. The trial court instructed the jury that to convict on the repeated acts charge, it was required to "unanimously agree that at least three sexual assaults occurred between May 2012 and June 7, 2013" but that it "need not agree on which acts constituted the required three." The trial court further instructed the jury that if it could not agree on a verdict on the repeated acts charge, it should then "consider whether [Uszler] is guilty of the offense of second degree sexual assault by intercourse with a child under the age of sixteen."

As to second-degree sexual assault of a child, the trial court instructed the jury that to find Uszler guilty, it must unanimously agree that Uszler committed the same act of sexual

intercourse[5] with H.D.U. prior to H.D.U. having turned sixteen. The court further instructed the jury that it could not find Uszler guilty of both the repeated acts charge and second-degree sexual assault of a child.

The jury found Uszler not guilty on the repeated acts charge but guilty of second-degree sexual assault of a child. The trial court entered a judgment of conviction and sentenced Uszler to thirty years' imprisonment on the second-degree sexual assault of a child charge, broken down into twenty years of initial confinement and ten years of extended supervision.

Uszler filed a postconviction motion in June 2020, seeking a new trial on the grounds that the trial court erred in instructing the jury as to second-degree sexual assault of a child as a lesser-included offense. In support of his motion, Uszler argued first that second-degree sexual assault of a child "is not *factually* included in the greater charged offense" because "the jury was free to convict Mr. Uszler of second-degree sexual assault based on any act before H.D.U. turned 16" and that it therefore could not "be said that it was utterly impossible to commit the greater offense without committing [the] lesser" because "the greater offense requires actions within a specified period of time and the lesser could well have been committed outside this specified period of time." (Some emphasis omitted.) Uszler also argued that second-degree sexual assault was not *legally* included in the repeated acts charge because the jury could "convict of repeated

[5] Second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2) can be committed by "sexual contact" or "sexual intercourse." Because the State's theory as to the repeated acts charge was sexual intercourse, as evidenced by its reliance on conduct occurring prior to H.D.U.'s twelfth birthday (WIS. STAT. §§ 948.025(1)(b) and 948.02(1)(b)), the court instructed the jury that as to second-degree sexual assault of a child, it should consider whether Uszler had sexual intercourse with H.D.U. prior to her sixteenth birthday. It further instructed that "sexual intercourse" "means any intrusion, however slight, by any part of a person's body or any object into genital or anal opening of another human being. Emission of semen is not required. Sexual intercourse includes cunnilingus and fellatio. Cunnilingus means oral contact with the clitoris or vulva. Fellatio means oral contact with the penis."

acts of sexual assault without … finding the evidence sufficient to support a conviction of second-degree sexual assault of a child … because in second-degree sexual assault, a *particular instance* of sexual intercourse is an element on which the jurors unanimously must agree." (Emphasis added.)

The postconviction court held a hearing and ultimately denied Uszler's motion, concluding that Uszler's position "that once you have charged a repeated acts charge, you can't charge separately either a separate count or as a lesser included in the underlying assaults" "just makes no sense." Uszler appeals.

A defendant "may be convicted of either the crime charged or an included crime, but not both." WIS. STAT. § 939.66 (2019-20). Whether an offense is a lesser-included offense is a question of law we review de novo. *See* ***State v. Carrington***, 134 Wis. 2d 260, 262, 397 N.W.2d 484 (1986). To determine whether an offense is a lesser-included offense under § 939.66(1) (2019-20), we apply the ***Blockburger***[6] "elements only" test, which requires that "the lesser offense must be statutorily included in the greater offense and contain no element in addition to the elements constituting the greater offense." *See, e.g.,* ***Carrington*** 134 Wis. 2d at 265. Under that framework, "an offense is a 'lesser included' one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the 'greater' offense." ***Hagenkord v. State***, 100 Wis. 2d 452, 481, 302 N.W.2d 421 (1981). Our supreme court has explained that "for one crime to be included in another, it must be 'utterly

[6] ***Blockburger v. United States***, 284 U.S. 299 (1932). WISCONSIN STAT. § 939.66(1) is a codification of ***Blockburger***'s "elements only" test. *See* ***State v. Selmon***, 175 Wis. 2d 155, 163 n.4, 498 N.W.2d 876 (Ct. App. 1993).

impossible' to commit the greater crime without committing the lesser." ***Carrington***, 134 Wis. 2d at 265 (citation omitted). The "elements only" test does not focus "on the peculiar factual nature of a given defendant's criminal activity, but on whether the lesser offense is statutorily within the greater." ***Hagenkord***, 100 Wis. 2d at 481.

As relevant here, repeated first-degree sexual assault of a child contrary to WIS. STAT. § 948.025(1)(b) required that the State establish the following: (1) Uszler committed at least three sexual assaults of the victim; (2) Uszler had sexual intercourse with H.D.U.; (3) H.D.U. was under the age of twelve at the time of the alleged sexual intercourse; and (4) at least three sexual assaults took place within a specified period of time (May 2012 through June 7, 2013).[7] *See* WIS. STAT. §§ 948.025(1)(b), 948.02(1)(b); WIS JI—CRIMINAL 2107; WIS JI—CRIMINAL 2102B. A single act of second-degree sexual assault of a child contrary to § 948.02(2) required

[7] Uszler argues that second-degree sexual assault of a child cannot be a lesser-included offense of the repeated acts charge because the repeated acts charge does not require unanimity as to the three or more underlying violations of WIS. STAT. § 948.02(1)(b) that give rise to a violation of WIS. STAT. § 948.025(1)(b). Although a jury need not unanimously agree as to the three underlying offenses of a repeated acts charge, the jury nevertheless must unanimously agree that a sufficient number of sexual assaults occurred to satisfy the required elements. It would be illogical to conclude that second-degree sexual assault of a child based on the theory of sexual intercourse, which requires only that the State establish a single act occurred, is nevertheless *not* a lesser-included offense to a repeated acts charge based on sexual intercourse where the jury must unanimously agree that *multiple* acts of sexual intercourse occurred.

Moreover, the record demonstrates that the trial court specifically instructed the jury that if it considered second-degree sexual assault of a child, it was required to unanimously agree as to the same incident of sexual intercourse before it could return a guilty verdict. When a proper instruction has been given, we assume "on appeal that the jury has abided by th[at] instruction[,]" ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), and that the "jury acted according to law," ***State v. Pitsch***, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985) (citation omitted). Uszler has not raised an argument that the jury instruction itself was problematic. And, to the extent he suggests he did not receive fair notice that the State would seek an instruction as to a lesser-included charge, we reject that argument. Based on the repeated acts charge, Uszler was undoubtedly aware the State would seek to establish he committed not one, not two, but *at least three* sexual assaults of H.D.U., that the State's theory was based on sexual intercourse, and that up until the day of trial, the time period specified as to the repeated acts charge encompassed a much larger time period than what he ultimately faced at trial.

the State to establish: (1) Uszler had sexual intercourse with H.D.U.; and (2) H.D.U. was under the age of sixteen at the time of the alleged sexual intercourse. Sec. 948.02(2); WIS JI—CRIMINAL 2104.

In comparing the two offenses, WIS. STAT. § 948.02(2) (second-degree sexual assault of a child), unlike WIS. STAT. § 948.025(1)(b) (first-degree repeated sexual assault of a child), does *not* require that the State establish the sexual intercourse took place during a specific time period prior to the victim's twelfth birthday or that there were multiple incidents. To the contrary, second-degree sexual assault of a child requires that the State establish that a *single* act occurred prior to the victim's *sixteenth* birthday. An actor who commits three or more acts of sexual intercourse during a specific time period prior to the victim's twelfth birthday contrary to § 948.025(1)(b) also necessarily commits a single act of sexual intercourse prior to that victim's sixteenth birthday. Stated otherwise, it is impossible to have sexual intercourse at least three times without having sexual intercourse at least one time, and it is likewise impossible for a victim to be under the age of twelve without also being under the age of sixteen. It is therefore impossible to commit the offense of first-degree repeated sexual assault of a child as charged here (the greater offense) without also committing the offense of second-degree sexual assault of a child (the lesser offense). Because second-degree sexual assault of a child does not require any

proof in addition to that which is necessary to establish first-degree repeated sexual assault of a child as charged here, the ***Blockburger*** "elements only" test is satisfied.[8]

Having concluded that second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2), is a lesser-included offense of repeated acts of sexual assault of a child, contrary to WIS. STAT. § 948.025(1)(b), where the theory alleged is based upon violations of § 948.02(1)(b), we next consider whether the trial court erred in instructing the jury it could consider second-degree sexual assault as a lesser-included offense. *See* ***State v. Moua***, 215 Wis. 2d 511, 517-18, 573 N.W.2d 202 (Ct. App. 1997) (jury instruction as to lesser-included offense is appropriate when the offense is a lesser-included offense as a matter of law and where "the instruction is justified based on the evidence").

Whether a lesser-included offense should be submitted to the jury is a legal issue that we determine independently. ***State v. Kramar***, 149 Wis. 2d 767, 791, 440 N.W.2d 317 (1989). A jury may be given the option of finding a defendant guilty of a lesser-included offense "*only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.*** at 792. In deciding this question, we view the evidence "in the light most favorable to the defendant." ***Id.*** The trial court must, upon request, submit a lesser-included offense to the jury "even when the defendant has given exculpatory testimony" if a reasonable view of the evidence, including testimony by the defendant other than the

[8] Although Uszler argues at length in his appellate briefs (as he did in his postconviction motion) that second-degree sexual assault of a child is not a lesser-included offense in this case because it is not factually the same as the repeated acts charge, whether the facts are the same is not determinative as to the legal question at issue and we therefore do not address that aspect of his argument. *See* ***State v. Lickes***, 2021 WI 60, ¶33 n.10, 397 Wis. 2d 586, 960 N.W.2d 855 (only dispositive issues need be addressed).

exculpatory portions of that testimony, "supports acquittal on the greater charge and conviction on the lesser charge." ***State v. Wilson***, 149 Wis. 2d 878, 900, 440 N.W.2d 534 (1989).

We conclude the evidence supports the trial court's decision to instruct the jury on the lesser-included offense of second-degree sexual assault of a child. The jury heard testimony as to H.D.U.'s age when various purported sexual assaults occurred, and to convict on the repeated acts charge, it was required to conclude that at least three acts had occurred prior to her twelfth birthday. However, as the trial court noted:

> The evidence [was] all over the place with regard to [the repeated acts charge] in terms of age. There has been a fair amount of testimony that it was when she was eleven. There is then some testimony that could be read as there were contacts when she was eleven but then it progressed to intercourse after [her] twelfth birthday[.]

Because there were reasonable grounds in the evidence presented at trial to acquit on the greater and convict on the lesser, it was appropriate to give the lesser-included offense instruction.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21 (2019-20).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals