COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2005-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN M. CZARNECKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

Before Brown, P.J., Snyder and English,[1] JJ.

PER CURIAM. Brian M. Czarnecki appeals from a judgment convicting him of two counts of second-degree sexual assault of a child under

[1] Circuit Judge Dale L. English is sitting by special assignment pursuant to the Judicial Exchange Program.

sixteen years old on his no contest pleas and from an order denying his postconviction claim of a double jeopardy violation. He contends that the charges were multiplicitous. We disagree and affirm.

Czarnecki was charged under § 948.02(2), STATS., 1995-96, with one count of finger-vagina intercourse and one count of attempted penis-vagina intercourse.[2] The victim's version of events is described in the criminal complaint and was the factual basis for Czarnecki's no contest pleas.[3] Czarnecki came into the victim's room at night, lifted her nightgown to her neck, kissed her breasts, inserted his finger into her vagina and then attempted to insert his penis into her vagina. The victim pushed Czarnecki away before he was able to complete the penile intercourse. Czarnecki was convicted on his no contest pleas.

Postconviction, Czarnecki argued for the first time that his sexual assault convictions were multiplicitous and violative of the double jeopardy provisions of the state and federal constitutions. The circuit court rejected Czarnecki's double jeopardy claim on the merits and also held that it was untimely because Czarnecki did not raise it before entering his no contest pleas.

The State renews on appeal its claim that Czarnecki waived his double jeopardy claim by not raising it before entering his no contest pleas. We decline the State's invitation to dispose of this appeal on waiver grounds, and we turn to the merits of Czarnecki's double jeopardy argument.

---

[2] Sexual intercourse is defined as vulvar penetration. *See* § 948.01(6), STATS., 1995-96.

[3] Czarnecki waived the preliminary examination.

The double jeopardy provisions of the state and federal constitutions protect a defendant from being punished twice for the same offense. *See* ***State v. Anderson***, 219 Wis.2d 739, 746, 580 N.W.2d 329, 332 (1998). Multiplicitous charges occur when a single criminal offense is charged in more than one count. *See* ***id.*** We employ a two-prong test to analyze claims of multiplicity: "1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count." ***Id.*** at 746, 580 N.W.2d at 333. Czarnecki has made a "continuous offense" challenge to the charges against him, i.e., he challenges the multiple charges brought under one statutory section. *See* ***id.*** at 747, 580 N.W.2d at 333.

> In a "continuous offense" challenge, the course of conduct is alleged to have constituted multiple violations of the same statutory provision, so our focus is not on statutory definitions but on the facts of a given defendant's criminal activity.

Id. (quoted source omitted).

We first address whether the charged offenses are identical in fact.[4] Because Czarnecki entered no contest pleas, there is no evidentiary record of his criminal activity. *See* ***id.*** at 748, 580 N.W.2d at 333. Therefore, we turn to the criminal complaint to determine if the offenses are identical in fact. *See* ***id.***

An offense is not significantly different in fact unless the defendant's acts are separated in time, of a significantly different nature or required a separate volitional act. *See* ***State v. Hirsch***, 140 Wis.2d 468, 473, 410

[4] Having been charged under the same sexual assault statute, we conclude that the offenses are identical in law, recognizing that one charge is for an attempt. *See* ***State v. Hirsch***, 140 Wis.2d 468, 473, 410 N.W.2d 638, 640 (Ct. App. 1987).

N.W.2d 638, 640 (Ct. App. 1987). Czarnecki contends that because his conduct occurred over a short period of time, the charges were multiplicitous under ***Hirsch***. We disagree.

In ***Hirsch***, the defendant touched the victim's genital and anal areas three times in the same way. *See* ***id.*** at 474, 410 N.W.2d at 641. The ***Hirsch*** court held that these touchings were part of the same general transaction, occurred in the space of a few minutes and there was no significant change in activity as there had been in ***State v. Eisch***, 96 Wis.2d 25, 291 N.W.2d 800 (1980). *See* ***Hirsch***, 140 Wis.2d at 475, 410 N.W.2d at 641. ***Hirsch*** renders charges multiplicitous when the perpetrator's acts are virtually the same and the acts occur in the same episode. *See* ***id.***

In contrast, in ***Eisch*** the defendant intruded upon the victim's body four times in four different ways over several hours. *See* ***Eisch***, 96 Wis.2d at 27-28, 291 N.W.2d at 801-02. Charging Eisch with four separate counts of sexual assault was not multiplicitous. *See* ***id.*** at 42, 291 N.W.2d at 808.

Even though Czarnecki's insertion of his finger into the victim's vagina and his attempted insertion of his penis occurred in a short period of time during a single assaultive episode, Czarnecki employed methods of bodily intrusion which were different in nature and required a separate volitional act. When the acts occur in the same episode but are volitionally distinct and involve different types of intrusion on the victim's body, charging each act is not multiplicitous. *See* ***Eisch***, 96 Wis.2d at 36, 291 N.W.2d at 805-06. "Each act is a further denigration of the victim's integrity and a further danger to the victim." ***Harrell v. State***, 88 Wis.2d 546, 565, 277 N.W.2d 462, 469 (Ct. App. 1979).

The attempted penis-vagina intercourse did not inevitably flow from the completed finger-vagina intercourse; the attempted intercourse was a separate, volitional decision to violate the victim's bodily integrity a second time in a different manner. This situation falls squarely within the holding of ***Eisch***.

Turning to the second prong of the multiplicitous charging analysis, it is well settled that the legislature intended to permit multiple charges where there have been separate volitional sexual assaults. *See* ***Eisch***, 96 Wis.2d at 36, 291 N.W.2d at 806. Therefore, we conclude that the charges against Czarnecki were not multiplicitous and there is no basis for reversing his conviction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.