

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 30, 2007**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP2328-CR**

**Cir. Ct. No. 2005CF70**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**JAMES A. STUDENEC,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Vilas County:  
NEAL A. NIELSEN III, Judge. *Reversed and cause remanded.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. The State appeals an order dismissing five counts of misconduct in public office against James Studenec, a probation officer. Studenec was also charged with five counts of sexual assault by a probation officer for the same acts, and the trial court concluded the misconduct charges

were multiplicitous. Because we conclude the charges are not multiplicitous, we reverse the order and remand the matter for further proceedings.

¶2 Charges are multiplicitous if they charge a single criminal offense in more than one count. *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992). Claims of multiplicity are analyzed using a two-prong test that requires examination of: (1) whether the charged offenses are identical in law and fact; and (2) if they are not, whether the legislature intended the multiple offenses to be brought as a single count. *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). If the crimes are not identical in law or fact, the defendant bears the burden of rebutting a presumption that the legislature intended cumulative punishments. *See State v. Davison*, 2003 WI 89, ¶45, 263 Wis. 2d 145, 666 N.W.2d 1. Crimes are not identical in law if each requires proof of an element that the other does not. *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932). This “elements only test” is a purely legal analysis independent of the specific facts of the case. *State v. Smits*, 2001 WI App 45, ¶7, 241 Wis. 2d 374, 626 N.W.2d 42.

¶3 Sexual assault by a probation officer and misconduct in public office are not identical in law because each requires proof of an element not found in the other. Sexual assault by a probation officer requires proof of sexual contact by a probation officer who supervised the victim’s probation. *See* WIS. STAT. § 940.225(2)(i).<sup>1</sup> Misconduct in public office, as prohibited by WIS. STAT. § 946.12(2), requires proof that the defendant engaged in conduct in his official capacity, knowing his conduct was in excess of his lawful authority or knowing it

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

was forbidden by law. *See* WIS JI—CRIMINAL 1731 (1990). Studenec argues that knowledge of wrongdoing is not an element of misconduct in public office, citing the adage “ignorance of the law excuses no one.” The plain language of § 946.12(2) explicitly denies the State the benefit of this common law principle and requires proof of knowledge of wrongdoing.

¶4 Because the offenses each contain an element not found in the other, Studenec must rebut the presumption that the legislature intended multiple punishments. He offers no evidence of legislative intent and the legislative history provides no evidence of its intent. However, WIS. STAT. § 939.65 provides: “[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.” The exceptions for included offenses set out in WIS. STAT. § 939.66 do not apply because misconduct in public office is not an included offense of sexual assault by a probation officer under the *Blockburger* test. *See State v. Dibble*, 2002 WI App 219, ¶6, 257 Wis. 2d 274, 650 N.W.2d 908. Therefore, the legislature intended to allow cumulative punishment for these offenses.

*By the Court.*—Order reversed and cause remanded.

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

