COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP104-CR **Cir. Ct. No. 2009CF48**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. NICOLAI, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Robert Nicolai, III appeals from a judgment convicting him of second-degree sexual assault and third-degree sexual assault. On appeal, he argues that the convictions were multiplicitous. We disagree and affirm.

¶2 The criminal complaint alleged that the victim awoke to find Nicolai, a guest in the victim's home, penetrating her vagina with his penis. For this act, Nicolai was charged with second-degree sexual assault (unconscious victim) and third-degree sexual assault (victim did not consent).[1] Nicolai moved to dismiss the third-degree sexual assault charge as multiplicitous. The circuit court denied Nicolai's motion to dismiss. We decide whether the convictions were multiplicitous de novo. ***State v. Beasley***, 2004 WI App 42, ¶6, 271 Wis. 2d 469, 678 N.W.2d 600.

¶3 Multiplicitous charges violate a defendant's Fifth Amendment right to be free from being "placed twice in jeopardy of punishment for the same offense." ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). The first step of the multiplicitous inquiry is whether the offenses are identical in law and fact. ***Beasley***, 271 Wis. 2d 469, ¶7. If each offense requires proof of an element that the other offense does not require, the offenses are not identical in law and fact. ***Id.***, ¶8.

¶4 Nicolai concedes that the charges were not identical in law and fact. We agree. Second-degree sexual assault requires proof that the victim was unconscious; third-degree sexual assault requires proof of lack of consent. The offenses are not identical in law and fact.

¶5 Nicolai stakes his appeal on the second step of the multiplicitous inquiry: whether the legislature intended multiple offenses to be brought as a

[1] Second-degree sexual assault contrary to WIS. STAT. § 940.225(2)(d) (2009-10) precludes "sexual contact or sexual intercourse with a person who the defendant knows is unconscious." Third-degree sexual assault contrary to § 940.225(3) precludes having sexual intercourse with a person without the consent of that person.

single count, thereby relieving him of exposure to cumulative punishments. ***Id.***, ¶7. Because the offenses are not identical in law and fact, a presumption arises that the legislature intended to permit cumulative punishments. ***Id.***, ¶10. Nicolai had the burden to show a clear legislative intent to the contrary, i.e., an intent not to authorize cumulative punishments. ***Id.***, ¶7.

¶6 The circuit court ruled that Nicolai did not sustain his burden to show via legislative history or context that the legislature did not intend cumulative punishments for second-degree sexual assault and third-degree sexual assault. Our review of the circuit court's conclusion that Nicolai did not meet his burden is de novo as is our analysis of the factors relevant to determining legislative intent in the multiplicitous inquiry. ***Id.***, ¶6. Four factors are considered in determining legislative intent: (1) applicable statutory language; (2) legislative history and the context of the statutes; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct. ***Id.***, ¶9.

¶7 Nicolai argues that the language of the sexual assault statutes does not offer any guidance as to whether the legislature intended cumulative multiple punishments for second-degree sexual assault and third-degree sexual assault. We disagree. The legislature expressed its intent to permit cumulative punishments when it created separate statutes prohibiting second-degree sexual assault and third-degree sexual assault, crimes which have different elements and apply to different factual situations. *See* ***id.***, ¶10.

¶8 We conclude that ***Sauceda*** controls this case. In ***Sauceda***, the child alleged that she was "'half asleep' when she felt someone touching her vaginal area." ***Sauceda***, 168 Wis. 2d at 489. Sauceda was convicted of first-degree sexual assault for having sexual contact with a person under twelve years of age and

second-degree sexual assault for having sexual contact with a person the defendant knew was unconscious. ***Id.*** at 490.

¶9 Postconviction, Sauceda argued that the convictions were multiplicitous. ***Id.*** at 490-91. The supreme court held that the language of the statutes and their legislative history confirmed that the legislature intended multiple punishments for Sauceda's conduct. ***Id.*** at 497. The court noted that the provisions of WIS. STAT. § 940.225 "are primarily directed at protecting one's freedom from sexual assault." ***Sauceda***, 168 Wis. 2d at 497. "[V]arious subsections [of WIS. STAT. § 940.225] define different methods of sexual assault. The violation of any one of those subsections in no way immunizes the defendant from violating the same or any of the other subsections during the course of sexual misconduct." ***Sauceda***, 168 Wis. 2d at 497.

¶10 We conclude that Nicolai did not rebut the presumption that the legislature intended to punish him for the separate crimes of having sexual intercourse with an unconscious person without her consent. Nicolai's assaultive acts against the victim were significantly different in nature; he committed separate and distinct offenses for which multiple punishments were appropriate. *See* ***id.*** The charges were not multiplicitous.

By the Court.—Judgment affirmed.

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