COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

No. 95-0672-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER JOHNSON,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Monroe County: MICHAEL J. ROSBOROUGH, Judge. *Judgments affirmed in part and reversed in part. Cause remanded with directions to the trial court to enter an order dismissing count 3 of the information charging Johnson with third-degree sexual assault with a person without consent of that person in violation of sec. 940.225(3), STATS. Judgments of conviction and sentence affirmed in all other respects.*

Before Eich, C.J., Dykman and Sundby, JJ.

EICH, C.J. Christopher Johnson appeals from judgments convicting him of three counts of sexual assault committed upon a single victim. He challenges two of the convictions--intercourse with an unconscious person,

and nonconsensual sexual intercourse--on grounds that they were based on a single act of vaginal intercourse and thus violate the double jeopardy clauses of the United States and Wisconsin constitutions. He claims that a third count of second-degree sexual assault for an incident of oral sex with the same victim is unsupported by the evidence.

We conclude that the two convictions for the single act violate Johnson's right to be free from double jeopardy; we therefore reverse his conviction for third-degree sexual assault (nonconsensual intercourse). We affirm the remaining convictions for second-degree sexual assault and the sentences imposed by the court.

Johnson and a co-defendant and housemate, Scott Konze, were charged with these and other offenses as a result of an incident occurring at their home in Sparta in April 1994. The victim was Elizabeth E., then eighteen years old and a high school senior.

Konze and Johnson were hosting a beer party at their home on the evening in question and Elizabeth E. was one of ten to fifteen people who attended the party, playing drinking games and smoking marijuana. All three became very intoxicated.[1] Most of the guests had departed around midnight, and by approximately 12:30 a.m., only Elizabeth, Johnson, Konze, and two others, Jeremy Szaflarski and Jeffery Rickert, remained. By then, Elizabeth was dozing or nodding off, telling the others she was quite "high."

While Johnson held her arms, Konze poured beer over her head soaking her shirt, and she went to a bedroom to find a clean shirt to put on. While she was sitting on the bed changing her shirt, the four men came into the room and Johnson and Konze began jumping on the bed and hitting Elizabeth E. with pillows. According to Szaflarski, Elizabeth was curled up, protecting her head and upper body, when Johnson "pounc[ed]" on her with most of his body weight (he weighed about 200 pounds and Elizabeth 115-130). Szaflarski stated that Johnson pounced on Elizabeth at least twice in a wrestling-type

[1] At one point, Elizabeth E. testified that she "wasn't that drunk that night," and had only "a few beers." As will be seen, however, she also testified that she was "in and out" of consciousness during the sexual assaults, at times being unable to move or speak.

maneuver, landing on her prone body with most of his body weight. Elizabeth testified that a blanket may have been thrown over her head during this time and that it felt as if Johnson and Konze may have been hitting her with something harder than pillows. She said it left her "very dazed," and for the ensuing fifteen or twenty minutes neither Szaflarski nor Rickert saw her move again--even when the bed broke from the jumping and the men put it back together.

Szaflarski believed that Elizabeth had "passed out" after the "pillow fight." She testified that she was "in and out" of consciousness, unable to move or speak, although she did recall some of what was going on at the time. Johnson and Konze "check[ed]" Elizabeth by lifting her arms and letting them drop, and after Konze got no response when he ran his hands over her breasts and vaginal area, he and Johnson removed her clothes and, at Konze's urging, Johnson performed oral sex on her. According to Rickert, Elizabeth was not moving and appeared to be unconscious during the sex act, which formed the basis of one of the charges against Johnson.

Konze then had vaginal intercourse with Elizabeth and she testified that, while she realized what was happening, she was unable to move or speak. She remained motionless during Konze's assault, even though Konze moved her and changed her body position several times. When Konze finished and the men left the room, Elizabeth curled up and began crying and then went to sleep.

Johnson returned to the bedroom a short time later and had vaginal intercourse with Elizabeth. She testified that while she was "somewhat" awakened by her legs being lifted and she was able to recall the intercourse, she was "in and out" of consciousness at the time and when she next awoke Johnson had entered her and was engaged in intercourse. She described herself as withdrawing or "going back" into unconsciousness and did not remember Johnson completing the act.

Konze contradicted Elizabeth's, Szaflarski's and Rickert's accounts of the events, insisting that they were lying and that Elizabeth was fully conscious throughout the evening and that any sexual acts were with her consent.

The jury found Johnson guilty of second-degree sexual assault (sexual contact without consent and with and by use or threat of force or violence) for the act of oral intercourse, and of both second-degree (intercourse with an unconscious person) and third-degree (nonconsensual intercourse) sexual assault for the later act of vaginal intercourse. Johnson objected to entry of convictions on the two vaginal intercourse counts on grounds that they constituted multiple convictions for a single act. The trial court denied his postconviction motions, while expressing "strong reservations" whether convictions on both counts were appropriate on the facts of the case. Additional facts will be discussed below.

I. Double Jeopardy

Multiple convictions for the same offense violate the double jeopardy protections of the state and federal constitutions. ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992). Whether a violation exists in a given case is a question of constitutional law, which we review de novo. ***Id***.

The scope of the double jeopardy protection is governed by interpretation of the words "`same offense,'" ***State v. Gordon***, 111 Wis.2d 133, 137, 330 N.W.2d 564, 565 (1983), and whether two criminal statutes proscribe the "same offense" is determined by ascertaining whether the legislature intended to impose cumulative punishments under each. ***State v. Kuntz***, 160 Wis.2d 722, 753, 467 N.W.2d 531, 543 (1991).

We employ a two-step test to analyze claims of multiplicity. We first apply the "elements only" test of ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), to determine whether each charged offense requires proof of an additional element or fact which the other does not. ***State v. Johnson***, 178 Wis.2d 42, 48-49, 503 N.W.2d 575, 576 (Ct. App. 1993).

The analysis focuses entirely on the statutes defining the offenses and has been codified in § 939.66, STATS., which provides that a defendant "may be convicted of either the crime charged or an included crime, but not both," and which defines "included crime" as one "which does not require proof of any

fact in addition to those which must be proved for the crime charged." Section 939.66(1). Thus, under the ***Blockburger*** test,

> "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.
>
> ... An offense is not a lesser-included one if it contains an additional statutory element."

Id. at 49, 503 N.W.2d at 576 (quoted source omitted).

If the ***Blockburger*** test is met--if each offense requires proof of an element the other does not--a presumption arises that the legislature intended to permit cumulative convictions unless other factors indicate otherwise. ***State v. Selmon***, 175 Wis.2d 155, 161, 498 N.W.2d 876, 878 (Ct. App. 1993). "The question then becomes whether there are `other factors which evidence a contrary ... intent.'" ***Johnson***, 178 Wis.2d at 49, 503 N.W.2d at 576 (quoted source omitted).

Blockburger is met in this case. Third-degree sexual assault is committed by one who "has sexual intercourse with a person without the consent of that person ...." Section 940.225(3), STATS. The second-degree charge of which Johnson was convicted as a result of the vaginal intercourse incident[2] penalizes one who "[h]as sexual contact or sexual intercourse with a person who the defendant knows is unconscious." Section 940.225(2)(d). It may be seen that the first requires proof both that Elizabeth E. was unconscious at the time of the

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[2] In addition to intercourse with an unconscious person, second-degree sexual assault includes sexual contact or intercourse without consent and by use of threat of force or violence (of which Johnson was also convicted as a result of the oral-sex incident with Elizabeth E.); nonconsensual sexual contact or intercourse resulting in physical or emotional injury to the victim; intercourse with a person suffering from a mental illness or deficiency rendering the person incapable of consent; nonconsensual sexual contact or intercourse abetted by one or more other persons, and sexual contact or intercourse by an employee of an institution, agency or home with a resident. Section 940.225 (2)(a), (b), (c), (f) and (g), STATS.

intercourse and that Johnson knew she was unconscious, and that neither of these elements is required for the second. Additionally, third-degree sexual assault requires proof that the victim did not consent to the contact, and consent is not part of the statutory description of second-degree assault. It follows that each of the charges requires proof of an element or elements the other does not, and that third-degree sexual assault is not a lesser-included offense of the type of second-degree assault for which Johnson was convicted. Section 939.66(1), STATS. Thus, "absent a clear indication of legislative intent to the contrary, punishment for both offenses is constitutionally permissible." ***State v. Kuntz***, 160 Wis.2d 722, 756, 467 N.W.2d 531, 545 (1991).

To ascertain the legislative intent, "we look to `the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishment.'" ***Johnson***, 178 Wis.2d at 50, 503 N.W.2d at 577 (quoted source omitted). In this instance, neither the language of the statutes nor the legislative history provides any guidance, and Johnson argues persuasively that the interest protected in both statutes is the same--freedom and protection from nonconsensual intercourse--and nothing in the history of the laws or their language indicates that the legislature intended to punish a defendant twice for one act of sex when the victim (a) did not give her consent and (b) failed to do so because she was unconscious.

The State concedes that the factors relied on in various cases upholding multiple punishments for "separate volitional acts" are not present here. *See* ***State v. Eisch***, 96 Wis.2d 25, 38-42, 291 N.W.2d 800, 806-08 (1980) (four acts of intercourse by four separate bodily intrusions could be separately charged even though arising out of a "unitary assaultive episode"); ***Harrell v. State***, 88 Wis.2d 546, 563-73, 277 N.W.2d 462, 468-73 (Ct. App. 1979) (two acts of rape of same victim in same location occurring within one-half hour); ***State v. Kruzycki***, 192 Wis.2d 509, 521, 531 N.W.2d 429, 434-35 (Ct. App. 1995) (two separate acts of intercourse within one hour).

Indeed, we held in ***State v. Hirsch***, 140 Wis.2d 468, 474-75, 410 N.W.2d 638, 641 (Ct. App. 1987), that separate charges that the defendant, in the space of "no more than a few minutes," (a) touched a five-year-old child's vaginal area, and then (b) touched her anal area, and then (c) touched her vagina again, were unconstitutionally multiplicitous. We said that the touchings were all part of "the same general ... episode," and that

> [g]iven the short time frame, we cannot say that "the defendant had sufficient time for reflection between the assaultive acts to again commit himself." ***Harrell***, 88 Wis.2d at 560, 277 N.W.2d at 467. There was no pausing for contemplation as in ***Harrell***, nor was there a significant change in activity as in ***Eisch***.
>
> Fundamental fairness dictates that the information charging three counts for this episode be found multiplicitous. "A defendant ought not to be charged, tried, or convicted for offenses that are substantially alike when they are a part of the same general transaction or episode." ***Eisch***, 96 Wis.2d at 34, 291 N.W.2d at 805.

Hirsch, 140 Wis.2d at 475, 410 N.W.2d at 641.

The State argues, however, that multiple punishment is appropriate in this case because Johnson's continuous act of intercourse could be "effectively split ... into two temporally separate parts: one part in which Elizabeth was unconscious [and] the other in which Elizabeth was, by definition, awake and conscious, but did not consent to the act of intercourse."

We think such a division is unrealistic and arbitrary. There was evidence that Elizabeth, after a night of drinking games and marijuana smoking, was extremely intoxicated and, after being pummelled for a considerable period of time by two men twice her size, had "passed out" on the bed, showing no response and appearing to be unconscious--even when the men fondled her and moved her arms and body about, and when Konze subsequently had intercourse with her. There is nothing to suggest that she was in any different condition when Johnson had intercourse with her. According to her own testimony, while she was "somewhat" awakened during Johnson's act, she withdrew or "went back" into semi-consciousness and remembered nothing about it afterward. We do not believe a person in that state--one who was so intoxicated that she could neither speak nor move--may realistically be said to have regained consciousness in mid-act so as to permit Johnson to be convicted of two offenses for his single act--however despicable it may have been. In our view, she did not consent for the simple reason that she was, for all

intents and purposes, "unconscious."[3] It follows that Johnson could not be convicted of both offenses.

The remaining question is, of course, the remedy. Citing ***State v. Martin***, 121 Wis.2d 670, 681, 360 N.W.2d 43, 50 (1985), Johnson argues that his sentences for both offenses should be voided and his conviction should stand only on the "lesser" count of third-degree sexual assault. We disagree.

The ***Martin*** court did, as Johnson notes, discuss a line of cases--culminating in ***State v. Gordon***, 111 Wis.2d 133, 330 N.W.2d 564 (1983)--which the court said stood for the proposition that "when a defendant is convicted of and sentenced for two offenses which are later held to be the same offense, and when one conviction and sentence is vacated on double jeopardy principles, the validity of both punishments is implicated, the sentences for both offenses are illegal, and resentencing on the valid conviction is permissible." ***Martin***, 121 Wis.2d at 681, 360 N.W.2d at 49. ***Martin*** did not, however, address the point argued by Johnson: that the conviction on the *greater* offense must be reversed. Indeed, as the State points out, the ***Gordon*** court, after concluding that the defendant could not be convicted of both the greater and the lesser offenses, vacated the conviction for the *lesser* crime. ***Gordon***, 111 Wis.2d at 136, 146, 330 N.W.2d at 567-68, 570. Johnson does not challenge the sufficiency of the evidence to convict him for the greater charge,[4] and we see no reason to void that conviction. We therefore reverse the conviction for third-degree sexual assault.

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[3] In ***State v. Pittman***, 174 Wis.2d 255, 277-78, 496 N.W.2d 74, 84 (1993), the supreme court recognized that one who is asleep is "unconscious" within the meaning of § 940.225(2)(d), the statute Johnson is accused of violating. In ***State v. Curtis***, 144 Wis.2d 691, 695, 424 N.W.2d 719, 721 (Ct. App. 1988), we interpreted the term in light of the dictionary definition of "`unconscious'" as "`not knowing or perceiving....'" (quoted source omitted). And in ***State v. Disch***, 129 Wis.2d 225, 234, 385 N.W.2d 140, 144 (1986), the supreme court stated, "The word `unconscious' is used to describe a person who is insensible, incapable of responding to sensory stimuli, or in a state lacking conscious awareness." We think that aptly describes Elizabeth E.'s condition at the time of the assault.

[4] Johnson cursorily suggests that even if it could be said that Elizabeth E. was unconscious, there was no evidence that he was aware of that fact. The evidence of Elizabeth's condition and her lack of awareness of what was going on around her is ample, however, and Johnson could be no less aware of that condition than were the other witnesses to the sorry events of the evening.

As to the sentences, the trial court withheld sentence on all counts and imposed identical concurrent terms of probation and jail time for each. In such circumstances, there is no need for resentencing. *See* ***State v. Tappa***, 123 Wis.2d 210, 216, 365 N.W.2d 913, 916 (Ct. App.), *rev'd on other grounds*, 127 Wis.2d 155, 378 N.W.2d 883 (1985) (where two of four counts reversed and trial court had considered all four together for determining the length of the sentences, and made the sentences for the valid counts concurrent, "[i]t is ... unnecessary to remand for a modification of sentence"); ***Blenski v. State***, 73 Wis.2d 685, 702, 245 N.W.2d 906, 915 (1976) (where convictions on some counts reversed as multiplicitous, resentencing is not required where the sentences on those counts were concurrent to the sentences imposed on the valid counts).

We therefore reverse Johnson's conviction for third-degree sexual assault (nonconsensual intercourse) and confirm his sentence of five years' probation, with the jail and restitution provisions ordered by the trial court, for his conviction for second-degree sexual assault (intercourse with an unconscious person).

II. Sufficiency of the Evidence: Forcible Sexual Contact

Johnson argues that the evidence was insufficient to convict him of second-degree sexual assault for the act of oral sex committed on Elizabeth E. He was charged under § 940.225(2)(a), STATS., which provides that one is guilty of second-degree sexual assault for having sexual contact with another person without consent and by use of threat of force of violence. Johnson challenges the sufficiency of the evidence on the latter point--"by use or threat of force or violence"--and, after reciting the evidence concerning the oral sexual assault which we have outlined earlier in this opinion, he argues that "[n]o force or violence was employed ... to compel Elizabeth E. to have oral sex with him. Nor was force or violence used in the actual sexual touching."

The test for overturning a jury's verdict is well established:

> "[An appellate] court must affirm [the verdict] if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt. The function of weighing the credibility of witnesses is exclusively in the jury's province, and *the jury verdict will be*

> *overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.*"

State v. Alles, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982) (emphasis in the original) (quoting from ***Fells v. State***, 65 Wis.2d 525, 529, 223 N.W.2d 507, 510 (1974)).

Evidence is not incredible as a matter of law "unless the evidence supporting the jury's verdict conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). We do not assess the credibility of witnesses or weigh the evidence on appeal: "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***Id***. This is so because of the jury's opportunity to observe the demeanor of the witnesses.

The[] principles limiting [appellate] review [of jury verdicts] are grounded on the sound reasoning that the jury has the "great advantage of being present at the trial"; it can weigh and sift conflicting testimony and attribute weight to those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence.

Alles, 106 Wis.2d at 377, 316 N.W.2d at 382 (1982).

Our consideration of the sufficiency of the evidence is also guided by the rule that "`[i]f more than one inference can be drawn from the evidence, the inference which supports the jury finding must be followed unless the testimony was incredible as a matter of law.'" ***Id.***

Viewing the events surrounding the oral-sex incident, as we must, in the light most favorable to the verdict, we are satisfied that they provide adequate support for the verdict. We note first that the jury could reasonably

view the "pillow fight" preceding the assault as much more than the friendly, playful event Johnson claims it was. According to the testimony of those observing the goings-on, Elizabeth E., in a state of "high" intoxication, was being repeatedly pummelled with pillows (which she stated felt like they contained something "harder") by Johnson and Konze. During the fray the bed broke, a light fixture was smashed and Konze himself hit his head on the wall hard enough to daze him. Johnson had "pounced" on Elizabeth with nearly his full body weight, landing on her prone body immediately before the bed broke, and all this occurred very shortly before the assault.

We agree with the State that, while Johnson may not have meant to harm Elizabeth in what he describes as the "pillow fight," the jury could reasonably believe that this course of repeated physical contact, together with Elizabeth's intoxicated condition, left her in a state of unconsciousness or semi-consciousness that rendered her unable to resist the sexual assault that followed.

In ***State v. Bonds***, 165 Wis.2d 27, 32, 477 N.W.2d 265, 267 (1991) (quoted source omitted; citation omitted), the supreme court stated:

> We recognize that the force element of sexual assault "maintains the proscription against force or compulsion not as separate and distinct forms of conduct, but as a more generalized concept of conduct, including force threatened and force applied, directed toward compelling the victim's submission." Force used at the time of contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced.

We are satisfied that the jury could reasonably find that Elizabeth E. was forced to submit to Johnson's first act of oral intercourse and we therefore affirm his conviction on that charge.

By the Court.—Judgments affirmed in part and reversed in part. Cause remanded with directions to the trial court to enter an order dismissing count 3 of the information charging Johnson with third-degree sexual assault with a person without consent of that person in violation of sec. 940.225(3), STATS. In all other respects we affirm the judgments of conviction and sentence.

Not recommended for publication in the official reports.