COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2008

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. 2007AP819-CR

Cir. Ct. No. 2004CF292

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

Before Anderson, P.J., Snyder, and Neubauer, JJ.

¶1 PER CURIAM. Kenneth Jackson appeals from a judgment of conviction of two counts of second-degree sexual assault of a child, two counts of third-degree sexual assault, and one count of child enticement. He also appeals from an order denying his motion for postconviction relief. He argues that

convictions for both second-degree sexual assault of a child and third-degree sexual assault for the same acts are multiplicitous. He also claims he was denied the effective assistance of trial counsel because counsel failed to warn him of the prejudicial effect of a certain defense witness. We affirm the judgment and order.

¶2 Jackson was convicted of sexually assaulting thirteen-year-old Melissa A. on an evening when she slept over at a friend's house. That evening Jackson was also staying at the house. He gave Melissa and her friend beer and alcohol. In the middle of the night Melissa got sick and Jackson helped her in the bathroom. He then took her to his room, laid her on the bed, pulled down her pajama bottoms and panties, and put his mouth on her vagina. Jackson kissed her on the lips and then penetrated her vagina with his fingers.

¶3 For each of the two separate acts of sexual contact, Jackson is convicted of both second-degree sexual assault of a child under WIS. STAT. § 948.02(2) (2005-06),[1] which prohibits sexual intercourse or contact with a person who has not attained age sixteen, and third-degree sexual assault under WIS. STAT. § 940.225(3), which prohibits sexual intercourse or contact with a person without that person's consent. We decide the issue of whether the convictions are multiplicitous de novo. ***State v. Beasley***, 2004 WI App 42, ¶6, 271 Wis. 2d 469, 678 N.W.2d 600. The determination involves a two-step inquiry. First, we determine whether the charged offenses are identical in law and fact. ***Id.***, ¶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. *See* ***id.***, ¶8. The second

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

inquiry is whether the legislature intended multiple offenses to be brought as a single count and the defendant bears the burden to show a clear legislative intent that cumulative punishments are not authorized. ***Id.***, ¶7.

¶4 Here Jackson concedes, as he must, that the two offenses are not identical in fact and law. Both offenses require that the defendant had sexual intercourse or contact with the victim. Third-degree sexual assault requires proof that the victim did not consent. Unlike third-degree sexual assault, second-degree sexual assault of a child does not require any proof of lack of consent. Additionally, second-degree sexual assault of child requires proof of the victim's age. Third-degree sexual assault does not have an age element. Since the offenses are different in fact and law, a presumption arises that the legislature intended to permit cumulative punishments. ***Id.***, ¶10.

¶5 The presumption of legislative intent can be rebutted only by clear legislative intent to the contrary. ***Id.*** Four factors are considered in determining legislative intent: (1) all applicable statutory language; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct. ***Id.***, ¶9. To rebut the presumption, the defendant must meet the burden of clear legislative intent in light of the four factors. ***Id.***, ¶10.

¶6 Jackson traces the origin of the offenses back to common law and particularly the common law's recognition that a child is incapable of giving consent to sexual activity. He equates proof of age with proof of lack of consent. However, we are charged with examining the intent of the legislature as evidenced by the statutory words. We do not consider the common-law parameters of a crime. *See* ***State v. Genova***, 77 Wis. 2d 141, 145, 252 N.W.2d 380 (1977)

(common-law crimes abolished); ***Wray v. State***, 87 Wis. 2d 367, 374, 275 N.W.2d 731 (Ct. App. 1978) (criminal offenses are exclusively statutory), *rejected on other grounds by* ***State v. Syed Tagi Shah***, 134 Wis. 2d 246, 397 N.W.2d 492 (1986).

¶7 In ***State v. Sauceda***, 168 Wis. 2d 486, 489, 485 N.W.2d 1 (1992), the court held it was not impermissible for a defendant to be convicted of both sexual assault of a child and sexual assault of an unconscious person for the same act with the same victim. The court recognized that "[f]or more than 35 years, the criminal offenses of sexually assaulting a minor and sexually assaulting a person incapable of communicating consent to the sexual contact or intercourse have remained separate and distinct statutory provisions." ***Id.*** at 497. Upon review of the various sexual assault offenses and their differing punishments the court concluded that the inability to consent to the sexual activity is not the sole consideration for punishment. ***Id.*** at 497-98.

> A common legal thread for all sexual assaults is inability to consent or lack of consent to the sexual contact or intercourse. However, the legislature punishes defendants convicted of sexual assault differently based solely on the victim's age or mental state.… Because these offenses are punished differently, inability to consent or lack of consent is not the sole factor considered by the legislature when determining the punishment for defendants convicted of these offenses.

Id. at 498-99.

¶8 The ***Sauceda*** court also concluded that the nature of the proscribed conduct in the offenses demonstrates that the legislature intended multiple punishments. ***Id.*** at 499. There is a difference between having sexual contact with a child and having sexual contact with knowledge that the victim does not consent. Like the hypothetical considered in ***Sauceda***, a defendant might not have the nerve

to engage in sexual contact with a person who does not consent. *See* ***id.*** at 500. That the defendant proceeds even in the face of no consent is a different concern for the legislature than that of protecting children from sexual activity.[2] To hold that multiple punishments are not allowed addresses only one of the two primary concerns of the legislature, a result that is "absurd." *See* ***id.*** at 501. We conclude that the nature of the proscribed conduct and the appropriateness of multiple punishment confirm the legislative intent to permit multiple punishments.

¶9 Jackson has not met his burden of showing a clear legislative intent to prohibit multiple punishments. It is not enough to point out that no reported Wisconsin case permits a defendant to be charged with both second-degree sexual assault of a child and third-degree sexual assault of the same victim. Jackson's reliance on ***Yearty v. State***, 805 P.2d 987, 994-95 (Alaska Ct. App. 1991), holding that a single act of sexual contact cannot support a conviction of both first-degree sexual assault and sexual assault of a minor because age is a substitute for lack of consent, does not carry the day in this state. The ***Yearty*** court did not address the issue in the context of a presumption that the legislature intended to permit cumulative punishments or the defendant's burden to rebut that presumption.

¶10 Moreover, Wisconsin rejects the simple proposition that age is a substitute for lack of consent. In ***State v. Selmon***, 175 Wis. 2d 155, 163, 498 N.W.2d 876 (Ct. App. 1993), the court held that sexual assault of a child is not a lesser included offense of sexual assault with the use of force simply because the victim is a child. The court rejected the notion that a presumption of nonconsent

[2] *See* ***State v. Fisher***, 211 Wis. 2d 665, 674-75, 565 N.W.2d 565 (Ct. App. 1997) (setting forth the purposes and significant interests addressed by offenses prohibiting sexual contact with children).

by a child had any relevancy to the determination of whether sexual assault of a child was a lesser included offense. ***Id.*** The ***Sauceda*** court held the inability to consent was not the sole factor considered by the legislature when determining the punishment for defendants convicted of these offenses. ***Sauceda***, 168 Wis. 2d at 499. The presumption that the legislature intended multiple punishments and the absence of any clear legislative intent to the contrary compels the conclusion that Jackson's convictions are not multiplicitous.

¶11 At trial, the defense called Bobby Lane to testify. Jackson told his attorney he wanted Lane to testify about past false accusations made against him concerning improper contact with juvenile girls and that Lane facilitated the accusations because he was angry about bad drugs Jackson had given him. Lane was supposed to be the source of false rumors that prompted Melissa's accusation.

¶12 Lane in fact testified that about three years earlier he took some teenage girls to the police station to make reports about Jackson's inappropriate behavior towards them and that no charges were filed. He said the girls came to talk to him. He denied blaming Jackson for a bad drug trip. On cross-examination Lane indicated the nature of the complaints consisted of Jackson "cruising the strip" and trying to get a girl into his car and offering alcohol to girls. Jackson argues that trial counsel was ineffective for not discussing with Jackson the high risk involved in calling Lane as a witness. He suggests that Lane's testimony was actually prejudicial to him because the prosecutor mentioned it in closing argument.[3]

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[3] The prosecutor argued in rebuttal:

(continued)

¶13 To support a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficiency was prejudicial. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583. Whether counsel's performance was ineffective presents a mixed question of fact and law. ***Id.***, ¶15. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See* ***id.*** However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. ***Id.***

¶14 The trial court found that trial counsel discussed calling Lane as a witness with Jackson after Jackson suggested Lane as a witness. Trial counsel acknowledged that calling Lane as a witness was a "calculated risk" that he felt needed to be made at trial. The trial court also found that Lane's testimony simply did not go as planned. Specifically, Lane denied harboring ill will against Jackson for bad drugs.

¶15 Since trial counsel discussed calling Lane as a witness with Jackson, there is no deficient performance. Jackson approved of calling Lane as a witness. That the risks attendant to Lane's testimony may not have been fully explained to Jackson is not deficient performance since Lane changed his testimony and did not

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> But his witness, Bobby Lane, someone he put on the stand, tells about him as someone who's willing to listen to girls, hears accounts about him trying to drive by and pick up a girl in a car, him providing alcohol to girls. I'm sitting there going I can't believe I'm hearing this. This is the evidence he put in that he has other people talking about how he's going looking for young girls.

testify as anticipated.[4] There was no showing that trial counsel should have anticipated that Lane would deny being mad at Jackson for providing him with bad drugs. Trial counsel cannot be expected to warn against the unexpected. Jackson was not denied the effective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

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

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[4] Although calling Lane would have opened the door to the nature of the allegedly false accusations, warning Jackson about that risk of other bad act evidence was unnecessary since Lane's testimony was supposed to have revealed the trumped-up nature of the accusations.