COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 23, 1997

NOTICE

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

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

No. 97-0746-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD E. STUDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Richard Studt appeals his convictions for aggravated battery and second-degree recklessly endangering safety. The charges arose out of a fist fight in which Studt stabbed the victim in the arm with a four-inch fillet knife. On appeal, Studt argues that the two charges were multiplicitous, violating the double jeopardy clause by charging him twice for what amounted to

one criminal wrongdoing, unified in terms of time, place, manner, condition, degree, and substance. Studt asks us to go beyond the longstanding "elements only/same elements" double jeopardy standards from ***Blockburger v. United States***, 284 U.S. 299 (1932), and apply the seemingly more flexible "multifactored" and "fundamental fairness" variants of the ***Blockburger*** standards we have used in decisions like ***Harrell v. State***, 88 Wis.2d 546, 277 N.W.2d 462 (Ct. App. 1979), and ***State v. Hirsch***, 140 Wis.2d 468, 410 N.W.2d 638 (Ct. App. 1987). The Wisconsin Supreme Court has adopted the ***Blockgurger*** "elements only" test for resolving double jeopardy challenges. Under this test, the two crimes of which Studt was convicted are discrete. We therefore conclude that Studt's prosecution did not violate double jeopardy, and we affirm his convictions.

We note that the legislature may allow multiple convictions and punishments for the same criminal act without running afoul of the double jeopardy clause, provided that the State pursues them in a single prosecution and the legislature intended multiple convictions. *See* ***State v. Sauceda***, 168 Wis.2d 486, 492-93, 485 N.W.2d 1, 3-4 (1992). In fact, this is sometimes true even if they fail the ***Blockburger*** "same elements" test; the legislature may specifically authorize cumulative, coincident "same elements" prosecutions and convictions. *See* ***Missouri v. Hunter***, 459 U.S. 359, 368-69 (1983); *see also* ***United States v. Halper***, 490 U.S. 435, 450-51 (1989); ***United States v. Baker***, 63 F.3d 1478, 1494 (9th Cir. 1995); ***United States v. Martinez***, 49 F.3d 1398, 1402 (9th Cir. 1995); ***United States v. Torres***, 28 F.3d 1463, 1464 (7th Cir. 1994); ***United States v. Boatner***, 966 F.2d 1575, 1581 n.9 (11th Cir. 1992). In that event, the sole question is the legislature's intent. *See* ***Hunter***, 459 U.S. at 368-69.

Here, we have already twice found no double jeopardy problem with the coincident prosecutions and convictions of the aggravated battery and reckless

injury/endangerment species of crimes. *See* ***State v. Eastman***, 185 Wis.2d 405, 518 N.W.2d 257 (Ct. App. 1994); ***State v. Kanarowski***, 170 Wis.2d 504, 489 N.W.2d 660 (Ct. App. 1992). These decisions applied the longstanding ***Blockburger*** "same elements" analysis to coincident convictions of these crimes and found such crimes to have different elements. This ends our inquiry in Studt's case, regardless of how his coincident convictions under these statutes might fare under ***Harrell's*** "multifactored" and ***Hirsch's*** "fundamental fairness" standards. At this point, at least in the realm of coincident prosecutions of aggravated battery and reckless injury/endangerment species of crimes, the ***Eastman*** and ***Kanarowski*** decisions control, and the ***Harrell*** and ***Hirsch*** doctrines are nonbinding. In short, Studt's coincident convictions are constitutional under the double jeopardy clause.

By the Court—Judgment affirmed.

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