COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 00-3280
00-3281
00-3282
00-3283
00-3284

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG L. MILLER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Craig Miller, pro se, appeals orders of the circuit court rejecting his postconviction claims. Miller argues that his right to be free

from double jeopardy was violated and that there was no factual basis for the bail jumping convictions. We affirm.[1]

¶2 Miller first argues that he received two convictions for one crime because he was convicted of both substantial battery and aggravated battery, which he contends is multiplicitous. "Multiplicity is defined as the charging of a single criminal offense in more than one count." ***State v. Grayson***, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992).

¶3 The two convictions are not multiplicitous under the Wisconsin and United States Constitutions if they are not identical in law and fact.[2] *See* ***State v. Carol M.D.***, 198 Wis. 2d 162, 169, 542 N.W.2d 476 (Ct. App. 1995); *see also* ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). Miller's argument does not really center on the constitutional prohibition against double jeopardy; it is based on the statutes. Pursuant to WIS. STAT. § 939.66(2m), the legislature has made substantial battery a lesser-included offense of aggravated battery and

[1] As a preliminary matter, the State argues that Miller's claims are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). After considering the State's arguments in favor of a procedural bar based on ***Escalona-Naranjo***, and Miller's arguments supporting his position that he had sufficient reason for not previously raising the issues, we conclude that it is most expedient to address the merits of Miller's claims.

[2] To be convicted of aggravated battery, a person's conduct must cause "great bodily harm to another by an act done with intent to cause bodily harm." *See* WIS. STAT. § 940.19(4) (1999-2000). "Great bodily harm" means bodily injury that causes "protracted loss or impairment of the function of any bodily member or organ." WIS. STAT. § 939.22(14). To be convicted of substantial battery, a person's conduct must cause "substantial bodily harm to another by an act done with intent to cause bodily harm." *See* WIS. STAT. § 940.19(2). "'Substantial bodily harm' means bodily injury that causes a laceration that requires stitches." WIS. STAT. § 939.22(38).

In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

explicitly stated that a defendant may not be convicted of both a crime and an included crime.[3] *See also* ***State v. Vassos***, 218 Wis. 2d 330, 337-38, 579 N.W.2d 35 (1998). We agree with Miller that § 939.66(2m) prohibits conviction of both substantial battery and aggravated battery *where the conviction is premised on the same conduct*. Here, however, the two convictions were based on different conduct that occurred at different times. Miller punched Arnita Young in the left eye, impairing her vision and causing a retinal tear and focal detachment that required laser surgery. This act caused great bodily harm to Young because it impaired her ability to see until the injury was corrected by surgery. On the same evening, but after a period of time had elapsed, Miller struck Young on the right side of her face with an object, causing an injury that required stitches. This act constituted substantial bodily harm because it caused a laceration that required stitches. Miller's conviction of the two crimes did not violate § 939.66(2m) because each charge was based on a different act, separated in time and causing different injuries. *See* ***State v. Eisch***, 96 Wis. 2d 25, 31-33, 291 N.W.2d 800 (1980). Additionally, this evidence is sufficient to support the convictions.

¶4 Miller also argues that there was no factual basis for the bail jumping convictions because he had not been released on bond when he violated the no contact provisions of his bond. Miller's argument is premised on the fact that he made the phone calls from jail to Arnita Young and Christine Miller, with whom he was to have no contact. He cites ***State v. Orlik***, 226 Wis. 2d 527, 595

[3] WISCONSIN STAT. § 939.66(2m) provides: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following: … [a] crime which is a less serious or equally serious type of battery than the one charged."

N.W.2d 468 (Ct. App. 1999). Miller's reliance on ***Orlik*** is misplaced. Otto Orlik was unable to post a cash bond and, therefore, was never released pursuant to the court commissioner's bond order. ***Id.*** at 529. Here, however, Miller was released on a signature bond and was ordered to have no contact as a condition of the bond. Although he was still incarcerated for an unrelated case, he was guilty of bail jumping because he had been released on bond in the case that formed the basis for the bail jumping convictions.

By the Court.—Orders affirmed.

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