STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2432-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JAMA I. JAMA,

Defendant-Respondent.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR DANE COUNTY, ELLEN K BERZ, JUDGE

REPLY BRIEF FOR PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

TABLE OF CONTENTS

Page

Cases

Page

Statutes

Page

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2432-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JAMA I. JAMA,

Defendant-Respondent.

APPEAL FROM AN ORDER OF THE CIRCUIT COURT
FOR DANE COUNTY, ELLEN K BERZ, JUDGE

REPLY BRIEF FOR PLAINTIFF-APPELLANT

ARGUMENT

I. The circuit court misconstrued both the sexual assault statute and the burglary statute to require proof, not just of lack of consent, but lack of consent by a person who was competent to give consent, thereby adding an element not intended by the legislature to the crimes defined by those statutes.

A. The court erroneously added a nonexistent element to the crime of third-degree sexual assault.

The fact that a defendant has sexual contact or intercourse with a person who is incapable of consenting to

such acts does not immunize the defendant from a conviction for third-degree sexual assault.

To the contrary, third-degree sexual assault is committed when the defendant has sexual intercourse or sexual contact with any person without that person's consent. Wis. Stat. § 940.225(3) (2013-14).

Under Wis. Stat. § 940.225(4) "consent" requires: (1) words or overt actions, (2) by a person who is competent to give informed consent, (3) which indicate a freely given agreement to have sexual intercourse or sexual contact.

These three factors are stated in the conjunctive. All three must be present for there to be consent. If any one of the three factors is absent there is no consent.

So if there are no words or overt actions there is no consent. If words and actions do not indicate a freely given agreement to have sexual intercourse or sexual contact there is no consent. If words and actions which indicate a freely given agreement to have sexual intercourse or sexual contact are not given by a person who is competent to give informed consent there is no consent.

Indeed the term "without consent," as generally applicable throughout the criminal code, includes situations where a person is unable to understand the nature of the consent because of a defective mental condition. Wis. Stat. § 939.22(48) (2013-14).

Both these statutes dealing with consent should be read together and harmonized. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457; *Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130.

If there is no consent under § 939.22(48) when a person is unable to consent, there should be no consent under § 940.225(4) when the person is unable to consent. If a person is not competent to consent, there cannot be and there is no consent.

The circuit court's ruling that a sexual act can be without consent only if the person who does not give consent is capable of giving informed consent introduces an element into the crime of third-degree sexual assault that is not included in the statute and is wholly contrary to the plain intent of the legislature.

Consent does not involve a conscious choice to consent or to not consent. Consent is a one way street, not a two way boulevard.

There must certainly be a conscious choice to consent. But there need not be any conscious choice to not consent, to refuse or decline to have sex. The statute plainly does not require proof of any affirmative refusal to have sex. There need only be the absence of a choice to consent. If there is no affirmative choice to consent then there is no consent.

Although a person must be competent to consent in order to make a conscious choice to not consent, a person need not be competent to consent in order to make no choice, either to consent or to not consent. A person does not have to be competent to do anything in order to not do anything.

While Jama is correct that consent is not an issue in a case of second-degree sexual assault where the victim is too intoxicated to consent, Wis. Stat. § 940.225(2)(cm) and (4), this appeal does not involve a charge of second-degree sexual assault. This appeal involves a charge of third-degree sexual assault, where consent is an issue.

In cases like this one where consent is an issue, there is a presumption that a person who is unconscious is incapable of consenting, and therefore there is no consent. Wis. Stat. § 940.225(4)(c).

II. The jury properly found Jama guilty of third-degree sexual assault.

A. The evidence was sufficient to prove that HH did not consent to have sexual intercourse with Jama.

The evidence in this case does not show merely that HH had no memory of not giving consent. The evidence shows that she had no memory because Jama knocked her unconscious (88:216-18). And because HH was unconscious, she could and did not consent to allow Jama to have sexual intercourse with her.

B. The offenses of second-degree sexual assault of an intoxicated person and third-degree sexual assault are not multiplicitous.

The same criminal act may constitute different crimes with similar but not identical elements. *Geitner v. State*, 59 Wis. 2d 128, 130, 207 N.W.2d 837 (1973).

The prohibition against double jeopardy does not prohibit multiple convictions for violating two different sexual assault statutes by committing a single sexual act when each statute contains an element that the other does not. *State v. Selmon*, 175 Wis. 2d 155, 161-62, 498 N.W.2d 876 (Ct. App. 1993). This inquiry is a purely legal analysis of the statutory elements of the offenses without any consideration of the facts of the particular case. *Selmon*, 175 Wis. 2d at 162.

If this legal test is met, it is presumed that the legislature intended to permit multiple convictions under both statutes unless other factors clearly indicate otherwise. *Selmon*, 175 Wis. 2d at 161.

Wisconsin Statute § 944.225(2)(cm), making it a crime to have sexual intercourse or contact with a person who is too intoxicated to be capable of giving consent, and Wis. Stat. § 944.225(3), making it a crime to have sexual intercourse or contact without consent, each have elements that the other statute does not have.

Wisconsin Statute § 944.225(2)(cm) requires that the victim be intoxicated, that the victim be incapable of giving consent because of the intoxication, that the defendant knows the victim is incapable of giving consent, and that the defendant has the purpose to have sex with the victim while the victim is incapable of giving consent.

Wisconsin Statute § 944.225(3) does not contain any of these four elements.

Obversely, Wis. Stat. § 944.225(3) requires that the sexual activity be without the victim's consent.

The absence of consent is not an element of Wis. Stat. § 944.225(2)(cm). Indeed, consent is not an issue with respect to this section. Wis. Stat. § 944.225(4).

Jama's double jeopardy argument fails because it fails to address the legal elements of the two offenses, but focuses only on the facts involved in the commission of these offenses. Jama claims that on the facts of this case it is impossible to have sex with a person who is incapable of consenting without also having sex without that person's consent.

While that assertion is correct, and while the accuracy of that assertion is what makes Jama guilty of both offenses, that fact is not relevant in the multiplicity analysis. *State v. Smith*, 55 Wis. 2d 304, 310, 198 N.W.2d 630 (1972).

What is relevant is that it is legally possible to satisfy all the elements of each of the crimes without satisfying all the elements of the other one. In particular, consent is an element of third-degree sexual assault but is not an element of second-degree sexual assault of an intoxicated person.

Jama does not suggest that there are any factors showing that the legislature did not intend to allow conviction for both second-degree sexual assault of an intoxicated person and third-degree sexual assault.

III. The jury properly found Jama guilty of burglary.

A. The evidence was sufficient to prove that Jama entered HH's apartment with intent to sexually assault and steal from her, and that she did not give him consent to enter her apartment for those purposes.

A criminal conviction can be sustained only if there is sufficient evidence to support guilt on the theory of guilt submitted to the jury in the instructions. *State v. Inglin*, 224 Wis. 2d 764, 772-73, 592 N.W.2d 666 (Ct. App. 1999).

In this case, the jury was instructed that the state was required to prove that Jama entered HH's residence without her consent (93:24, 26).

But instructions must be considered together in the context of the overall charge. *State v. Hoover*, 2003 WI App 117,

¶ 29, 265 Wis. 2d 607, 666 N.W.2d 74; *State v. Foster*, 191 Wis. 2d 14, 28, 528 N.W.2d 22 (Ct. App. 1995).

The jury was also instructed that a person may be intoxicated to the degree that they are incapable of giving consent (93:20-21). Indeed, that was the state's comprehensive theory of this entire case, that HH was too intoxicated to give Jama consent to do any of the things he did to take advantage of her condition.

These instructions together allowed the jury to find that HH did not give Jama consent to even set foot across the threshold into her apartment because she was too intoxicated to give him any such consent.

But even if HH might have consented to let Jama enter her apartment for the purpose of helping her get in, the evidence showed that any consent was limited to that purpose and did not include any consent to enter for the purposes of raping and robbing her.

HH testified that she did not give anyone permission to come into her apartment and crack her over her head (88:217). HH testified that she did not consent to let Jama enter her apartment for the purpose of stealing from her (88:232). And she testified that she did not consent to let anyone have sexual intercourse with her (88:228).

Jama knocked HH unconscious as soon as he entered the apartment (88:216-18), before raping and robbing her. There would have been no need for the knockout if HH had agreed that Jama could come in to do whatever he wanted with her and to take whatever he wanted from her.

The jury instruction on consent was broad enough to include this factual scenario. The jury was told it had to find

that the entry was without consent, and in fact it was without consent. It was without consent to enter for the purposes of raping and robbing the resident of the apartment that was entered.

Nothing in the instruction precluded the jury from finding that Jama's entry was without consent if he did not have consent to enter HH's apartment for the purposes of raping and robbing her.

To the contrary, the jury was instructed that Jama was guilty of burglary only if he entered HH's apartment with the intent to commit a sexual assault or with the intent to steal (93:24, 26).

But Jama would not commit a sexual assault or a theft if he had HH's consent to have sex with her and to take her property. If Jama's entry was unlawful only if he entered with the intent to have sex with HH and to take her property without her consent, then the critical question of consent was whether HH consented to let Jama enter for those purposes.

So the instructions on the intent element and the consent element could reasonably be considered together to mean that Jama was guilty of burglary if HH did not consent to let him enter her residence for the purposes that made a nonconsensual entry unlawful.

Because Jama had to have those purposes when he entered the apartment, the instruction indicated that the element of lack of consent could be satisfied if there was not consent to enter for the purposes Jama had to have in mind when he entered.

Jama cites no authority to support his assertion that the jury could not find lack of consent under these facts unless it

was expressly instructed that it could find lack of consent under these facts.

In *Inglin*, the jury was instructed that the defendant was guilty if he acted without the consent of the victim, which meant no consent in fact. *Inglin*, 224 Wis. 2d at 770-71.

This court found that the evidence was sufficient to prove that Inglin acted without consent because the victim did not understand the nature of the thing to which she consented due to a mistake of fact, as provided in the definition of "without consent" in Wis. Stat. § 939.22(48)(c). *Inglin*, 224 Wis. 2d at 774-75.

Thus, this court found that the evidence was sufficient to prove lack of consent under an instruction that simply told the jury that it had to find lack of consent, without any additional indication that they could find lack of consent under the specific factual scenario where the victim did not understand the nature of the thing to which she consented due to a mistake of fact.

The evidence was sufficient to prove that Jama entered HH's apartment without her consent under the instructions given to the jury, even though the instructions did not expressly advise the jury that they could find lack of consent if HH did not agree to let Jama enter her apartment to rape and rob her.

B. The verdicts convicting Jama of second-degree sexual assault and burglary were not mutually exclusive.

Jama relies on two decisions of the United States Supreme Court to argue that the rule of mutual exclusivity should apply in this case.

But both *Heflin v. United States*, 358 U.S. 415 (1959), and *United States v. Gaddis*, 424 U.S. 544 (1976), were decided on federal statutory grounds, not constitutional grounds. Therefore, neither decision is controlling precedent in this state. *State v. Seay*, 2002 WI App 37, ¶ 9 n.4, 250 Wis. 2d 761, 641 N.W.2d 437; *State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶ 18 n.4, 247 Wis. 2d 1013, 635 N.W.2d 292.

Jama never argues why these decisions should persuade this court to adopt any aspect of the mutually exclusive rule. Because this argument is undeveloped, it need not be considered by this court. *State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

In any event, Jama argues that Wisconsin courts have found that lack of capacity to consent invalidates purported consent. Brief for Defendant-Respondent at 17-18. In other words, if there is no capacity to consent, there is no consent.

So a verdict finding that HH lacked the capacity to consent is completely compatible with a verdict finding that she did not give consent.

The verdicts convicting Jama of second-degree sexual assault and burglary were not mutually exclusive.

CONCLUSION

It is therefore respectfully submitted that the decision and order of the circuit court directing the entry of judgments of not guilty of the crimes of third-degree sexual assault, burglary with intent to commit a sexual assault and burglary with intent to steal notwithstanding the jury's verdicts of guilty should be reversed, and the verdicts finding Jama guilty of those crimes should be reinstated.

The case should be remanded to the circuit court for sentencing and the entry of judgments of conviction on the three remaining crimes of which Jama is guilty.

Dated: October 16, 2015.

BRAD D. SCHIMEL
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,561 words.

Dated this 16th day of October, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of October, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General