DA 20-0596

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 2

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSEPH JOHN MCNAMARA,

Defendant and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DC 19-120
Honorable Jennifer B. Lint, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Gregory Hood, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Assistant Attorney General, Helena, Montana

William E. Fulbright, Ravalli County Attorney, Angela Wetzsteon, Deputy County Attorney, Hamilton, Montana

Submitted on Briefs: November 30, 2022

Decided: January 3, 2023

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Appellant Joseph John McNamara (McNamara) appeals the September 17, 2020 Judgment and Commitment of the Twenty-First Judicial District Court sentencing him to 55 years in the Montana State Prison, including a consecutive 10-year Department of Corrections (DOC) commitment for two convictions of criminal endangerment.

¶2 We restate the issue on appeal as follows:

> *Whether McNamara's two criminal endangerment convictions violate the multiple charges statute.*

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 On the morning of July 7, 2019, McNamara went with his girlfriend, Andrea Golie (Golie), to a park near Hamilton, Montana.[1] McNamara got into a dispute with Golie and, at some point, he drank a beer. Golie left the park alone and returned to her home along Golf Course Road in Hamilton. Later that morning, after a stop at a gas station, McNamara drove his van toward Golie's home. McNamara was driving approximately 70 miles-per-hour—double the posted speed limit—when nine-year-old Robert Leonardi (Leonardi) exited his home and attempted to cross Golf Course Road. McNamara hit and killed Leonardi. Law enforcement later found a beer can at the crash scene and meth residue in McNamara's van.

[1] Facts restated from the District Court's Judgement and Commitment.

¶5 McNamara briefly stopped after hitting Leonardi, then he resumed traveling at a high speed away from the accident. While driving away, McNamara came dangerously close to hitting Shane and Janelle Ellinger (the Ellingers)—the driver and passenger, respectively, in a car approaching an intersection along his route. The Ellingers feared that McNamara would crash into them because he was "out of control." To avoid such a crash, Shane Ellinger quickly stopped short of the intersection.

¶6 Following his near collision with the Ellingers, McNamara ditched his van and took off on foot. He relied on car rides from two individuals to distance himself from the accident. He also stopped at the homes of two different friends where, on each occasion, he tried to change his appearance by shaving his face and changing his clothes. Law enforcement located McNamara at a home in Hamilton after a search of more than five hours. Upon arrest, McNamara was asked if he would submit to a blood test for analysis. McNamara declined to provide any blood because he claimed to have "smoked something" after the crash.

¶7 On July 23, 2019, the State filed an Information against McNamara. The State charged him with felony negligent homicide, in violation of § 45-5-104, MCA; three counts of felony criminal endangerment as to three different victims, including each of the Ellingers, in violation of § 45-5-207, MCA; felony drug possession, in violation of § 45-9-102(6), MCA; felony tampering with or fabricating evidence, in violation of § 45-7-207, MCA; misdemeanor possession of drug paraphernalia, in violation of § 45-10-103, MCA; and, misdemeanor failure to remain at an accident when a person is injured, in violation of § 61-7-103, MCA. On June 4, 2020, the State added a charge of

misdemeanor failure to exercise due care, in violation of § 61-8-504, MCA, to the Information.

¶8 On June 15, 2020, a five-day jury trial commenced. The jury convicted McNamara of all charges, except the third count of criminal endangerment—the count not pertaining to the Ellingers. Prior to sentencing, McNamara argued that his single act of driving could not result in a conviction and sentence for two counts of criminal endangerment based on his interpretation of the "multiple charges" statute, § 46-11-410, MCA. The District Court sentenced McNamara to 55 years in the Montana State Prison, including a consecutive 10-year DOC commitment for both convictions of criminal endangerment.

STANDARD OF REVIEW

¶9 We review conclusions of law, including statutory interpretation, de novo. *LHC, Inc. v. Alvarez*, 2007 MT 123, ¶ 13, 337 Mont. 294, 160 P.3d 502.

DISCUSSION

¶10 *Issue: Whether McNamara's two criminal endangerment convictions violate the multiple charges statute.*

¶11 At sentencing, the District Court explained that the term of 55 years, including a consecutive 10-year DOC commitment for both of McNamara's convictions of criminal endangerment, reflected his "extensive" criminal history, failure to demonstrate any "skill or trade, [] legal means of support, [and] [] social or economic ties to the community," and the absence of any evidence that "he has made any efforts to progress at correcting his criminal thinking and behavior[.]" The court acknowledged McNamara's position that two criminal endangerment convictions based on a single act violated the multiple charges

statute, § 46-11-410, MCA, but concluded that "the state's position [that no such violation occurred] is absolutely correct."

¶12 Section 46-11-410(2), MCA, prevents a defendant from being convicted of more than one offense if:

> (a) one offense is included in the other;
>
> (b) one offense consists of only of a conspiracy or other form of preparation to commit the other;
>
> (c) inconsistent findings of fact are required to establish the commission of the offense;
>
> (d) the offenses differ only in that one is defined to prohibit a specific instance of the conduct; or
>
> (e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of conduct constitute separate offenses.

If none of those provisions are implicated, then § 46-11-410(1), MCA, may apply. Section 46-11-410(1), MCA, states that "[w]hen the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense."

¶13 McNamara argues that the District Court did not comply with § 46-11-410, MCA, for two reasons: first, that his conviction and sentence for two counts of criminal endangerment resulted from the same transaction; and second, that one offense of criminal endangerment in his case was included in the other.

Same Transaction Analysis

¶14 McNamara claims that the single purpose underlying his criminal endangerment convictions—presumably, driving quickly away from Leonardi—indicates that his convictions arose from the same transaction. He alleges that the same transaction underlying the convictions triggers the prohibition on a conviction for more than one offense under subsection (2) of § 46-11-410, MCA.[2] He summarizes this Court's case law as mandating that "[w]hen analyzing a 'transaction' for purposes of § 46-11-410, MCA, a court must examine 'the facts underlying the charged offenses, including the defendant's motivat[ion] by . . . a common purpose or plan[.]'" (quoting *State v. Strong*, 2015 MT 251, ¶ 17, 380 Mont. 471, 356 P.3d 1078). He suggests that the facts underlying his charge—including that it took him "seconds" to drive by the Ellingers—make clear that the charges for criminal endangerment arose from the same transaction, which means he cannot be convicted for multiple counts of criminal endangerment.

¶15 The State cites *State v. Allen*, 2016 MT 185, ¶ 11, 384 Mont. 257, 376 P.3d 791, in support of its argument that multiple convictions resulting from the same transaction do not violate the multiple charges statute so long as none of the categories in § 46-11-410(2), MCA, apply.

¶16 McNamara's reliance on *Strong* is misplaced. In that case, we reviewed our case law on what constitutes the "same transaction" as well as when, despite conduct amounting

[2] Though § 46-11-410(2), MCA, contains five separate prohibitions, McNamara only specifically refers to (2)(a). Given that McNamara broadly refers to a violation of § 46-11-410, MCA, on several occasions, this Court did not limit its analysis of McNamara's claims under § 46-11-410(2), MCA, to subsection (2)(a).

to the "same transaction," the defendant can be convicted more than once. Citing *State v. Goodenough*, 2010 MT 247, 358 Mont. 219, 245 P.3d 14, the *Strong* Court specified that describing "offenses as a continuing course of conduct [does] not transform those offenses into a single transaction." *Strong*, ¶ 15. Additionally, we recognized our jurisprudence upholding multiple convictions for conduct resulting from "distinct criminal events." *Strong*, ¶ 15. And, we noted that the existence of one or multiple victims may be a factor in determining whether distinct criminal events occurred. *Strong*, ¶ 16. McNamara incorrectly reads *Strong* as prioritizing the defendant's purpose in our analysis of § 46-11-410, MCA. *Strong* instead demonstrates that the application of § 46-11-410, MCA, hinges on a close analysis of the statute underlying the charges.

¶17 This Court's decision in *Goodenough* shows that the plain language of the statute giving rise to charges in question may be determinative as to whether the multiple charges statute has been violated. In that case, we identified distinct criminal events where a grandfather sexually assaulted his granddaughter on numerous occasions over the span of several years. *Goodenough*, ¶¶ 26-27. We stated that "an offense should not be construed as a continuing course of conduct unless the statute defining the offense compels such a conclusion." *Goodenough,* ¶ 25. This Court then analyzed the grandfather's charged offenses, including sexual assault—defined by § 45-5-502(1), MCA, as any time "[a] person . . . knowingly subjects another person to any sexual contact without consent." *Goodenough*, ¶ 25. We concluded that "[n]one of the charged offenses [are] statutorily defined so as to compel a conclusion that they should be construed to involve a continuing course of conduct." *Goodenough*, ¶ 25.

¶18 Nothing in the criminal endangerment statute, § 45-5-207(1), MCA, compels the conclusion that it must be construed as a continuing course of conduct. Criminal endangerment occurs where a person "knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another[.]" Section 45-5-2017(1), MCA. Notably, this structure mirrors that of the sexual assault statute at issue in *Goodenough*—both apply whenever "a person" "knowingly" engages in criminal conduct that affects "another."

¶19 McNamara provides no rationale for why this Court should interpret the criminal endangerment statute in a manner inconsistent with its holding in *Goodenough*. Instead, McNamara emphasizes that his single purpose for engaging in criminal conduct must limit his punishment to a single charge. However, the criminal endangerment statute defines the criminal event at issue in this case—one person knowingly engaging in conduct that creates a substantial risk of death or serious bodily injury to another *individual*—and the facts relay that such an event occurred on two occasions. McNamara knowingly drove in a manner that created a substantial risk of death or serious bodily injury to Shane Ellinger and the same conduct created a substantial risk of death or serious bodily injury to another individual, Janelle Ellinger. Two distinct criminal events occurred because the criminal endangerment statute applies any time "another" is the subject of the defendant's criminal conduct. Clearly the statute contemplates "another" as one individual person.

Included Offense Analysis

¶20 McNamara argues his convictions violated § 46-11-410(2)(a), MCA, because his charge for criminally endangering one Ellinger included his charge for endangering the

other. Section 46-1-202(9)(a), MCA, defines an included offense as an offense that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" McNamara correctly notes that the statutory elements of the two criminal endangerment charges are exactly the same. However, McNamara errs by conflating whether two charges contain the same elements with whether the same facts can establish proof of those elements for each charge. He erroneously concludes that "[b]ecause the statutory elements of the two [c]riminal endangerment charges are exactly the same, one is necessarily included in the other, prohibiting [his] conviction on both counts for the same act." The State identified this error and correctly observed that "[t]he element of 'to another' in criminal endangerment is dispositive in this case because there were multiple victims."

¶21 Whether one offense includes the other depends on the facts necessary to prove the offenses. *See* § 46-1-202(9)(a), MCA. The elements of criminal endangerment include "to another," an attendant circumstance.[3] Section 45-5-207(1), MCA; *see State v. Weatherell,* 2010 MT 37, ¶ 13, 355 Mont. 230, 255 P.3d 1256 (identifying similar language in § 45-5-206(1)(a), MCA, as an attendant circumstance). Establishing an attendant circumstance requires proof of a specific fact. *See Weatherell*, ¶ 13.

¶22 Here, the facts necessary to prove that a defendant engaged in conduct constituting criminal endangerment with respect to one person, Shane Ellinger, cannot establish proof of a separate offense of criminal endangerment pertaining to a different individual, Janelle

[3] *Black's Law Dictionary* defines attendant circumstance as "[a] fact that is situationally relevant to a particular event or occurrence." *Circumstance, Black's Law Dictionary* (11th ed. 2019).

Ellinger—they are separate "anothers." Proof of each count requires establishing different facts. As such, the lesser included offense provisions are not implicated here.

CONCLUSION

¶23 McNamara's convictions of criminal endangerment were based on two distinct criminal offenses. Therefore, the convictions are affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE