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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1789**

Paul Joseph Welle, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 11, 2018
Affirmed
Johnson, Judge**

St. Louis County District Court
File No. 69DU-CR-11-3785

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Rebekka L. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Klaphake, Judge.*

*Retired judge of the Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

In 2012, a St. Louis County jury found Paul Joseph Welle guilty of unintentional second-degree felony murder and first-degree manslaughter because he caused a man's death by punching him in the face. The district court entered a conviction and imposed a sentence on the offense of unintentional second-degree felony murder. In 2017, Welle petitioned for post-conviction relief on the ground that the district court should have sentenced him on the less-serious and more-specific offense of first-degree manslaughter. The post-conviction court denied the petition. We conclude that Welle was not entitled to be sentenced on the offense of first-degree manslaughter and, therefore, affirm.

FACTS

On November 6, 2011, at approximately 12:30 a.m., Welle argued with Dale Anderson at the Powerhouse Bar in the city of Proctor. Welle told Anderson, "You don't threaten me. Nobody threatens me. Outside now." The two men left the bar through the front door. Approximately 15 seconds later, Anderson was lying on the ground in a pool of blood. Welle fled the scene. Anderson died three days later. An autopsy showed that Anderson had a skull fracture and severe brain injuries that were "incompatible with life."

The state charged Welle with two offenses: (1) unintentional second-degree felony murder, with a predicate felony of first-degree assault, in violation of Minn. Stat. § 609.19, subd. 2(1) (2010); and (2) first-degree manslaughter, with a predicate offense of fifth-degree assault, in violation of Minn. Stat. § 609.20(2) (2010). The case was tried to a jury on seven days in September 2012. The jury found Welle guilty on both counts. The district

court entered a judgment of conviction on count 1, the offense of unintentional second-degree felony murder. The district court sentenced Welle to 216 months of imprisonment.

On direct appeal, this court reversed and remanded for a new trial on the ground that the district court erred by admitting inadmissible evidence that Welle had punched other persons in the face on three prior occasions, each of which resulted in a criminal conviction. *State v. Welle*, 847 N.W.2d 52, 56, 60 (Minn. App. 2014). The state sought further review in the supreme court, which granted review and reversed this court's opinion with respect to the admissibility of the evidence of Welle's prior assaults and remanded to this court for further consideration of Welle's other arguments. *State v. Welle*, 870 N.W.2d 360, 365-67 (Minn. 2015). This court then affirmed Welle's conviction. *State v. Welle*, No. A13-0256 (Minn. App. Jan. 25, 2016) (order op.).

In August 2017, Welle petitioned for post-conviction relief. He asked the post-conviction court to vacate his conviction and sentence on the offense of unintentional second-degree felony murder and, instead, enter a conviction and impose a sentence on the offense of first-degree manslaughter. The post-conviction court denied the petition. Welle appeals.

D E C I S I O N

Welle argues that the post-conviction court erred by denying his petition for post-conviction relief. He contends that the statute setting forth the offense of unintentional second-degree felony murder is in irreconcilable conflict with the statute setting forth the offense of first-degree manslaughter and that the district court was required to sentence him only on the latter offense.

In general, a prosecutor has discretion to charge a defendant “under any statute that the defendant’s acts violate without regard to the penalty.” *State v. Chryst*, 320 N.W.2d 721, 722 (Minn. 1982). But if two criminal statutes apply to a defendant’s alleged conduct, one statute is more specific than the other statute, the more-general statute imposes greater punishment than the more-specific statute, and the legislature has expressed a policy that the more-specific statute should govern to the exclusion of the more-general statute, then the statutes are deemed to be in irreconcilable conflict such that the prosecutor is *not* free to charge the offense set forth in the more-general statute. *See State v. Kalvig*, 296 Minn. 395, 397-400, 209 N.W.2d 678, 680-81 (1973). However, two statutes are *not* in irreconcilable conflict unless, in all conceivable circumstances, conduct that violates the more-specific statute also would violate the more-general statute. *See Chryst*, 320 N.W.2d at 722-23.

In this case, the state charged Welle with two offenses and pursued both charges to verdict. The statute cited in count 1 provides that a person is guilty of unintentional second-degree felony murder if he or she

causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting
. . . .

Minn. Stat. § 609.19, subd. 2(1). The statute cited in count 2 provides that a person is guilty of first-degree manslaughter if he or she

violates section 609.224 and causes the death of another or causes the death of another in committing or attempting to commit a misdemeanor or gross misdemeanor offense with

such force and violence that death of or great bodily harm to any person was reasonably foreseeable, *and murder in the first or second degree was not committed thereby.*

Minn. Stat. § 609.20(2) (emphasis added). Section 609.224, which is referenced in section 609.20(2), sets forth the offense of fifth-degree assault. *See* Minn. Stat. § 609.224 (2010). A person commits misdemeanor fifth-degree assault if he or she “(1) commits an act with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another.” *Id.*, subd. 1. A fifth-degree assault may be aggravated to a gross-misdemeanor if the person commits the offense “within three years of a previous qualified domestic violence-related offense” or commits the offense “against the same victim within ten years of a previous qualified domestic violence-related offense.” *Id.*, subd. 2. In addition, a fifth-degree assault offense may be aggravated to a felony if the requirements of the gross-misdemeanor offense are satisfied and there are two or more “previous qualified domestic violence-related offense[s].” *Id.*, subd. 4.

The post-conviction court rejected Welle’s argument on the ground that the two statutes at issue are *not* in irreconcilable conflict because they are different in scope and apply to different forms of conduct. The post-conviction court interpreted the last clause of section 609.20(2) to mean that, if a person committed first-degree murder or second-degree murder, the person could not have committed first-degree manslaughter. The post-conviction court also reasoned that Welle’s interpretation of the statutes would, if recognized, lead to “a strange outcome.” The post-conviction court quoted the following excerpt from an unpublished opinion of this court:

If we were to accept [appellant's] argument, a first-degree assault that results in death could not be charged under the second-degree unintentional-felony-murder statute; rather, it must be charged under the first-degree misdemeanor-manslaughter statute. The statutory penalty for second-degree unintentional felony murder is imprisonment up to 40 years. Minn. Stat. § 609.19, subd. 2. The statutory penalty for first-degree misdemeanor manslaughter is imprisonment up to 15 years. Minn. Stat. § 609.20 (2008). But the statutory penalty for first-degree assault is imprisonment up to 20 years. Minn. Stat. § 609.221, subd. 1. Thus, [in appellant's view], an offender who commits a first-degree assault faces a lesser statutory penalty if the victim dies as a result of the assault.

State v. Rubio-Segura, No. A11-2246, 2012 WL 5381843, at *3 (Minn. App. Nov. 12, 2010) (concluding that district court did not plainly err by not *sua sponte* instructing jury on elements of first-degree manslaughter), *review denied* (Minn. Jan. 15, 2013).

On appeal, Welle contends that the post-conviction court erred in its analysis of the interrelationship between the two statutes. Welle contends that “the elements of both offenses are the same—that is, the State was required to prove an assault that causes death.” He further contends that “the facts proven at Appellant’s trial constitute both second-degree unintentional felony murder and the more specific and less serious offense of first-degree misdemeanor manslaughter.”

A.

The supreme court’s caselaw recognizes five requirements for a determination that two statutes are in irreconcilable conflict with each other: (1) both statutes apply to the defendant’s conduct; (2) one statute is more specific, and one statute is more general; (3) the more-general statute imposes greater punishment than the more-specific statute; (4) the legislature has expressed a policy that the more-specific statute should govern to

the exclusion of the more-general statute; and (5) in all conceivable circumstances, conduct that violates the more-specific statute also would violate the more-general statute. See *Chryst*, 320 N.W.2d at 722-23; *Kalvig*, 296 Minn. at 398, 209 N.W.2d at 680. We will apply these five requirements in the context of this case.

The first requirement is not satisfied in this case. Both statutes do not apply to Welle's conduct. In light of the last clause of section 609.20(2), the two statutes cannot apply to the same conduct simultaneously. Rather, the two offenses are mutually exclusive. First-degree manslaughter is defined so as to avoid any overlap with unintentional second-degree felony murder. Because of that definition, both statutes do not apply to Welle.

The second requirement is satisfied. As Welle contends, the statute setting forth the offense of first-degree manslaughter is more specific because the predicate offense is fifth-degree assault. By comparison, the predicate offense for unintentional second-degree felony murder is any felony, including a felony-level fifth-degree assault as well as other felony offenses.

The third requirement is satisfied. The statute setting forth the offense of unintentional second-degree felony murder authorizes a sentence of as much as 40 years of imprisonment. Minn. Stat. § 609.19, subd. 2. The sentencing guidelines applicable to Welle establish a presumptive sentence of 128 to 288 months for unintentional second-degree felony murder. Minn. Sent. Guidelines IV (2010). By comparison, the statute setting forth the offense of first-degree manslaughter authorizes a sentence of as much as 15 years of imprisonment. Minn. Stat. § 609.20. The sentencing guidelines applicable to

Welle establish a presumptive sentence of 74 to 189 months for first-degree manslaughter. Minn. Sent. Guidelines IV.

The fourth requirement is not satisfied. The legislature has not expressed a policy that the first-degree-manslaughter statute should govern to the exclusion of the unintentional-second-degree-felony-murder statute.

The fifth requirement is not satisfied. It is *not* true that, in all conceivable circumstances, conduct that violates the more-specific statute also would violate the more-general statute. There are three types of fifth-degree assault that may be the predicate offense of first-degree manslaughter: misdemeanor, gross-misdemeanor, and felony. If a person has committed first-degree manslaughter because of the predicate offense of *misdemeanor* fifth-degree assault or *gross-misdemeanor* fifth-degree assault, the person has not committed unintentional second-degree felony murder.

Because only two of the five requirements are satisfied, the two statutes at issue in this case are *not* in irreconcilable conflict. See *Chryst*, 320 N.W.2d at 722-23; *Kalvig*, 296 Minn. at 398, 209 N.W.2d at 680.

B.

Before concluding, we consider Welle's arguments that are based on three prior opinions of this court.

First, Welle relies on this court's opinion in *State v. Craven*, 628 N.W.2d 632 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). In *Craven*, we concluded that the district court erred by sentencing the appellant on the offense of felony-murder instead of the offense of fleeing causing death. *Id.* at 637. Welle relies on the fifth paragraph of the

analysis in *Craven*, where we noted, “the fleeing causing death statute contains a proviso that indicates that the statute only applies where the death does not constitute murder or manslaughter.” *Id.* at 635 (citing Minn. Stat. § 609.487, subd. 4 (2000)).¹ We reasoned that the proviso “states a broad preference for the more general provisions of the criminal code defining murder or manslaughter.” *Id.* Yet we also reasoned that the proviso “does not manifest an intent that the general felony-murder statute should prevail over the more specific fleeing causing death statute.” *Id.* Welle contends that the last clause of section 609.20(2) is similar to the statutory proviso in *Craven*. He contends further that if the proviso in *Craven* did not allow the application of the more-general statute in that case, similar language in the last clause of section 609.20(2) should not allow the application of the more-general statute in this case.

Although *Craven* is somewhat analogous, it does not control the analysis in this case. The *Craven* opinion was concerned with the interrelationship between the felony-murder statute and the fleeing-causing-death statute. The proviso at issue there was contained within the fleeing-causing-death statute. But the fleeing-causing-death statute is not at issue in this case. Furthermore, the relevant part of the *Craven* opinion considered the statutory proviso only with respect to the issue of whether the legislature has expressed

¹The statute in effect at that time provided as follows: “Whoever flees or attempts to flee by means of a motor vehicle a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, and who in the course of fleeing causes the death of a human being *not constituting murder or manslaughter* or any bodily injury to any person other than the perpetrator may be sentenced to imprisonment” Minn. Stat. § 609.487, subd. 4 (2000) (emphasis added).

a policy that the more-specific statute should govern to the exclusion of the more-general statute, which we have identified above as the fourth requirement of the irreconcilable-conflict test. The *Craven* court did not expressly consider whether, in light of the statutory proviso, both statutes actually applied to the defendant's conduct. See *Craven*, 628 N.W.2d at 634-38; see also *Kalvig*, 296 Minn. at 398, 209 N.W.2d at 680. Likewise, the *Craven* court did not expressly consider whether, in all conceivable circumstances, conduct that violates the more-specific statute also would violate the more-general statute. See 628 N.W.2d at 634-38; see also *Chryst*, 320 N.W.2d at 722-23. We have considered those requirements and found them lacking in this case. Accordingly, *Craven* does not compel the conclusion that the two statutes at issue in this case are in irreconcilable conflict.

Second, Welle relies on this court's opinion in *State v. Meyer*, 646 N.W.2d 900 (Minn. App. 2002). The *Meyer* opinion, which is based substantially on the *Craven* opinion, also is distinguishable on the ground that the court did not consider whether, in all conceivable circumstances, conduct that violates the more-specific statute also would violate the more-general statute. See *id.* at 902-04; see also *Chryst*, 320 N.W.2d at 722-23. Accordingly, *Meyer* also does not compel the conclusion that the two statutes at issue in this case are in irreconcilable conflict.

Third, Welle relies on this court's opinion in *State v. Olson*, 459 N.W.2d 711 (Minn. App. 1990), review denied (Minn. Oct. 25, 1990). In *Olson*, the appellant argued that the district court erred by instructing the jury on both a charge of second-degree murder and a charge of first-degree manslaughter. *Id.* at 715-16. We rejected the appellant's argument for two reasons. First, the appellant did not request an instruction on only one charge. *Id.*

at 716. Second, the appellant was found guilty only of the lesser charge, which meant that he was not prejudiced by the district court's instructions on both charges and actually may have benefitted from instructions on both charges. *Id.* In any event, we did not seek to determine whether the two statutes were in irreconcilable conflict, as contemplated by *Kalvig* and *Chryst*. *See id.*; *see also Chryst*, 320 N.W.2d at 722-23; *Kalvig*, 296 Minn. at 398, 209 N.W.2d at 680. Thus, *Olson* has no application to the present appeal.

In sum, the two statutes that Welle violated are not in irreconcilable conflict, and he was not entitled to be convicted of and sentenced on the less-serious and more-specific offense. Thus, the post-conviction court did not err by denying Welle's petition for post-conviction relief.

Affirmed.