MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

STEVEN M. BURKHALTER,

Appellant.

DOCKET NUMBER WD82489

Date: August 31, 2021

Appeal from:

Jackson County Circuit Court
The Honorable Charles H. McKenzie, Judge

Appellate Judges:

Division One: Lisa White Hardwick, P.J., and Alok Ahuja and Anthony Rex Gabbert, JJ.

Attorneys:

Justin Ortiz, Kansas City, MO, for appellant

Kristen S. Johnson, Jefferson City, MO, for respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,
v.
STEVEN M. BURKHALTER, Appellant.

WD82489 Jackson County

Before Division One Judges: Lisa White Hardwick, P.J., and Alok Ahuja and Anthony Rex Gabbert, JJ.

Steven Burkhalter was accused of first-degree rape and first-degree sodomy for engaging in vaginal and anal intercourse with his victim in August 2015, at a time when the victim was incapable of consenting. Burkhalter waived his right to a jury trial, and was tried by the court. At the conclusion of the evidence, Burkhalter argued that, with respect to the charge of first-degree sodomy, the court should consider convicting him of the lesser-included offense of first-degree sexual abuse, which was subject to a lower range of punishment. The circuit court refused to consider first-degree sexual abuse as a lesser-included offense. The court convicted Burkhalter of both charged offenses: first-degree rape; and first-degree sodomy. The court sentenced him to a total term of fifteen years' imprisonment.

Burkhalter appeals.

AFFIRMED.

Division One holds:

Under § 556.046.2, RSMo, a fact-finder is required to consider convicting a defendant of an "included" offense if "there is a basis for a verdict acquitting the [defendant] of the offense charged and convicting him of the included offense." This standard is not satisfied where an "included" offense would be established by proof of *the same facts* which would establish the charged offense. Where the same facts would establish the commission of two different statutory offenses, it is for the prosecutor – not a fact-finder – to choose the offense(s) for which the defendant will be prosecuted.

In this case, the prosecutor argued to the court that first-degree sodomy was proven because Burkhalter had penetrated the Victim's anus with his penis.

However, under the relevant statutes, the State was required to prove only that Burkhalter engaged in "deviate sexual intercourse" with the victim, by committing an act involving his genitals and the victim's anus. Merely touching the victim's anus with Burkhalter's penis would be enough; no penetration was required. On the other hand, first-degree sexual abuse would have been established by proof that Burkhalter touched the Victim's anus. In the circumstances of this case, proof of the same act would establish both offenses. Therefore, first-degree sexual abuse was not a *lesser*-included offense of first-degree sodomy. In its role as fact-finder, the circuit court was not required to consider first-degree sexual abuse before convicting Burkhalter of first-degree sodomy.

Opinion by: Alok Ahuja, Judge August 31, 2021

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