COURT OF APPEALS
DECISION
DATED AND RELEASED

November 21, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-1073-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD L. MUNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed*.

Before Eich, C.J., Roggensack and Deininger, JJ.

DEININGER, J. Richard Munson appeals from a judgment convicting him of one count of first-degree sexual assault of a child and seven counts of second-degree sexual assault of a child. He claims that: 1) he was improperly denied access to exculpatory evidence; 2) the trial court allowed improper examination of witnesses by the State; 3) the trial court improperly joined all eight charges against him; and 4) the charges against him were

multiplicitous, in violation of the Double Jeopardy Clause. We reject the arguments and affirm the judgment.

BACKGROUND

Munson was charged with one count of first-degree sexual assault of a child under the age of thirteen, based on an incident of sexual intercourse with M.J., an eleven-year-old boy. He was also charged with seven counts of second-degree sexual assault of a child under the age of sixteen based on a series of sexual contacts and acts of intercourse with D.E., a fifteen-year-old boy. A jury found him guilty of all eight counts.

Prior to trial, Munson filed a motion to sever the first-degree charge from the seven second-degree charges, a motion to obtain D.E.'s and M.J.'s school and social services records, and a motion in limine to prevent the State from introducing evidence concerning Munson's alleged past involvement in satanic activities.

The trial court denied the motion to sever. The court conducted an *in camera* review of the victims' school and social services records and concluded that they contained no evidence helpful to Munson. The trial court therefore denied Munson's motion to obtain access to the records, but ruled that Munson could ask the victims at trial if they were on juvenile supervision and whether any promises had been made by police or social services in exchange for their testimony. The trial court substantially granted Munson's motion *in limine* by prohibiting the State from referring to satanism or a curse, although the court allowed the State to ask the victims if they were afraid of Munson.

Other facts will be discussed below.

ANALYSIS

Exculpatory Evidence

Munson argues that by denying him access to the victims' school and social service records, the trial court violated his right to discover exculpatory evidence. Under the due process clause, a defendant has a right to discover evidence which is exculpatory on the issues of guilt or punishment. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963); *see* ***State v. Shiffra***, 175 Wis.2d 600, 605, 499 N.W.2d 719, 721 (Ct. App. 1993). However, the defendant's right to exculpatory evidence does not entitle him or her to search the State's entire file. ***United States v. Bagley***, 473 U.S. 667, 675 (1985). Where, as here, the defendant seeks discovery of information that is confidential under statute,[1] the defendant is entitled to an *in camera* review by the trial court of the material sought. *See* ***Shiffra***, 175 Wis.2d at 605, 499 N.W.2d at 721. The *in camera* review of evidence "achieves the proper balance between the defendant's rights and the state's interests in protection of its citizens." ***Id.***

Munson has not included copies of the confidential materials in the appellate record. Instead, he argues that because the records "*may have* revealed issues of questionable veracity, of unfound [sic] accusations made in the past, of troubling episodes and [of] behavior which may apply to the credibility of the witnesses," we should conclude that his due process rights were violated. (Emphasis added).

A defendant appealing a criminal conviction has the duty to incorporate material evidence into the appellate record. *See* ***State v. Dietzen***, 164 Wis.2d 205, 212, 474 N.W.2d 753, 756 (Ct. App. 1991). To prevail on appeal, Munson must demonstrate that the records were material to his defense. ***State v. Mainiero***, 189 Wis.2d 80, 87, 525 N.W.2d 304, 307 (Ct. App. 1994). We cannot review the constitutionality of the trial court's decision without the materials which formed the basis for that decision. *See* ***State v. Rushing***, 197 Wis.2d 631, 643 n.3, 541 N.W.2d 155, 160 (Ct. App. 1995) (appellate review is limited to those portions of the record available to the reviewing court); *see also* § 809.15, STATS., (either party may move to supplement the trial court record on appeal). Further, Munson's speculations regarding the possible effect of the records are insufficient to demonstrate that the records contained information material to his defense. *See, e.g.*, ***State v. Davis***, 95 Wis.2d 55, 60, 288 N.W.2d 870, 872 (Ct. App. 1980) ("[s]elf-serving assertions by a defendant based on mere speculation cannot serve as the grounds for a finding of actual prejudice.").

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[1] *See* § 48.78, STATS., (juvenile records); § 118.125, STATS., (pupil records).

Munson next argues that by denying him access to the victims' school and social service records, the trial court violated his Sixth Amendment right to confront his accusers. The right to effective cross-examination is guaranteed by the Confrontation Clause. ***Davis v. Alaska***, 415 U.S. 308, 315 (1974). However, the right is not unlimited. It does "not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." ***Pennsylvania v. Ritchie***, 480 U.S. 39, 53 (1987) (plurality opinion). Again, without the records, we cannot review Munson's claim of error.

Munson also argues that he was denied his right to cross-examination because the investigating officers and social worker did not tape-record their interviews with D.E. He claims that a recording may have shown evidence that D.E. was motivated to fabricate or exaggerate his allegations in order to win favorable treatment from authorities regarding his supervision. Munson failed to raise this objection at the trial. "Without an objection, even an error based upon an alleged violation of a constitutional right may be waived." ***State v. Damon***, 140 Wis.2d 297, 300, 409 N.W.2d 444, 446 (Ct. App. 1987). We therefore decline to review the issue.

State's Questions on Redirect Examination

Munson argues that the trial court improperly allowed the State to ask D.E. and M.J. at trial if they were afraid of Munson. Munson challenges the victims' responses on the basis of relevance under § 904.02, STATS., and prejudice under § 904.03, STATS.[2] At trial, Munson cross-examined D.E. regarding his initial denial to investigators of any sexual contact with Munson. The State sought to introduce evidence that D.E. and M.J. believed that Munson had engaged in satanic activities in the past and feared that he was capable of putting a curse on them. The trial court ruled that the State could ask the victims if they were afraid of Munson, but did not allow the State to delve into

[2] In his brief, Munson also makes a general argument, without citation to authority, that the State's questions violated his constitutional right to a fair trial. We decline to review the issue, however. Arguments unsupported by references to legal authority will not be considered. ***State v. Martinez***, 198 Wis.2d 222, 234 n.7, 542 N.W.2d 215, 221 (Ct. App. 1995).

Munson's alleged satanic practices, on the basis that such questions would be unfairly prejudicial under § 904.03.

The relevance and possible prejudicial effect of evidence under §§ 904.02 and 904.03, STATS., is a discretionary determination by the trial court. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982).[3] We must uphold the trial court's determination where the trial court has considered the facts of the case and reasoned its way to a conclusion that is one a reasonable judge could reach and is consistent with applicable law. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991).

Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than without the evidence. Section 904.01, STATS. At issue was whether the victims' initial denials of sexual contact, as opposed to their later claims, were truthful. Evidence that the victims were afraid of Munson tends to make it more likely that the initial denials were not truthful than without the testimony.

Even relevant evidence, however, is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. Section 904.03, STATS. Evidence is not unfairly prejudicial simply because it is adverse to a party; rather, evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *See* ***State v. DeSantis***, 155 Wis.2d 774, 792, 456 N.W.2d 600, 608 (1990). The trial court carefully circumscribed the State's questions and the witnesses' answers to avoid any mention of curses or satanic activities. Thus the State introduced evidence relevant to its contention that D.E.'s initial denial was made out of fear without referring to evidence which may have allowed the jury to make its determination on an improper basis. We conclude that the trial court's decision was a reasonable one and thus a proper exercise of discretion.

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[3] Munson suggests that we review the propriety of the State's questions de novo, under the standard of review for "constitutional facts." *See* ***State v. Griffin***, 131 Wis.2d 41, 62, 388 N.W.2d 535, 543 (1986), *aff'd*, 483 U.S. 868 (1987). However, Munson has not raised a constitutional issue; he has raised an evidentiary one. The de novo standard does not apply.

Severance

Munson argues that the trial court improperly denied his motion to sever the seven second-degree charges involving D.E. from the one first-degree charge involving M.J.

A motion for severance is addressed to the trial court's discretion. ***State v. Hoffman***, 106 Wis.2d 185, 209, 316 N.W.2d 143, 157 (1982).[4] We will reverse the trial court's determination only where the defendant can establish that the joinder caused "`substantial prejudice.'" ***State v. Locke***, 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993) (quoted source omitted).[5]

Generally, where evidence on the charges would be admissible in separate trials, the risk of prejudice will not be significant. ***State v. Bettinger***, 100 Wis.2d 691, 697, 303 N.W.2d 585, 588 (1981). Thus, courts have recognized that the test for prejudicial joinder parallels the analysis of the admissibility of other acts evidence under ***Whitty v. State***, 34 Wis.2d 278, 149 N.W.2d 557 (1967), *cert. denied*, 390 U.S. 959 (1968). *See* ***Locke***, 177 Wis.2d at 597, 502 N.W.2d at 894.

The trial court concluded that evidence of sexual contact with either boy would be admissible at a trial involving the other. Evidence of other acts of misconduct may be offered to show, among other things, motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake of accident. Section 904.04(2), STATS.; ***State v. Plymesser***, 172 Wis.2d

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[4] Munson again argues on appeal that the standard of review is the de novo standard applied to "constitutional facts." *See supra*, n.2. Munson has not referred us to any legal authority indicating that a severance determination implicates constitutional facts. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments unsupported by legal authority will not be considered).

[5] The first step in reviewing joinder is determining whether the charges were properly joined under § 971.12(1), STATS. ***State v. Locke***, 177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993). Munson does not claim that the charges were improperly joined initially. We thus address only the second step in reviewing joinder, determining whether prejudice would result from a trial on the offenses as joined. Section 971.12(3); *see* ***id.*** at 597, 502 N.W.2d at 894.

583, 591, 493 N.W.2d 367, 371 (1992). In ***Locke,*** 177 Wis.2d at 595-96, 502 N.W.2d at 894, the joined counts also involved sexual assaults against different child victims, occurring two years apart. We held there that evidence of "each episode was highly probative of Locke's intent, as well as a scheme or plan in the other episode." ***Locke***, 177 Wis.2d at 599, 502 N.W.2d at 895. Here, where all of the assaults against D.E. took place within one year of the assault against M.J., we cannot conclude the trial court's conclusion of mutual admissibility was unreasonable.

Evidence otherwise admissible under § 904.04(2), STATS., is still inadmissible, however, if the prejudicial effect of the evidence substantially outweighs the probative value of the evidence.[6] Section 904.03, STATS.; ***State v. Friedrich***, 135 Wis.2d 1, 19, 398 N.W.2d 763, 771 (1987). At the motion hearing Munson objected to the denial of severance, arguing that had the charges been severed, he would have objected to the testimony of D.E. in the trial involving M.J. Munson did not state the basis for his claim of prejudice or present any arguments that the prejudicial effect of the evidence outweighed its probative value under § 904.03. As we have already noted, the evidence of the assaults against each of the boys was highly probative on relevant issues common to both. While this evidence of "other acts" was certainly adverse to Munson, we cannot say that it tended unduly to suggest guilt "on an improper basis." *See* ***State v. DeSantis***, 155 Wis.2d 774, 792, 456 N.W.2d 600, 608 (1990).

We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). We conclude that the trial court properly exercised its discretion in denying the motion to sever.

Double Jeopardy

[6] Munson argues that the trial court erroneously exercised its discretion by not stating on the record that the potential prejudice to Munson was outweighed by the public interest served by the joinder under § 971.12(3). *See* ***State v. Hoffman***, 106 Wis.2d 185, 209, 316 N.W.2d 143, 157 (1982). In denying the motion to sever, however, the trial court implicitly found that the potential prejudice did not outweigh the public interest in joinder. *See* ***State v. Locke***, 177 Wis.2d 590, 598, 502 N.W.2d 891, 895 (Ct. App. 1993).

Finally, Munson contends that the seven convictions and sentences relating to D.E. were multiplicitous and thus constituted double jeopardy. We review a claim of multiplicity de novo, owing no deference to the trial court's conclusions of law. ***State v. Bergeron***, 162 Wis.2d 521, 534, 470 N.W.2d 322, 327 (Ct. App. 1991). There is a two-pronged test for multiplicity: the first is "whether the charges are identical in law and fact;" the second is "the legislative intent as to the allowable unit of prosecution under the statute in question." ***Id***. The State concedes that the seven counts of second-degree sexual assault are identical in law. Munson claims that the counts were also identical in fact.

Charges are not identical in fact if each count requires proof of a significant evidentiary fact not required or pertinent to proof of the other counts. ***Id.*** at 534, 470 N.W.2d at 327. Each separate volitional act is a basis for a separate charge, ***id.*** at 535, 470 N.W.2d at 327, and separate punishment for each is appropriate. ***Id.*** at 536, 470 N.W.2d at 328.

The complaint charged Munson with seven counts of sexual assault of D.E. Four of the counts alleged that sexual contact or intercourse occurred during four different time periods. The remaining three counts alleged that sexual contact or intercourse occurred sometime between December 15, 1993, and January 15, 1994, with one of the three counts more specifically alleging an incident of intercourse between December 20 and 25, 1993. Each of the three counts alleged a different type of act: anal intercourse, oral intercourse, genital touching. Each count, therefore, required proof of a significant evidentiary fact not required for the other counts.

Munson contends that because D.E.'s testimony was not credible, there was insufficient evidence for a jury to find him guilty for seven separate acts. D.E. testified to seven separate instances of sexual contact or intercourse with Munson. Munson cross-examined D.E. extensively regarding his initial denial of sexual contact with Munson as well as the extent to which his memory may have been unclear regarding the dates and circumstances of those contacts.

The jury is "the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence." ***State v. Webster***, 196

Wis.2d 308, 320, 538 N.W.2d 810, 815 (Ct. App. 1995). We will not second-guess a jury's findings unless the evidence, when viewed most favorably to the verdict, is so lacking in probative value that no jury could find guilt beyond a reasonable doubt. ***Id.*** at 320, 538 N.W.2d at 814. D.E.'s testimony, if believed by the jury, was sufficient to allow a jury to find that Munson engaged in each of the seven incidents of sexual contact charged.

The second prong of the multiplicity test concerns legislative intent as to the allowable unit of prosecution under the statute in question. ***Bergeron***, 162 Wis.2d at 534, 470 N.W.2d at 327. We conclude that the separate volitional acts of sexual contact or sexual intercourse are separately prosecutable and separately punishable. *See* ***id.*** at 535, 536, 470 N.W.2d at 327, 328; ***Harrell v. State***, 88 Wis.2d 546, 564, 277 N.W.2d 462, 469 (Ct. App. 1979). Munson offers no argument to the contrary.

We therefore conclude that the seven charges involving D.E. and the resulting convictions were not multiplicitous.[7]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] Munson also argues that the existence of Chapter 980, STATS., which provides for the involuntary commitment of convicted sex-offenders after a prison sentence who are found to be sexually violent persons, § 980.04 to 980.06, STATS., violates the Double Jeopardy Clause by subjecting Munson to increased jeopardy for his multiple convictions. Unless or until Munson becomes subject to Chapter 980 proceedings, he lacks standing to raise the issue. Moreover, the Wisconsin Supreme Court has held that Chapter 980 does not violate the Double Jeopardy Clause. ***State v. Carpenter***, 197 Wis.2d 252, 272, 541 N.W.2d 105, 113 (1995), *petition for cert. filed*, No.95-8131 (U.S. Mar. 06, 1996).