COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 6, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3069-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

COLIN N. GELFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUSAN E. BISCHEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Colin Gelford appeals a judgment sentencing him to consecutive twenty-year prison terms for two counts of sexually assaulting a child. He argues that: (1) the consecutive sentences expose him to double jeopardy because the two sexual assaults were part of a single occurrence; (2) the trial court improperly considered Gelford's membership in the National Man/Boy

Love Association (NAMBLA); (3) the court improperly considered uncharged and unproven allegations of other sexual assaults; and (4) Gelford's trial counsel was ineffective for failing to challenge the admissibility of physical evidence and for failing to negotiate a more favorable plea agreement. We conclude that none of these issues was properly preserved for appeal. In addition, although the current record is insufficient to allow review of the fourth issue, the first three issues have no merit.

Gelford's first three issues are raised for the first time on appeal. He did not object to consideration of his membership in NAMBLA or other uncharged sexual assaults of children or to the imposition of consecutive sentences. He also failed to raise these issues by postconviction motion. These issues are therefore not properly before this court. *See* ***State v. Meyer,*** 150 Wis.2d 603, 606, 442 N.W.2d 483, 485 (Ct. App. 1989). Gelford argues that his trial attorney's failure to preserve these issues underscores the deficiency of her performance. Ineffective assistance of trial counsel cannot be raised for the first time on appeal. Rather, the issue must be raised in a postconviction motion and hearing at which trial counsel must have the opportunity to explain her decisions. *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

Even though the first three issues were not properly preserved for appeal, we will review the merits of those issues because the record is sufficient for this court to decide the merits of these issues. We conclude that none of these issues provides a basis for relief.

Gelford's consecutive sentences did not violate his right against double jeopardy. The two counts to which he pled no contest involved a child

touching his penis and him touching the child's buttocks. Gelford photographed these activities, establishing that they were separate acts. Although the incidents may have been close in time, they are sufficiently different in circumstances to constitute separate offenses. *See, e.g.,* ***Harrell v. State,*** 88 Wis.2d 546, 572, 277 N.W.2d 462, 472-73 (1979). Gelford's double jeopardy rights are not implicated because he is not being punished twice for a single offense.

The trial court properly considered Gelford's membership in NAMBLA at sentencing. The court properly noted that Gelford had the right to join this organization which supports a reduction in the legal age of sexual consent. Nonetheless, his association with this group, coming only a few months after his discharge from a sexual offender treatment program, raises grave concerns about the sincerity of Gelford's remorse, his desire for treatment and his rehabilitative prospects. While people have the right to join political associations and lobby for a change in the laws, the trial court is not precluded from considering these facts when determining the likelihood that a defendant will be rehabilitated in prison. The trial court properly considered Gelford's membership in NAMBLA as a matter relevant to his character and sufficiently linked to his crimes. *See* ***State v. J.E.B.,*** 161 Wis.2d 655, 664-66, 469 N.W.2d 192, 196-97 (Ct. App. 1991). "The constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." ***Dawson v. Delaware,*** 503 U.S. 159, 164-65 (1992).

The trial court properly considered other uncharged sexual assaults committed by Gelford. *See* ***State v. Speer,*** 176 Wis.2d 1101, 1131, 501 N.W.2d 429, 440 (1993). The other sexual activity with children was established by files found in Gelford's computer and establish a pattern of his sexual activity. Cases

cited by Gelford relating to the use of "other crimes evidence" are inapposite. At sentencing, the court is not limited to considering acts that would be admissible at trial under § 904.04(2), STATS.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.