COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3421-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAYMOND D. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

SNYDER, P.J. Raymond D. Wilson appeals from a judgment of conviction for three counts of first-degree sexual assault of a child and an order denying his motion for postconviction relief. He claims that the trial court erred because: (1) the three charges were multiplicitous; (2) his confession on one of the counts was uncorroborated, thus there was not enough evidence to sustain that particular conviction; and (3) the trial court misused its discretion in refusing to

appoint the psychologist the defense recommended as an independent court expert. We conclude that there was no error, and consequently affirm.

Wilson was charged following an incident in December 1993. Wilson and two friends were guests at the residence of the mother of the victim. While Wilson and one friend were in the kitchen of the residence, Wilson noticed a young girl sleeping in an adjacent bedroom.[1] Wilson went into the room and sat on the bed, awakening the victim. He told her to be quiet and then forcibly removed her clothing, ripping her underwear. He undressed, laid on top of her and tried to kiss her. He felt her "private parts," which he specified as her breasts and vaginal area. He performed cunnilingus and then attempted vaginal-penile intercourse. During the attack, the girl tried to resist and attempted to kick Wilson. He threatened to beat her if she did not "knock it off."

The mother of the girl noticed that Wilson's companion, who had been in the kitchen with him, had abruptly walked out the front door. The mother decided to check on Wilson's whereabouts. When she entered her daughter's bedroom and turned on the light, she saw Wilson, naked, jump up from the bed. He grabbed some of his clothes and fled. The police were called and the girl was taken to the hospital. Approximately a week later the girl found Wilson's identification and a condom in her bedroom.

The police left a message for Wilson with his roommate and Wilson later voluntarily appeared at the police department. He was given ***Miranda*** warnings and he waived his rights by signing a waiver form. He then gave a

[1] The victim was twelve years old at the time of the assault.

statement in which he confessed to essentially the version of the assault the girl had provided and an affidavit which specifically detailed the crime.[2]

Wilson was charged with three counts of first-degree sexual assault of a child in violation of § 948.02(1), STATS. Count one specified that he "[p]laced his hands on the 'private parts' of [the victim]"; count two specified that he "[u]sed his tongue to lick the 'private parts' of [the victim]"; and count three specified that he "[p]laced his penis partially in the vagina of [the victim]."

Upon motion by defense counsel, Wilson was evaluated to determine whether he was competent to stand trial.[3] After being examined at the Winnebago Mental Health Institution, Wilson was found competent to proceed. After a trial, the jury returned guilty verdicts on all three counts, as well as a verdict that at the time the crime was committed, Wilson did not have a mental defect. He was sentenced to thirty years in prison.[4] After the denial of his motion for postconviction relief, he appeals.

Wilson contends that the charging of three separate counts is multiplicitous because the acts were all part of one assault and took place over a short period of time. Second, he contends that although he confessed in his

[2] Wilson's affidavit included the following: "I stripped the girl, and I started to feel her private parts"; "While I was in the room, I ate the girl up. This means I put my tongue on her private parts"; and "I attempted to have intercourse with the girl. I did not have an erection, and I was unable to get it in. I did not put my penis all the way into her."

[3] Defense counsel argued that Wilson "has exhibited an inability to both comprehend the present proceedings and to actively and intelligently participate in and assist his attorney in the preparation of a meaningful defense" and that his attempts to conference with Wilson resulted in "the defendant remaining mute throughout the entire conference."

[4] Wilson was sentenced on count one to twenty years, on count two to ten years to run consecutive to count one, and on count three to twenty years to run concurrent to counts one and two.

statement to police to touching the private parts of the victim, at trial the victim testified that he did not touch her and thus his confession was uncorroborated.[5] Therefore, he asserts that there was insufficient evidence for the jury to convict him on that count and the trial court should have vacated that conviction as a matter of law. Finally, he alleges that the trial court misused its discretion in refusing to appoint the doctor that the defense requested as an independent court expert. We address each of his arguments in turn.

Multiple convictions for the same offense violate the double jeopardy protections of the state and federal constitutions. *See* ***State v. Selmon,*** 175 Wis.2d 155, 161, 498 N.W.2d 876, 878 (Ct. App. 1993). Whether charges are multiplicitous is a question of constitutional fact which the court of appeals reviews independently. *See* ***id.***

Multiplicity is defined as "the charging of a single offense in more than one count." ***Harrell v. State***, 88 Wis.2d 546, 555, 277 N.W.2d 462, 464-65 (Ct. App. 1979). A two-pronged test is used to analyze questions of multiplicity. *See* ***Selmon,*** 175 Wis.2d at 161, 498 N.W.2d at 878.[6] This test is clearly outlined in ***State v. Kruzycki***, 192 Wis.2d 509, 521-22, 531 N.W.2d 429, 434 (Ct. App. 1995):

> When the claim is made that a single offense has been wrongfully divided into multiple offenses, the first question is whether the offenses are identical in law, that is, whether they involve one section of the criminal code, and whether they are identical in fact. Even though the offenses are "identical and contained within the same statutory section,

[5] The victim initially testified that she could not remember Wilson touching her with his hands; in response to further questioning, she testified that he had not used his hands.

[6] This test was adopted by the supreme court in ***State v. Sauceda***, 168 Wis.2d 486, 493-95, 485 N.W.2d 1, 4-5 (1992).

> the factual circumstances may be separated in time or significantly different in nature to justify multiple punishments." The second question is whether the legislature intended to allow multiple charges. [Quoted source omitted.] [Citations omitted.]

Wilson was charged in each count with first-degree sexual assault in violation of § 948.02(1), STATS. Each charge stemmed from a separate act: touching the victim's private parts with his hands, performing cunnilingus and the penile-vaginal contact.

The three counts of first-degree sexual assault are identical in law. The question of whether the charges allege one offense or multiple offenses will be determined by whether they are identical in fact. *See* ***State v. Bergeron,*** 162 Wis.2d 521, 534, 470 N.W.2d 322, 327 (Ct. App. 1991). "[U]nder Wisconsin law the allegation of substitute facts, all of which furnish the same legal element of the crime, does not result in multiplicitous charges if these facts are either separated in time or are of a significantly different nature in fact." ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980). There the supreme court concluded that when multiple counts are brought under the same charge, the question is whether the elements are sufficiently different in fact to demonstrate that a separate crime has been committed. *See* ***id.*** "[B]y embarking on a course of a different type of intrusion on the body of a victim, a different legislatively protected interest is invaded." ***Id.*** at 36, 291 N.W.2d at 806.

In applying this test to the case at bar, it is clear that the facts necessary to prove the charges were significantly different. The three counts were based upon discrete acts which represented separate intrusions on the victim. Each involved a different act on the part of the defendant and a separate violation of the victim's person. In fact, when questioned by a police investigator about whether he had had sexual intercourse with the victim after he fondled her, Wilson

told the investigator that "he thought about it and decided not to at that point." He also admitted in his sworn statement that after performing cunnilingus he then "attempted to have intercourse with the girl." We are convinced that under the facts of the assault the three charges were different in fact, each representing a "different type of intrusion on the body of [the] victim." *See* ***id.***

Wilson disputes this analysis and relies exclusively on ***State v. Hirsch***, 140 Wis.2d 468, 410 N.W.2d 638 (Ct. App. 1987), to support his claim of multiplicity. In that case we concluded that charging three counts of sexual assault for the defendant's act of moving his hand from the victim's vagina to her anus and back to her vagina within a period of a few minutes was multiplicitous. *See* ***id.*** at 470, 410 N.W.2d at 639. We concluded that the acts were part of a single episode, that they were "extremely similar in nature and character" and "[t]here was apparently little, if any, lapse of time between the alleged acts." ***Id.*** at 474-75, 410 N.W.2d at 641.

Hirsch is not controlling under the facts of this case. As was noted in ***Kruzycki,*** the ***Hirsch*** analysis does not apply in cases involving separate and distinctly different volitional acts. *See* ***Kruzycki***, 192 Wis.2d at 523, 531 N.W.2d at 434. Wilson admitted during his interrogation that after fondling and touching the victim's private parts, he thought about having intercourse with her. He next performed cunnilingus. After that act, he attempted penile-vaginal intercourse. Wilson's recitation of the attack evinces his knowledge that he was performing separate acts involving separate parts of the victim's body and that each act represented a separate course of conduct. We are unpersuaded by Wilson's attempt to denominate the ***Hirsch*** analysis as controlling.

We now turn to the second part of the test for multiplicity—whether the legislature intended cumulative punishments. The court in ***Eisch*** considered this same question with regard to acts falling within a single chargeable category. The court concluded that "as a matter of common sense, the legislative history reasonably demonstrates that these offenses may be separately charged and that to do so is not unfair or prejudicial to an offender." ***Eisch,*** 96 Wis.2d at 38-39, 291 N.W.2d at 807. The court also stated:

> Initially, it should be noted that the acts of cunnilingus, fellatio, anal intercourse, and intrusion of an object into a genital opening are separately enumerated …. It is apparent, therefore, that although the legislature concluded that these different acts were to be deemed to be the same in law, they were so different in fact that a specific incorporation in the definition of sexual intercourse was required to make them applicable to the substantive crime …. This legislative manifestation is, of course, no more than a recognition given to facts and circumstances as they are commonly known to exist. Each of these methods of bodily intrusion is different in nature and character.

Id. at 34-35, 291 N.W.2d at 805.

We conclude that the legislative intent is clear and that the legislature intended to permit separate charges for acts of fondling, cunnilingus and vaginal-penile contact. The charges are not multiplicitous and we affirm the trial court.

Second, Wilson asserts that his confession to touching the victim's private parts with his hands was uncorroborated, and consequently, there was not sufficient evidence to support his conviction on that count. The issue raised is whether, as a matter of law, the trial court should have vacated the conviction as to this count because the State failed to meet its burden of proof. This presents a question of law and we will review it de novo. "An appellate court decides

questions of law independently without deference to the lower court's decision." ***State v. Big John***, 146 Wis.2d 741, 748, 432 N.W.2d 576, 579 (1988).

Wilson and the State agree as to the rule of law which is controlling on this issue. The rule is:

> [A]s to the need for corroborating evidence, all elements of the crime do not have to be proved independently of an accused's confession—it is enough that there be some corroboration of the confession in order to sustain the conviction. As [the supreme court] has put it, '... The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.'

State v. Verhasselt, 83 Wis.2d 647, 662, 266 N.W.2d 342, 349 (1978) (citations omitted) (quoted source omitted). The rationale for the requirement is that corroboration is required in order to assure confidence in the truth of the confession. *See* ***Holt v. State***, 17 Wis.2d 468, 480, 117 N.W.2d 626, 633 (1962).

Wilson argues that because the victim initially testified that she could not remember whether Wilson touched her breasts or her vaginal area with his hands, and then denied that either occurred, there was no evidence beyond his confession that the touching occurred, and thus his conviction on that count must be vacated.[7] We view the evidence as a whole to determine whether there was sufficient corroboration to meet the ***Verhasselt*** test.

[7] In support of this argument, Wilson presents a hypothetical: "To demonstrate the matter more dramatically, suppose the evidence at trial was changed by the absence of defendant's admission to touching the victim with his hands. Is there any possibility that he could still validly be convicted of the count in question?" However, we will not view the fondling conviction in a vacuum. Wilson's confession was corroborated by the victim's testimony and the physical evidence in all other respects. The fact that the victim could not testify as to this particular intrusion in light of the other violations to her person is not surprising and does not cause us to lack confidence in the veracity of Wilson's confession. *See* ***Holt v. State,*** 17 Wis.2d 468, 480, 117 N.W.2d 626, 633 (1962).

In this case, the testimony of the victim and the statement given by Wilson to the police are closely aligned. Wilson said the victim was sleeping when he entered the room and that he awakened her; she said she woke up and found a man on her bed. He said he stripped her; she said he ripped her bra and underwear off. They both said he undressed. They both said he performed cunnilingus. They both said he attempted to put his penis into her vagina. They both said that when the victim's mother entered the room, Wilson grabbed some of his clothes and fled. Additionally, other aspects of Wilson's confession were corroborated by the girl's mother, physical evidence and the testimony of Wilson's friend.

We conclude that this evidence, taken as a whole, is enough to satisfy the ***Verhasselt*** test and the rationale behind it. While the victim could not recall whether Wilson used his hands and then denied that he had, she also had no recollection of another aspect of the attack.[8] The twelve-year-old victim was suddenly awakened by a strange man in her bedroom, and it is not surprising that she was unable to recount with specificity each part of the attack. Wilson's confession was corroborated by the victim's recollections on many significant facts, the standard required by the ***Verhasselt*** test. The trial court found that there

[8] When the victim was examined at the hospital, scratches on her back were noted. Both the victim and her mother testified that she did not have those scratches when she went to bed before the attack, yet she had no recollection of Wilson scratching her.

was "plenty of evidence in the record" to support the verdict, and we reach the same conclusion.[9]

Finally, Wilson claims that the trial court misused its discretion when it refused to appoint the psychologist suggested by the defense as the court's expert.[10] When a circuit court's action falls within its discretionary authority, that action will be upheld absent an erroneous exercise of discretion. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis.2d 646, 656, 511 N.W.2d 879, 883 (1994). We therefore apply that standard.

The statute that is at the heart of this issue is § 971.16(2), STATS., which provides in relevant part:

> **Examination of defendant.**
>
> ....
>
> **(2)** If the defendant has entered a plea of not guilty by reason of mental disease or defect or there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, *the court may appoint at least one physician or at least one psychologist,* but not more than 3 physicians or psychologists or

[9] Other jurisdictions which follow a rule of law similar to the ***State v. Verhasselt***, 83 Wis.2d 647, 266 N.W.2d 342 (1978), test have addressed comparable situations with analogous results. *See generally* ***Drumbarger v. State,*** 716 P.2d 6, 12 (Alaska Ct. App. 1986) (corroborating details of one assault enough to satisfy requirement applied to confession to other assaults of similar nature to same victim); ***Kirksey v. State,*** 339 S.E.2d 401, 402 (Ga. Ct. App. 1986) (victim's testimony corresponded with confession in several respects and found to be sufficient corroboration); ***People v. Stevens,*** 544 N.E.2d 1208, 1220 (Ill. App. Ct. 1989) (no recollection by victim of actual sexual assault, but memory of being grabbed and screaming coupled with torn nightgown and statements to daughter and physician sufficient to corroborate confession); and ***People v. Fenton,*** 563 N.Y.S.2d 522, 523 (N.Y. App. Div. 1990) (victim had no recollection of sexual assault because she was knocked unconscious, yet her discovery upon awakening that her pants were down, her underwear was torn and she had pain in her vagina was sufficient to corroborate confession).

[10] It is undisputed by the parties that the trial court had discretion in appointing one or more court experts for the responsibility phase of the trial.

> combination thereof, *to examine the defendant and to testify at the trial....* The fact that the physician or psychologist has been appointed by the court shall be made known to the jury and the physician or psychologist shall be subject to cross-examination by both parties.[11] [Emphasis added.]

It is within the trial court's discretion to decide whether a court expert will be appointed. *See* ***State v. Burdick***, 166 Wis.2d 785, 792, 480 N.W.2d 528, 531 (Ct. App. 1992). The purpose behind the statutory grant of discretion was articulated in ***Jessner v. State***, 202 Wis. 184, 186-87, 231 N.W. 634, 636 (1930), in which the court stated:

> [The statute's] enactment was in response to a well-settled conviction that, in criminal cases at least, where the interests of society were involved, there should be some technical evidence from unprejudiced and reliable sources.... To secure the reliable and unprejudiced opinions of the ablest experts in such cases ... the Board of Circuit Judges sponsored the enactment of this statute.

While conceding that the appointment of a particular expert is a matter of trial court discretion, Wilson argues that the trial court erroneously exercised that discretion when it rejected his request that it appoint Dr. Paul Voelkel. Wilson claims that Voelkel was rejected solely because of the "personal and subjective low regard" the trial court had for him. He then submits that under ***State v. Ogden***, 199 Wis.2d 566, 573, 544 N.W.2d 574, 577 (1996), the supreme court warned that a "judge's predispositions must never be so specific or rigid so as to ignore the particular circumstances of the individual offender." Wilson contends that because the trial court stated, "I don't—this Court doesn't appoint

[11] There was some initial confusion in the trial court about whether a psychologist could be appointed at all. The statute was amended in 1991 to include psychologists as possible experts. *See* 1991 Wis. Act 39, § 3636m. The current statute, which was effective at the time of trial, is included above.

Dr. Voelkel," the court's refusal was the result of an impermissive preconceived policy and was based on personal and subjective reasons. We do not agree.

The purpose behind having court-appointed experts is to allow the court to gather evidence from "'unprejudiced and reliable sources.'" *See* ***State v. Bergenthal***, 47 Wis.2d 668, 684, 178 N.W.2d 16, 25 (1970) (quoted source omitted). The primary purpose of a court-appointed expert is to present to the jury a disinterested and impartial view of the issue involved. *See* ***id.*** Here, the trial court expressed a lack of confidence in the doctor based upon prior cases in which he had been appointed. Rather than basing its determination on subjective reasons, as Wilson claims, the trial court explained:

> I've always thought that … you get to know experts and certain experts the Court lacks a great deal of confidence in … this witness, this particular doctor was a court appointed doctor on many occasions and the results, well, I don't need to talk about that, but I think it's within the Court's province to appoint experts … and experts that it deems to be the Court's expert ought to be experts that the Court has some confidence in.

The record is devoid of any evidence that the decision was based upon anything personal or subjective; rather, the court properly exercised its discretion in refusing to appoint an expert in whom it lacked confidence.

There is another reason which was not cited to by the trial court, but which we conclude also supports the court's exercise of discretion. An appellate court may examine alternate reasons to sustain a trial court's discretionary decision. *See generally* ***Loomans v. Milwaukee Mut. Ins. Co.,*** 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). In this case, Voelkel had a prior relationship with Wilson. He had examined Wilson in 1990 to determine his competency to

stand trial on another case. The record also discloses that defense counsel described Voelkel at one point as Wilson's "treating physician."

The ***Burdick*** court concluded that the purpose of the statute is to obtain "'some evidence in the case, not bought and paid for, coming from *impartial witnesses* who owe no duty or allegiance to either side of the controversy.'" ***Burdick***, 166 Wis.2d at 792, 480 N.W.2d at 531 (quoted source omitted) (emphasis added). Voelkel was not impartial; he had previously rendered an opinion as to the mental status of Wilson and he had an ongoing relationship with him. We conclude that the trial court had two legitimate bases upon which to refuse to appoint Voelkel as an independent court expert.

In sum, we conclude that the three counts of first-degree sexual assault are not multiplicitous, that there was sufficient evidence to corroborate Wilson's confession that he had touched the victim's private parts with his hands, and that the trial court appropriately exercised its discretion in declining to name Voelkel as its court-appointed expert. The judgment of conviction and the order denying postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.