

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

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Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

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**No. 99-0489-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRIS J. JACOBS III,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Marathon County:  
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 DYKMAN, P.J. Chris J. Jacobs III appeals from a judgment convicting him of kidnapping and false imprisonment, while using a dangerous weapon, contrary to WIS. STAT. §§ 940.31(1)(b), 940.30 and 939.63(1)(a)2 and 3 (1985-86). Jacobs argues that his conviction violated the double jeopardy and due

process clauses of the United States and Wisconsin Constitutions because he had been acquitted in a murder trial based on the same set of events as his current trial. He also contends that evidence presented in his murder trial was inadmissible as other acts evidence in this case. Finally, he asserts that the trial court erred by denying him sentence credit for the time he spent in custody on the murder charges. We disagree with each argument and affirm.

## I. Background

¶2 In 1988, Jacobs was charged as a party to the crime of first-degree murder of Randy, Irene, Marie, Clarence and Helen Kunz. A jury acquitted Jacobs of all five counts. In 1993, the State charged Jacobs with the kidnapping and false imprisonment of Helen Kunz, while using a dangerous weapon, based on the same set of events that gave rise to the murder charges. Jacobs moved to dismiss, arguing that, under the issue preclusion doctrine<sup>1</sup> incorporated into the guarantee against double jeopardy in the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution, his prosecution was barred because of the murder acquittals.<sup>2</sup> The trial court denied Jacobs' motion.

¶3 In an interlocutory appeal, we affirmed the trial court's order denying Jacobs' motion. See *State v. Jacobs*, 186 Wis. 2d 219, 228, 519 N.W.2d

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<sup>1</sup> The parties use the term "collateral estoppel." However, the supreme court has adopted the term "issue preclusion" in place of "collateral estoppel." See *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

<sup>2</sup> The doctrine of issue preclusion and the constitutional protection against double jeopardy are distinct legal principles. However, in *Ashe v. Swenson*, the Supreme Court held that the rule of issue preclusion, or collateral estoppel, "is embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

746 (Ct. App. 1994). Jacobs argued that the State based its murder charges on the theory that he had been involved in kidnapping Helen Kunz, and that the jury found that he had not kidnapped her when it acquitted him. *See id.* at 225. We acknowledged that the doctrine of issue preclusion embodied in the constitutional guarantee against double jeopardy “provides ‘that when a[n] issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’” *Id.* at 225 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). However, we explained that “[t]he burden is ‘on the defendant to demonstrate that the issue whose relitigation he [or she] seeks to foreclose was actually decided in the first proceeding.’” *Id.* at 226 (quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990)). We concluded that Jacobs had not demonstrated that the jury found that he had not abducted Helen Kunz when it acquitted him on the murder charges. *See id.* at 227. The jury could have based its verdict on the conclusion that Jacobs lacked the requisite intent to commit party to a crime murder. *See id.* Since the jury in the murder case had not necessarily decided whether Jacobs kidnapped or falsely imprisoned Helen Kunz, the State was not precluded from charging him with those crimes. *See id.* at 228.

¶4 Before his trial for kidnapping and false imprisonment, Jacobs filed two motions to exclude evidence that had been presented during his murder trial. After a hearing, the trial court ordered that the murder evidence was admissible as other acts evidence under WIS. STAT. § 904.04(2) (1997-98).<sup>3</sup> The court concluded that other acts evidence was not barred by the rule of issue preclusion

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<sup>3</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

embodied in the guarantee against double jeopardy because it was not related to an issue of ultimate fact foreclosed by a jury in previous litigation.

¶5 The trial court stated that the murder evidence was admissible under WIS. STAT. § 904.04(2) as it was relevant to the permissible purposes of proving plan, opportunity, motive and context. It also concluded that the probative value of the murder evidence was not substantially outweighed by the danger of unfair prejudice, confusion, misleading the jury or wasting time. The court explained that the evidence was highly probative because of its nearness in place and time to the crimes with which Jacobs was currently charged. Considering that Helen Kunz's abduction was part of the same set of events that resulted in her and her family's murders, the court said that the jury could not fairly weigh the evidence regarding the kidnapping and false imprisonment charges without the context of the entire criminal episode. The court explained that the risk of unfair prejudice would be reduced because the jury would be told that Jacobs had been acquitted in the murder trial. The court also said that it would give the jury a limiting instruction several times throughout the trial so that they would not be misled or confused. Finally, the court acknowledged that presentation of the evidence from the murder trial would take up a significant amount of time, but said it would not be wasteful because of its high probative value.

¶6 Before the opening statements, the trial court gave the jury the following instruction:

Evidence will be presented during the trial concerning allegations of criminal conduct for which the defendant is not on trial, that being the homicides of Helen Kunz and members of the Kunz family.

This evidence will be referred to as other-acts evidence. You are instructed that at an earlier jury trial, the

defendant was tried for and found not guilty of committing or aiding or abetting those homicides.

If you reasonably conclude that the defendant committed the other acts for which he was found not guilty, you should consider the evidence only on the issues of motive, opportunity, preparation or plan, and context. You may not consider other-acts evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case.

The evidence was received only on the following issues: motive, that is, whether the defendant had a reason to desire the results of the crimes here charged; opportunity, that is, whether the defendant had an opportunity to commit the crimes here charged; preparation or plan, that is, whether such other conduct of the defendant was part of a design or a scheme that led to the commission of the offenses charged; and context, that is, the immediate circumstances within which the prosecution alleges the offenses which are charged here occurred.

You may consider the evidence only for the purposes I have described, giving it just such weight as you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

The court gave a similar instruction during the witness testimony and after the closing arguments. The court also briefly reminded the jury of its other-acts instruction at several points during the testimony.

¶7 The jury convicted Jacobs of kidnapping and falsely imprisoning Helen Kunz, while using a dangerous weapon. The trial court sentenced him to a total of thirty-one years in prison. The court granted Jacobs sixty-three days of sentence credit for his time in custody between the jury verdict and sentencing in this case, but declined to grant credit for the time he spent in custody for the murder charges. Jacobs appeals.

## II. Analysis

### A. *Kidnapping And False Imprisonment Charges*

¶8 Jacobs argues that the State was barred from prosecuting him for kidnapping and falsely imprisoning Helen Kunz by the double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution. He asserts that the jury in the murder trial already rejected the State's theory that he had participated in the murder of the Kunz family and in Helen Kunz's abduction. Thus, he contends that under the issue preclusion doctrine incorporated into the guarantee against double jeopardy, the State was barred from litigating the issue of Helen Kunz's abduction again.

¶9 Jacobs made the same argument in his interlocutory appeal and we will not revisit it here. In that appeal, we decided that Jacobs' prosecution was not barred by the doctrine of issue preclusion embodied in the protection against double jeopardy because he did not establish that the jury in the murder trial necessarily found that he had not abducted Helen Kunz. See *Jacobs*, 186 Wis. 2d at 227-28. Our decision in the interlocutory appeal established "the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989).

¶10 Jacobs argues that the law of the case doctrine does not apply in this case. He points out that the law of the case doctrine is not a rule that we must inexorably follow in every case. See *id.* at 38-39. In fact, we may "reconsider a prior ruling in a case 'whenever cogent, substantial, and proper reasons exist.'" *State v. Brady*, 130 Wis. 2d 443, 447, 388 N.W.2d 151 (1986) (quoting *McGovern v. Eckhart*, 200 Wis. 64, 78, 227 N.W. 300 (1929)). Jacobs argues that one such

reason is when “controlling authority has since made a contrary decision of the law applicable to such issues.” *Id.* at 448 (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967)).

¶11 Jacobs asserts that, since his interlocutory appeal, the supreme court made a contrary decision of law in *State v. Vassos*, 218 Wis. 2d 330, 579 N.W.2d 35 (1998). He explains that, in the interlocutory appeal, we followed the general rule that, in determining whether a jury could have grounded its verdict on an issue other than the one the defendant seeks to foreclose, we “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter....” *Jacobs*, 186 Wis. 2d at 226 (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)). Jacobs argues that the supreme court changed the general rule in *Vassos* by specifying that in determining “whether a particular factual matter has been determined adversely to the prosecution, trial courts must consider the legal theory underlying the first trial.” *Vassos*, 218 Wis. 2d at 344.

¶12 We do not agree that the supreme court’s statement in *Vassos* amounted to a contrary decision of law. In *Brady*, the contrary decision of law was a case in which the United States Supreme Court adopted a good-faith exception to the exclusionary rule regarding evidence seized pursuant to an illegal arrest. *Brady*, 130 Wis. 2d at 453. In contrast, the court’s statement in *Vassos* that “trial courts must consider the legal theory underlying the first trial,” did not amount to such a significant change in the law. The rule we followed in the interlocutory appeal requires courts to look at “the pleadings, evidence, charge, and other relevant matter ....” *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (emphasis added). The legal theory underlying a trial is relevant matter that a court could consider under *Ashe*. The supreme court did not change the law by making that point clear.

¶13 Jacobs contends that *State v. Canon*, 230 Wis. 2d 512, 602 N.W.2d 316 (Ct. App. 1999), *review granted* (Wis. Dec. 17, 1999) (No. 98-3519-CR), is important to our decision of whether his prosecution was barred by the doctrine of issue preclusion embodied in the guarantee against double jeopardy. We conclude that *Canon* has not changed the law as it pertains to this case and does not alter our conclusion that we must follow the law of the case established in the interlocutory appeal.

¶14 Finally, Jacobs argues that the “rule of *Stromberg*,” as applied in *Feela v. Israel*, 727 F.2d 151 (7th Cir. 1984), requires that his conviction be reversed. In *Griffin v. United States*, 502 U.S. 46, 53 (1991), the Supreme Court explained that *Stromberg v. California*, 283 U.S. 359 (1931), held that “where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.” Jacobs argues that his conviction must be reversed because the jury verdict rested on a theory that the previous jury may have rejected.

¶15 We do not agree that *Stromberg* applies to this case. In *Stromberg*, the defendant was charged under a California statute that prohibited displaying a red flag for any of three purposes: (1) as a symbol of opposition to organized government; (2) as an invitation to anarchistic action; or (3) as an aid to seditious propaganda. *Stromberg*, 283 U.S. at 361. The trial court instructed the jury that they could convict the defendant if they found that she displayed a flag for any one of the three purposes. *See id.* at 363. The jury returned a general verdict of conviction. *See id.* at 367-68. The Supreme Court held that the first clause of the statute was an unconstitutional restriction of free speech. *See id.* at 368-70. The Court concluded that the conviction must be reversed, because it was impossible



to determine from the general verdict whether the defendant was convicted under the unconstitutional clause or one of the other two clauses. *See id.*

¶16 In *Feela*, the Seventh Circuit applied *Stromberg* in a double jeopardy context. Feela was first acquitted of van theft, but later tried and convicted of conspiracy to commit armed robbery. *See Feela*, 727 F.2d at 153-54. In the second trial, the court instructed the jury that, to convict Feela of conspiracy, they had to find beyond a reasonable doubt that an act in furtherance of the conspiracy had been performed by one of the conspirators. *See id.* at 155. Evidence of the van theft was introduced in the conspiracy trial, but the jury's general verdict made it impossible to determine whether they found the van theft to be the act in furtherance of the conspiracy. *See id.* The Seventh Circuit reversed the conviction because it was possible that, in rendering the general verdict, the jury decided beyond a reasonable doubt that the act in furtherance of the conspiracy was the van theft for which the defendant had already been acquitted. *See id.*

¶17 Jacobs' case presents a different situation. As we explained in the interlocutory appeal, Jacobs could not establish that the jury in his first trial resolved the ultimate issue of whether he abducted Helen Kunz against the State. *See Jacobs*, 186 Wis. 2d at 227. Since Jacobs failed to demonstrate that the first jury found that he had not abducted Helen Kunz, it was not a violation of double jeopardy to allow the second jury to find that he had. *See id.* at 227-28. If, on the other hand, Jacobs had demonstrated that the jury in his first trial found that he did not abduct Helen Kunz, it would be unconstitutional for the second jury to conclude that he did. *See id.* at 225-26. If the second jury was then presented with several possible theories of conviction, one being that Jacobs had abducted Helen Kunz, but then rendered a general verdict, making it impossible to tell on which

theory they rested the conviction, *Stromberg* would require reversal. That is not the case.

### *B. Other Acts Evidence*

#### 1. Double Jeopardy

¶18 Jacobs argues that the issue preclusion doctrine incorporated in the protection against double jeopardy also bars the admission of any evidence related to the murder trial. He contends that the first jury decided that he did not murder Helen Kunz and that the trial court should have limited the presentation of evidence in this case so that the jury could not resolve any factual issues against him that the previous jury had resolved against the State. This issue involves the application of constitutional principles to the facts of the case, and is thus subject to de novo review. See *State v. Landrum*, 191 Wis. 2d 107, 114, 528 N.W.2d 36 (Ct. App. 1995).

¶19 We conclude that the evidence from the murder trial was not barred by the rule of issue preclusion embodied in the guarantee against double jeopardy. In fact, in *Landrum*, we rejected the same argument that Jacobs presents here, based on the Supreme Court's decision in *Dowling v. United States*, 493 U.S. 342 (1990). In *Dowling*, the Court held that the government was not precluded from introducing, in a robbery trial, the testimony of a witness from a previous burglary trial in which the defendant was acquitted. *Id.* at 348. The Court explained that admission of such evidence under the Federal Rules of Evidence was governed by a reasonableness standard, rather than the beyond a reasonable doubt standard. See *id.* The Court concluded that “[b]ecause a jury might reasonably conclude that [the defendant was present at the burglary], even if it did not believe beyond a reasonable doubt that [the defendant] committed the crimes charged at the first

trial, the [issue preclusion] component of the Double Jeopardy Clause is inapposite.” *Id.* at 348-49.

¶20 In *Landrum*, we concluded that the rule of issue preclusion embodied in the protection against double jeopardy did not bar the State from introducing, in a second trial, the testimony of the alleged victim in an earlier sexual abuse case in which the defendant was acquitted. *Landrum*, 191 Wis. 2d at 116-17. We explained:

[A]lthough we will assume that Landrum’s acquittal established that there was a reasonable doubt as to whether Landrum had sexual contact with Lisa W., the State did not have to demonstrate that Landrum had sexual contact with Lisa W. beyond a reasonable doubt in order to introduce Lisa W.’s testimony in the second trial. Under § 904.04(2), STATS., evidence of other acts is admissible if the evidence is such that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act. Because a reasonable jury could find by a preponderance of the evidence that Landrum had sexual contact with Lisa W., the [issue preclusion] component of the double jeopardy clause does not apply.

*Id.* at 117 (citation and footnote omitted). The same reasoning applies to Jacobs’ argument here.

## 2. WIS. STAT. § 904.04(2)

¶21 Jacobs argues that the trial court erred by admitting the evidence from the murder trial as other acts evidence under WIS. STAT. § 904.04(2). He contends that the murder evidence was irrelevant and that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

¶22 In *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the supreme court spelled out a three-step framework for analyzing the admissibility of other acts evidence under WIS. STAT. §§ 904.04(2) and 904.03.<sup>4</sup> The framework is as follows:

(1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

(3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

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<sup>4</sup> WISCONSIN STAT. § 904.04(2) provides:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

WISCONSIN STAT. § 904.03 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Id.* at 772-73 (footnote and citation omitted).

¶23 The decision to admit other acts evidence is within the trial court's discretion. *See id.* at 780. We will sustain the trial court's exercise of discretion if it examined the relevant facts, applied a proper standard of law and reached a reasonable conclusion by a demonstrated rational process. *See id.* at 780-81.

¶24 We conclude that the trial court properly exercised its discretion by admitting the evidence from the murder trial as other acts evidence. First, it admitted the evidence for the purposes of proving plan, opportunity, motive and context. Each of these purposes is acceptable under WIS. STAT. § 904.04(2). Although "context" is not specifically listed in the statute, the list of permissible purposes is not exclusive. *See State v. Kaster*, 148 Wis. 2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989). As long as it is not used to show that the defendant acted in conformity with a character trait, other acts evidence can be used to demonstrate the context within which a crime took place. *See State v. Seibert*, 141 Wis. 2d 753, 761, 416 N.W.2d 900 (Ct. App. 1987).

¶25 Next, the trial court reasonably decided that the evidence from the murder trial was relevant. Other acts evidence is relevant if it tends to make a consequential fact or proposition more or less probable. *See Sullivan*, 216 Wis. 2d at 772. To be admissible, other acts evidence need only be relevant to one of the permissible purposes under WIS. STAT. § 904.04(2). *See State v. Murphy*, 188 Wis. 2d 508, 518, 524 N.W.2d 924 (Ct. App. 1994). In fact, we can affirm a trial court's decision to admit other acts evidence even if we disagree as to the purposes for which the evidence is properly admitted. *See State v. Roberson*, 157 Wis. 2d 447, 453-54, 459 N.W.2d 611 (Ct. App. 1990).

¶26 While we do not agree that the murder evidence was relevant to each of the purposes listed by the trial court, we conclude that it was relevant for the purposes of showing identity, opportunity and context. In determining whether other acts evidence is relevant to the issue of identity, we look to the “nearness in time, place and circumstance of the other act to the alleged crime.” *Murphy*, 188 Wis.2d at 519. The Kunz murders and Helen Kunz’s abduction were part of the same set of events, and thus were virtually identical in time, place and circumstance. For the same reason, the evidence from the murder trial was relevant for showing that Jacobs had the opportunity to abduct Helen Kunz and that her abduction was part of the larger story of her and her family’s murders. Evidence regarding Jacobs’ participation in the murders would make it more probable that: (1) he was also the person who abducted Helen Kunz; (2) his being at the scene and murdering her family gave him the opportunity to abduct her; and (3) her abduction was one part of a larger criminal episode.<sup>5</sup>

¶27 Finally, the trial court reasonably concluded that the probative value of the murder evidence was not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, or wasting time. As the court pointed out, since the murder trial involved the same set of events as Jacobs’ current trial, the evidence from the murder trial was highly probative. In addition, the court gave a limiting instruction at several points in the trial, instructing the jury that the evidence was received only for the permissible purposes and not for

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<sup>5</sup> Jacobs contends that the murder evidence was irrelevant because “[e]vidence of a crime for which defendant has previously been acquitted has next to no probative value.” We disagree. Other acts evidence “is relevant if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act.” *State v. Landrum*, 191 Wis. 2d 107, 119-20, 528 N.W.2d 36 (Ct. App. 1995). The fact that one jury did not find beyond a reasonable doubt that Jacobs committed the murders does not mean that another jury could not find by a preponderance of the evidence that he did. *See id.*

determining whether Jacobs acted in conformity with any particular character trait. The use of a limiting instruction minimizes the risk of unfair prejudice. *See Landrum*, 191 Wis. 2d at 122. The court also explained that Jacobs had already been acquitted of murdering Helen Kunz and her family, thus minimizing the possibility that the jury would be misled or confused as to what was at issue in Jacobs' current trial. Lastly, considering that the murder evidence was highly probative for the purposes of showing identity, opportunity and context, its presentation was not a waste of time.

### *C. Due Process*

¶28 Jacobs contends that his prosecution and the admission of the evidence from the murder trial violated the fundamental fairness test of the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, sections 1 and 8 of the Wisconsin Constitution. He argues that it was unfair to force him to relitigate issues already decided in his favor. He also points out that the murders of the Kunz family and Helen Kunz's kidnapping and false imprisonment were intertwined. He asserts that, as a result, allowing the State to introduce the murder evidence based on a preponderance of the evidence standard also lowered the State's burden to less than beyond a reasonable doubt for the kidnapping and false imprisonment charges.

¶29 We conclude that Jacobs prosecution and the introduction of the murder evidence did not violate the fundamental fairness test of the due process clauses. In *Landrum*, 191 Wis. 2d 107, we rejected a similar argument based on the Supreme Court's decision in *Dowling*, 493 U.S. 342. In *Dowling*, the Court explained that the category of infractions violating the test of fundamental fairness was very narrow and declined "to use the Due Process Clause as a device for

extending the double jeopardy protection to cases where it otherwise would not extend.” *Id.* at 352-54. In *Landrum*, we explained that the defendant’s interests in not relitigating an already decided issue were adequately protected by the double jeopardy clause. *Landrum*, 191 Wis. 2d at 118. We also held that introduction of testimony from a trial in which the defendant was acquitted did not violate fundamental fairness by lowering the burden of proof because the testimony was not introduced to establish criminal liability, but for the limited purposes deemed acceptable under WIS. STAT. § 904.04(2). *See id.* In Jacobs’ case, the court repeatedly instructed the jury that he had been found not guilty in the murder trial and that the murder evidence was to be considered only for the purposes allowed under § 904.04(2). Jacobs’ rights are adequately protected by the double jeopardy clause and § 904.04(2).

#### *D. Sentence Credit*

¶30 Jacobs contends that the trial court erred by not granting him sentence credit for the time he spent in custody on the murder charges. Under WIS. STAT. § 973.155(1)(a), “[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.” Jacobs points out that the murder charges arose from the same set of events as the crimes for which he was eventually convicted and sentenced. Thus, he asserts that his time in custody on the murder charges were in connection with the same “course of conduct” for which he was sentenced. The application of § 973.155 to undisputed facts involves a question of law that we review de novo. *See State v. Tuescher*, 226 Wis. 2d 465, 468, 595 N.W.2d 443 (Ct. App. 1999), *review denied*, 602 N.W.2d 761 (Wis. July 1, 1999) (No. 98-2564-CR).



¶31 We disagree with Jacobs’ argument. In *Tuescher*, 226 Wis. 2d at 479, we concluded that “a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts.” In so concluding, we explained that Wisconsin case law supported the “position that under § 973.155, one sentence does not arise from the same course of conduct as another sentence unless the two sentences are based on the same specific acts.” *Id.* at 475. This case does not involve “multiple concurrent sentences imposed at different times, but arising from a single relatively brief criminal episode,” as did *Tuescher*. *Id.* at 472. However, our narrow interpretation of the phrase “course of conduct” still applies. Jacobs’ murder charges arose from the same criminal episode, but were based on different specific acts than the kidnapping and false imprisonment charges.

¶32 In *State v. Boettcher*, the supreme court explained that the drafters of § 973.155 used “course of conduct” to ensure that “a defendant who was charged with rape, but convicted of assault ... get his full presentence credit.” *State v. Boettcher*, 144 Wis. 2d 86, 98, 423 N.W.2d 533 (1988). Thus, the court explained, “course of conduct” was “not intended to refer to dual credit for multiple charges, but was instead intended to assure that credit would be given in the case of a conviction of a different crime than that charged.” *Id.* In this case, Jacobs was not charged with murder, but convicted of something else; he was charged with and convicted of kidnapping and false imprisonment. He is not entitled to sentence credit for time spent in custody on the murder charges.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

