COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1670-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PEDRO ENRIQUE-GAITAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Pedro Enrique-Gaitan appeals from a judgment entered after a jury convicted him of two counts of second-degree sexual assault, and one count of misconduct in public office, contrary to WIS. STAT.

§§ 940.225(2)(a) & 946.12(2) (1997-98).[1] He argues that the trial court erred in: (1) concluding that only one of the three charged sexual assault counts was multiplicitous; (2) admitting other-acts evidence; and (3) denying what he claims was his request to submit polygraph-testing evidence at sentencing. We reject his arguments and affirm.

I. BACKGROUND

¶2 The trial evidence established that in the early morning hours of November 2, 1997, Lola M.-P. and her boyfriend left a south-side party, intending to go to the boyfriend's apartment. When the two realized they were locked out of the apartment, Lola decided to find a motel room. While her boyfriend waited at a Citgo station, Lola drove down South 27th Street where Enrique-Gaitan, a Milwaukee police officer, stopped her for making an illegal U-turn. Enrique-Gaitan took Lola's driver's license and returned to his squad car. When he returned to her car, he informed Lola that her license plates had been suspended and ordered her to remove them immediately. Lola refused, and Enrique-Gaitan asked her, "what should I do with you?" When Lola replied, "you're the cop, you tell me," Enrique-Gaitan made sexual overtures and suggested that they resolve the problem by going to a motel. Lola refused, telling him that she was not that type of person.

¶3 Enrique-Gaitan then asked Lola why her identification differed from his computer's information, and invited her to see the computer in his squad car. When Lola agreed, Enrique-Gaitan advised her that she could not look at it where

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

they were currently located, and instructed her to follow him. Lola complied, following him from South 27th Street to a secluded area of a K-Mart parking lot.

¶4 On arrival at the parking lot, Enrique-Gaitan exited his squad and motioned for Lola to come to him. Lola said she entered the passenger side of the squad car, and Enrique-Gaitan showed her his computer. Lola testified that Enrique-Gaitan then grabbed her, kissed her, and forcibly pulled her hand to rub his penis. As she tried to pull away, Enrique-Gaitan told her to suck his penis. A call then came over the police radio, and Enrique-Gaitan ordered Lola to return to her car. Enrique-Gaitan then followed Lola to her car and entered the passenger side of her car where he again forcibly kissed her, squeezed her breast, and rubbed her pants, fondling her vagina. Lola testified that when another call then came over Enrique-Gaitan's radio, he "jumped out" of her car and told her to drive away. She complied, returning to the Citgo station. Shortly thereafter, Enrique-Gaitan appeared at the station; video camera evidence confirmed his appearance there.

¶5 The State introduced other-acts evidence. It consisted of testimony from Linda S., an Alverno College security guard, who testified that Enrique-Gaitan, while on duty, engaged in similar conduct ultimately coaxing her into his squad car to view his computer and attempting to pull her hand toward his penis. The court provided a cautionary instruction limiting the jury's consideration of the other-acts evidence to the purposes of proving Enrique-Gaitan's plan, opportunity, and preparation to obtain sexual gratification.

II. ANALYSIS

¶6 Enrique-Gaitan contends that separate convictions for second-degree sexual assault arising from (1) Lola's touching his penis, and (2) his touching her

vagina violate the double jeopardy provisions of the state and federal constitutions. We disagree.

¶7 The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and article 1, section 8 of the Wisconsin Constitution, protect defendants from multiple punishments for the same offense.[2] *See* ***State v. Kurzawa***, 180 Wis. 2d 502, 515, 509 N.W.2d 712, 717 (1994) (citation omitted). Whether a charging document is multiplicitous is a question of law, which we review de novo. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). We analyze claims of multiplicity using a two-prong test. *See* ***id.*** First, we inquire whether the charges are identical in law and fact. *See* ***id.*** Second, we consider whether the legislature intended that multiple punishments be imposed. *See* ***id.***

¶8 Under the first prong, we must determine whether "we are reviewing multiple charges brought under different statutory sections (a 'lesser-included offense' challenge), or multiple charges brought under one statutory section (a 'continuous offense' challenge)." ***Id.*** at 747. Whether the focus is on the law or the facts depends on the particular challenge raised. *See* ***id.***

> In a "lesser-included offense" challenge, the factual situations underlying the offenses are the same, so our focus is on whether the offenses are also identical in law. In a "continuous offense" challenge, the course of conduct is alleged to have constituted multiple violations of the same statutory provision, so our focus is not on statutory definitions but on the facts of a given defendant's criminal activity.

[2] The Double Jeopardy Clause of the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. Similarly, article I, § 8 of the Wisconsin Constitution provides: "[N]o person for the same offense may be put twice in jeopardy of punishment."

Id. (citations omitted). Here, the two convictions for second-degree sexual assault are identical in law. Consequently, our focus is on the facts of Enrique-Gaitan's offenses.

¶9 "Charged offenses are not multiplicitous if the facts are either separated in time or of a significantly different nature." ***Anderson***, 219 Wis. 2d at 749. Offenses "are significantly different in nature if each requires 'a new volitional departure in the defendant's course of conduct.'" ***Id.***

¶10 Here the two counts of sexual assault—involving the victim's hand to the defendant's penis, and the defendant's hand to the victim's vagina—were separate in time and were of a significantly different nature. The first assault occurred in Enrique-Gaitan's squad car; the second, in Lola's car. The two assaults were significantly different in nature, each involving a different part of the body and each requiring a volitional departure in Enrique-Gaitan's conduct. *See* ***State v. Bergeron***, 162 Wis. 2d 521, 534-36. 470 N.W.2d 322 (Ct. App. 1991) ("[W]here the evidence shows the defendant committed separate volitional acts, it is appropriate to punish the defendant separately for each offense."). Accordingly, we conclude that these two convictions for second-degree sexual assault do not violate the double jeopardy provisions of the federal and state constitutions.

¶11 Enrique-Gaitan also claims that the trial court erred in admitting other-acts evidence. He contends that evidence of his enticement of an Alverno College Security officer for the purpose of assaulting her in his squad car was inadmissible character evidence. We disagree.

¶12 Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. *See* ***State v. Larsen***, 165 Wis. 2d 316, 319-320, 477 N.W.2d 87 (Ct. App. 1991). Our review is limited to determining

whether the trial court erroneously exercised this discretion. *See* ***id.*** at 320 n.1. We will not overturn a trial court's evidentiary ruling unless it has no reasonable basis. *See* ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983).

¶13 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.

To determine whether evidence of "other acts" is admissible, the trial court must engage in a three-step analysis. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, the trial court must determine if the proffered evidence fits within one of the exceptions of § 904.04(2). Second, the trial court must determine if the other-acts evidence is relevant under WIS. STAT. § 904.01.[3] Third, pursuant to WIS. STAT. § 904.03,[4] the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *See* ***Sullivan***, 216 Wis. 2d at 772-73.

[3] WISCONSIN STAT. § 904.01, provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[4] 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."

¶14 Enrique-Gaitan argues that the trial court erred in admitting the testimony of Linda S. who testifed that approximately one week prior to the assault on Lola, Enrique-Gaitan lured her into his squad car and forced her to touch his penis. The trial court admitted the evidence under several theories, including that the evidence was relevant to the issue of whether Enrique-Gaitan had used a similar plan to obtain sexual gratification prior to the assaults on Lola.

¶15 The Wisconsin Supreme Court has broadly defined the "plan" exception of WIS. STAT. § 904.04(2), to include "a system of criminal activity" comprised of multiple acts of a similar nature, not all necessarily culminating in the charged crime or crimes. *See* ***State v. Friedrich***, 135 Wis. 2d 1, 24, 398 N.W.2d 763 (1987). The supreme court has explained:

> [R]eliance on the "plan" exception to sec. 904.04(2), Stats., requires that an inference be drawn. McCormick states that other-acts evidence sought to be introduced to establish the existence of a plan "will be relevant as showing motive, and hence the doing of the criminal act, the identity of the actor, or his intention." While identity is not at issue in this case, the doing of the act and the intent are at issue. Defendant has denied doing the act. Moreover, intent is an element of the crime. The other-acts testimony . . . is thus relevant since the "plan" established by the facts of record relates to these contested issue of fact.

Id. at 23 (citation omitted). Here, Linda's testimony was offered for a permissible purpose. Linda's testimony provided probative evidence of the assaults on Lola by showing that Enrique-Gaitan had previously employed essentially the same plan to obtain sexual gratification by luring her (Linda) into his squad.[5]

[5] Additionally, Linda's testimony was admissible under a corroboration/doctrine of chances theory. Linda's testimony rebutted Enrique-Gaitan's claim that Lola falsely accused him, and corroborated Lola's account. *See* 22 CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5248, at 520-21 (1978).

(continued)

¶16 Thus, Linda's testimony was relevant. It described a significant feature or imprint of Enrique-Gaitan's conduct—using his computer to lure women into his squad to seek sexual gratification. It described an event that was very close in time, place, and circumstances to the assaults on Lola.

¶17 Finally, given the trial court's cautionary instruction, we conclude that the probative value of Linda's testimony was not substantially outweighed by the danger of unfair prejudice. *See* ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992) (we presume jury follows cautionary instruction). Accordingly, we conclude that the trial court properly admitted Linda's testimony under the "plan" exception.

¶18 Alternatively, Enrique-Gaitan argues that even if Linda's testimony was admissible, the trial court should have excluded it because he offered to stipulate that "the conduct behind the K-Mart between Enrique-Gaitan and Lola, *if believed*, would admittedly have been an intentional act, with force, and without Lola's consent, to obtain sexual gratification while acting in his official capacity as a city of Milwaukee Police Officer." We disagree.

> In those cases where the witnesses to the [other] crime offered as corroboration [of the complainant's allegation of the charged crime] are completely independent [of the complainant] and to each other, it can be argued that the [other-acts] evidence tends to corroborate on a probability theory; i.e., how likely is it that [the] independent witnesses would make the same mistake or concoct similar false accusations.

Id. at 521 n.10.

¶19 To preclude the admission of other-acts evidence proffered by the State, a defendant may offer to stipulate to the elements of the offense for which the other-acts evidence is being offered. *See* ***State v. Wallerman***, 203 Wis. 2d 158, 167, 552 N.W.2d 128 (Ct. App. 1996). Whether to allow such a stipulation is left to the sound discretion of the trial court. ***Id.*** at 168 n.4. This court has developed the following guidelines to assist courts in determining whether to accept a ***Wallerman*** stipulation:

> After having considered whether there is sufficient evidence to prove the elements to which the stipulation applies, the court should: (1) determine exactly what the defendant is conceding; (2) assess whether the other-acts evidence would still be necessary despite the concession; (3) personally voir dire the lawyers and the defendant to ensure they understand the effects of the concession; and (4) address these matters pretrial where possible.

State v. DeKeyser, 221 Wis. 2d 435, 444, 585 N.W.2d 668 (Ct. App. 1998).

¶20 Here, the trial court properly rejected Enrique-Gaitan's proposed stipulation. The trial court correctly noted that the defendant's proposed stipulation did not concede any element of the charged crime, but rather, served as an attempt to *conditionally* concede the ultimate issue. The court concluded that the stipulation did not concede the issue on which the Linda S. evidence was being offered—whether the charged crimes occurred. That is, by showing that Enrique-Gaitan had similarly employed a unique plan to obtain sexual gratification on a prior occasion, Linda's testimony helped to prove what Enrique-Gaitan did *not* concede: that he assaulted Lola. The trial court was correct. Thus, we conclude that the trial court did not err in rejecting the ***Wallerman*** stipulation. *See* ***Old Chief v. United States***, 519 U.S. 172, 186-87 (1995) ("[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it.").

¶21 Enrique-Gaitan also argues that the trial court improperly rejected his offer to take a polygraph test to support his claim of consent at sentencing. The record belies his argument. Enrique-Gaitan never directly asked the court to permit him to take a polygraph or to present the results at sentencing. As the State explains:

> After the court accepted the guilty verdicts at trial, it ordered a presentence report at the state's request and with defendant's agreement. In preparation for sentencing, defense counsel submitted to the presentence author a six-page document entitled "Version of the Offense for Presentence Report," in which defendant claimed, for the first time, that he had consensual sexual contact with Lola on the night in question. A few days later, and four days before sentencing, defense counsel sent the presentence author a letter stating in part: "[Defendant] is, of course, willing to undergo polygraph testing if you felt (sic) testing was appropriate to your investigation."

Thus, the record does not establish the premise essential to Enrique-Gaitan's argument. *See* ***State v. Neudorff***, 170 Wis. 2d 608, 616, 489 N.W.2d 689 (Ct. App. 1992) (failure to raise claim of error before the trial court waives the issue on appeal). Consequently, we need not address whether, had Enrique-Gaitan moved the court to adjourn sentencing so that he could take a polygraph and submit test results to the court, the court would have been obligated to allow that and consider the results.

By the Court.—Judgment affirmed.

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