COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 00-0140-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON LESLIE HARMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Aaron Leslie Harmer appeals his judgment of conviction for sexual assault in violation of WIS. STAT. § 948.025.[1] Aaron

[1] WISCONSIN STAT. § 948.025, entitled "Engaging in repeated acts of sexual assault of the same child," states:

(continued)

contends that § 948.025 is unconstitutional on its face and as applied. He also complains that the court did not permit him to present a defense by excluding evidence that his former father-in-law had solicited someone to have Aaron killed. We previously rejected a similar constitutional challenge in ***State v. Molitor***, 210 Wis. 2d 415, 565 N.W.2d 248 (Ct. App. 1997), and we conclude that the trial court's exclusion of Aaron's "hit-man" evidence did not violate his right to present a defense. Accordingly, we affirm the judgment.

BACKGOUND

¶2 Aaron was charged with the repeated sexual assault of Samantha C. and Cory N. Both children were at his home on occasion for childcare. Some of these times Aaron's daughter A.H. was also present. The alleged assaults were reported in September 1997 while Aaron was in Arizona with A.H.

¶3 A.H. is the daughter of Aaron and Dawn Harmer. Their marriage dissolved, and the relationship became acrimonious. They shared custody of A.H., and the hostility between the parents spilled over into custody issues. In

---

> (1) Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of a Class B felony.
> (2) If an act under sub.(1) is tried to a jury, in order to find the defendant guilty the members of the jury must agree that at least 3 violations occurred within the time period applicable under sub. (1) but not agree on which acts constitute the requisite number.
> ….
> (3) The state may not charge in the same action a defendant with a violation of this section and with a felony violation involving the same child under ch. 948.07, 948.08, 948.10, 948.11 or 948.12, unless the other violation occurred outside the time period applicable under sub. (1). This subsection does not prohibit a conviction for an included crime under s. 939.66 when the defendant is charged with a violation of this section.

All references to the Wisconsin Statutes are to the 1997-98 version.

September 1997, Aaron and his daughter left Wisconsin to live in Arizona. Dawn and her father, James Harmer,[2] did not know where Aaron and A.H. were and complained to the police. In November 1997, Aaron was arrested and charged with interference with parental custody.

¶4 While in custody on the interference charges, Aaron was questioned regarding the sexual assault of Samantha and Cory. Charges of sexual assault under WIS. STAT. § 940.025(1) were brought against Aaron after he was acquitted of the charge of interference with custody. He moved to dismiss the charges on the grounds that § 940.025 was unconstitutional on its face and as applied. The court denied his motion.

¶5 At trial, Samantha and Cory both testified that Aaron had assaulted them numerous times. In an attempt to impeach them, Aaron produced prior statements describing types of sexual assault he claims were inconsistent with their trial testimony.[3]

¶6 Aaron's theory of defense was that his ex-wife and James induced the children to fabricate the sexual assault claims. He contended his ex-wife and her father set him up because they wanted him out of their lives. In addition to the evidence admitted, Aaron wanted to introduce evidence that James had solicited someone to find and kill Aaron. He asked James whether he had hired a hit man. The State objected and the court sustained the objection. The sidebar conference

[2] Aaron changed his surname to Harmer once married to Dawn Harmer.

[3] For example, at trial Cory N. testified that Aaron had touched Cory's penis, but in earlier statements he reported that Aaron had Cory touch Harmer's penis. In each report, however, Cory indicated Aaron touched Cory's penis. Samantha C. did not report penis-mouth contact in pretrial reports, but did so at trial. In the reports cited to us, however, Samantha each time reported Aaron touched her vaginal area with his penis and mouth and touched her anus.

concerning the objection was not recorded and was not later summarized. Earlier, Aaron indicated to the court that he desired to call Dennis Murphy, who would testify that James had solicited him to find and kill Aaron. The State objected on the grounds that this testimony would cause a trial within a trial. The court did not explicitly rule on Aaron's request.

¶7 The jury was instructed that it must unanimously agree that Aaron committed at least three assaults, but that it need not agree on which acts constitute the required three. The jury found Aaron guilty. Additional facts shall be supplied in our analysis of Aaron's contentions.

DISCUSSION

1. Constitutionality of WIS. STAT. § 948.025

¶8 Aaron claims that WIS. STAT. § 948.025 is unconstitutional. A statute's constitutionality is a question of law that we review de novo. *See* ***Molitor***, 210 Wis. 2d at 418. The Wisconsin Constitution's guarantee of a right to trial by jury includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence. *See* WIS. CONST., art. I, §§ 5 and 7; ***State v. Derango***, 2000 WI 89 at ¶ 13. "The principal justification for the unanimity requirement is that it ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense." ***State v. Lomagro***, 113 Wis. 2d 582, 591, 335 N.W.2d 583 (1983).

¶9 Aaron contends that WIS. STAT. § 948.025 unconstitutionally permits a jury to avoid the unanimity requirement. Specifically, he argues that the jury might agree that he committed at least three sexual assaults on the children

without agreeing unanimously on which assaults occurred. We reject this argument.

¶10 Jury unanimity is required "only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and ... not ... with respect to the alternative means or ways in which the crime can be committed." ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979). The threshold question in a unanimity challenge, therefore, is whether the statute creates multiple offenses or a single offense with multiple modes of commission. *See* ***id.***

¶11 In ***Molitor,*** we held that the act proscribed by WIS. STAT. § 948.025 is a single element consisting of a series of assaults on the same victim, occurring over time and resulting in cumulative injury. *See* ***id.*** at 421-22. We decided that because there is only one element, the jury must unanimously decide that the child was assaulted at least three times, but need not agree on which specific assaults were committed. *See* ***id.*** at 423.

¶12 Aaron asks that we overrule ***Molitor***. We generally have no power to overrule, modify or withdraw language from our previously published opinions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). When our earlier decision, however, is based upon a decision of the United States Supreme Court, which that court later says does not stand for the proposition advanced, we may overrule or modify our earlier decision. *See* ***State v. Wulff***, 200 Wis. 2d 318, 326, 546 N.W.2d 522 (Ct. App. 1996). Aaron claims that this exception applies. He contends that ***Richardson v. United States***, 526 U.S. 813 (1999), distinguished a California law that we found persuasive in ***Molitor*** and that it is therefore permissible for us to consider overruling ***Molitor***. We disagree.

¶13 In ***Richardson***, the Supreme Court addressed a federal statute making it a crime to engage in a continuing criminal enterprise, defining a continuing criminal enterprise as one involving a violation of the drug statutes where the violation is a part of a continuing series of violations. *See* ***id.*** at 815. The court was faced with construing the statute to determine whether the phrase "series of violations" referred to one element, a series of violations constituting the underlying facts or means, or whether the phrase created several elements namely the several violations. *See* ***id.*** at 817-18. ***Richardson*** attributed significance to the federal statute's use of the words "violation" and "violates," noting that they have a legal connotation, generally connected to a jury determination that certain conduct violates a law. *See* ***id.*** at 818-19. The Court determined that the statute's reference to "series of violations" reflected Congress' intent to create several elements that a jury must unanimously find to convict. *See* ***id.*** at 820-21.

¶14 ***Richardson***, 526 U.S. at 821, distinguished ***People v. Gear***, 23 Cal.Rptr.2d 261 (Cal. Ct. App. 1993), the California case that the ***Molitor*** court found persuasive. *See* ***Molitor***, 210 Wis. 2d at 421-23. We do not read ***Richardson,*** however, to overrule or modify ***Gear***, much less any Supreme Court decision relied upon by ***Molitor***. Moreover, ***Gear*** did not mandate the result in ***Molitor***; it was persuasive, not controlling authority. *See* ***Molitor***, 210 Wis. 2d at 420-23. ***Wulff***'s exception does not apply. Accordingly, although there is merit to Aaron's contention that ***Richardson***'s analysis is persuasive,[4] we may not overrule or withdraw our prior decision. *See* ***Cook***, 208 Wis. 2d at 189-90.

[4] The California statute in ***People v. Gear***, 23 Cal.Rptr.2d 261 (Cal. Ct. App. 1993), did not use the words "violate" or "violation," while WIS. STAT. § 948.025 does. *See* ***State v. Molitor,*** 210 Wis. 2d 415, 421-22, 565 N.W.2d 248 (Ct. App. 1997).

¶15 Aaron also asserts that WIS. STAT. § 948.025 is unconstitutional as applied in this case because the jury could have disagreed about the way each of the victims was sexually assaulted. We fail to see how this challenge differs from his challenge to the statutory language. If the statute does not violate the right to a unanimous verdict on its face, it does not do so as applied where the argument is identical. Although there are some discrepancies in the children's various statements and testimony as to the nature of the sexual assault, they consistently said they were assaulted one way or another at least three times. Because unanimity on the means of committing a series of assaults is not required in any case, such unanimity is not required in this case. Accordingly, we reject Aaron's constitutional challenge.

2. "HIT MAN" EVIDENCE

¶16 Aaron complains that his right to present a defense was compromised when the trial court erroneously refused to admit evidence that James solicited a "hit man" to kill Aaron. Whether a defendant's right to present a defense was violated is a question of constitutional fact that this court reviews de novo. *See* ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994). In reviewing a question of constitutional fact, we accept the circuit court's findings of historical fact, unless those facts are clearly erroneous, but we independently apply those facts to the constitutional standard. *See* ***State v. McMorris***, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997).

¶17 While a court may not "deny [a] defendant a fair trial or the right to present a defense by a mechanistic application of rules of evidence," ***State v. DeSantis***, 155 Wis. 2d 774, 793, 456 N.W.2d 600 (1990), "[c]onfrontation and compulsory process only grant defendants the constitutional right to present

relevant evidence not substantially outweighed by its prejudicial effect." ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). Thus, there is no constitutional right to present irrelevant evidence. *See* ***State v. Jackson***, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994).

¶18 We conclude that Aaron had no right, constitutional or otherwise, to introduce the "hit man" evidence because its probative value was outweighed by its unfairly prejudicial impact and it would only serve to confuse the issues at trial.[5] *See* **State v. Cardenas-Hernandez**, 219 Wis. 2d 516, 532, 536, 579 N.W.2d 678 (1998).

¶19 James was not called to testify for the State. There was therefore no need to impeach him. What Aaron desired to prove was that James influenced Cory and Samantha to falsely accuse Aaron of sexual assault. James's bias would be relevant to show motive for such tampering. There is, however, no proof that James did anything to influence the children, and his bias is therefore irrelevant. James testified that he had never had any contact with Samantha or Cory. Indeed, Aaron conceded at trial that there was no proof that James ever spoke to the children.[6]

---

[5] For these same reasons, we conclude that the trial court did not erroneously exercise its discretion by refusing to admit the "hit man" evidence. Whether to admit or exclude evidence is a discretionary decision that will not be reversed on appeal unless it constitutes an erroneous exercise of discretion. *See* ***State v. Morgan***, 195 Wis. 2d 388, 416, 536 N.W.2d 425 (Ct. App. 1995). Lacking a record of the court's reasons for refusing the evidence, we independently reviewed the record to determine whether it provides a basis for the court's exercise of discretion, looking for reasons to sustain its discretionary ruling. *See* ***State v. Mainiero***, 189 Wis. 2d 80, 95, 525 N.W.2d 304 (Ct. App. 1994).

[6] Moreover, James's alleged willingness to have Aaron Harmer murdered does not necessarily translate into the ability to prevail upon the children to fabricate their stories.

¶20 Moreover, James acknowledged that he had "extremely bad feelings for Aaron Hammer." Indeed, James had reported that Aaron had sexually assaulted A.H., although that report was investigated and found to lack merit. Moreover, introduction of the "hit man" evidence had the potential for distracting and confusing the jury by creating a trial within a trial on a collateral issue. Presumably James would have responded that he did not hire a hit man to find and kill Aaron. He testified that he relied on the police, family and friends to help find Aaron when he was in Arizona. At that point, Aaron would have attempted to produce Miller to testify that James approached him about finding and killing Aaron. The State likely would have felt compelled to respond, and the jury would have been led astray on an issue collateral to Aaron's guilt or innocence. Therefore, the trial court properly exercised its discretion by excluding this evidence.

By the Court.—Judgment affirmed.

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