COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-0422-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNIE FAMOUS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Ronnie Famous has appealed from a judgment convicting him of four counts of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1) (1999-2000),[1] and one count of exposing a child to

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

harmful material in violation of WIS. STAT. § 948.11(2)(a). He has also appealed from an order denying a portion of his motion for postconviction relief. We affirm the judgment and the order.

¶2 Famous raises five issues on appeal: (1) whether his trial counsel rendered ineffective assistance when he failed to file a pretrial motion alleging that the four counts of sexual assault were multiplicitous; (2) whether his trial counsel rendered ineffective assistance when he failed to file a pretrial motion contending that the sexual assault counts should have been charged as a single count under WIS. STAT. § 948.025(1) rather than as four individual counts under WIS. STAT. § 948.02(1); (3) whether the evidence was sufficient to support his conviction for the sexual assault charge set forth in count two of the information; (4) whether the trial court erroneously exercised its discretion by admitting a sexually explicit videotape into evidence; and (5) whether the trial court erroneously exercised its discretion by permitting a police investigator to testify as to the effects of showing sexually explicit material to children. None of Famous's arguments provide a basis for relief from the judgment or order.

¶3 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** However, even if deficient performance is found, a judgment of conviction will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "This requires showing that counsel's errors were so serious

as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687.

¶4 Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. ***Id.***

¶5 It is not ineffective assistance to fail to bring a motion which would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). Because a motion challenging the charges against Famous on multiplicity grounds would have been without merit, Famous's trial counsel did not perform deficiently by failing to bring such a motion.

¶6 The sexual assault charges were based upon allegations made by Valerie B., who was ten years old at the time of the offenses and eleven years old at the time of trial. Valerie testified that on a day in early May 1998, she and her family were at a house in which Famous and others resided. She testified that she went into Famous's bedroom to try to calm her crying baby sister. She testified that while she was in the room, Famous entered carrying a television and a VCR. She testified that he put them on top of a dresser and barricaded the door to the bedroom with another dresser. She testified that they then watched a "nasty" video, which she described as including nude "grown up" boys and girls, and

showing, among other things, "[g]irls … doing it to each other," and somebody sticking a six-to-ten inch "black and silver thing" "in the girl's behind."

¶7 Valerie testified that after Famous showed her the video, he sat down on the bed and pulled his pants down, enabling her to see "his private parts." She testified that he told her to put her hand on "his private spot," an expression Valerie used to refer to Famous's penis. She testified that Famous told her to "[r]ub on his private spot," which she did, describing it as changing from soft to hard and emitting "clear stuff."

¶8 Valerie testified that "after the clear stuff came out of his private spot," Famous "touched my chest." She further testified that after touching her chest, Famous unbuttoned her pants, told her to take them down, and "touched my private spot," referring to her vaginal area. She testified that she told Famous that it hurt, but that he told her to be quiet or he would make it hurt more. She testified that after Famous finished touching her "private spot," he sat back on the bed and tried to put his private spot in her mouth. She testified that he told her to get on her knees, and that Famous "got his private spot to [her] lips." Valerie testified that at this point her younger brothers banged on the bedroom door, Famous removed the barricade, and she went downstairs. She testified that the entire encounter in the bedroom, including watching the video, lasted a little over an hour.

¶9 "Multiplicity arises when the defendant is charged in more than one count for a single offense." ***State v. Rabe***, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980). To determine whether charges are multiplicitous, a court must first determine whether the charges are identical in law and fact. ***Id.*** at 63. The second component of the test for multiplicity requires an assessment of the legislative

intent concerning the allowable unit of prosecution under the statute. ***Id.*** "The overall test is one of fundamental fairness or prejudice to the defendant." ***State v. Hirsch***, 140 Wis. 2d 468, 471-72, 410 N.W.2d 638 (Ct. App. 1987).

¶10 When, as here, the offenses charged are identical in law, this court must determine whether each count requires proof of an additional fact which the other counts do not. ***Rabe***, 96 Wis. 2d at 63. "[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 (1980). The issue is whether the acts committed by the defendant "are so significantly different in fact that they may properly be denominated separate crimes although each would furnish a factual underpinning or a substitute legal element for the violation of the same statute." ***Id.*** at 34.

¶11 Although the conduct alleged in this case took place within a relatively short period of time, it is not multiplicitous because the various acts committed by Famous were substantially different in fact. Each alleged act of sexual contact—hand to penis, penis to mouth, hand to breast, and hand to vagina—involved different body parts of each actor, and constituted a separate, volitional act. *See* ***id.*** at 36. Even assuming that all of the acts happened within a fifteen-minute period, each discrete act required reflection on the part of Famous, followed by conscious deliberation and choice. Contrary to Famous's contentions, the situation is thus not akin to the situation in ***Hirsch*** where the defendant's acts were characterized by the court as "extremely similar in nature and character," consisting of moving his hand from the victim's vaginal area to her anal area and back to her vaginal area, with little, if any, lapse of time between the alleged touchings. *See* ***Hirsch***, 140 Wis. 2d at 474-75. Because each of Famous's acts

was different in nature, and required a separate volitional choice by him, separate charging of the four offenses was appropriate under both components of the test for multiplicity. *See* ***Eisch***, 96 Wis. 2d at 42.

¶12 Famous's claim that the sexual assault counts were required to be charged as a single count under WIS. STAT. § 948.025(1) rather than as four individual counts under WIS. STAT. § 948.02(1) also fails. Section 948.025 provides:

> **(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.

¶13 Famous contends that the present charges fall within WIS. STAT. § 948.025(1) because the four alleged sexual assaults satisfy the statutory requirements of that statute. Specifically, he contends that the four assaults exceeded three violations of WIS. STAT. § 948.02(1), involved the same child, and occurred within a specified period of time, namely, a twenty-four hour period in May 1998. He contends that the language of § 948.025(1) indicates a legislative intent to supersede § 948.02 in situations like these.

¶14 Statutory construction presents an issue of law which we review independently of the trial court. ***State v. David L.W.***, 213 Wis. 2d 277, 281, 570 N.W.2d 582 (Ct. App. 1977). We look first to the words of the statute, and if the language of the statute is clear, we do not look beyond the statute. ***Id.*** at 282. Only if a statute is ambiguous will courts resort to extrinsic aids to construction. ***Id.*** Ambiguity exists if reasonable persons could disagree as to the meaning of the statute. ***Id.*** Ambiguity can be found in the words of the statute itself or in the way the words of the statute interact with and relate to other statutes. ***State v. Sweat***, 208 Wis. 2d 409, 416, 516 N.W.2d 695 (1997).

¶15 On its face, WIS. STAT. § 948.025(1) appears to permit a prosecutor to charge a defendant with one count of violating § 948.025(1) when, as here, the defendant commits three or more violations of WIS. STAT. § 948.02(1) involving the same child within a one-day period. However, by incorporating violations of § 948.02(1), § 948.025(1) is ambiguous as to whether charging under § 948.025(1) is exclusive.

¶16 This ambiguity is resolved by considering the remainder of WIS. STAT. § 948.025, related charging statutes, and the legislative history of § 948.025. WISCONSIN STAT. § 939.65 states that "[e]xcept as provided in s. 948.025(3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." Section 948.025(3) provides that the State "may not charge in the same action a defendant with a violation of this section and with a … violation involving the same child under s. 948.02 … unless the other violation occurred outside of the time period applicable under sub. (1)." By its express language, § 948.025(3) thus prohibits the State from relying on the same offense to charge a defendant under both § 948.025(1) and WIS. STAT. § 948.02(1), but does not prohibit the State from electing under § 939.65 to charge a defendant with multiple counts under § 948.02(1) rather than a single count under § 948.025(1).

¶17 This construction of WIS. STAT. § 948.025(1) is supported by its legislative history, which evinces an intent to facilitate the prosecution of multiple sexual assaults, not to limit the State's ability to prosecute such cases. To convict a defendant under § 948.025, a jury need only unanimously agree that a defendant committed three or more acts of sexual assault against the same child within the specified time period. ***State v. Johnson***, 2001 WI 52, ¶15, 243 Wis. 2d 365, 627 N.W.2d 455. The predicate acts of sexual assault are not themselves elements of

the offense under § 948.025(1). ***Johnson***, 2001 WI 52 at ¶15. It is the *course* of sexually assaultive conduct which constitutes the primary element of a violation of § 948.025(1), and the jury need not unanimously agree on which predicate acts of sexual assault form the basis for the conviction. ***Johnson***, 2001 WI 52 at ¶¶15-16; § 948.025(2). Charging a defendant under § 948.025(1) thus permits the State to prosecute a defendant for the repeated sexual assault of a child who is unable to remember or specify with precision the dates of the different assaults, a goal reflected in the statute's legislative history. *See* Letter in Support of 1993 SB 308 from Walworth County District Attorney Phillip Koss to Senate Committee on Judiciary and Insurance; *see also* Analysis in Legislative Reference Bureau Drafts of Bills Underlying 1993 Wis. Act 227, § 30.

¶18 This is not a case where there was any uncertainty on the part of the victim as to the nature of the sexual assaults or when they occurred. Valerie clearly testified that they occurred on a single day in early May 1998 within a period of approximately one hour. The prosecutor therefore reasonably exercised his discretion in charging Famous with four counts of sexual assault in violation of WIS. STAT. § 948.02(1), rather than one count of violating WIS. STAT. § 948.025(1). Famous's trial counsel was not deficient for failing to contend that the acts were required to be charged as a single count under § 948.025(1).[2]

[2] We also note, as argued by the State, that Famous's construction of WIS. STAT. § 948.025(1) would lead to absurd results. Under Famous's analysis, a defendant who committed numerous, individually provable, violations of WIS. STAT. § 948.02(1) against the same child over a specified period of time would be subject to a lesser penalty than a defendant who committed only two violations of § 948.02(1). As a general rule, a court will avoid construing a statute in such a way as to produce an absurd result. *See* ***Seider v. O'Connell***, 2000 WI 76, ¶32, 236 Wis. 2d 211, 612 N.W.2d 659.

¶19 Famous's next argument is that the evidence was insufficient to support his conviction for the sexual assault alleged in count two of the information, which charged him with having touched Valerie's breast. "Sexual contact" within the meaning of WIS. STAT. § 948.02(1) occurs if a defendant intentionally touches the intimate parts of the victim. *See* WIS. STAT. § 948.01(5)(a). "Intimate parts" are defined in WIS. STAT. § 939.22(19) as the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.

¶20 At trial, Valerie testified that Famous touched her "chest," but never explicitly testified that he touched her breast. Famous contends that the "chest" comprises more than the breasts, and that testimony that he touched Valerie's chest therefore was insufficient to prove that he had sexual contact with her as alleged in count two. In conjunction with this argument, Famous also contends that his trial counsel rendered ineffective assistance when he failed to object to the special verdict submitted to the jury as to count two, which required the jurors to determine whether Famous touched Valerie's chest, not whether he touched her breast.

¶21 The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are for the jury. ***Id.*** at 504. We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***Id.*** "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state

and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted).

¶22 We conclude that the evidence was sufficient to support Famous's conviction for count two. The trial court correctly instructed the jury that before it could find that Famous was guilty of this sexual assault, it had to find beyond a reasonable doubt that he touched Valerie's breast. Because the jurors were correctly instructed that any touching of Valerie's "chest" had to include or refer to her "breast," it was a question of fact for them to decide whether Valerie's testimony that Famous touched her chest established that he touched her breast. In making this determination, the jury was entitled to consider that at the time Famous touched Valerie's "chest," he was in the midst of committing other, varied sexual acts with her. They could therefore infer that he intended to touch her breast when he engaged in the touching referred to by Valerie. Based upon this inference and Valerie's young age at the time of the assaults and trial, the jurors could also reasonably infer that when Valerie testified that Famous touched her "chest," she meant that he touched her breast. *Cf.* ***State v. Morse***, 126 Wis. 2d 1, 6-7, 374 N.W.2d 388 (Ct. App. 1985) (victim's testimony that the defendant placed his hand on her crotch and "put his hand in between my legs in the crotch" was sufficient to permit the jury to infer that the defendant touched the victim's vaginal area). No basis to disturb the conviction therefore exists, nor did counsel render ineffective assistance by failing to object to the language of the special verdict.

¶23 Famous's next argument is that the trial court erroneously exercised its discretion by admitting into evidence excerpts from a sexually explicit

videotape which was seized from Famous's bedroom six days after the assaults. Famous contends that there was insufficient evidence that this was the videotape allegedly shown by him to Valerie, and that a proper foundation therefore did not exist for the admission of the videotape. He relies on the delay between the alleged assaults and the seizure of the videotape, and the fact that other people lived in the house with him. His primary contention is that the videotape which the prosecutor presented in evidence differed from the videotape described by Valerie as having been shown to her. He relies on the fact that at trial and in a statement given to police prior to trial, Valerie stated that the video shown to her by Famous depicted a man putting a rocket-shaped black and silver thing into a woman's "bootie" or "butt." The video seized by the police and offered into evidence at trial depicted a woman putting a black and silver dildo into another woman's anus.

¶24 A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). When reviewing a question on the admissibility of evidence, this court must determine whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. ***Id.***

¶25 We reject Famous's claim that a sufficient foundation did not exist for the admission of the videotape. Although Valerie's testimony as to the gender of the person using the dildo was incorrect, her overall description of the videotape viewed by her was consistent with the tape introduced at trial, which depicted nude men and women, women engaged in sexual activities with each other, and the use of a black and silver dildo matching Valerie's description of a black and silver, six-to-ten inch rocket-shaped object. In addition, evidence indicated that

when the police seized the videotape from Famous's bedroom, it was stopped at the scene involving use of the dildo.

¶26 The trial court reasonably determined that this evidence was sufficient to permit the jury to infer that the videotape offered into evidence was the tape viewed by Valerie, and that an adequate foundation existed for its admission. The trial court also reasonably determined that any discrepancies between Valerie's description and the actual video went to the weight to be given the evidence by the jury, not its admissibility.

¶27 Famous's final argument is that the trial court erroneously exercised its discretion by admitting certain testimony from Michael Vendola, a police investigator. Vendola testified as an expert in the field of child sexual exploitation. He told the jury that although he had not viewed the videotape that was admitted in this case, he had been provided information about its contents. He then testified as to the reasons an adult would show a sexually explicit videotape to a minor. He testified that viewing such a videotape piques a child's natural curiosity about sexual matters. He also testified that by portraying adults engaged in sexual activities and having fun, the videotape validates sexualized activity and lowers the child's inhibitions. Finally, he testified that viewing the videotape demonstrates, or teaches the child, what to do.

¶28 To be admissible, expert testimony must be relevant and assist the trier of fact in understanding the evidence or deciding a fact in issue. ***State v. Richard A.P.***, 223 Wis. 2d 777, 791, 589 N.W.2d 674 (Ct. App. 1998). Whether proffered testimony is relevant and of assistance to the trier of fact presents a discretionary determination for the trial court. ***Id.*** The trial court's decision will

be upheld if it is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id.***

¶29 Famous does not challenge Vendola's expertise. However, he contends that Vendola's testimony was irrelevant. He reasons that because consent is not an element of first-degree sexual assault of a child, whether or not Valerie's inhibitions were lowered by watching the video was irrelevant.

¶30 Evidence is relevant if it makes a fact that is of consequence to the determination of the action more probable or less probable. ***State v. Mayer***, 220 Wis. 2d 419, 429, 583 N.W.2d 430 (Ct. App. 1998); WIS. STAT. § 904.01. As already discussed, the evidence at trial was sufficient to permit the jury to find that Famous showed a sexually explicit video to Valerie. Vendola's testimony that an adult would show such a video to a child in order to facilitate the subsequent commission of a sexual assault was therefore relevant because it established a motive for Famous to show the video to Valerie, and made it more probable that Famous committed the sexual assaults. Vendola's testimony also made it less likely that the jurors would conclude that Valerie's allegations of sexual assault were untruthful based upon their belief that a child would have been so horrified upon seeing the video that he or she would have tried to flee or fight. Because Vendola's testimony was thus clearly relevant, the trial court properly overruled Famous's objection to it.

By the Court.—Judgment and order affirmed.

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