COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3023-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL R. F.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Daniel F. appeals a judgment convicting him of first-degree sexual assault of a child and an order denying his motion for postconviction relief. He argues that his conviction should be overturned because

(1) the trial court erroneously denied his motion to dismiss a second count of first-degree sexual assault; (2) the counts were improperly joined; (3) the counts should have been severed; and (4) the trial court erroneously instructed the jury. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 Daniel was charged with one count of sexual assault of his daughter, who was under the age of thirteen. At the preliminary hearing, his daughter, J., age twelve, testified that while in the bathroom of her house, her father, Daniel, told her to pull down her pants and underwear. He put his penis in her vagina for a few minutes and let his sperm out into the toilet. She testified that this was not the first time but started near the time she was ten years old and that it happened "lots more." After her testimony, her sister A., age ten, testified that on her second day of kindergarten she was sitting on the couch in her pajamas and her father touched her breast and vagina.

¶3 The trial court found that there was probable cause to believe that Daniel had committed a felony. The State filed a two-count information. The first count charged sexual assault of J., and the second count charged sexual assault of A. Daniel moved to dismiss the second count and, alternatively, to sever the two counts for trial. The trial court ultimately denied the motion.

¶4 After a jury trial, Daniel was found guilty of the first count and not guilty of the second. Daniel brought a motion seeking relief from his conviction on the first count. The trial court denied postconviction relief and he filed this appeal.

DISCUSSION

1. The Two-count Information

¶5 Daniel argues that when a prosecutor files a one-count complaint, it is improper to subsequently file a two-count information involving a separate assault occurring four years earlier with a different child. We disagree. This issue involves an interpretation of WIS. STAT. § 971.01, an issue of law we review de novo.[1] *See* ***Ansani v. Cascade Mtn., Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998).

¶6 Under WIS. STAT. § 971.01,

> a felony not charged in the preliminary examination can be made a count in a subsequently filed information if there is evidence direct or inferential in respect to that felony adduced at the preliminary *or* if the subsequently charged felony is demonstrated by the state to be transactionally related, i.e., "not wholly unrelated" to one or more of the felonies for which the defendant has been bound over for trial.

State v. Richer, 174 Wis. 2d 231, 253-54, 496 N.W.2d 66 (1993) (emphasis added).

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[1] WISCONSIN STAT. § 971.01(1) reads:

> The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and … shall file an information according to the evidence on such examination subscribing his or her name thereto.

All statutory references are to the 1997-1998 version unless noted otherwise.

¶7 The judge retains sole responsibility for determining whether probable cause exists to warrant binding the defendant over for trial. ***Id.*** at 251 n.14. "Once the defendant has been bound over, however, it is up to the district attorney to 'examin[e] the testimony received at the preliminary hearing and issue[] the appropriate charge.'" ***Id.*** "The district attorney is afforded great latitude in making this determination as long as the charge rests solely 'within the confines of the evidence introduced at the preliminary examination.'" ***Id.*** We conclude that because there was direct evidence of the second count adduced at the preliminary hearing, the State was entitled to include that charge in the information.

¶8 Daniel goes to great lengths to demonstrate that the count involving A. was "wholly unrelated" to the count involving J. This argument proceeds from the flawed premise that there is only one standard to be met, the "wholly unrelated" standard. To the contrary, by use of the disjunctive "or," ***Richer*** unequivocally holds that the "evidence … adduced" standard is a separate alternative to the "wholly unrelated" standard. ***Id.*** at 253-54. Because Daniel's argument is based on a misreading of ***Richer***, and he provides no additional supporting legal precedent, we reject it.

2. Joinder

¶9 Next, Daniel argues that joinder of the two counts was improper. He contends that the charged offenses were four years apart, and evidence of one would not have been admissible at the trial of the other. We are unpersuaded. Whether initial joinder is proper is a question of law we review de novo. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). The joinder

statute, WIS. STAT. § 971.12(1), is to be construed broadly in favor of initial joinder. ***Locke***, 177 Wis. 2d at 596. Section 971.12(1) provides in part:

> JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

¶10 The State relies on the "same or similar character" provision. *See* WIS. STAT. § 971.12(1). Crimes are of the same or similar character if they are the same type of offense occurring over a relatively short time frame and the evidence to each overlaps. ***Locke***, 177 Wis. 2d at 596. Here, as for both counts, the charges are identical, and Daniel's intent and sexual purpose must be shown in both cases. *See* ***id.*** Because the sexual assaults involved two sisters in the same family home, evidence of the offenses overlaps.

¶11 Daniel contends, however, that the charged offenses did not occur over a relatively short period because one occurred in 1994 and the other in 1998. The time factor must be determined on a case-by-case basis. ***State v. Hamm***, 146 Wis. 2d 130, 140, 430 N.W. 2d 584 (Ct. App. 1988). In ***Hamm***, assaults occurring over a two-year span were held to have occurred over a relatively short period of time. ***Id.***

¶12 There is no per se rule for when the time period between similar offenses is so great that they may not be joined. ***Id.*** "Indeed, that is why we have referred to a 'relatively short period of time' between the two offenses." ***Id.*** "The time period is relative to the similarity of the offenses, and the possible overlapping of evidence." ***Id.*** For example, a "twenty-month period between

offenses did not violate the 'relatively short period of time' factor, when the offenses were of the same type, the evidence would overlap somewhat, and 'relative to these factors,' the time period was sufficiently short." ***Id.*** In the case before us, we are satisfied that the strong similarity between the two incidents and the overlapping evidence overcomes any objection based upon the time interval of four years.

3. Severance

¶13 Next, Daniel argues that the court should have severed the trial of count two from count one. We disagree. We recognize that whenever defendants are tried jointly on a multicount indictment there is a remote possibility that the jury may infer guilt on all the counts garnered simply from a finding of guilt on one of the counts. This conjectural possibility should not, however, dictate nonuse of multicount indictments under proper circumstances. *See* ***United States v. Meriwether***, 486 F.2d 498, 504 (5th Cir. 1973).

¶14 Accordingly, WIS. STAT. § 971.12(3) provides that even after initial joinder, the court may order separate trials of the charges if it appears that a defendant is prejudiced by joinder of the counts. ***Locke***, 177 Wis. 2d at 597. A motion for severance is addressed to trial court discretion. ***Id.***

> When a motion for severance is made, the trial court must determine what, if any, prejudice would result from a trial on the joined offenses. The court must then weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts.
>
> An erroneous exercise of discretion, in the balancing of these competing interests, will not be found unless the defendant can establish that failure to sever the counts caused "substantial prejudice." In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in

> separate trials, the risk of prejudice arising because of joinder is generally not significant.

Id.

¶15 We reject Daniel's claim that evidence concerning count two would not have been admissible in a trial on count one. As Daniel recognizes, resolution of this issue is essentially whether evidence of count two would have been admissible as other acts evidence at trial on count one. A three-part framework is employed for analyzing the admissibility of other acts evidence:

> 1. Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2)?[2]
>
> 2. Is the other acts evidence relevant under Wis. Stat. § (Rule) 904.01?
>
> 3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stat. § (Rule) 904.03?

State v. Davidson, 2000 WI 91, ¶35, 236 Wis. 2d 537, 613 N.W.2d 606.

¶16 "[A]longside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***Id.*** at ¶36. Our supreme court "has consistently held that in sexual assault cases, especially those involving crimes against children, the

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[2] WISCONSIN STAT. § 904.04(2) reads:

> 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.

greater latitude rule applies" together with the three-part framework. ***Id.*** at ¶44. "Like many other U.S. jurisdictions, Wisconsin courts permit 'a more liberal admission of other crimes evidence' in sexual assault cases than in other cases." ***Id.*** In sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial. *See* ***id.*** at ¶51. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Id.*** With these principles in mind, we turn to the application of the three-part analytical framework to the specific facts of the case before us.

¶17 Daniel focuses his challenge on the second and third steps: relevancy and prejudice.[3] Under WIS. STAT. § 904.01, relevancy has two facets. "The first consideration in assessing relevance is whether the evidence relates to a fact or proposition that is of consequence to the determination of the action." ***State v. Sullivan***, 216 Wis. 2d 768, 785, 576 N.W.2d 30 (1998). "The substantive law determines the elements of the crime charged and the ultimate facts and links in the chain of inferences that are of consequence to the case." ***Id.*** at 785-86. Intent to become sexually aroused or gratified is an element of the definition of sexual contact under WIS. STAT. § 948.01(5). *See also* WIS. STAT. § 948.02(1). Because intent is of consequence to the case, the other acts evidence satisfies the initial relevancy consideration under WIS. STAT. § 904.01. *See* ***Sullivan***, 216 Wis. 2d at 785-86.

[3] By not specifically challenging the first step, Daniel essentially concedes that the other act would have been offered to show intent, motive, or scheme, which are proper purposes under WIS. STAT. § 904.04(2).

¶18 "The second consideration in assessing relevance is probative value, that is, whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." ***Id.*** at 786. "The probative value of the other acts evidence in this case depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." ***Id.***

> Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the probative value lies in the similarity between the other act and the charged offense. The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence. In other words, "[I]f a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable."

Id. at 786-87.

¶19 The other acts evidence bears great similarity to the charged offense in time, place and circumstance. The assaults were not unduly remote in time.[4] They occurred at Daniel's home with his young daughters. The acts involved touching of the girls' vaginal areas and breasts with his hand, with the exception that his assault of J. also involved vaginal-penile contact. A court could reasonably conclude that the episodes share the common motive to take advantage of the intimacy of the home and the vulnerability of his young daughters to obtain sexual gratification. Because of the nearness in time, place and circumstances of the other act to the alleged offense, the record discloses a rational basis for

[4] *See* ***United States v. Cuch***, 842 F.2d 1173, 1178 (10th Cir. 1988), and cases cited within (seven and one-half years not unduly remote under FED. RULES EVID. RULE 404(b), 28 U.S.C.A.).

concluding that the other act evidence has a tendency to show intent or motive. *See* ***id.*** at 785. Consequently, the record supports the determination that the other acts evidence meets both facets of the relevancy test under WIS. STAT. § 904.01. *See* ***id.*** at 786.

¶20 Daniel also challenges the third step: prejudice. The question posed is whether, under WIS. STAT. § 904.03, the probative value of the other act would be substantially outweighed by the danger of unfair prejudice. *See* ***Davidson***, 2000 WI 91 at ¶13. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis. 2d at 789-90.

¶21 The record discloses a reasonable basis to conclude that the probative value of the other act evidence would not be substantially outweighed by the danger of unfair prejudice. As our previous discussion demonstrates, the probative value of other act evidence, depending partially upon its nearness in time, place, and circumstance to the alleged crime or element sought to be proved, is high. "[S]imilarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." ***Davidson***, 2000 WI 91 at ¶75. Consistent with ***Davidson*** and ***Sullivan***, the trial court could reasonably have determined that the similarities made the other crimes evidence highly probative of the defendant's intent and the lack of absence or mistake, and the danger of unfair prejudice low.

¶22 In view of ***Davidson***, we conclude that the trial court reasonably could have determined that the probative value of the other acts evidence would

not be substantially outweighed by the danger of unfair prejudice under WIS. STAT. § 904.03. Consequently, under the three-step analytical framework set forth in ***Davidson*** and consistent with the greater latitude rule, a decision by the trial court to admit evidence of another assault against A. would not constitute an erroneous exercise of discretion.[5]

4. Jury Instructions

¶23 Next, Daniel argues that over defense counsel's objection, the trial court erroneously instructed the jury. Daniel challenges the following instruction:

> If you find that the offense charged or either of them was committed by the defendant, it is not necessary for the state to prove that the offense was committed on the precise date alleged in the information. If the evidence shows beyond a reasonable doubt that he offense was committed on a date near the date alleged, that is sufficient.

¶24 Daniel concedes that this type of instruction is ordinarily permissible in child sexual assault cases where the precise date of the offense cannot be

[5] Daniel also alleges: "The only material issue was whether the defendant had assaulted [J.] at the time charged, as opposed to having *ever* assaulted her." Relying on ***State v. Alsteen***, 108 Wis. 2d 723, 324 N.W.2d 426 (1982), he apparently attempts to imply that he conceded the elements of the offense, making proof of motive, intent or purpose irrelevant. Daniel accompanies this assertion with no record citation, however.

> [W]e decline to embark on our own search of the record, unguided by references and citations to specific testimony …. Section (Rule) 809.19(1)(e), Stats., requires parties' briefs to contain "citations to the … parts of the record relied on" and we have held that where a party fails to comply with the rule, "this court will refuse to consider such an argument." … "[I]t is not the duty of this court to sift and glean the record *in extenso*" to find facts which will support [an argument]."

Tam v. Luk, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Therefore, we do not address this argument.

determined with certainty. However, he contends that it was improper and prejudicial here because the jury heard evidence that similar assaults occurred innumerable times since J. was nine and one-half years old. Daniel claims that the possibility of an open-ended timeframe for considering the offense is grounds for reversal. He points out that J. testified that there were numerous acts of sexual contact over a lengthy period. He cites the jury instruction committee's note of caution: "This instruction should *not* be used when evidence of more than one criminal act has been admitted in support of a single charge …." WISCONSIN JI—CRIMINAL 255 Comment at 1 (2000).

¶25 He complains that the jury could have found him guilty on the basis of alleged sexual contact separate from the charged offense, citing ***Jensen v. State***, 36 Wis. 2d 598, 153 N.W.2d 566 (1967). We reject his argument.

¶26 Daniel has not preserved this argument for appellate review. WISCONSIN STAT. § 805.13(3) states that at the instruction conference: "Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, *stating the grounds for objection with particularity on the record.* Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." (Emphasis added.)

¶27 At the instruction conference, Daniel, through counsel, objected to the instruction as follows:

> I don't think that this sort of instruction really applies in the fact situation in this particular case that we have in front of us. That deals with a case where you have an Information that says the offense occurred on such and such a date, let's say October 4, 1999. The evidence then comes in, and the witness testifies, "Well, gee, it wasn't on October 4 that it happened, it was on October 6 of 1999 when the offense occurred." In that situation, that clarifying instruction, that

> particular instruction which is being requested here is an appropriate one, but it doesn't apply to what the facts are in this particular case.
>
> Essentially what the Information here is, the Information alleges that on August 28 of 1998, [J.] was sexually assaulted or had sexual contact with Daniel []. That is what the Information alleges. What is the evidence in this case? *All the evidence directly points* and [J]. has testified *that's the date that that offense occurred*. There is no discrepancy in this case between the Information and the testimony. I think there is some prejudice and danger if this particular instruction is given in that basically it will – it gives some approval to the State to basically impeach its key or star witness in terms of saying, well, she was mistaken, it wasn't on August 28. She was not to be believed it was on August 28.
>
> So I think it would mislead and confuse the jury and basically give the State an advantage that it should not properly have in this particular case, so I would object to it on that basis.

¶28 Daniel's objection at the trial court level is at odds with his argument on appeal. At the trial court, he emphasized that "all the evidence" and J.'s testimony directly points to the offense occurring on August 28, 1998. Now, on appeal, Daniel takes the opposite tack, insisting that the evidence showed numerous acts of sexual contact over a lengthy period.

¶29 We conclude that Daniel's objection failed to comply with WIS. STAT. § 805.13(3). "We will not … blindside trial courts with reversals based on theories which did not originate in their forum." ***State v. Rogers,*** 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Whether to give a particular jury instruction is within the trial court's discretion. ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988). We will not overturn a discretionary determination on a ground that was not brought to the trial court's attention. ***State v. Foley***, 153 Wis. 2d 748, 754, 451 N.W.2d 796 (Ct. App. 1989).

¶30 "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. This rule is "not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." ***Id.*** "The rule promotes both efficiency and fairness, and 'go[es] to the heart of the common law tradition and the adversary system.'" ***Id.*** (quoting ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997)). Because Daniel's specific challenge to the jury instruction was not preserved, we do not address it on appeal.

By the Court.—Judgment and order affirmed.

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