

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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.

**Appeal Nos. 2008AP364-CR
2008AP365-CR
2008AP366-CR**

**Cir. Ct. Nos. 2005CF703
2005CF839
2005CF1152**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL M. REVELES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 VERGERONT, J. Michael Reveles appeals the judgments of conviction on six counts of second-degree sexual assault in violation of WIS.

STAT. § 940.225(2)(g) (2007-08)¹ and the order denying his postconviction motion. First, he argues the evidence was insufficient to support the convictions because the State failed to prove an essential element of the crime beyond a reasonable doubt. Second, he argues that certain of the six counts are multiplicitous and therefore violate the double jeopardy provisions of the state and federal constitutions.² We conclude the evidence was sufficient and no counts are multiplicitous. We therefore affirm the judgments of conviction and the order denying postconviction relief.

BACKGROUND

¶2 In 2004 and 2005, Reveles was employed as a certified nursing assistant at St. Mary's Hospital in Madison. Between March 30, 2005, and May 20, 2005, three criminal complaints were filed against Reveles, all alleging second-degree sexual assault in violation of WIS. STAT. §940.225(2)(g).

¶3 WISCONSIN STAT. § 940.225(2) provides that whoever does the following is guilty of a Class C felony:

(g) Is an employee of a facility or program under s. 940.295 (2) (b), (c), (h) or (k) and has sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² The Fifth Amendment to the United States Constitution provides in relevant part: “[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” Article I, § 8 of the Wisconsin Constitution provides in relevant part: “no person for the same offense may be put twice in jeopardy of punishment....”

WISCONSIN STAT. § 940.295(2)(h) refers to “[a]n inpatient health care facility.” The complaints alleged that St. Mary’s Hospital was an inpatient health care facility under para. (2)(h). For purposes of § 940.295, “inpatient health care facility” has the meaning given in WIS. STAT. § 50.135(1): “any hospital, nursing home, county home, county mental hospital or other place licensed or approved by the department [of health services (DHS)]³” *See* § 940.295(1)(i).

¶4 The three cases were joined for trial⁴ and Reveles was tried for six counts of sexual assault involving patients at St. Mary’s Hospital: two involving Ramona B.; two involving Betty T.; and one each for Terry W. and Susan M. Reveles waived his right to a jury trial and was tried before the court.

¶5 The circuit court found Reveles guilty of all six counts. Reveles moved for postconviction relief on two grounds. First, he contended that there was insufficient evidence to prove beyond a reasonable doubt that St. Mary’s Hospital was licensed or approved by DHS. Second, he contended that the two counts involving Ramona B. were multiplicitous, as were the two counts involving Betty T. and therefore his right to be free from double jeopardy was violated. The court denied relief on both grounds. Reveles appeals both rulings.

³ The Department of Health and Family Services became the Department of Health Services, effective July 1, 2008. 2007 Wis. Act 20, § 9121(6)(a).

⁴ Another sexual assault case against Reveles was joined with the other three, but was ultimately dismissed before trial.

DISCUSSION

I. Sufficiency of the Evidence

¶6 Reveles contends there was insufficient evidence to establish beyond a reasonable doubt that St. Mary's Hospital was licensed or approved by DHS and that, in this case, this was an element of the crime under WIS. STAT. § 940.225(2)(g). The State does not dispute Reveles's contention that St. Mary's Hospital's licensure or approval by DHS is an element of the crime with which Reveles's was charged. We take this as an implicit concession that it is an element of the crime. *See State ex rel. Sahagian v. Young*, 141 Wis. 2d 495, 500, 415 N.W.2d 568 (Ct. App. 1987). The State's position is that there was circumstantial evidence and reasonable inferences from the evidence sufficient to establish this element beyond a reasonable doubt.

¶7 Due process requires that the State must prove each element of a charged offense beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). When we review a challenge to the sufficiency of the evidence, we view the evidence most favorably to the State and to the conviction. *Id.* If more than one reasonable inference can be drawn from the evidence presented at trial, we accept the inference most favorable to the verdict, even if other inferences could be drawn. *See State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. The test is whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *State v. Schutte*, 2006 WI App 135, ¶14, 295 Wis. 2d 256, 720 N.W.2d 469 (citing *Poellinger*, 153 Wis. 2d at 503-04). This highly deferential standard of appellate review of a challenge to the sufficiency of the evidence is the same whether the fact finder is a jury or the circuit court. *Routon*, 304 Wis. 2d

480, ¶17. Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime presents a question of law, which we review de novo.

Id.

¶8 Before discussing the evidence we provide some additional statutory background. A hospital is defined in WIS. STAT. § 50.33(2)(a) as

any building, structure, institution or place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment of and medical or surgical care for 3 or more nonrelated individuals hereinafter designated patients, suffering from illness, disease, injury or disability, whether physical or mental, and including pregnancy and regularly making available at least clinical laboratory services, and diagnostic X-ray services and treatment facilities for surgery, or obstetrical care, or other definitive medical treatment.

It is illegal for a facility to use the term “hospital” to identify itself if it is not approved by DHS. WIS. STAT. § 50.39(2). In addition, “no hospital may operate in Wisconsin unless it is approved by the department.” WIS. ADMIN. CODE § HFS 124.03(1) (Dec. 2004).⁵ Once DHS has issued a certificate of approval to a hospital, that certificate remains in effect unless there is a substantial failure to comply with the statutes or administrative code provisions regulating hospitals. WIS. STAT. § 50.35. If the department issues an order revoking a certificate of approval, the attorney general enforces the order by court action, including injunctive relief. Section 50.39(4).

¶9 The State presented the following evidence at trial. Mary Kay Leonard testified without contradiction that she is the director of an intermediate

⁵ All references to the Wisconsin Administrative Code are to the December 2004 version unless otherwise noted.

care unit at St. Mary's Hospital in Madison. She is a registered nurse with a bachelor of science degree in nursing. She has been a registered nurse for thirty-one years, has worked at St. Mary's Hospital for sixteen years, and has been the director of the Medical Intermediate Care Unit at St. Mary's Hospital for fifteen years. She is responsible for the 24/7 operation of the unit, including hiring and dismissing employees, acquiring equipment, and handling the budget. Leonard testified that Reveles was employed in her unit as a certified nursing assistant and also as a monitor watcher at the relevant times in 2004 and 2005. Another witness testified that she was a registered nurse and had been working at St. Mary's Hospital for four years.

¶10 The State also presented evidence of the primary diagnosis, treatment, and procedure performed on each of the victims while they were patients at St. Mary's Hospital. Susan M. suffered coronary atherosclerosis of native coronary vessel and underwent a cardiac catheterization after being admitted to the hospital on an emergency basis. Terry W. was taken to St. Mary's Hospital by emergency ambulance and admitted with bleeding in the brain due to a brain aneurism that had burst; she had emergency surgery that day and remained in the hospital fourteen days. Ramona B. was admitted to St. Mary's Hospital on March 17, 2005, and remained there for three or four days; she had fallen and there was concern that she might have suffered a rupture in the brain because she was on blood thinners following a previous stroke. Betty T. was admitted to St. Mary's Hospital with cerebral thrombosis with cerebral infarction (a decrease in blood supply to the brain) and underwent a cardiac catheterization, remaining at the hospital for eight days.

¶11 In denying the postconviction motion, the court stated:

the Court is convinced that adequate evidence has been presented. First, the testimony of knowledgeable persons established that St. Mary's Hospital actually holds itself out as "St. Mary's Hospital." The Wisconsin Statutes make clear that the use of the term "hospital" is strictly limited. Second, a number of witnesses testified to facts showing that St. Mary's Hospital met the definition of "hospital" provided in WIS. STAT. § 50.33(2). The Statutes are clear that maintenance of a "hospital" is subject to [DHS] approval.

¶12 We agree with the circuit court that the evidence was sufficient to establish beyond a reasonable doubt that St. Mary's Hospital is a hospital approved by DHS. The court was entitled to credit the testimony set forth in paragraphs 9 and 10, *supra*. From this testimony it is reasonable to infer beyond a reasonable doubt that St. Mary's Hospital has been holding itself out as a hospital, has been operating as a hospital, and has met the definition of a hospital under WIS. STAT. § 50.33(2)(a) for at least the last sixteen years. Given that it is illegal for a facility to hold itself out as a hospital and to operate as a hospital without DHS approval, WIS. STAT. § 50.39(2) and WIS. ADMIN. CODE. § HFS 124.03(1), and given the enforcement mechanism for violating that prohibition, § 50.39(4), it is reasonable to infer that St. Mary's Hospital is approved to operate as a hospital by DHS. For the same reasons, it is reasonable to infer beyond a reasonable doubt that St. Mary's Hospital's certificate of approval has not been revoked.

¶13 Reveles contends that the State was required to provide "affirmative proof" that St. Mary's Hospital was licensed. He does not explain what he means by "affirmative proof," nor does he cite any case stating that "affirmative proof" of an element is required to support a conviction. He mentions that one "possibility" for "sufficient proof" of licensure would be testimony directly addressing licensure. We agree that this is one option for proving this element, but it is not the only option. It is well established that a finding of guilt may rest upon

evidence that is completely circumstantial. *Poellinger*, 153 Wis. 2d at 501. We apply the same standard to sufficiency of evidence whether it is circumstantial or direct. *Id.*

¶14 Reveles points to *State v. Powers*, 2004 WI App 156, 276 Wis. 2d 107, 687 N.W.2d 50, as precedent for his position that a successful prosecution under WIS. STAT. § 940.225(2)(g) requires that the State “affirmatively prove” the state-licensed status of the hospital. We do not agree. The issue in *Powers* was whether an employee of a health care facility operated by the United States Department of Veteran Affairs could be subject to § 940.225(2)(g). The parties stipulated that the facility was federally regulated and was not subject to state regulation. *Id.*, ¶10. We concluded that the facility did not meet the definition of “inpatient health care facility” in WIS. STAT. § 50.135(1) because it was not “licensed or approved by [DHS].” *See id.*, ¶¶9-11. There is nothing in *Powers* that requires any particular type of proof that a facility is “licensed or approved by [DHS],” § 50.135(1), in order to satisfy § 940.225(2)(g). Indeed, in *Powers* there had been no trial; rather, Powers moved to dismiss the charge after arraignment and we granted leave to appeal the nonfinal order denying that motion. 276 Wis. 2d 107, ¶5.

¶15 We conclude the evidence is sufficient for a reasonable fact finder to determine beyond a reasonable doubt that St. Mary’s Hospital is a hospital approved by DHS. Although there is no direct evidence of a certificate of approval, the reasonable inferences from the evidence are sufficient in force and probative value to establish this element beyond a reasonable doubt.

II. Multiplicity

¶16 The information charged Reveles with one count of touching Ramona B.’s breasts and one count of touching her genitals. It charged him with one count of touching Betty T.’s breasts and one count of touching her genitals.⁶ Reveles argues that the evidence presented at trial was insufficient to support charging two separate counts with respect to Ramona B. and two separate counts with respect to Betty T. Reveles contends this violates the protection in the double jeopardy clause against multiple charges for the same punishment.

¶17 The purpose of a multiplicity challenge is to prevent the defendant from being subject to multiple punishments for the same offense. *State v. Koller*, 2001 WI App 253, ¶28, 248 Wis. 2d 259, 635 N.W.2d 838. We analyze multiplicity challenges using a two-part test. *Id.*, ¶29. First, we decide whether the offenses are identical in law and fact under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Koller*, 248 Wis. 2d 259, ¶29. Second, if the offenses are not identical in law and fact, we inquire whether the legislature intended multiple

⁶ WISCONSIN STAT. § 940.225(5)(b)1. provides that “sexual contact,” for purposes of § 940.225, means:

Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):

a. Intentional touching by the defendant or, upon the defendant’s instruction, by another person, by the use of any body part or object, of the complainant’s intimate parts.

“Intimate parts” means “the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.” WIS. STAT. § 939.22(19).

punishments for the offense in question. *Id.* Whether a multiplicity violation exists in a given case is a question of law that we review de novo. *Id.*, ¶32.

¶18 Reveles confines his argument to the first part of the test. He contends that the two counts involving Ramona B. and the two counts involving Betty T. are identical in fact because each set of charges arises out of a “single brief, continuous incident.” There is no dispute that the two charges involving Ramona B. are identical in law because both allege a violation of WIS. STAT. § 940.225(2)(g). The same is true of the two charges involving Betty T.

¶19 As a threshold matter, we address the State’s contention that Reveles has waived his right to raise this multiplicity challenge on appeal because he failed to timely raise the issue before the end of the trial. The State relies on *Koller*. In *Koller*, we held that a multiplicity challenge based on the proof presented at trial must be raised before the end of trial so that the State has an “opportunity to develop more facts while the witnesses [are] on hand and to enable the trial court to resolve the matter in an efficient and timely manner.” *Id.*, ¶¶43-44. If a multiplicity objection is not made before the case is submitted to the jury, the objection is waived and the defendant may not obtain relief unless he or she shows that the failure to object constituted ineffective assistance of counsel. *Id.*, ¶44.

¶20 Reveles concedes that he failed to raise a multiplicity objection before the case was submitted to the jury, but he asserts that *Koller* is “suspect” because it is inconsistent with a line of cases arising in a guilty plea context. Specifically, in *State v. Morris*, 108 Wis. 2d 282, 284 n.2, 322 N.W.2d 264 (1982), *abrogated by State v. Kelty*, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886, the court held that, while it is generally true that a guilty plea waives all nonjurisdictional defects including constitutional claims, there are certain defects

that are not waived and a double jeopardy claim is one. In *Kelty*, the court abrogated this rule, holding that a guilty plea waives the right to assert a multiplicity claim on a direct appeal when the claim cannot be resolved on the record. 294 Wis. 2d 62, ¶¶2, 20-27, 34, 39. Relying on *Kelty*, Reveles contends he may raise a multiplicity claim on appeal because the claim can be resolved on the record as it stands, without further fact-finding.

¶21 *Morris*, *Kelty*, and the other cases Reveles cites address waiver of multiplicity objections only in the context of a guilty plea. In contrast, *Koller* is directly on point because it addresses a situation in which the defendant's multiplicity challenge is directed to evidence presented at trial. We conclude we are bound by *Koller*. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court has the power to overrule, modify or withdraw language from a previously published decision of the court of appeals). Any argument that *Koller* was wrongly decided must be addressed to the supreme court.

¶22 Following *Koller*, we conclude that, because Reveles did not raise a multiplicity objection to the charges before they were sent to the jury, he has waived his right to raise this issue on appeal. 248 Wis. 2d 259, ¶44. We see no reason to disregard waiver. We therefore consider whether the failure to object before the end of trial constituted ineffective assistance of counsel.

¶23 In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that trial counsel's performance was deficient and that he was prejudiced as a result of that deficient performance. *Koller*, 248 Wis. 2d

259, ¶7. In this case there was no *Machner*⁷ hearing because the circuit court determined that the evidence at trial established there was no multiplicity violation. Therefore we are not reviewing findings of fact made by the circuit court but are applying de novo the legal standards of deficient performance and prejudice to the evidence at trial. *See id.*, ¶10. If the evidence at trial shows the charges involving Ramona B. and Betty T. were not multiplicitous, then trial counsel was not deficient for failing to object on those grounds and Reveles was not prejudiced by the lack of an objection.⁸ We therefore turn to Reveles’s argument that the trial evidence shows the two charges involving each patient were identical in fact.

¶24 Charges are not identical in fact if they are “separated in time or are of a significantly different nature....” *State v. Eisch*, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980).

The “different nature” inquiry is not limited to an assessment of whether the acts are different types of acts. Rather, even the same types of acts are different in nature “if each requires ‘a new volitional departure in the defendant’s course of conduct.’” Furthermore, time is an important factor, but even a brief time separating acts may be sufficient:

“That the interval is merely minutes or even seconds, as with the other elements and factors discussed, cannot be a

⁷ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁸ We note that in this case the analysis we undertake for the ineffective assistance claim is substantively the same as that we would undertake if we were to accept Reveles’s contention that *State v. Kelty*, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886, permits a direct multiplicity challenge on appeal, in spite of waiver, based on the facts presented at trial. Both analyses in this case involve the application of the multiplicity standard to the evidence presented at trial under a de novo standard of review.

solely determinative factor. The resolution of this factor is not solved by a stopwatch approach.”

The pertinent time question is whether the facts indicate the defendant had “sufficient time for reflection between the assaultive acts to again commit himself.”

Koller, 248 Wis. 2d 259, ¶31 (citations omitted).

¶25 Ramona B. testified as follows. While she was a patient at St. Mary’s Hospital, Reveles came into her room, asked her if she wanted a back rub, and drew the curtains around her bed. He told her to lay on her stomach, and he began rubbing her back. In the course of this he moved his hands around her sides and began rubbing her breast. At that point, she tensed up and Reveles pulled away. After that, Reveles placed his hand on her buttocks and asked her if she wanted it rubbed. She said no. She indicated that he said something to her along the lines of “it feeling good.” She rolled over, trying to sit up, but Reveles reached under her gown and rubbed her breast again and while he did this, his other hand “came up through my private part.” According to Ramona B., this continued until she heard a noise, at which point he stopped. She then left the room and went to a common area where she sat “thinking about what just went on.” She decided that “he wasn’t getting away with it” and she reported the incident to a nurse ten to fifteen minutes later.

¶26 We conclude that the two counts involving Ramona B. are not multiplicitous. After Reveles rubbed her breast, she tensed up, and he pulled away. At that point, he could have refrained from any further sexual contact with Ramona B. Instead, he placed his hand on her buttocks and when she said no and tried to evade his touch, he chose to touch her breast again and also to touch her

genitals. We are satisfied that the touching of her genitals constituted a separate violation from the act of touching her breast.

¶27 Betty T. testified as follows. While she was a patient at St. Mary’s Hospital, Reveles asked her roommate, Ramona B., if she wanted a back rub, but because the curtains were drawn, she could not see what happened. After Ramona B. left the room, Reveles asked her if she wanted a back rub, and she said yes. Reveles instead gave her a sponge bath. In the course of the sponge bath, Reveles motioned for her to turn over on to her back, and she did. He touched her breast and her nipple and then “rubbed the nipple and pulled it out.” He then placed his fingers in the folds of her genitals and rubbed “back and forth.” She stiffened up and he stopped.

¶28 We conclude that the two counts involving Betty T. were not multiplicitous. Not only did Reveles touch two different intimate parts, he manipulated each in two distinct ways, each a separate volitional act.

¶29 We reject Reveles’s argument that *State v. Hirsch*, 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987), supports his position that the two charges against each victim are identical in fact because each set of charges arises out of a “single, brief continuous incident.” In *Hirsch*, we held that the defendant’s actions—moving his hand back and forth between a five-year-old victim’s vagina and anus three times—were “extremely similar in nature and character” and therefore were identical in fact. *Id.* at 474-75. We stated that the acts occurred within a few minutes of each other and we determined that there was “no pausing for contemplation ... nor was there a significant change in [the defendant’s] activity....” *Id.* at 475. In contrast, with both Ramona B. and Betty T. there were distinct activities involving different intimate parts, constituting a “new volitional

departure in [Reveles's] course of conduct.” See *State v. Cleveland*, 2000 WI App 142, 237 Wis. 2d 558, ¶25, 614 N.W.2d 543.

¶30 We also reject Reveles's argument that *Cleveland's* holding is inconsistent with *Hirsch* and therefore we must disregard *Cleveland*. See *State v. Swiams*, 2004 WI App 217, ¶23, 277 Wis. 2d 400, 690 N.W.2d 452 (if two court of appeals cases conflict, the earlier one governs). In *Cleveland* we held that two instances of touching an eleven-year-old's breasts were different in fact, though they were close together in time. 237 Wis. 2d 558, ¶25. The defendant there was alleged to have rubbed an eleven-year-old's breasts from the front as he polished her leather coat, then squeezed her breasts from behind as he lifted her off a chair. *Cleveland*, 237 Wis. 2d 558, ¶¶3, 26. We concluded that each contact was based on a separate volitional choice by the defendant. *Id.*, ¶26. *Hirsch* and *Cleveland* do not conflict because the distinct activities in *Cleveland* with each touching of the intimate part or parts is not present in *Hirsch*.

¶31 Reveles also points out in that in *Eisch* and *State v. Bergeron*, 162 Wis. 2d 521, 470 N.W.2d 322 (Ct. App. 1991), in which the court found multiplicity, the sexual assaults were prolonged and involved assaultive behavior. However, nothing in those opinions suggest that less assaultive acts or acts any closer in time must be found to be identical in fact.

¶32 Because we conclude that the two counts against Reveles with respect to Ramona B. and the two counts with respect to Betty T. were not multiplicitous based on the trial evidence, Reveles's trial counsel was not deficient for not raising a multiplicity objection, nor was Reveles prejudiced by the lack of

an objection.⁹ Accordingly, we conclude that Reveles did not receive ineffective assistance of counsel.

CONCLUSION

¶33 The circuit court correctly denied Reveles's postconviction motion based on his challenge to the sufficiency of the evidence and his multiplicity challenge. Accordingly, we affirm his conviction and the order denying his postconviction motion.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

⁹ We agree with the State that under *State v. Koller*, 2001 WI App 253, ¶¶44, 55, 248 Wis. 2d 259, 635 N.W.2d 838, in order to show that the defendant was prejudiced by counsel's failure to make a multiplicity objection before the case went to the jury, the defendant must show the State would have been unable to present evidence satisfying the circuit court that the two counts were multiplicitous. However, because we conclude the defendant has not shown prejudice for another reason, we need not address this point.

