**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2011

**A. John Voelker
Acting Clerk of Court of Appeals**

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.

Appeal No. 2010AP947-CR

Cir. Ct. No. 2007CF91

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN D. MADSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kevin Madsen appeals a judgment of conviction for child enticement, soliciting a child for prostitution, and two counts of second-degree sexual assault of a child. Madsen also appeals an order denying his postconviction motions. Madsen argues: the jury instructions for the sexual

assault charges violated various constitutional rights because they did not specify the dates of the alleged assaults; he was wrongfully denied his right to testify; the circuit court erroneously denied his change of venue motion; the circuit court erroneously admitted prior bad acts evidence; and his counsel was ineffective for numerous reasons. We reject Madsen's arguments and affirm.

BACKGROUND

¶2 At Madsen's jury trial, Kirsten P. testified she ran away from home on March 7, 2007, when she was fifteen years old, and went to the home of Daniel Owens to use methamphetamine. Kirsten stayed with Owens until March 28. Owens provided Kirsten alcohol and drugs on a daily basis while she was at his house, and told visitors that Kirsten was working the corner for him. Kirsten stated Madsen twice came to Owens' house and offered Owens methamphetamine in exchange for having sexual intercourse with her. Kirsten testified Madsen had sexual intercourse with her on both occasions.

¶3 Kirsten explained that the first sexual encounter occurred approximately one week after she arrived at Owens' home, and the second occurred in the week before her departure. She testified about details of both assaults, including what occurred, where, and what both she and Madsen were wearing. Kirsten also stated that at times when Madsen was not present, Owens stabbed her finger with a screwdriver, cut her leg when he threw an ashtray, and burnt her skin with a torch and a meth pipe.

¶4 Madsen did not testify at trial. He was convicted and the circuit court denied two postconviction motions. He now appeals.

DISCUSSION

Submission of identical jury instructions on both sexual assault charges

¶5 Madsen first argues the submission of two identical sexual assault instructions violated the prohibition against double jeopardy and denied him both due process and the right to a unanimous jury verdict. He contends the instructions should have differentiated the two sexual assault counts by date. Madsen also argues his trial counsel was ineffective for failing to object to the instructions.

¶6 We reject Madsen's arguments. It is implausible that the jury did not understand that one charge referred to the first sexual assault and the other referred to the second assault. Kirsten testified about two different assaults, providing two dates eight days apart, and explaining different details about each assault. Additionally, both the State and defense counsel referred to two separate acts in their closing arguments. Moreover, the court's instructions to the jury referred to the "first count" and the "second count," respectively, and informed the jury:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the amended information. Each count charges a separate crime and each one must be considered separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.

The court further cautioned the jury that its verdict on each count must be unanimous, and read to the jury the verdict forms:

> First of these reads as follows—and it's labeled "First Count"—"We, the jury, find the defendant Kevin D. Madsen," then there's a blank and you will either fill in "not guilty" or "guilty of having sexual intercourse with a

> child under the age of 16." And obviously the second one, which refers to the second count, reads exactly the same way, only it's with regard to the second allegation.

¶7 Most likely, the jurors assumed that count one referred to the act that occurred first in time and that count two referred to the act that occurred about a week later. Even if this is not the case, there is still no cause for concern. In a recent decision involving a similar argument, we observed:

> [T]he jury here did not return a combination of acquittal and guilty verdicts; rather, it convicted [the defendant] on both counts in question, returning two verdicts of guilty. This eliminates the risk that the jury was not unanimous and, thus, does not give rise to prejudice by offending the unanimous jury requirement. The unanimity of the jury is accurate even if the jurors … did not all agree on which act should be assigned to which count.
>
> Moreover, the jury was explicitly told that "[e]ach Count charges a separate crime and you must consider each one separately." We agree with the State that no reasonable juror could hear that instruction and conclude that he or she could predicate both guilty verdicts on the same act. Thus, when all the jurors agreed that [the defendant] was guilty of both counts, they unanimously agreed beyond a reasonable doubt that he had committed both of the acts of sexual assault charged .... How each individual juror assigned the two acts between the two counts made no difference; for however each juror assigned them, each juror could not find [the defendant] guilty of both counts without concluding beyond a reasonable doubt that [he] engaged in both acts charged.

State v. Becker, 2009 WI App 59, ¶¶23-24, 318 Wis. 2d 97, 767 N.W.2d 585 (citation omitted). That analysis is equally applicable here. We presume that the jury is rational and that it followed the instructions given. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶¶33, 40, 270 Wis. 2d 62, 676 N.W.2d 475.

¶8 It does not matter whether we review Madsen's claim directly or through the lens of ineffective assistance of counsel. There is simply no

possibility that the jury was not unanimous on both counts. Nor is there any reasonable basis for Madsen's double jeopardy argument, that the jury might have convicted him twice of one act but acquitted him of the other. Madsen's due process argument adds nothing to his unanimity and double jeopardy claims. Thus, Madsen cannot demonstrate any prejudice from his trial counsel's failure to ensure the jury instructions differentiated the two sexual assault counts by date. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 693 (1984).

Madsen's decision not to testify

¶9 Madsen argues he was denied the right to testify because he did not know he could change his mind and revoke his initial waiver of the right. Madsen has forfeited his right to appellate review of this claim.

¶10 An appellant claiming denial of the right to testify must make an offer of proof about what the testimony would have been. WIS. STAT. § 901.03(1);[1] ***State v. Winters***, 2009 WI App 48, ¶¶17-21, 317 Wis. 2d 401, 766 N.W.2d 754. In ***Winters***, we observed that because the defendant failed to make an offer of proof along with his postconviction motion, we "would have to speculate about the substance of the testimony Winters claims he would have given at trial, which we are not permitted to do." ***Id.***, ¶24. As in ***Winters***, Madsen has forfeited his right to review because he made no offer of proof. His mere assertion that "he felt the jury needed to hear from his side that he did not commit the offenses," is inadequate. *See* ***id.***, ¶23.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶11 Madsen also argues trial counsel was ineffective for failing to inform Madsen of the potential to reassert his right to testify. This argument fails for the same reason. To succeed on his claim, it is Madsen's burden to demonstrate both deficient performance and prejudice. *See* ***Strickland***, 466 U.S. at 687, 693; ***State v. Evans***, 187 Wis. 2d 66, 93, 522 N.W.2d 554 (Ct. App. 1994). Prejudice exists if there is a reasonable probability of a different outcome absent counsel's errors. ***Strickland***, 466 U.S. at 694. We cannot conduct the prejudice inquiry without knowing what Madsen's testimony would have been. As the State emphasizes, Madsen's testimony could have led to damaging impeachment evidence from prior statements he made to police.

Denial of Madsen's motion for a change of venue

¶12 Madsen moved for a change of venue due to pretrial publicity. At the motion hearing, the State argued the court should deny the motion and increase the size of the jury pool. The court decided to take the motion under advisement and make a final determination at the time of jury selection. The court convened a sixty-six-person jury pool. The court began voir dire by asking each juror if he or she had been exposed to any information about the case, and whether he or she had formed an opinion about the case on the basis of this information. Any juror who answered both questions affirmatively was excused. The court did not rule on Madsen's motion.

¶13 Madsen forfeited his right to appellate review of this issue by failing to ask the circuit court for a ruling prior to proceeding to trial. *See* ***Ruff v. State***, 65 Wis. 2d 713, 722, 223 N.W.2d 446 (1974); *see also* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994) ("[A] party must raise and argue an issue with enough prominence to signal to the trial court that it is being

called upon to address an issue and make a ruling."). Moreover, Madsen does not describe the challenged media coverage in his brief or include it in his appendix, and he fails to address the eight established criteria for evaluating whether pretrial publicity tainted the jury. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). "We will not decide issues that are not, or inadequately, briefed." ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

<u>Admission of prior bad acts evidence</u>

¶14 Madsen argues the circuit court erroneously permitted Tracy Kist to testify about an incident that occurred two years before the charged incidents, when Kist was nineteen years old. Kist testified that after she and Madsen smoked methamphetamine together in her car and at her apartment, he requested oral sex in exchange for providing additional methamphetamine, and she declined.

¶15 The circuit court concluded the testimony was offered for three permissible purposes under WIS. STAT. § 904.04(2): motive, intent, and plan. Madsen does not seriously challenge these conclusions. Nor does Madsen develop any argument that the testimony was not relevant to the solicitation and enticement charges. Madsen does assert, however, that the evidence was unfairly prejudicial because it was utilized to paint him as a despicable character and persuade the jury to find him guilty for that reason.

¶16 Madsen fails to acknowledge the circuit court's lengthy limiting instruction to the jury. That instruction informed the jury it could only consider Kist's testimony as it related to motive, intent, or plan, and only with regard to the solicitation and enticement counts. The instruction also cautioned the jury that the testimony, if believed, could not be used to conclude Madsen had a certain

character or acted in conformity with that character, or to conclude that Madsen was a bad person and therefore guilty. We are satisfied that the court's cautionary instruction sufficiently mitigated the potential for unfair prejudice from Kist's limited testimony. *See* ***State v. Davidson***, 2000 WI 91, ¶78, 236 Wis. 2d 537, 613 N.W.2d 606.

<u>Ineffective assistance of counsel</u>

¶17 Finally, Madsen argues his trial counsel was ineffective for failing to object to the evidence regarding Owens mistreating Kirsten and providing her drugs, and for not calling two witnesses who would have impeached Kirsten's testimony that she was not free to leave Owens' home.

¶18 Madsen sets forth no rationale for excluding any evidence about Owens. As the State emphasizes, the testimony was necessary to provide context for the crimes alleged to have been committed by Madsen. Madsen fails to demonstrate any deficient performance relative to this argument.

¶19 Next, trial counsel's failure to introduce the two witnesses' testimony did not prejudice Madsen. While the witnesses would have testified they transported Kirsten to and from Owens' residence during her three-week stay, Kirsten herself acknowledged as much in her own cross-examination testimony.

By the Court.—Judgment and order affirmed.

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