COURT OF APPEALS
DECISION
DATED AND RELEASED

August 1, 1995

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

NOTICE

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

Nos. 94-1201-CR
94-1202-CR
94-1203-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELVIN R. TUCKER,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. In these consolidated cases, Melvin R. Tucker appeals from the judgments of conviction for: (1) armed robbery and false imprisonment while armed, habitual criminality, resulting from his attack on Doreen G. on November 2, 1991; (2) three counts of first-degree sexual assault and one count of armed robbery, habitual criminality, resulting from his attack

on Cynthia B. on November 4, 1991; and (3) one count of first-degree sexual assault and one count of armed robbery, habitual criminality, resulting from his attack on Michelle W., on November 11, 1991. We affirm.

I. BACKGROUND

On November 2, 1991, Doreen G., on her way home from work shortly after midnight, was walking from a bus stop to her home on the northeast side of Milwaukee. A man Doreen G. later identified as Tucker confronted her, called her an "arrogant white bitch," told her he was going to teach her a lesson, indicated that he had a gun, and put a knife to her throat. He took her umbrella and wallet, dragged her off the sidewalk into the yards of nearby apartment buildings, and continued to hold the knife to her throat where it made superficial cuts. Doreen G. struggled and, when she heard what sounded like an approaching car, Tucker released her saying, "Run, bitch, run."

On November 4, 1991, Cynthia B. was walking on the northeast side of Milwaukee at approximately 7:45 p.m. when a man she later identified as Tucker confronted her. He pulled a gun, stuck it in Cynthia B.'s side, put a knife to her chest and throat, and threatened to shoot her. He then walked her up a hill behind nearby houses, entered a secluded area in a residential yard, and sexually assaulted her by forcing his penis into her mouth, and into her vagina two times. He also took her purse, jacket, gold watch and silver bracelet, and he cut her chest with the knife. DNA evidence established an eight band, four probe match between the swabs taken from Cynthia B. following the assault and blood drawn from Tucker, rendering a statistical probability of a random match at no more than one in three-million.

On November 11, 1991, Michelle W., on her way home from work at approximately 6:45 - 7:00 p.m., was walking from a bus stop to her home. A man confronted her, put his arm around her, held a gun against her face and threatened to shoot her. He directed her through some yards, an alley, and to an area between two garages where he told her to put her purse and bag on the ground. He put the gun away, displayed a knife, held it to her neck, and sexually assaulted her by forcing his penis into her vagina. At the sound of a

door opening or closing, he picked up her purse and ran. DNA evidence established a two probe, four band match between the swabs taken from Michelle W. and the blood drawn from Tucker, rendering a statistical probability of a random match with another African-American at approximately one in two-thousand.

Additional evidence introduced at Tucker's trial included: a citizen witness's identification of a suspicious man in the area of the Michelle W. assault at approximately 6:45 p.m., "kind of hiding from somebody down the street," standing near a car with license number HRC-514; police identification of license plate number HRK-514 as listing to Tucker's car; the November 13, 1991 police search of Tucker's car and recovery of a starter pistol; Tucker's agreement to meet with a Milwaukee police detective investigating the November 11 assault; Tucker's failure to appear for the meeting with the detective; Tucker's apprehension on November 22, 1991 in Centralia, Illinois, as he was trying to hide under a bed in the home where he was staying.

II. EXCLUSION OF SCHMIDT/PODD TESTIMONY

Tucker first argues that the trial court erred in granting the State's motion *in limine* to exclude testimony from two citizen witnesses, Tracy Schmidt and Juliet Podd. According to the offer of proof, they would have testified that on November 4, 1991, at approximately 8:25 p.m., they were walking in the area of the Cynthia B. assault when they observed a suspicious black male walking with a white female. Tucker is a black male; Cynthia B. is a white female. At a subsequent line-up that included Tucker, Schmidt and Podd did not identify Tucker as the man they saw but, instead, identified Anthony Blue as the man they saw walking with the woman.

The State moved for exclusion of the Schmidt/Podd testimony, representing that DNA evidence had excluded Blue as the perpetrator, and arguing that the testimony would be irrelevant and an improper collateral attack on Cynthia B.'s credibility. Defense counsel pointed out that the State had failed to present any DNA evidence regarding Blue and, in any event, that the reliability of such evidence would be for the jury's consideration. The trial

court granted the State's motion.[1] The admission of evidence is within the discretion of the trial court. ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). A trial court's evidentiary ruling will not be overturned on appeal if it had a reasonable basis and was made in accordance with proper legal standards and the facts of record. ***Id.*** When a trial court fails to articulate consideration of factors on which its decision could properly have been based, it has erroneously exercised its discretion as a matter of law. ***State v. Johnson***, 118 Wis.2d 472, 480-481, 348 N.W.2d 196, 200-201 (Ct. App. 1984). This court, however, is not required to reverse such a decision if we can conclude *ab initio* that the facts of record would support the trial court's decision had discretion properly been exercised and articulated. ***Id.*** at 481, 398 N.W.2d at 201. Further, we will not reverse the trial court decision unless it was wholly unreasonable. ***Id.***

We have reviewed the testimony of Schmidt and Podd at the offer of proof, defense counsel's affidavit regarding what their trial testimony would

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[1] The trial court's oral decision was unclear:

> There is not any—after listening to the testimony, reviewing the Court's notes as to the evidentiary hearing that the Court had with those witnesses who took the stand, they didn't witness a crime.... They didn't witness the act itself. What they witness—what's been explained by all the parties—I don't think that's in dispute factually.
>
> And when the Court looked at that testimony that was had and hearing had on it, and the case law, reviewing the Court's notes and the briefs that were submitted previously, there's no other purpose for that testimony other than commenting so to speak on the credibility of the witness who picked out the defendant from the lineup who happens to be scientifically apparently proven that that person or those person—that person who was picked out is excluded as potential suspect in the case.

We express our concern to the trial court in two respects: (1) nothing in this record establishes the basis for the trial court's willingness to adopt the representation of the State regarding DNA evidence in the absence of any evidentiary presentation, given the dispute repeatedly voiced by defense counsel; (2) nothing in the trial court's oral decision provides a coherent statement of the trial court's rationale affording this court the opportunity to consider the trial court's basis for decision.

have shown, and the police accounts of their interviews. We conclude that, under ***State v. Denny***, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984), the proffered testimony of Schmidt and Podd was not admissible.

In ***Denny***, we explained that evidence supporting the theory that a third-party committed a crime is admissible only if it shows a "legitimate tendency" that the third-party was the perpetrator. We stated:

> [T]o show "legitimate tendency," a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted. On the other hand, evidence that simply affords a possible ground of suspicion against another person should not be admissible.

Denny, 120 Wis.2d at 623, 357 N.W.2d at 17. In this case, the Schmidt/Podd testimony would not have even established a "possible ground of suspicion" against any other person. In the first place, both Schmidt and Podd were relatively vague and uncertain about their identifications. When, for example, Podd was asked whether the man she identified at the line-up was the same man she saw on the street, she answered, "That I thought was the man I saw. I really didn't get a very clear look of his face, more of his body and his clothing than I did of his face." Schmidt was unable to even identify the race of the woman with whom the man was walking. Moreover, as defense counsel conceded in argument before the trial court, Cynthia B.'s estimate of the time of the assault was prior to the time that Schmidt and Podd said they observed the man walking in the area with a woman. Thus, exclusion of the Schmidt/Podd testimony was proper to avoid confusing the jury with extraneous information that could have established nothing more than the possibility that Schmidt and Podd saw Anthony Blue, or someone who looked like him, at the scene of the Cynthia B. assault subsequent to the time that Tucker confronted Cynthia B.

The testimony had no legitimate tendency to establish that anyone other than Tucker was the perpetrator of the Cynthia B. assault.[2]

III. EXPERT TESTIMONY

Tucker next argues that the trial court erred in denying his motion to introduce expert testimony regarding identification. The defense submitted affidavits to the trial court stating that Tucker sought "to introduce expert witness testimony from Dr. Terrill Bruett regarding the psychological principals [sic] underlying human observation and perception." Additionally, the affidavits referred to factors that could have undermined the one-person identifications provided by Cynthia B. and Doreen G. At the hearing regarding identification, counsel also stated:

> I could—if the Court would want to do that, I could also bring in Dr. Bruett to make an offer of proof as far as the nature of the testimony.

The trial court took no testimony but ruled:

> Well I think—well without going on but having read the ***Hampton*** [***v. State***, 92 Wis.2d 450, 285 N.W.2d 868 (1979)] case and listening to the arguments, it certainly would indicate an abdication of the rule of the fact finder. And, and the identification does in fact go to the, you know, the weight of the evidence

[2] Tucker also argues that although the Schmidt/Podd testimony related specifically to the Cynthia B. assault, its introduction also would have undermined the strength of the State's evidence regarding the other assaults. Thus, he argues, the linkage among the three assaults requires that all the convictions be reversed based on the trial court's decision on the Schmidt/Podd testimony. Obviously, because we have concluded that the trial court did not err in excluding the Schmidt/Podd testimony, we need not consider Tucker's additional argument regarding the relationship between that testimony and the assaults on Doreen G. and Michelle W.

> and the perceptions of those witnesses that are on the stand. The Court's going to deny that also based upon those reasons.

We conclude that the trial court erred. Once again, the trial court decision provides little clue to its reasoning. Moreover, the trial court's decision is virtually identical to that which we rejected in ***State v. Hamm***, 146 Wis.2d 130, 430 N.W.2d 584 (Ct. App. 1988).

In ***Hamm***, as in the instant case, defense counsel initially did not make a complete offer of proof regarding the anticipated expert testimony. ***Id.***, 146 Wis.2d at 141, 430 N.W.2d at 589. In ***Hamm***, counsel did, however, advise the trial court "that the expert's role would be to enable the jurors to better evaluate and understand the evidence regarding identification and to advise them of the variables they should take into account." ***Id.*** at 141, 430 N.W.2d at 589-590. The trial court excluded the eyewitness identification testimony ruling that it was "an experimental area and an inexact science," and also that it was "inappropriate to permit the expert to testify as a 'superjuror.'" ***Id.*** at 141-142, 430 N.W.2d at 590. We concluded, however:

> that the trial court's ruling on the motion to exclude the expert's testimony was an abuse of discretion. The court had heard no testimony from the expert. Neither the prosecution nor the defense knew what the expert's testimony would be, and the state does not argue that the ruling should be sustained simply because the offer of proof was inadequate. The trial court therefore lacked a factual basis for its ruling. We cannot sustain an evidentiary ruling which lacks a factual basis in the record.

Id. at 146, 430 N.W.2d at 591. Here, the circumstances are virtually the same. The trial court heard no testimony from the expert; the State does not argue that the ruling should be sustained simply because of any inadequacy in the offer of

proof; the trial court referred to nothing that established a factual basis for its ruling.

A trial court's decision to admit or exclude expert testimony is a discretionary one that will not be reversed "if it has 'a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Blair***, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991). The trial court's determination depends on its evaluation of whether the expert testimony will assist the jury in analyzing issues that otherwise would be difficult for the ordinary person in the community. ***Id.*** at 74-75, 473 N.W.2d at 571. We are not required to reverse the discretionary decision of a trial court if we can conclude, *ab initio*, that there are facts of record which support the trial court decision. ***Johnson***, 118 Wis.2d at 481, 348 N.W.2d at 201 (Ct. App. 1984). Here, however, the facts of record are as limited as those in ***Hamm***; there is nothing on which we could base an *ab initio* evaluation of whether Dr. Bruett's testimony would have aided the jury's analysis.

The State argues, however, that any error in the exclusion of expert testimony in this case was harmless. We agree. The supreme court has explained:

> [W]here the judge erred in the application of the rules of evidence to the case and that error was in respect to a crucial and controlling feature of the crime, the judgment should be reversed unless we can be sure that the error did not contribute to the guilty verdict.

State v. Dyess, 124 Wis.2d 525, 547, 370 N.W.2d 222, 233 (1985). Clearly, identification is "a crucial and controlling feature of the crime." In this case, however, we "can be sure that the error did not contribute to the guilty verdict." *See* ***id.***

Again, ***Hamm*** provides the most salient point of reference. When the defendant moved for a new trial in ***Hamm***, the court reassessed its initial

decision to exclude expert testimony and entertained a full offer of proof. ***Hamm***, 146 Wis.2d at 146, 430 N.W.2d at 592. The offer covered "the difficulties jurors have in evaluating the reliability of eyewitness identifications, the psychological principles that govern eyewitness memory, and highlighted specific factors in the testimony known to *influence eyewitness* reliability." ***Id.*** at 146-147, 430 N.W.2d at 592 (emphasis in original). The trial court then concluded that such information "was well within the jurors' common knowledge and that the expert's testimony was therefore unnecessary." ***Id.*** at 148, 430 N.W.2d at 592. Thus, the trial court concluded "that the use of the expert's testimony would tend to divert the attention of the jurors from material issues and unduly lengthen the trial, and that the use of such testimony would tend to make the expert witness a 'superjuror,' thus usurping the role of the jury as finder of fact." ***Id.***

In ***Hamm***, we concluded that the trial court's decision on the post-trial motion had a "logical rationale" based on the facts of record established in the offer of proof. ***Id.*** at 149, 430 N.W.2d at 593. In the instant case, as we have noted, Tucker sought to provide expert testimony on "psychological principles underlying human observation and perception. These factors are virtually the same as those that the defendant in ***Hamm*** proposed to introduce; indeed, they are the very factors that ***Hamm*** deemed to be within the jurors' common knowledge. Neither before the trial court nor on appeal has Tucker suggested anything in the expert's testimony that would have been beyond the jurors' common knowledge. Therefore, although we conclude that the trial court erred in precipitously reaching its ruling and in doing so without providing an articulate rationale, we can discern no way in which this error contributed to the guilty verdicts.

IV. MULTIPLICITY

Tucker next argues that the information charging three counts of first-degree sexual assault and one count of armed robbery in the Cynthia B. attack was multiplicitous and, therefore, that the trial court erred in denying his motion to dismiss the information based on multiplicity of counts.

"Multiplicity is the charging of a single offense in separate counts." ***State v. Tappa***, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985). Whether charges are multiplicitous is an issue subject to our *de novo* review. ***State v. Hirsch***, 140 Wis.2d 468, 470-471, 410 N.W.2d 638, 639 (Ct. App. 1987). We must consider (1) whether the separately charged offenses are identical both in law and in fact, and (2) "'the legislative intent as to the allowable unit of prosecution under the statute in question.'" ***Tappa***, 127 Wis.2d at 162, 378 N.W.2d at 886 (citation omitted). In this case, although the sexual assault counts against Cynthia B. are identical in law, they are not identical in fact.

In ***Harrell v. State***, 88 Wis.2d 546, 277 N.W.2d 462 (Ct. App. 1979), we explained:

> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder—an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Id., 88 Wis.2d at 565, 277 N.W.2d at 469. In ***Harrell***, we affirmed the defendant's convictions for two counts of sexual assault and one count of armed robbery although the three offenses were part of a single course of conduct. ***Harrell***, 88 Wis.2d at 553, 277 N.W.2d at 464. In the Cynthia B. attack, although the sexual assaults were not as separated in time as were the assaults in ***Harrell***, they were distinct in fact. The testimony established that Tucker's first assault on Cynthia B. was oral intercourse; the second was vaginal intercourse from behind; the third was vaginal intercourse from the front. The acts were factually distinct and, therefore, we conclude that the charges were not multiplicitous.

V. JOINDER AND SEVERANCE

Tucker next argues that the trial court erred in granting the State's request to join all three cases involving the attacks on all three victims in a single trial. He also argues that the trial court erroneously exercised its discretion by not granting his subsequent motions for severance. He points to differences among the three attacks to support his contention that the crimes did not have special characteristics making them appropriate for joinder. He also correctly points out that the trial court failed to enumerate or analyze the statutory factors governing joinder under § 971.12, STATS., but merely cited the administration of justice, which is not a statutory factor in deciding the initial propriety of joinder.[3]

Under § 971.12, STATS., joinder of crimes for trial is appropriate when the crimes "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Whether joinder is proper is a question of law. ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982). Section 971.12(1) is to be broadly construed in favor of joinder, ***id.***, in order to promote efficient, economical judicial administration and to avoid multiple trials, ***State v. Leach***, 124 Wis.2d 648, 671, 370 N.W.2d 240, 252 (1985).

Crimes are not of the same or similar character merely because they are violations of the same statute. ***Hoffman***, 106 Wis.2d at 208, 316 N.W.2d at 156. The test is whether the crimes are the same type of offenses, whether they occurred over a relatively short period of time, and whether the evidence as to each crime overlaps. ***Id.*** There is no per se rule concerning what is a

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[3] Again, the trial court's analysis and decision on this issue is unclear. The trial court stated:

> As to the motion to consolidate or the objection to motion to consolidate, the Court believes, after reading the case law, that it's certainly based upon the administrative— administration of justice that it will not substantially prejudice the defendant in the incidents that are before the Court as to time and place and the entire record because the Court believes that that consolidation is certainly appropriate. If there is a problem with as trial begins to any aspect as to those different counts, certainly prophylactic instruction can be given.

"relatively short period of time." ***Hamm***, 146 Wis.2d at 139-140, 430 N.W.2d at 589. The permissible time period is dependent upon the similarity of the offense and the extent the evidence overlaps. ***Id.*** at 140, 430 N.W.2d at 589.

Here, joinder was proper. Although Tucker identifies various distinctions among the assaults, the similarities are far more impressive. The victims were all in their twenties. Each was walking alone after dark, on the north or northeast side of Milwaukee when confronted by the perpetrator. Each was threatened with either a knife, a gun, or both, held to the neck or head. Each was forced off the street into secluded nearby areas. The attacker robbed each and then released each victim after completing the crime or after hearing the first hint of an approaching person. The attacker used similar language with his victims. The assaults all occurred within ten days. Finally, according to one of the criminal complaints, Tucker's admission to Marion Stewart, the person who lived in the house where Tucker was apprehended, confirmed that these assaults were part of a common scheme or plan. According to the complaint, Tucker told Stewart that he was:

> strung out on cocaine and doing robberies in Milwaukee, taking pussy from his victims, that he used a gun and a knife, and that the police came up with him because some nosey ass mother fucker wrote down a portion of his license plate number from his Cadillac when he was ripping off another fine ass bitch.

We conclude that joinder was proper under § 972.12(1), STATS.

Tucker's alternate argument is that the trial court erroneously exercised its discretion when it denied his motions to sever. Even where joinder is proper, a defendant may move to sever the counts on the basis of prejudice. Section 971.12(3), STATS. A motion to sever presents a discretionary decision requiring the trial court to weigh the potential for prejudice to the defendant against the public's interest in avoiding multiple trials. ***Hoffman***, 106 Wis.2d at 209, 316 N.W.2d at 157. An appellate court will not conclude that the trial court erroneously exercised its discretion in denying a motion to sever unless the

defendant establishes that joinder would substantially prejudice his or her defense. ***Id.*** We review the evidence to determine if evidence of each of the joined crimes would be admissible in each trial if the crimes were tried separately. ***Id.*** at 208-210, 316 N.W.2d at 157. This test requires that we review the evidence of the separate offenses for its admissibility as other acts or other crimes evidence under § 904.04(2), STATS. ***Hoffman***, 106 Wis.2d at 210, 316 N.W.2d at 157.

While evidence of other acts or other crimes is not admissible to prove a defendant's character, it is admissible if offered for other purposes, such as motive, intent, plan, or identification. *See* § 904.04(2), STATS. When deciding whether to admit evidence of other crimes or acts, the trial court must first determine if the evidence is admissible under § 904.04(2). ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). If the evidence is admissible, the trial court must then determine whether the probative value of the evidence is substantially outweighed by its prejudice to the defendant. ***Id.*** The probative value of other acts evidence depends upon the nearness in time, place, and circumstances to the alleged crime of elements to be proven. ***Id.*** at 746-747, 467 N.W.2d at 540. Where the issue is identity, the standards of relevancy and probative value are higher because of the greater prejudice accompanying other acts evidence. ***Id.*** at 749, 467 N.W.2d at 541. There should be such a concurrence of common features and points of similarity among the acts that it can be reasonably said the other acts and the crime charged show a discernible method of operation or the similarities constitute the imprint of the defendant. ***State v. Fishnick***, 127 Wis.2d 247, 263, 378 N.W.2d 272, 281 (1985).

Here, evidence from the three attacks was relevant as to motive, intent, plan or identity. From our discussion regarding joinder, it is clear that the evidence satisfies the criteria of nearness in time, place and circumstance. The common circumstances of the crimes outweigh the dissimilarities. Evidence from the three attacks would be admissible under § 904.04(2), STATS., in the separate trial of the others. Further, the probative value of such evidence would not be substantially outweighed by a danger of unfair prejudice, confusion of issues, waste of time or needless presentation of cumulative evidence. *See* § 904.03, STATS. Therefore, we conclude that the State's motions for joinder were properly granted and that Tucker's motions for severance were properly denied.

VI. SENTENCING

Finally, Tucker argues that his sentences are excessive. He received the maximum sentence on each count, to be served consecutively, for a total of two-hundred-one years.

We will not reverse a sentence absent an erroneous exercise of discretion. ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). We presume that the trial court acted reasonably and, therefore, the defendant bears the burden to establish some unreasonable or unjustifiable basis for the sentence imposed. ***Id.*** We will find an erroneous exercise of sentencing discretion only when the sentence is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

In sentencing, the trial court must consider the gravity of the offense, the character of the offender, and the need for public protection. ***Thompson***, 172 Wis.2d at 264, 493 N.W.2d at 732. The weight accorded to each of the factors is within the trial court's discretion. ***Id.*** In this case, the trial court referred to the primary factors that must be considered, as well as others that can be considered. The trial court then gave particular emphasis to the seriousness of the crimes:

> To say that these victims were traumatized brutally would be an understatement for this Court to make. This Court can't think of anything more heinous or horrific than the acts that you committed during this reign of terror when you subsequently got out of prison.

The trial court also made brief mention of Tucker's prior incarceration and the apparent failure of his prison rehabilitation. The trial court considered the need

for public protection by referring to the importance of Tucker no longer being "able to walk the streets of this city." Although the trial court's analysis is brief, the record provides ample support for the maximum sentences. Given the extremely serious, violent, and terrifying nature of these crimes, sentences totalling 201 years do not shock public sentiment or violate the judgment of reasonable people. Tucker has provided nothing to establish any impropriety in the sentences.

By the Court. – Judgments affirmed.

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