COURT OF APPEALS
DECISION
DATED AND RELEASED

February 18, 1997

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

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Nos. 94-3334-CR
96-0381-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD A. EDSON,

Defendant-Appellant.

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

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

PER CURIAM. Gerald A. Edson appeals from judgments of conviction in two multiple-count sexual-assault-of-a-child cases. The first case, F-941926, charged seven counts of first-degree sexual assault of a child. *See* § 948.02(1), STATS. The second case, F-942539, charged four counts of first-degree sexual assault of a child and one count of second-degree sexual assault

of a child. *See* § 948.02(1) & (2).[1] Edson argues that: (1) the trial court lost jurisdiction to act in both cases when this court ordered a stay of proceedings in one of the two cases; (2) the trial court erred in denying his motion to suppress statements made to the Milwaukee Police Department; (3) his constitutional rights were violated by the police's failure to electronically record his police interview; (4) the charges were multiplicitous; (5) his request for substitution of judge was timely; and (6) his constitutional rights were violated because the case was charged in two complaints, and because the charges contained in the second case were considered during sentencing in the first case. We affirm.

Edson was charged in Milwaukee County Circuit Court case Nos. F-941926 and F-942539. Edson filed a substitution request pursuant to § 971.20, STATS., against the Honorable John A. Franke in one of the two cases, F-942539. Judge Franke denied the motion, concluding that it was untimely. *See* § 971.20(4) & (5). The State then sought consolidation of the two cases, with Judge Franke presiding over the one trial. Judge Franke joined the two cases for trial subject to the defendant's right to challenge the joinder.

Subsequently, Edson petitioned this court for a supervisory writ preventing Judge Franke from presiding in F-942539. He did not ask this court for a supervisory writ in the other case. This court stayed the proceedings in F-942539 pending a decision on Edson's petition for a supervisory writ. This court did not stay the proceedings in the other case.

Subsequently, the parties met for a pretrial conference only in F-941926; the proceedings in F-942539 were still under the stay. The State requested that F-941926 proceed to trial. Judge Franke determined that the stay in F-942539 did not prevent him from acting in the other case. The charges in F-941926 went to trial. During trial, Edson filed a motion to suppress the inculpatory statements he made to the police, arguing that the police ignored his request for counsel. The trial court denied his motion.

[1] One count of first-degree sexual assault of a child and the second-degree sexual-assault-of-a-child count were disposed of prior to trial and are not part of this appeal.

Edson was found guilty on all seven counts in F-941926. After this court denied Edson's petition for a supervisory writ, Edson pled guilty to the charges in F-942539.

Edson first argues that Judge Franke lost jurisdiction to act in F-941926 when this court ordered the proceedings stayed in F-942539 because the two cases had been consolidated. We disagree. After Judge Franke received notice that this court stayed the proceedings in F-942539 pending a decision on Edson's petition for a supervisory writ, he decided to proceed with trial in F-941926:

> [T]he stay of the proceedings [F-942539] by the Court of Appeals apprised me of the ability to act in the other case [F-941926]. I see no reason to find that that somehow stays any other case involving this defendant including any case that there might have been joinder granted.
>
> This date was set for a pretrial in the case ending 926. It was set for further proceedings on the defendant's motion against prejudicial joinder of the cases and any other pretrial motions that may have been filed. I'm simply going to find that the issue of joinder is moot. The other case has been stayed and cannot go to trial. I'm finding that this case remains set for trial and there's been no reason presented why it should not proceed to trial.

The trial court has the discretion to order separate trials of counts previously joined for trial. *See* § 971.12(3), STATS. We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

We are satisfied that the trial court arrived at a reasonable result. The State sought consolidation of the two cases. The State's request was granted

subject to Edson's challenge. The trial court had not made a decision on Edson's request for relief from prejudicial joinder before we stayed the second action, F-942539. As noted, Edson only requested that the second action, F-942539, be stayed. The trial court, therefore, was free to proceed to trial on the first action, F-941926. The decision to proceed in F-941926 was well within the trial court's discretion.

Edson next contends that the trial court erred in denying his motion to suppress his confession. He argues that the police refused to honor his request for counsel during the custodial interrogation and to immediately terminate the questioning, thereby violating his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***Edwards v. Arizona***, 451 U.S. 477 (1981). The State contends that Edson's "request" for an attorney was a mere inquiry and was insufficient to constitute an invocation to his right to counsel. We agree with the State.

On review of an order denying suppression, "we are bound by the circuit court's findings of historical fact unless they are contrary to the great weight and clear preponderance of the evidence." ***State v. Coerper***, 199 Wis.2d 216, 221–222, 544 N.W.2d 423, 426 (1996). "Whether [a defendant's] ***Miranda*** rights were violated is a constitutional fact which this court determines without deference to lower courts." ***Id.***, 199 Wis.2d at 222, 544 N.W.2d at 426.

If a suspect asserts clearly his right to counsel during a custodial interrogation, law enforcement officers are required to immediately cease all questioning. ***Edwards***, 451 U.S. at 484-485. However, if the request for counsel is ambiguous so that a "reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," the police officer is not required to cease questioning. ***Davis v. United States***, 512 U.S. 452, ___, 114 S. Ct. 2350, 2355, 129 L.Ed.2d 362 (1994); *see* ***Coerper***, 199 Wis.2d at 223, 544 N.W.2d at 426. "A request for counsel is a statement in which the person, `express[es] his desire to deal with the police only through counsel.'" ***State v. Jones***, 192 Wis.2d 78, 94, 532 N.W.2d 79, 85 (1995) (quoting ***Edwards***, 451 U.S. at 484).

The trial court found that before the police officers advised Edson of his ***Miranda*** rights, Edson asked the officer, "Is this something I'm going to need an attorney for?"[2] Edson's request is not a clear indication that he wanted the police contact to terminate for the purpose of obtaining counsel. His statement was vague, indecisive, and ambiguous as to whether he wanted an attorney. *See* ***Davis***, 512 U.S. at ___, 114 S. Ct. at 2357, 129 L.Ed.2d at 373 (accused's remark, "Maybe I should talk to a lawyer" was not a request for counsel).

Edson argues that even if his statement was ambiguous, under ***State v. Walkowiak***, 183 Wis.2d 478, 486-487, 515 N.W.2d 863, 867 (1994), the police were required to resolve the ambiguity before questioning. ***Davis*** declined to adopt a rule requiring officers to ask clarifying questions when a suspect makes an ambiguous or equivocal statement regarding counsel. Wisconsin courts recognize ***Davis***, not ***Walkowiak***, as the law on this issue. *See* ***Jones***, 192 Wis.2d at 110–111, 532 N.W.2d at 92 (Abrahamson, J., dissenting).

Edson also asserts that the statement he gave was involuntary because the police allegedly took advantage of his old age, deteriorating health, and the fact that he was tired and on medication. A statement is not involuntary or in violation of a defendant's Fifth Amendment rights unless the statement was obtained by coercive police activity. ***State v. Kunkel***, 137 Wis.2d 172, 191, 404 N.W.2d 69, 77 (Ct. App. 1987), *cert. denied*, 484 U.S. 929 (1987). This inquiry focuses on whether the police used actual coercive or improper police practices to compel the statement. ***State v. Clappes***, 136 Wis.2d 222, 235-236, 401 N.W.2d 759, 765 (1987). If the defendant fails to establish that the police used actual coercive or improper pressures to compel the statement, the inquiry ends. ***Id.***, 136 Wis.2d at 236, 401 N.W.2d at 765.

The record indicates no evidence of actual coercion or improper pressures on the part of the police. Edson was seated and not handcuffed. He was given beverages and allowed to use the bathroom during questioning. His statement was taken over a ninety-minute period. Although Edson contends

[2] On appeal, Edson claims he said: "I think I need a lawyer, don't I?" Edson, however, does not indicate how the trial court's finding is "clearly erroneous." *See* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS.

that the officers took advantage of his old age and ill-health, he does not contend that he was in discomfort or medical distress during questioning. Neither does he contend that he was threatened with physical violence nor that he was questioned for an extensive period of time. *See* ***Clappes***, 136 Wis.2d at 236-237, 401 N.W.2d at 766. Edson failed to establish that the police used actual coercion or improper tactics to compel his statement.

Edson next claims that the police officer's failure to record his statement violated his due process rights, relying on case law from Alaska and Minnesota, which have adopted recording requirements for all custodial interrogations.[3] Wisconsin law, however, does not require police to record statements made by suspects subject to a custodial interrogation. Whether such a policy should be adopted is more properly left to the supreme court. The police officers established to the trial court's satisfaction that the ***Miranda*** warnings were properly given, that no impermissible tactics were used, and, that under the totality of the circumstances, the confession was voluntary. This is all that is required under current Wisconsin law.

Next, Edson argues that the charges in both cases were multiplicitous. We review a claim of multiplicity *de novo*, owing no deference to the trial court's conclusions. ***State v. Bergeron***, 162 Wis.2d 521, 534, 470 N.W.2d 322, 327 (Ct. App. 1991). A two-pronged test is used to analyze questions of multiplicity. ***State v. Hirsch***, 140 Wis.2d 468, 471, 410 N.W.2d 638, 639 (Ct. App. 1987). The first prong requires an inquiry into whether the charged offenses are identical in law and in fact. ***Id***. The second prong requires consideration of the legislative intent regarding whether the legislature intended the offenses to be brought as a single count. ***Id.***, 140 Wis.2d at 471, 410 N.W.2d at 639-640.

[3] Edson finds little support for his claim from case law in other jurisdictions. Of the several states that have considered the issue, only one state, Alaska, has concluded that electronic recording of confessions, when feasible, is constitutionally required under due process. *See* ***Stephan v. State***, 711 P.2d 1156, 1159 (Alaska 1985). The case on which Edson relies on most heavily, ***State v. Scales***, 518 N.W.2d 587 (Minn. 1994), explicitly chose not to base the recording requirement on the due process clause. ***Id.***, 518 N.W.2d at 592. ***Scales*** imposed the recording requirement in the exercise of the court's "supervisory power to insure the fair administration of justice." ***Id.***

Offenses are different in fact if they are significantly different in nature or separated in time. ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980). Each separate volitional act is a basis for a separate charge, ***Bergeron***, 162 Wis.2d at 535, 470 N.W.2d at 327, and separate punishment for each is appropriate, ***id.***, 162 Wis.2d at 535-536, 470 N.W.2d at 328.

Case No. F-941926

The complaint in this case charged Edson with seven counts of first-degree sexual assault of a child. Edson argues that the charges are identical in law and fact. We agree that the charges are identical in law, but they are not identical in fact.[4] Counts 1 and 2 are significantly different in nature and require proof of different evidentiary facts: count 1 involved an act of hand-to-penis contact (Edson's hand touching the child's penis), and count 2 involved an act of penis-to-hand contact (Edson's penis being touched by the child's hand). Count 3 alleged the same type of act as count 1, and count 4 alleged the same type of act as count 2 but occurred at a different time than counts 1 and 2. Counts 5 and 6 occurred on different dates than those specified in counts 1 through 4 and involved a different child. Finally, count 7 involved an act of mouth-to-penis contact (Edson placing his mouth on the child's penis).

The second prong of the multiplicity test concerns legislative intent as to the allowable unit of prosecution under the statute in question. ***Bergeron***, 162 Wis.2d at 534, 470 N.W.2d at 327. The separate acts of sexual contact are separately prosecutable and separately punishable. *See* ***id.***, 162 Wis.2d at 521, 470 N.W.2d at 327-328. Edson offers no argument to the contrary.

Case No. F-942539

Here, Edson was charged with three counts of first-degree sexual assault of a child. Again, Edson argues that the charges are identical in law and fact. Although we agree that the charges are identical in law, they are not identical in fact.[5] Although the three counts involved the same victim and occurred on or about the same day, the offenses are significantly different in nature. Count 3 involved an act of hand-to-penis contact (Edson touching the child's penis); count 4 involved an act of penis-to-hand contact (Edson's penis

[4] The State concedes that the seven counts of first-degree sexual assault of a child are identical in law.

[5] The State concedes that the three counts of first-degree sexual assault of a child are identical in law.

being touched by the child's hand); count 5 involved an act of mouth-to-penis contact (Edson placing his mouth on the child's penis).

Edson does not offer anything evincing a legislative intent against charging the three separate sexual assaults in separate counts. Given the presumption that the legislature intended cumulative punishments, *see* ***State v. Kanarowski***, 170 Wis.2d 504, 513, 489 N.W.2d 660, 663 (Ct. App. 1992), the charges were not multiplicitous.

Edson next argues the substitution-of-judge issue that we resolved in our previous decision denying his petition for a supervisory writ. Our decision denying his petition for a supervisory writ on the merits of his claim cannot be challenged in this proceeding. *See* ***Univest Corp. v. General Split Corp.***, 148 Wis.2d 29, 38-39, 435 N.W.2d 234, 238 (1989) (law-of-the-case doctrine provides that legal issues determined in a prior appeal are the law of the case and are binding precedent to be followed in successive stages of the same litigation unless there are compelling reasons for reconsidering the prior decision); *see also* § 809.10(4) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.").

Next, Edson argues that his constitutional rights were violated because the case was charged in two complaints. Edson, however, does not cite any authority on point for his position. "Simply to label a claimed error as constitutional does not make it so, and we need not decide the validity of constitutional claims broadly stated but never specifically argued." ***State v. Scherreiks***, 153 Wis.2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989) (citation omitted).

Finally, Edson argues that the prosecution in F-942539, the second action, was barred by the protection against double jeopardy because those charges were considered during sentencing in the first action, F-941926. We disagree. The double-jeopardy clause protects against three types of abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments

for the same offense. ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969). Edson was neither prosecuted for, nor convicted of, the crimes charged in F-942539 in the first case. He argues, however, that because the conduct giving rise to the charges in F-942539 was taken into account during the trial court's sentencing in the first case, F-941926, he effectively was punished for that conduct during the first trial and that, as a result, the State's prosecution in the second action is barred.

In ***Witte v. United States***, 515 U.S. ___, 115 S. Ct. 2199, 132 L.Ed.2d 351 (1995), the United States Supreme Court considered and rejected substantially the same argument raised here by Edson. In ***Witte***, the petitioner pled guilty to a marijuana offense that arose in 1991; in calculating his sentence under the United States Sentencing Guidelines, the district court considered petitioner's involvement in a cocaine offense that occurred in 1989-1990 and sentenced him accordingly. The United States Supreme Court agreed with the Fifth Circuit Court of Appeals that Witte's subsequent indictment on charges arising out of the 1989-1990 cocaine offenses was improperly dismissed on double-jeopardy grounds because a defendant

in Witte's situation "is punished for double jeopardy purposes only for the offense of which the defendant is convicted." ***Id.***, 115 S. Ct. at 2205, 132 L.Ed.2d at 1362. The United States Supreme Court clarified that:

> To the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the "character of the offense," the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a different offense (which that related conduct may or may not constitute).

Id., ___ U.S. at ___, 115 S. Ct. at 2207, 132 L.Ed.2d at 366 (emphasis in original); *see* ***State v. Jackson***, 110 Wis.2d 548, 552-553, 329 N.W.2d 182, 185 (1983) (consideration of information about the defendant's character and conduct at

sentencing does not result in punishment for any offense other than the one of which the defendant was convicted).

Our review of the trial court's sentencing in the first action establishes that the trial court considered the charges in the second case as a factor in assessing Edson's character and the dangers that he posed to the community. Double jeopardy did not bar the State's prosecution of the charge in the second case after that charge was taken into consideration during sentencing of Edson in the first case.

By the Court.—Judgments affirmed.

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