COURT OF APPEALS
DECISION
DATED AND RELEASED

June 20, 1996

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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No. 95-2939-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICKY L. SCHUMACHER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Dykman, Sundby and Vergeront, JJ.

VERGERONT, J. Ricky L. Schumacher appeals from a judgment of conviction for two counts of sexual assault of a person under the age of thirteen, in violation of § 948.02(1), STATS. He contends that, while the evidence was sufficient to convict him on one count, it was not sufficient to convict him on two counts. We conclude the evidence was sufficient to convict him on both counts, and affirm.

Count I of the criminal complaint and the information alleged that in November 1994, at 1514 1/2 George Street in the City of La Crosse, Schumacher had penis-vagina contact with his eight-year-old daughter, S.S. Count II alleged that in November 1994, at the same address, Schumacher had penis-buttocks contact with S.S.

The trial was to the court. The testimony of S.S. was presented to the court through her videotaped deposition and through a videotaped interview of S.S. by a social worker. Schumacher's claim is that S.S.'s testimony was sufficient to establish that one instance of sexual contact occurred during November 1994, but it was not sufficient to establish that two instances of sexual contact occurred in November 1994.

S.S. stated, in response to the social worker's question, that the last time something happened with her father was when they were in their "old house" (1514 1/2 George Street) and her father arrived home after a night of drinking. She and her brothers were sleeping. She had her own room. Her father woke her up and "started to ... touch me in the private parts." The social worker asked S.S. to identify "private parts" on a toy bear, and S.S. pointed to the breasts, vagina and buttocks. The social worker then questioned S.S. about whether the lights were on in her room (S.S. said they were off); whether she had pajamas on (S.S. said she had a nightgown on); and with what and where her father touched her. In response to these last questions, S.S. answered that her father touched her with his hand and with his penis, and she pointed to her vagina and her buttocks when asked where he put his penis.

The social worker's next question was whether her father said anything before, during or after he touched her. S.S. answered that he said he would kill her if she told anyone. In answer to the social worker's question about when he said that, S.S. said it was about a year ago. When asked how long this had been happening, S.S. answered: "Since I was six or seven years old. And I'm eight years old now."

The social worker's next question was what her father did with his penis when he had his penis near her private parts. S.S. answered that he "put it in me and made white stuff come out." In answer to the question of whether he did anything else that made her uncomfortable, S.S. said that he touched her

private parts. S.S. stated that she told him to stop but he would not listen. She added: "That's all I can think of."

The social worker continued:

> Okay. We were trying to remember when this happened, the last time that this happened. Do you remember if this has happened since you've been in third grade, or did it happen last--during the summertime, or was it second grade? Or does, does that help to try to remember--.

After a series of follow-up questions trying to elicit information on when the "last time" occurred, S.S. stated she thought it was "after Halloween [1994]." Later questioning established that no incident with her father had occurred since the family moved from 1514 1/2 George Street.

The pediatrician who examined S.S. on December 6, 1994, testified that S.S. told her that the last episode with her father occurred two days before Thanksgiving of that year. In the pediatrician's opinion, the findings of her physical exam of S.S. were consistent with chronic sexual abuse with respect to the vagina and the rectum.

Four witnesses testified that S.S. had told each of them that her father was molesting her.

Schumacher's two sons, R.S. and C.S., who lived with Schumacher and S.S. testified for the defense. They both testified that they knew nothing of any sexual abuse of S.S. by their father and that they had never been awakened in the night and heard things going on between their sister and their father. This conflicted with S.S.'s testimony that on one occasion when her father took her to his room, R.S. was awakened and asked what had happened. S.S. stated that her father had told R.S. that she was just being a jerk.

The trial court found that S.S.'s testimony was extremely credible and that it was corroborated by the pediatrician's findings. The court

determined that Schumacher was guilty of both counts beyond a reasonable doubt.

When reviewing the sufficiency of the evidence to support a trial court verdict, we must view the evidence most favorably to the State and uphold the verdict if any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence to find the requisite guilt. ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We do not reverse the conviction unless the evidence, viewed most favorably to the State, is so lacking in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***Id.*** It is the role of the trier of fact, not this court, to resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. ***Id.*** at 506, 451 N.W.2d at 757. If more than one reasonable inference can be drawn from the evidence, the inference that supports the finding of the trier of fact must be accepted unless the testimony is incredible as a matter of law. ***State v. Witkowski***, 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

According to Schumacher, S.S.'s testimony that the last time she was assaulted her father "started to touch me ... in the private parts" is sufficient for a reasonable trier of fact to find that there was one instance of sexual contact in November 1994. But Schumacher contends that, because the social worker at that point asked S.S. to clarify what she meant by private parts, it is not clear that S.S. was still talking about the last assault when she indicated her father put his penis in her vagina and buttocks. There is ambiguity, according to Schumacher, because S.S. could have been talking about other occasions in response to the social worker's questions after the clarification about private parts.

Schumacher's argument, in essence, is that more than one reasonable inference may be drawn from S.S.'s testimony. We do not decide whether that is the case because we may not reject the inferences the trial court drew if they are reasonable and if S.S.'s testimony is not incredible as a matter of law. We conclude her testimony is not incredible as a matter of law. We also conclude that, viewing the evidence most favorably to the State, the inference that penis-vagina and penis-buttocks contact occurred in November 1994 is a reasonable one.

The social worker began the pertinent questioning by asking about the last assault. S.S. answered definitively about where it occurred and that she was sleeping when her father woke her up and began touching her private parts. After clarifying what she meant by private parts, S.S. again answered questions in a way that shows she was describing a specific memory: the light was out and she had a nightgown on, not pajamas. In this context, it is reasonable to infer that the testimony that immediately followed--that her father touched her with his hand and put his penis in her vagina and buttocks--was also part of her description of the last assault.

This inference is supported by other testimony of S.S. The social worker later asked her, "Does he put--does he put his penis in you in front or in back? There's kind of two different privates, aren't there?" S.S. answered: "On both, sometimes both." This indicates that S.S. is distinguishing between two different types of assaults--vaginal and rectal--and that her father sometimes engages in both. She also told the social worker that her father made her perform fellatio, but she did not mention this in connection with the last assault.

The trial court could reasonably infer that S.S. could distinguish between the different types of assault she was subjected to and that she was specifically identifying the assaults that occurred during the last incident, penis-vagina and penis-buttocks, when she indicated on the toy bear the two places where her father had placed his penis.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 95-2939-CR(D)

SUNDBY, J. (*dissenting*). Because the victim in this case was an eight-year-old child, the police could not learn from her the dates of the more than one hundred occasions on which, she claims, her father had sexual contact with her. The police identified one occasion on which sexual contact occurred by the child's statement that it happened while they were living in the "old house" and after Halloween. The information charged defendant with two counts of sexual contact with his daughter: Count I, penis-vagina, and Count II, penis-buttocks, sometime in November 1994. The information does not allege that defendant penetrated his daughter's vagina or buttocks on this occasion. In fact, the victim stated that defendant touched her breasts, vagina and buttocks with his hands and with his penis. The State does not claim that there was any temporal separation between defendant's touchings.

The defendant does not use the term "multiplicitous" to describe the two counts of the information. However, he argues:

> It is apparent that the State charge[d] the two counts out of the last incident which occurred between the victim and the defendant. From that last incident, the State alleges two separate sexual contacts occurred rather than one continuous act.

I conclude that defendant intends to argue that because the alleged touching was one continuous act, the two counts are multiplicitous.

I agree with the State that "[t]he exact nature of the defendant's argument is somewhat unclear." It states: "The state interprets [defendant's argument] to be that the evidence was insufficient to permit the trier of fact to reasonably conclude that both penis-vagina contact and penis-buttocks contact occurred the last time that [the victim] was sexually assaulted by her father rather than that the charges were multiplicitous." I conclude that defendant intends to raise a "multiplicitous" argument because the evidence as to both counts was the same. The State argues that defendant has waived the multiplicity argument by failing to raise the issue, either in the trial court or in this court. We need not decide that question because defendant has raised the issue, albeit most inartfully.

The State argues that, in any event, defendant's multiplicity challenge would not be successful. Multiplicity is the charging of a single offense in separate counts. ***State v. Seymour***, 177 Wis.2d 305, 316, 502 N.W.2d 591, 596 (Ct. App. 1993), *aff'd*, 183 Wis.2d 683, 515 N.W.2d 874 (1994). "Multiplicitous charging is impermissible because it violates the double jeopardy provision of the Wisconsin and United States Constitutions." ***State v. Seymour***, 183 Wis.2d 683, 693 n.8, 515 N.W.2d 874, 879 (1994) (quoting ***State v. Tappa***, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985)).

The State cites ***State v. Eisch***, 96 Wis.2d 25, 291 N.W.2d 800 (1980), and ***State v. Kruzycki***, 192 Wis.2d 509, 531 N.W.2d 429 (Ct. App. 1994), to support its argument that defendant's multiplicity challenge would be unsuccessful. However, we need not look to those cases because we have a "spotted cow" case which we cited in ***Kruzycki***, ***State v. Hirsch***, 140 Wis.2d 468, 410 N.W.2d 638 (Ct. App. 1987). In ***Hirsch***, the defendant was charged with three counts of sexual contact with a five-year-old child. The first count charged that he touched the child's vaginal area, the second count charged that he then touched her anal area, and the third count charged that he then touched her vaginal area a second time. The complaint and information did not set forth the time period in which the contacts occurred, but we said it was "apparent that the episode took no more than a few minutes." ***Id.*** at 475, 410 N.W.2d at 641. We added, "[t]here was apparently little, if any, lapse of time between the alleged acts. Given the short time frame, we cannot say that `the defendant had sufficient time for reflection between the assaultive acts to again commit himself.'" ***Id***. (quoting ***Harrell v. State***, 88 Wis.2d 546, 560, 277 N.W.2d 462, 467 (Ct. App. 1979)).

If the two acts charged were vaginal and anal intercourse, the State could argue that these acts are sufficiently separate and distinct volitional acts to justify separate counts. "Nonconsensual penile entry of a victim's vagina and anus is vastly different in kind and degree of force than manually touching a vagina and anus." ***Kruzycki***, 192 Wis.2d at 523, 531 N.W.2d at 434. However, the evidence does not support vaginal or anal penetration *on the charged occasion*.

I have viewed the videotaped interview by the social worker of the child and her videotaped deposition. She stated that on other occasions her father had penetrated her, but on this occasion she only related the touching. Her statements do not support that her father "had sufficient time for reflection between the assaultive acts to again commit himself." I conclude therefore that defendant should be resentenced on one of the counts and I would reverse the judgment and remand for that purpose.

I further conclude that the trial court erroneously exercised its discretion in sentencing the defendant. Defendant's appellate counsel does not raise this issue and we would have to exercise our discretionary reversal authority under § 752.35, STATS., to review this issue. I would exercise that authority in this case.

Defendant is a thoroughly despicable human being. However, he is also a thoroughly despicable, *sick* human being. He suffers from the disease which costs society more in loss of economic wealth and creates more societal problems than all other diseases combined--chronic alcoholism. Contrary to the pre-sentence investigation report and the sentencing guidelines, the trial court sentenced defendant on the first count to thirty-five years' imprisonment and on the second count to twenty years' imprisonment, the second sentence to run consecutive to the term of imprisonment on the first count. The State Probation and Parole Agent, after a very comprehensive review of the differing versions of the charged offenses, defendant's prior record, his family background, and his personal history, recommended that on the first count, defendant receive a term of confinement "towards the maximum allowable sentence." On the second count, the Agent recommended that the trial court impose a lengthy sentence but stay the sentence and place defendant on probation for a long period of time, consecutive to his release from prison. The Agent also recommended that defendant continue to be involved in a sex offender treatment program.

The Agent stated:

> If this defendant were in total denial and of a bad attitude and void of any empathy or emotion, I would recommend to the court that he serve the remaining years of his life incarcerated. However, because he has shown significant movement in his position, he should be afforded the opportunity to make changes in his life and perhaps, to be a salvaged part of society. It is therefore suggested that the sentencing guidelines be durationally exceeded, but not to the point that it amounts to a life sentence for this man.

The trial court also "durationally exceeded" the sentencing guidelines. The court stated: "Sexual assaults don't seem to fit in any nice little cubbyhole that we can put them, no little boxes, neat little boxes that they fit in. And that's why I've ignored the guidelines." Although the legislature has not repealed § 973.012, STATS., it is now clear that ***State v. Halbert***, 147 Wis.2d 123, 131-32, 432 N.W.2d 633, 637 (Ct. App. 1988), which held that a sentencing court's failure to consider the sentencing guidelines is not subject to appellate review, is precedential. In ***State v. Elam***, 195 Wis.2d 683, 538 N.W.2d 249 (1995), an equally divided supreme court held that ***Halbert*** is precedential under the decision of the court in ***State v. Speer***, 176 Wis.2d 1101, 501 N.W.2d 429 (1993), where, again, an equally divided court concluded that ***Halbert*** was "good law." Therefore, the fact that the trial court ignored the sentencing guidelines is not a question subject to our review, unless we overrule ***Halbert***. Whether we have that authority is a question now pending before the Wisconsin Supreme Court in ***Cook v. Cook***, No. 95-1963 (May 7, 1996) (petition for review granted).

I would hold, however, that the trial court erroneously exercised its discretion when it failed to consider the pre-sentence investigator's report. The trial court concentrated on the number of lives defendant destroyed and the risk to the community unless defendant was incarcerated "for a substantial period of time to make sure that there are no further victims." The trial court wholly ignored the Agent's judgment that defendant might be salvageable and therefore it was inappropriate to sentence him to a "life sentence." Defendant is forty-eight years of age. He has no felony convictions and the offenses he has committed, including the heinous sex offenses against two of his daughters, are alcohol and other drug related. The sentence recommended by the Agent offers some hope to the defendant that he can at some time be returned to his family and society. The sentence imposed by the court is for all practical purposes a life sentence.

It is regrettable that defendant's counsel did not introduce expert testimony at the sentencing hearing as to the nature of alcoholism and chemical dependency and defendant's probability of recovery if he receives the long-range therapy he needs for his chemical addiction and his sexual deviancy. I would remand this case for resentencing with, if necessary, a court ordered assessment of the defendant and a recommendation to the court by chemical dependency experts as to defendant's amenability to treatment.

I take this opportunity to urge the Wisconsin Supreme Court to direct that every judge shall receive a prescribed number of hours of education as to the nature of the disease of alcoholism and other chemical dependency. I further urge the legislature to provide for an indeterminate sentence for a person incarcerated for alcohol and other drug offenses where the offender is assessed as chemically dependent and that such person receive immediate treatment for his or her dependency and be released only when the treating professionals conclude that the person no longer presents a threat to society.