COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3772-CR

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

STATE OF WISCONSIN,

PLAINTIFF,

v.

ALLEN TONY DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Allen T. Davis appeals from a judgment of conviction and from an order denying him postconviction relief after a jury found him guilty of four counts of sexual assault of a child, contrary to § 948.02(2), STATS. He was sentenced to ten years' imprisonment for each count to run consecutively. Davis raises twelve issues on appeal. He claims: (1) the criminal

complaint is unconstitutionally vague; (2) the criminal complaint is duplicitous and, therefore, deprived Davis of the right to a unanimous verdict; (3) the trial court erred in admitting other acts evidence; (4) the trial court erred in refusing to allow testimony of the nature Davis's prior convictions; (5) the evidence at the preliminary hearing was insufficient to bind Davis over for trial; (6) the trial court erred in refusing to grant Davis a ***Miranda-Goodchild***[1] hearing prior to trial; (7) the trial court erred in excluding school, psychological and agency records regarding the victim; (8) the trial court erred when it refused to admit video evidence proffered by Davis; (9) the trial court erred in denying Davis's motion for a mistrial after a witness mentioned Davis's first trial in the matter; (10) the trial court erred when it allowed the jury to view medical records during its deliberations; (11) the trial court erred when it admitted testimony regarding the reasons for late reporting by child sexual assault victims;[2] and (12) the sentence was unduly harsh. We affirm.

I. BACKGROUND.

Between April and June of 1993, the victim, Sharika S., lived with her mother in Milwaukee. Her mother's boyfriend at the time was Davis. Sharika testified that "Tony" (Davis) stayed at the apartment frequently. Sharika testified that in early April, on an evening when her mother was not home, Davis came to her room, which she shared with her younger sister, and carried her to her

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

[2] In Davis's brief, on this issue, the heading reads: THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY REGARDING THE BEHAVIOR AND/OR EMOTIONAL STATE OF THE VICTIM. He then goes on to claim that the witness was unqualified to testify about late reporting by child sexual assault victims. We will thus treat this section as a complaint about the qualifications of the witness.

mother's bedroom, where her younger brother was sleeping. After taking her there, he put her on the bed and forcibly kissed her face and body. One night shortly thereafter, Davis again forced her to her mother's bedroom when her mother was not home, and this time forced his penis into her vagina. Sharika testified that this same act occurred approximately sixteen times between that night and June of 1993. Sharika also testified to three other sexual acts that occurred during the course of the two months: penis-to-mouth contact, mouth-to-vagina contact, and penis-to-buttocks contact. Although she could not pinpoint those acts to any specific date, Sharika approximated the incidents to have occurred before June 1993 but after the first penis-to-vagina contact.

Sharika went to live with her father in 1994, which is when she informed a school social worker about the incidents described above and the social worker reported the incidents to the authorities. Based on Sharika's statement detailing the above events, a complaint was issued and Davis was arrested. A jury trial took place August 29, 1994. Davis was convicted of four counts of second-degree sexual assault of a child. In postconviction proceedings, the trial court vacated the judgment and granted a new trial because the State used Davis's statement to the police in its case-in-chief when it indicated it would not, and because defense counsel was ineffective for failing to object during trial to the use of the statement. On November 18, 1996, a second jury trial commenced and Davis was again convicted of four counts of second-degree sexual assault of a child. He was sentenced to ten years in prison for each count, to run consecutive to one another, totaling forty years. Davis sought postconviction relief, which was denied by the trial court. He now appeals.

II. ANALYSIS.

(1) The Criminal Complaint is Unconstitutionally Vague.

Davis contends that the criminal complaint is unconstitutionally vague because the time frame that is indicated spans two months, without specificity as to when certain acts occurred within that time frame. Thus, he claims he was unable to prepare an adequate defense. The criminal complaint reads in pertinent part:

> THE ABOVE NAMED COMPLAINING WITNESS BEING DULY SWORN SAYS THAT THE ABOVE NAMED DEFENDANT (S) IN THE COUNTY OF MILWAUKEE, STATE OF WISCONSIN
>
> COUNT 01: SECOND DEGREE SEXUAL ASSAULT OF A CHILD
>
> During April and May, 1993 … did have sexual intercourse (penis to vagina) with a person who had not attained the age of 16, to wit, to wit [sic]: Sharika S[.] … contrary to Wisconsin Statute section 948.02(2).
>
> COUNT 02: SECOND DEGREE SEXUAL ASSAULT OF A CHILD
>
> During April or May, 1993 … did have sexual contact (penis to mouth) with a person who had not attained the age of 16, to wit, to wit [sic]: Sharika S[.] … contrary to Wisconsin Statute section 948.02(2).
>
> COUNT 03: SECOND DEGREE SEXUAL ASSAULT OF A CHILD
>
> During April or May, 1993 … did have sexual contact (mouth to vagina) with a person who had not attained the age of 16, to wit, to wit [sic]: Sharika S[.] … contrary to Wisconsin Statute section 948.02(2).
>
> COUNT 04: SECOND DEGREE SEXUAL ASSAULT OF A CHILD
>
> During April or May, 1993 … did have sexual contact (penis to buttocks) with a person who had not attained the age of 16, to wit, to wit [sic]: Sharika S[.] … contrary to Wisconsin Statute section 948.02(2).

Whether the two-month period of time alleged in the complaint is too expansive to allow Davis to prepare an adequate defense is an issue of constitutional fact that this court reviews *de novo*. *See* ***State v. Fawcett***, 145 Wis.2d 244, 249, 426 N.W.2d 91, 93 (Ct. App. 1988). In ***Fawcett***, this court explained:

> A criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense. However, where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. Time is not of the essence in sexual assault cases, and the pertinent statute … does not require proof of an exact date.

Fawcett, 145 Wis.2d at 250, 426 N.W.2d at 94. To determine whether the complaint sufficiently states the charges against the defendant, the Wisconsin Supreme Court set forth the following test in ***Holesome v. State***, 40 Wis.2d 95, 102, 161 N.W.2d 283, 287 (1968):

> In order to determine the sufficiency of the charge, two factors are considered. They are, whether the accusation is such that the defendant determine [sic] whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution of the same offense.

The ***Fawcett*** court listed seven factors, comprising the "reasonableness" test, to consider when applying the ***Holesome*** test. These factors are:

> (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between

> the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and the time of the alleged transaction or offense.

Fawcett, 145 Wis.2d at 253, 426 N.W.2d at 95.

Under the ***Holesome*** test, and incorporating the factors from ***Fawcett***, we observe that Davis was alleged to have committed at least four and as many as nineteen sexual assaults in a two-month period of time against a thirteen-year-old victim. "Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind …. In a case involving a child victim, we conclude a more flexible application of notice requirements is required and permitted." ***Fawcett***, 145 Wis.2d at 254, 426 N.W.2d at 95-96. Given the victim's age, it is conceivable that the surrounding circumstances and the nature of the crimes would have made it difficult for her to provide specific dates for each incident. Specifically, the victim estimated the assaults occurred in excess of sixteen to twenty times in a two-month period of time, at night, when everyone in the apartment was asleep and her mother was not home. Sharika S. testified that Davis told her not to tell anyone "or else," thus possibly intimidating and confusing her. The nature of the offense itself was secretive and intimidating to the victim, and made it unlikely that it would be discovered immediately. While it is difficult to assess whether the victim's age, the first factor, played a part in the victim's ability to recall specific dates, factors two and three support a conclusion that the complaint was sufficiently specific to allow Davis to defend himself.

Factor four also supports the conclusion that the complaint was sufficiently specific. The length of the alleged period of time was two months and the number of specific acts alleged is four. Each act alleged constituted a separate

count, thus distinguishing them from each other. In ***Fawcett***, the defendant was charged with two counts of sexual assault in a six-month period of time and this was found to be reasonably specific. The four separate counts alleged in the shorter two-month period of time is specific enough to allow Davis to defend himself.

The time between the alleged offenses and Davis's arrest, and between the date of indictment and the alleged offenses, factors five and six, is approximately eleven months. This period is longer than the thirty-nine-day period between the offense and the complaint in ***Fawcett***, *see* ***State v. R.A.R.***, 148 Wis.2d 408, 412 & n.3, 435 N.W.2d 315, 317 & n.3 (Ct. App. 1988) (discussing this specific time period in ***Fawcett***), but significantly less than the five years between the offense and complaint in ***State v. R.A.R.***, 148 Wis.2d at 412, 435 N.W.2d at 317, where this court found that this time period alone did not brand the charges insufficient, but when combined with other factors, rendered the charges insufficient. Further, the reason for the time period was because the victim did not come forward for many months out of fear and intimidation. As we noted, the notice requirements for child victims are more flexible. *See* ***Fawcett***, 145 Wis.2d at 254, 426 N.W.2d at 95.

The victim's ability to particularize the date and time of the alleged offenses was also impaired by the time period between the offenses and her disclosure of the incidents to the school social worker. We have already discussed the fear and intimidation felt by Sharika which contributed to this lapse of time. It may have also contributed to her inability to pinpoint specific dates. Moreover, these sexual assaults occurred in a repetitive nature, not as single incidences, producing a pattern of conduct and making it difficult for Sharika to particularize more than she did. Sharika was able to "pinpoint" the first act of penis-to-vagina

contact to early April, within a couple nights of the first time Davis forcibly took her into her mother's room. She further was able to determine that the other incidents charged occurred after the first, in April or May of 1993. Sharika thus determined that the charges other than the penis-to-vagina contact occurred within approximately a six-week period of time.

Under the ***Fawcett*** reasonableness test, we conclude that the two-month time period alleging these offenses was sufficiently specific to allow Davis to defend himself under ***Holesome***.

(2) The Criminal Complaint is Duplicitous, Depriving Davis of his Right to a Unanimous Verdict

Duplicity[3] is "the joining in a single count of two or more separate offenses." ***State v. Lomagro***, 113 Wis.2d 582, 586, 335 N.W.2d 583, 587 (1983). One of the "purposes of the prohibition against duplicity [is] … to guarantee jury unanimity." ***Id.*** at 586-87, 335 N.W.2d at 587. The ***Lomagro*** court further noted that

> the right to a jury trial as guaranteed by the Wisconsin Constitution includes the right to a unanimous verdict. The principal justification for the unanimity requirement is that it ensures that each juror is convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense.

Id. at 590-91, 335 N.W.2d at 588-89 (citations and footnote omitted).

[3] The non-legal definition of "duplicity' is "Deliberate deceptiveness in behavior or speech … double dealing." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 571 (3d ed. 1992). The more appropriate way to describe the occurrence or joining two or more offenses into one count would be "duplicative" joining. *See* ***id.*** However, since the word "duplicity" has become well established in legal parlance to describe the joining of two or more offenses into one count, we will refer to it as such. *See* BLACK'S LAW DICTIONARY 503 (6th ed. 1990).

To evaluate whether a defendant has been denied his or her right to a unanimous verdict,

> [t]he first step is to determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. If more than one crime is presented to the jury, unanimity is required as to each. If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.

Id. at 592, 335 N.W.2d at 589. In ***State v. Molitor***, 210 Wis.2d 415, 420, 565 N.W.2d 248, 251 (1997), this court concluded that "the unanimity requirement is met where multiple acts can be said to constitute 'one continuous, unlawful event and chargeable as one count.'" The supreme court, in an earlier case, relied on by ***Molitor***, determined that "when the charged behavior constitutes 'one continuous course of conduct,' the requirement of jury unanimity is satisfied regardless of whether there is agreement among jurors as to 'which act' constituted the crime charged." ***Id.*** (citing ***State v. Giwosky***, 109 Wis.2d 446, 451, 326 N.W.2d 232, 235 (1982)).

Davis argues that he was denied his right to a unanimous verdict because the complaint was duplicitous because it states that "the alleged assaults occurred 'on approximately sixteen different occasions during April and May, and perhaps a couple of times in June, 1993.'" The complaint, and the testimony of Sharika, specifically refer to approximately sixteen incidents of penis-to-vagina intercourse, and not to the other acts alleged. Thus, the analysis centers on count one.

The State chose to charge Davis with one count of penis-to-vagina intercourse, viewing the approximately sixteen occasions as "one continuous offense." *See* ***Lomagro***, 113 Wis.2d at 587, 335 N.W.2d at 587. In fact, "[s]everal courts have upheld the validity of indictments that consolidate several acts into a single count when such acts represent a single, continuing scheme that occurred within a short period of time and that involved the same defendant." ***Id.*** at 588, 335 N.W.2d at 587. Whether a series of acts represents a single course of conduct or separate offenses is a determination left initially to the discretion of the prosecution. *See* ***id.***

With respect to count one, the jury was presented with evidence describing a continuous course of conduct, constituting one crime. We thus conclude, under ***Giwosky*** and its progeny, that because the evidence presented described a pattern of conduct, the jurors did not have to determine which act constituted the crime charged. Thus, Davis was not denied his right to a unanimous verdict.

(3) The Trial Court Erred When it Admitted Other Acts Evidence.

Davis argues that the trial court erred when it allowed the victim to testify that penis-to-vagina intercourse occurred sixteen to twenty times over a period of two months despite the fact that Davis was only charged with one count of penis-to-vagina intercourse. The standard of review for a trial court's admission of other acts evidence is whether the trial court properly exercised its discretion. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). The admission of other acts evidence is controlled by § 904.04(2), STATS., which reads:

> **Character evidence not admissible to prove conduct; exceptions; other crimes.**
>
> ….
>
> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The trial court[4] ruled that such evidence was relevant because it addressed the issues of motive, intent and plan under § 904.04(2), STATS.

Davis contends that this evidence, even if it falls within one of the exceptions in § 904.04(2), STATS., does not satisfy the requirement of § 904.03, STATS., that the probative value of such evidence must not be substantially outweighed by unfair prejudice to the defendant resulting from the admission of such evidence.

We conclude that the trial court properly exercised its discretion when it found that the other crimes evidence was relevant to show motive, intent and plan under § 904.04(2), STATS. and further that the probative value of the evidence was not substantially outweighed by any unfair prejudice to Davis. First, the numerous incidents of sexual intercourse to which the victim testified supplied the basis for the charge of second degree sexual assault of a child (penis-to-vagina intercourse) under count one in the complaint. Because no specific dates were given by the victim, the State argues that it is necessary to show a pattern of conduct to substantiate count one. We agree. Second, under the greater latitude

[4] There were two trials in this case. The first trial court ruled on this motion and specifically mentioned § 904.04(2), STATS., and the subsequent court adopted the ruling of the first court.

standard used in sex crimes against minors, we conclude that the probative value of this evidence is great because it relates to Davis's motive, intent and plan. *See* ***State v. Conley***, 141 Wis.2d 384, 402, 416 N.W.2d 69, 76 (Ct. App. 1987), *vacated on other grounds sub nom.* ***Conley v. Wisconsin***, 487 U.S. 1230 (1988) (permitting admission of "uncorroborated, non-specific" claims because there is a "'greater latitude' standard for admitting other acts evidence in sex crimes cases, particularly in those involving incest and indecent liberties with a minor child."). We therefore conclude that the trial court did not err when it permitted the admission of other acts evidence.

(4) The Trial Court Erred When it Refused to Allow Testimony Regarding the Nature of Davis's Prior Convictions.

Davis claims that the trial court erred when it refused to allow him to introduce testimony that his prior convictions were not for sexual crimes. While Davis is correct that "evidence that the witness has been convicted of a crime is admissible," for purposes of credibility, *see* § 906.09(1), STATS., and that "where a witness truthfully acknowledges a prior conviction, an inquiry into the nature of the conviction cannot be made," *see* ***Voith v. Buser***, 83 Wis.2d 540, 545, 266 N.W.2d 304, 306-07 (1978), Davis cites no legal authority that supports his assertion that the nature of his convictions may be introduced for other purposes. "Arguments unsupported by references to legal authority will not be considered." ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). In any case, Davis did not testify; thus, the ruling was never put into effect and did not prejudice Davis.

(5) The Evidence at the Preliminary Hearing was Insufficient to Bind Davis Over for Trial.

Davis claims that the evidence presented at the preliminary hearing did not support a finding that he probably committed a felony because the only witness, the victim, was not specific as to the dates of the assaults. He further claims that he did not receive an impartial evaluation from the court commissioner because when the defense tried to elicit more specific dates from the victim, the state objected, claiming irrelevancy, and the commissioner responded:

> THE COURT: Well, it's relevant if counsel is looking to have additional charges issued. Right now the defendant is charged with four counts. I have heard testimony as to sixteen or more.
>
> ….
>
> I suppose we could pin it down and have more counts issued. That would be good.

"[A] conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing. Accordingly, a defendant who claims error occurred at his preliminary hearing may only obtain relief before trial." ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991). Further, Davis fails to show how these claimed errors affected his trial. In any event, the law is clear; Davis cannot now seek relief. *See* ***Webb***, 160 Wis.2d at 629-31, 467 N.W.2d at 111 ("To grant the defendant a new preliminary examination would be to give him an entirely disproportionate remedy.").

(6) The Trial Court Erred When it Denied Davis a ***Miranda-Goodchild*** *Hearing Prior to Trial.*

When Davis was arrested, he made a statement to the police. Before trial, Davis moved to exclude the statement, requesting a ***Miranda-Goodchild***

hearing.[5] When Davis requested the hearing, the prosecutor informed the court that the State would not be using Davis's statement in its case-in-chief. Thus, the only issue was whether the State could use Davis's statement to impeach him, were he to testify.

Davis claims that the trial court erred when it denied his request for a ***Miranda-Goodchild*** hearing before trial because it affected his decision whether to testify. The trial court did not deny Davis a hearing, but rather, determined that if Davis testified, and the State wanted to impeach him with his statement, the court would "revisit the issue and make sure there aren't any unresolved issues." Davis did not testify, thus the issue was never "revisited" by the trial court and a hearing did not occur. The trial court did not err in determining not to hold a pretrial hearing on the admissibility of Davis's statement for impeachment purposes when it indicated it would determine that if Davis would testify.

(7) The Trial Court Erred in Excluding School, Psychological and Agency Records Regarding the Victim.

Davis argues that records from the Milwaukee County Department of Human Services and Milwaukee Public Schools, regarding the victim were erroneously excluded from evidence. Davis does not address specific elements of the documents themselves in claiming their relevance. It is not the province of this court to provide argument for the appellant and we therefore decline to address this issue. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (we may decline to address issues inadequately briefed). Further,

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1986) (discussing voluntariness of confessions and procedure in custodial interrogations); ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 264-65, 133 N.W.2d 753, 763-64 (1965) (requiring the judge to hold a hearing to determine the voluntariness of defendant's confession).

while Davis contends that these records fall under the "business records" exception to the hearsay rule, he fails to provide any analysis of the hearsay rule or the business records exception. Thus we additionally decline to address this issue as it is "amorphous and insufficiently developed." *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 Wis.2d 392, 398-99 (Ct. App. 1995) (court of appeals need not address "amorphous and insufficiently developed" arguments).

(8) The Trial Court Erred When it Refused to Admit Video Evidence Proffered by Davis.

Davis claims that an independent videotape produced by him, which documented an apartment similar to the one where the sexual assault allegedly occurred, was relevant and should have been admitted by the trial court.[6]

A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards, and in accordance with the facts of record. *See* ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). In reviewing evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of evidence, would have permitted it to come in, but whether the trial court's exercise of discretion was proper under the standard indicated above. *See* ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982).

[6] In his brief, Davis claims that the videotape depicted the apartment where the "sexual assaults allegedly occurred." The record shows that the videotape did not depict that same apartment, apartment 307, but rather a different one, apartment 207. As the State points out, the trial court, in its ruling, treated the apartments as if they had similar layouts.

Davis argues that the videotape of the apartment layout shows that if Sharika's mother came home while Sharika was being assaulted in her mother's bedroom,[7] as she testified, her mother would have seen Davis and the victim, and they would not have been able to get to Sharika's bedroom without passing her mother.

The trial court viewed the videotape and ruled it inadmissible because it was irrelevant for the following reasons: (1) "a great deal of [the videotape] describ[ed] [(with voice-over)] the living room and the kitchen from the opposite direction, which aren't at issue"; (2) the location of the bed was critical for the jury to understand what took place and the videotape did not depict the location of the bed; (3) there was no testimony that the victim's mother was ever standing in the doorway when any sexual contact occurred or when Davis was carrying the victim back to her own bedroom; (4) the videotape itself did not clarify the dimensions of the apartment; and (5) the height at which the video camera was held was not shown to be the same as Sharika's mother's height.

The trial court enunciated a reasonable basis for its ruling, in accordance with accepted legal standards and the facts of the record. Its exercise of discretion was not clearly erroneous and, therefore, was proper. *See* ***Alsteen***, 108 Wis.2d at 727, 324 N.W.2d at 428 (if a reasonable basis exists for the trial court's determination it will be upheld).

[7] This room is also referred to as the "living room" in the record and in the briefs by the appellant and the State. The record shows that the "living room" and the mother's bedroom were the same room.

(9) The Trial Court Erred in Denying Davis's Motion for a Mistrial After a Witness Mentioned Davis's First Trial.

During Davis's trial, a witness made a reference to Davis's first trial:

> DEFENSE COUNSEL: How many times did you talk to her [Sharika S.]?
>
> WITNESS: One time.
>
> DEFENSE COUNSEL: And that was April 1st, and you've never talked to her since?
>
> WITNESS: I believe I talked to her at the earlier jury trial.

Davis moved for a mistrial based on that reference, and the trial court denied the motion. The trial court asked defense counsel if he wanted a cautionary instruction to the jury about the reference and the defense declined, saying "I don't want you to say anything to the jury now." Davis now claims the court erred in not granting the mistrial.

The decision of whether to grant a mistrial lies within the discretion of the trial court. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App 1988). "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** On appeal, this court will not reverse the denial of a motion for a mistrial absent a clear showing of an erroneous exercise of discretion by the trial court. *See* ***id.*** "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***State v. Bunch***, 191 Wis.2d 501, 506-07, 529 N.W.2d 923, 925 (Ct. App. 1995).

Davis claims because of the reference to the first trial, "it is likely that at least some jurors would have concluded that Davis was found guilty by a

previous jury." In denying the motion the court noted that the jury could have attributed a number of different reasons to the need for a second trial: "[F]or all they know it could have been a hung jury … maybe somebody got sick. Maybe something happened that the trial wasn't finished. They don't know what happened." The court went on, "I'm perfectly willing to give them [the jury] an instruction that they're not to concern themselves with what occurred at any … previous legal proceedings in this matter … but I don't think that that requires or necessitates a mistrial." As noted, the defense did not want a cautionary instruction.

The trial found that the statement made by the witness was not sufficiently prejudicial to grant a mistrial. In so doing, the court stated that the jury could have thought the witness was referring to a hearing, instead of a trial or that the witness was confused. This was not enough to warrant the granting of a mistrial. We conclude that the trial court correctly considered the facts and the arguments from counsel, and correctly offered the cautionary instruction. There is no clear showing of an erroneous exercise of discretion on the part of the trial court, and we will thus uphold its determination. *See* ***Pankow***, 144 Wis.2d at 47, 422 N.W.2d at 921.

(10) The Trial Court Erred When it Allowed the Jury to View Medical Records During its Deliberations.

Davis contends that the trial court erred when it allowed an exhibit, a report of a medical exam of the victim given by a witness, Nurse Arlene Kellett, to go back to the jury room, after the jury requested it. Davis claims that the viewing of the report by the jury unduly prejudiced him, and that the court erred in failing to give a limiting instruction to the jury that the records only pertained to count one.

The trial court has discretion to determine what exhibits will be permitted in the jury room. *See* ***State v. Jensen***, 147 Wis.2d 240, 259, 432 N.W.2d 913, 921 (1988). In determining whether to allow the jury to view an exhibit in the jury room the court should consider: (1) whether the exhibit will help the jury in their deliberations; (2) whether either party will be unduly prejudiced; and (3) whether the exhibit "could be subjected to improper use by the jury." ***Id.*** at 260, 432 N.W.2d at 922.

There was no request made by Davis for a limiting instruction, so that issue is waived. *See* § 805.13(3), STATS. ("[f]ailure to object [to a jury instruction] at the conference constitutes a waiver"); *see also* ***State v. Glenn***, 199 Wis.2d 575, 589, 545 N.W.2d 230, 236 (1996) (a failure to request that an instruction be given is treated the same as a failure to object to a jury instruction). Further, Davis's argument on this issue is inadequately briefed. *See* ***State v. Pettit***, 171 Wis.2d at 646, 492 N.W.2d at 642 (we may decline to address issues inadequately briefed).

Davis contends that the submission of this evidence to the jury was prejudicial because the testimony of the witness who generated the report was already in evidence and the "graphic nature of the exhibit could only serve to inflame the jury." We note that the court allowed only one page of the exhibit to go to the jury and that page was photocopied for the jury so that original highlighting could not be detected.

We conclude that the ***Jensen*** criteria were met when the trial court allowed one page of the exhibit to go to the jury room and, therefore, the trial court did not erroneously exercise its discretion. Because the jury specifically requested the evidence, it is presumed to have assisted the deliberations. Further,

Nurse Kellett testified that she had no specific recollection of examining Sharika, but that her report reflected her examination of the victim and was generated within a matter of minutes of the examination. Thus, the jury may have felt the report was the best evidence of the examination. Even though Davis contends the "graphic nature" of the exhibit "inflamed" the jury, he fails to address how or to point to specific portions of the exhibit that would support this contention.

(11) The Trial Court Erred When it Admitted Testimony Regarding the Reasons for Late Reporting by Child Sexual Assault Victims .

Davis asserts that the trial court erred when it allowed Nurse Kellett to testify about the reasons some children report sexual assaults late. He contends that the jury "was left with the impression that the victim's behavior was consistent with that of other sexual assault victims" and that Nurse Kellett was not qualified to make such an assessment.

Nurse Kellett's testimony about late reporting consisted, in part, of the following:

> COUNSEL: Does any of the training that you've done include information on why children late report?
>
> WITNESS: It's in the literature, yes.
>
> COUNSEL: Have you done reading outside of the training you've had regarding late reporting?
>
> WITNESS: Yes.
>
> COUNSEL: What type of reading have you done?
>
> WITNESS: Just medical journals, literature that's in the pediatric journals pertaining to sexual assault.
>
> ….
>
> COUNSEL: Now, in the eight years as well that you worked with sexual assault victims, have some of those victims been children?
>
> WITNESS: Yes.

> COUNSEL: Have some of them been young teen-age children?
>
> WITNESS: Yes.
>
> COUNSEL: And is any of the research that you've done or the training that you've done related to late reporting by children in their teens?
>
> WITNESS: Yes.
>
> COUNSEL: Based on that training and experience, Nurse Kellett, can you give us an idea of , based on your knowledge, why a person--and I'm talking about a child--would wait to report a sexual assault?
>
> WITNESS: There—
>
> DEFENSE COUNSEL: Objection. Competency.
>
> THE COURT: I'll allow it as long as it's understood that this is a general question.
>
> WITNESS: --could be fear, could be guilt depending on the person who's involved with the child.
>
> COUNSEL: Anything else that you can tell us about late reporting?
>
> WITNESS: Some people just repress it, put it out of their mind.

The determination of whether a witness is qualified to testify as an expert is within the discretion of the trial court. *See* ***State v. Robinson***, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988); § 907.02, STATS. Unless the trial court erroneously exercised its discretion, the ruling will be upheld. *See* ***Robinson***, 146 Wis.2d at 332, 431 N.W.2d at 171.

We conclude that the trial court did not erroneously exercise its discretion. The testimony established that Nurse Kellett had worked in a sexual assault unit at a hospital for eight years and had performed hundreds of examinations related to sexual assault. She also attended yearly conferences and read literature in her field regarding late reporting. The trial court's determination

that Nurse Kellett was qualified to testify about late reporting of sexual assaults by children was not erroneous.

(12) Davis's Sentence was Unduly Harsh.

Davis contends that, by imposing an excessively harsh sentence, the trial court punished him for exercising his right to a jury trial. "Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether there was an [erroneous exercise] of discretion." ***State v. Harris***, 119 Wis.2d 612, 622, 350 N.W. 2d 633, 638 (1984). To obtain relief on appeal, the defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis.2d 749, 782, 482 N.W.2d 883, 895 (1992). The trial judges must "articulate the basis for the sentence imposed on the facts of record." ***Id.*** The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character of the offender, and the need for protection of the public. ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984).

Davis does not point to anything in the record to support that the sentence was "unreasonable" or "unjustified." Simply advancing a theory is not enough. The record establishes that the trial court considered the appropriate factors when sentencing Davis:

> THE COURT: It's not just about the physical assault. It's about the psychological assault of her that she will have to endure and live with for the rest of her life.
>
> It's a very life defining moment, what occurred in that couple of months and it is something she will always have to struggle and deal with.
>
> So, when I look at the seriousness of the offense factor, short of homicide, it doesn't get any more serious than this, with respect to what you do to a child in a criminal sense.

> Your background and needs: you have a prior criminal record, which I would have hoped … would have convinced you to do something else with your life. It didn't. You have, as I indicated, some pretty strong positive abilities. It's just too bad you didn't focus them in the right direction.
>
> I also have to consider the community's need to be protected and if we don't protect our children, then everything else is a waist [sic] of time, in my view ….
>
> Considering all of those factors, I'm going to impose sentences on each count of 10 years.

We thus conclude there was no erroneous exercise of discretion by the trial court in imposing Davis's sentence.

For the reasons stated, this court affirms the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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