

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 98-3074

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KRISTEN MARSH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Kristen Marsh appeals an order denying his postconviction motion under § 974.06, STATS., in which he argued that he should have been charged with incest with a child rather than second-degree sexual assault of a child and incest, that dividing a single offense into multiple counts

constitutes double jeopardy and that his trial counsel was ineffective for failing to present that argument.¹ We reject these arguments and affirm the order.

Prosecutors have broad discretion to charge a defendant with any crime the State can prove, as long as the charging decision is not discriminatory and does not violate double jeopardy or the defendant's right to a unanimous jury. This rule applies even when the legislature enacts a more specific statute. *See State v. Eisenberg*, 151 Wis.2d 38, 43, 443 N.W.2d 328, 330 (Ct. App. 1989). The prosecutor remains free to charge two violations of more general statutes as long as the defendant's act is a violation of both statutes. *Id.*

There is no double jeopardy violation when each crime requires proof of an element that the other crime does not. *See State v. Saucedo*, 168 Wis.2d 486, 495, 485 N.W.2d 1, 4-5 (1992). Second-degree sexual assault and incest each require proof of an element not found in the other crime. Second-degree sexual assault of a child requires proof that the victim is under the age of sixteen. Incest requires proof of sexual relations or marriage between relatives. Because these crimes meet the *Blockburger* "elements only" test, Marsh's double

¹ Marsh also argues that the State presented insufficient evidence to support the incest conviction and that his trial counsel was ineffective because he failed to force the State to prove the required degree of kinship beyond a reasonable doubt. Those issues are not properly before this court and will not be addressed. They were not raised in the postconviction motion and cannot be raised for the first time on appeal. *See State v. Divanovic*, 200 Wis.2d 210, 226, 546 N.W.2d 501, 507 (Ct. App. 1996); *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Section 974.02(2), STATS., allows a direct appeal challenging the sufficiency of the evidence without filing a postconviction motion. That statute does not apply to appeals that arise under § 974.06, STATS. *See* § 974.02(1), STATS.

Marsh also requests reversal in the interest of justice. That issue is not properly before this court. *See State v. Allen*, 159 Wis.2d 53, 55, 464 N.W.2d 426, 427 (Ct. App. 1990). This court's authority to grant a new trial in the interest of justice under § 752.35, STATS., can be exercised only on direct appeal from the judgment of conviction or a postconviction motion under RULE 809.30, STATS. *Id.*

jeopardy rights were not violated by this prosecution. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Marsh argues that passage of § 948.06, STATS., (incest with a child) demonstrates that the legislature intended a single charge when a person has incestuous relations with a child. Wisconsin has long held that a person can be convicted of rape and incest based on a single act. *See State ex rel. Lawrence v. Burke*, 253 Wis. 240, 247, 33 N.W.2d 2d 242, 246 (1948). Nothing in the legislative history shows a purpose to overrule *Lawrence*. In § 939.65, STATS., the legislature clarified its intent regarding multiple prosecutions for a single act: “If an act forms the basis for a crime punishable by more than one statutory provision, prosecution may proceed under any or all such provisions.”

Because there is no basis for challenging the convictions based on double jeopardy or legislative intent, Marsh’s counsel was not ineffective and Marsh was not prejudiced by his counsel’s failure to raise that issue.

By the Court.—Order affirmed.

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

