

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 3, 2000

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-1493-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN D. MASCARETTI,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. John D. Mascaretti appeals from a judgment of conviction and an order denying his motion for postconviction relief. The issues on appeal both concern the use of his prior criminal convictions and juvenile adjudications at trial. Mascaretti first contends that the circuit court erred when it allowed the State to use these prior bad acts to impeach him without conducting

the required discretionary review. Second, Mascaretti contends that the court erred when it allowed this evidence in without distinguishing between the adult convictions and the juvenile adjudications. Because we conclude that the circuit court was not presented with the issue of whether to admit the evidence and because there is no requirement in the law that the circuit court distinguish between adult convictions and juvenile adjudications, we affirm.

¶2 Mascaretti was convicted after trial of armed robbery, false imprisonment and possession of a firearm by a felon. At the time of trial, Mascaretti had four criminal convictions and ten juvenile adjudications. Before he testified, the attorneys discussed with the court the use of Mascaretti's, as well as other witnesses', prior criminal convictions. The prosecutor stated that "we have a stipulation as to priors." Defense counsel agreed to that statement. Then the prosecutor stated that Mascaretti had fourteen prior convictions. Defense counsel did not disagree as to the number but raised with the court the fact that some of the prior convictions were juvenile adjudications. The court heard very brief argument and then stated: "Well, so far we've treated everybody with the strict numbers, and I don't want to get into what they are. I, frankly, don't think much beyond 1 or 2 makes much difference anyway, so we'll use the 14."

¶3 Mascaretti was sentenced to forty years in prison and probation. He then brought a postconviction motion challenging the convictions raising, among other things, the grounds asserted in this appeal. The court granted that portion of the motion which asked for a new trial on the felon in possession of a firearm charge. The court refused to grant the motion for a new trial on the armed robbery and false imprisonment charges. Mascaretti appeals from that portion of the order denying his motion on these grounds.

¶4 Mascaretti argues first that the circuit court erroneously exercised its discretion when it allowed the State to impeach Mascaretti with his prior criminal convictions and juvenile adjudications. Specifically, Mascaretti asserts that the court simply did not exercise any discretion because it allowed the evidence to be admitted without first considering the factors required by *State v. Kuntz*, 160 Wis. 2d 722, 746, 467 N.W.2d 531 (1991). *Kuntz* requires that the circuit court apply a two-pronged test when considering the admissibility of prior bad acts. *See id.* First, the court considers whether the evidence is admissible under WIS. STAT. § 904.04(2) (1997-98).<sup>1</sup> If it is, the court then considers whether the probative value is outweighed by the prejudicial value. *See Kuntz*, 160 Wis. 2d at 746. Mascaretti contends that the court was required to apply these factors to determine whether his prior convictions were admissible.

¶5 At the hearing on the postconviction motion, the circuit court stated that when it allowed the evidence to be used at trial, it understood that the parties had stipulated to the prior convictions. The record supports this assertion. Furthermore, the record establishes that defense counsel did not object to the prior convictions and adjudications being put before the jury. Defense counsel asked the court to distinguish between adult convictions and juvenile adjudications but did not object to the evidence coming in.

¶6 Because defense counsel did not object to the evidence, the issue of whether the evidence was admissible was never presented to the court. Consequently, there was no basis for the circuit court to apply the *Kuntz* factors. *Cf. State v. Salter*, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). The

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

court did not, therefore, fail to exercise its discretion. There was no basis for it to exercise its discretion.

¶7 The second issue Mascaretti raises is that the circuit court should not have allowed the jury to be given information that it knew was false. Mascaretti specifically contends that evidence that he had been convicted of fourteen crimes was “patently false” because ten of these were juvenile adjudications. There is simply no requirement in the law that the court distinguish between the two. Furthermore, it was Mascaretti’s defense counsel who put Mascaretti on the stand and asked him, “[H]ave you ever been convicted of a crime?” Mascaretti answered yes, and fourteen times.

¶8 Defense counsel could have phrased the question differently, or asked a subsequent question, to establish how many were adult convictions and how many were juvenile adjudications. He did not. Mascaretti cannot now use his counsel’s choice of trial tactics as the basis for his appellate challenge. Since Mascaretti’s counsel chose not to distinguish between the two when he asked Mascaretti about his prior convictions, Mascaretti cannot now use that failure as a basis for challenging his conviction.

¶9 For the reasons stated, we affirm the judgment of conviction and the order denying postconviction relief.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

