COURT OF APPEALS
DECISION
DATED AND RELEASED

October 15, 1997

NOTICE

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.

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

No. 96-2582-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VLADO GAZIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Vlado Gazic appeals from a judgment of conviction of four counts of first-degree sexual assault with a person under the age of thirteen. He argues that the evidence was insufficient, the charges are multiplicitous, and his sentence is excessive and the result of an erroneous exercise of discretion. We conclude that the evidence was sufficient and that

Gazic waived any claim that the charges are multiplicitous by failing to raise that claim before the conclusion of his trial. We affirm the judgment.

We first address Gazic's claim that the charges were multiplicitous. The complaint originally charged Gazic with two counts for sexual contact with six-year-old Cathy M. and four-year-old Kim M.[1] The information charged a separate count for touching each girl on her breast and vaginal area through her clothing for a total of four counts. Gazic argues that the act of touching separate areas of the body does not support a separate charge.

The multiplicity claim is not preserved for appellate review because it was not raised prior to appeal.[2] *See* ***State v. Patricia A.M.***, 168 Wis.2d 724, 739, 484 N.W.2d 380, 386 (Ct. App. 1992), *rev'd on other grounds*, 176 Wis.2d 542, 500 N.W.2d 289 (1993). Even though a multiplicity claim implicates a defendant's constitutional right prohibiting double jeopardy, *see* ***State v. Selmon,*** 175 Wis.2d 155, 161, 498 N.W.2d 876, 878 (Ct. App. 1993), such a claim may be waived by the failure to timely assert it.[3] *See* ***State v. Wolverton***, 193 Wis.2d 234,

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[1] Every effort should be made to conceal the identity of victims of sexual assault. We do so by using only the victim's first name and last initial. *See* RULE 809.19(2), STATS. We admonish Gazic's appellate counsel for effectively destroying the concealment of the victims' identity. Although Gazic's brief uses initials to identify the victims, it uses the full names of the victims' parents and includes the city of their residence.

[2] The record does not reflect that Gazic raised this claim in the trial court. Gazic has not filed a reply brief and therefore has not responded to the State's claim of waiver. He has not provided a record citation to when the claim was raised in the trial court.

[3] ***State v. Riley***, 166 Wis.2d 299, 302 n.3, 479 N.W.2d 234, 235 (Ct. App. 1991), states that "[a] claim under the double jeopardy clause, however, is not waived for failure to bring it before the trial court." That holding relies on cases determining that a guilty plea does not waive a double jeopardy claim, including ***Menna v. New York***, 423 U.S. 61, 62 (1975). An important qualification was stated in ***Menna***:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does

(continued)

253, 533 N.W.2d 167, 173 (1995) ("No procedural principle is more familiar … than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." (quoted source omitted)). It is incumbent on a defendant to raise a multiplicity claim before the end of trial so that the prosecution has an opportunity to develop those facts supporting multiple charges. *See* ***United States v. Griffin***, 765 F.2d 677, 681-82 (7th Cir. 1985). *See also* ***Wolverton***, 193 Wis.2d at 255, 533 N.W.2d at 174 ("Relief must be sought prior to trial so that the alleged error can be scrutinized and, if necessary, cured before the state, the witnesses, and the parties have gone to the burden, trauma, and expense of a trial."). Gazic waived his multiplicity claim and we do not address it.

When asked to review the sufficiency of the evidence, we determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We must accept the reasonable inferences drawn from the evidence by the jury. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990).

> not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.

Id. at 63 n.2. The ***Riley*** holding is limited to cases in which the defendant enters a guilty plea and still seeks to raise double jeopardy on appeal. *See also* ***State v. Hartnek***, 146 Wis.2d 188, 192 n.2, 430 N.W.2d 361, 362 (Ct. App. 1988) (a plea of no contest does not waive the right to challenge on multiplicity grounds). Where a defendant proceeds to trial, competing interests require that a multiplicity claim be raised before the conclusion of the trial.

Gazic argues that because Cathy gave many conflicting versions of the assaults by Gazic, no credible evidence exists to convict him. We acknowledge that Cathy did not consistently acknowledge that the assaults actually occurred. Her trial testimony was that while she was clothed Gazic touched her breast, butt and "private" area on six different occasions. She also saw Gazic touch her sister Kim in the same places.[4] The fact that Cathy had on certain occasions denied the assaults was brought to the attention of the jury. Her inconsistency in that regard created a credibility determination for the jury. *See* ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980) (inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve). We defer to the jury's function of weighing and sifting conflicting testimony in part because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

Even though Cathy denied the assaults on several occasions and Kim was unable to testify about them, when the allegations were repeated, Cathy and Kim were consistent on the primary details of what occurred. Each acknowledged that while in the bedroom during visitation with their mother, they had been touched by Gazic through their clothing on the breast and vaginal areas. Cathy admitted to being scared and that her mother had asked her to lie to keep Gazic out of jail. Expert testimony was offered that young victims commonly vacillate on whether the assault took place. Additionally, there was evidence that Cathy had

[4] At trial, Kim gave no response to many questions about whether Gazic had hurt her or whether she had been subjected to a "bad touch." She denied that Gazic touched her in the vaginal area but acknowledged that Gazic had hurt Cathy and was mean to her.

experienced certain reactive behavioral changes commonly associated with young victims of sexual assault. Given this additional corroborating evidence, there is no basis to conclude that Cathy's testimony was incredible as a matter of law.

Gazic also argues that there was insufficient proof that the touching occurred for the purpose of sexual arousal or gratification. Such intent may be inferred from the conduct and general circumstances of the case. *See* ***State v. Drusch***, 139 Wis.2d 312, 326, 407 N.W.2d 328, 334 (Ct. App. 1987). The touching of a child's breast and vaginal area is inferentially for sexual gratification when no other apparent reason exists for such contact. Moreover, the contact here occurred in a closed bedroom with the children removed from their mother's sight. Concealment raises an inference of an illicit purpose. The evidence is sufficient to support the inference that Gazic possessed the requisite intent.

The remaining issue is whether Gazic's sentence reflects a proper exercise of sentencing discretion. Gazic was sentenced to forty years on each count to be served consecutively, for a total of 160 years. Generally a motion to modify a sentence is a prerequisite to appellate review of a defendant's sentence. *See* ***Sears v. State***, 94 Wis.2d 128, 140, 287 N.W.2d 785, 790-91 (1980); ***State v. Barksdale***, 160 Wis.2d 284, 291, 466 N.W.2d 198, 201 (Ct. App. 1991). When no motion for modification is made in the trial court, the issue is not properly before this court. *See* ***State v. Norwood***, 161 Wis.2d 676, 681, 468 N.W.2d 741, 743 (Ct. App. 1991). Gazic did not file a postconviction motion and we need not address his argument that his sentence is excessive and based on improper factors.

We do, however, address Gazic's claim that the sentencing court denied him the protection of § 302.11(1g)(2), STATS., which establishes a mandatory release date for felony offenders. Gazic argues that he is denied equal

protection under the laws by the imposition of consecutive sentences for the purpose of ensuring that Gazic's mandatory release date does not fall within his life expectancy. Although the legislature has set forth a sentencing scheme which allows a sentence for life without the possibility of parole for only certain offenders, the trial court retains the authority to impose consecutive sentences regardless of the number of offenses. *See* § 973.15(2)(a), STATS. In § 973.15(2)(a), the legislature has very clearly provided that sentences may be either consecutive or concurrent and that it is the sentencing court that makes the decision. *See* ***State v. Paske***, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). The trial court stated its reasons for imposing the maximum sentences consecutively. That Gazic committed so many offenses that his mandatory release date is pushed beyond his life expectancy does not render his sentence unjust.[5]

By the Court.—Judgment affirmed.

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

[5] Gazic's other sentencing claims lack arguable merit. The trial court's comment about Gazic's failure to offer an explanation for the offenses was an assessment of Gazic's demeanor and did not violate his Fifth Amendment privilege to remain silent. The court's reliance on Gazic's 1972 Illinois conviction for rape and robbery was proper even though the conviction was reversed on appeal. The conviction was not reversed for insufficiency of the evidence and Gazic had admitted the crimes to police officers. *See* ***People v. Gazic***, 336 N.E.2d 73, 75, 76 (Ill. App. Ct. 1975). Since a sentencing court may consider offenses which were uncharged and unproven, *see* ***Elias v. State***, 93 Wis.2d 278, 284, 286 N.W.2d 559, 562 (1980), or the circumstances of a crime for which a defendant is acquitted, *see* ***State v. Bobbitt***, 178 Wis.2d 11, 17-18, 503 N.W.2d 11, 14-15 (Ct. App. 1993), it may certainly consider allegations that remain unproven only because Gazic was not retried. Nor was it error for the trial court to consider the age of the victims as an aggravating circumstance even though the victim's age is an element of the offense and has already been considered by the legislature in determining the maximum sentence. It is absurd to suggest that every assault against a child under thirteen years of age must be assessed in a similar way. Just as the characteristics of each defendant vary, so too does the vulnerability and resilience of young victims. The trial court is not restricted from considering the individual characteristics of a victim, including age.