COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3257-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KARL D. HEPPNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

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

PER CURIAM. Karl D. Heppner appeals from a judgment of conviction of two counts of second-degree sexual assault. He claims that the convictions are multiplicitous, that the evidence was insufficient, and that the trial court erroneously exercised its discretion in admitting portions of a nurse's testimony, in striking the testimony of his investigator, and in allowing the

introduction of evidence that Heppner had been convicted of seven prior crimes. We reject Heppner's claims and affirm the judgment.

Heppner was convicted of sexually assaulting Danielle H. in the furnace room of a Lake Geneva bowling alley/dance club. Danielle testified that Heppner pushed her to the floor and vaginally penetrated her from behind. Vaginal intercourse lasted a short time. Thereafter, Heppner held Danielle's head and forced his penis into her mouth. As Danielle turned her head, Heppner ejaculated on the side of her face and in her eye.

For the first time on appeal, Heppner claims that the convictions violate the prohibition against double jeopardy by dividing a single offense into multiple counts.[1] We deem his claim waived because it was not raised prior to appeal. *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

[1] Heppner argues that he inferentially raised a multiplicity claim by seeking to dismiss count one on the grounds that no evidence at the preliminary hearing supported the charge. A party must raise and argue an issue with some prominence in order to allow the trial court to address the issue and make a ruling. *See* ***State v. Ledger***, 175 Wis.2d 116, 135, 499 N.W.2d 198, 206 (Ct. App. 1993). Heppner's motion did not come close to objecting on multiplicity grounds. "We properly decline to review an issue where an appellant has failed to give the trial court fair notice that he or she objects to a particular issue." ***State v. Divanovic***, 200 Wis.2d 210, 226, 546 N.W.2d 501, 507 (Ct. App. 1996).

timely assert it.[2] *See* ***State v. Wolverton***, 193 Wis.2d 234, 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 upon 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."). We do not address this claim.[3]

---

[2] ***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 ***State v. Morris***, 108 Wis.2d 282, 284 n.2, 322 N.W.2d 264, 265 (1982), and ***State v. Olson***, 127 Wis.2d 412, 423-24 n.7, 380 N.W.2d 375, 381 (Ct. App. 1985), which Heppner cites. An important qualification was stated in ***Menna v. New York***, 423 U.S. 61, 63 n.2 (1975):

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

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.

[3] In his reply brief, Heppner suggests that we review the issue in the interests of justice. *See* § 752.35, STATS. We are not persuaded that reversal in the interests of justice is required because the convictions are not multiplicitous. Separate bodily penetrations during an ongoing assault are sufficiently different in fact as to justify separate charges. *See* ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980); ***State v. Kruzycki***, 192 Wis.2d 509, 522-24, 531 N.W.2d 429, 434-35 (Ct. App. 1995).

Our review of the sufficiency of the evidence is to 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, 290-91 (Ct. App. 1992). We defer to the jury's function of weighing credibility and sifting conflicting testimony. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989).

Heppner's attack on the sufficiency of the evidence is nothing more that an attack on Danielle's testimony about the incident. Heppner characterizes Danielle's testimony as conflicting with nature. He points out his belief that it would have been impossible to attempt to remove Danielle's jeans with one hand and that penetration from behind would have been impossible given the parties' positions and Danielle's resistance. He goes further to suggest that Danielle's testimony that she searched for her cigarettes rather than escape was wholly inconsistent with nonconsensual intercourse.[4] The argument simply reads like a closing argument and an appeal to the jury to reject the victim's version. Here, the jury was free to believe Danielle's testimony of how the assault occurred, including her explanation for not yelling out due to fear and shock. Moreover, her testimony was corroborated by accounts from other witnesses of her appearance

[4] Heppner also argues that Danielle's testimony is "intrinsically improbable" and incredible because she made no effort to gain anyone's attention during the assault and she made no effort to repel the forced intercourse in a manner that would raise attention. This type of argument is offensive. Long gone are the days when the required proof included demonstrating that the victim's "utmost resistance" was overcome. We cannot condone a credibility test measured only by the amount of resistance mounted by the victim.

after the assault and test results showing semen on her neck, hair and shirt. There is no basis to upset the credibility finding made by the jury.

At trial, nurse Mary Jordan, who had attended to Danielle in the emergency room, testified that Danielle's demeanor and physical condition were consistent with other sexual assault victims she had treated.[5] Heppner argues that Jordan was not qualified as an expert to give such testimony.

An expert's qualification is a matter resting in the sound discretion of the trial court. *See* ***State v. Robinson***, 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988). Jordan testified that she had been an emergency room nurse for seventeen years and had examined approximately seventeen women who were victims of sexual assault. This was sufficient to qualify her as an expert. The qualification of an expert is really a matter of experience and not licensure. *See* ***id.*** Heppner's perceived weakness in Jordan's expertise was simply a matter for the jury to consider in determining the weight of the evidence. "The law ... does not recognize any gradation of experts based on specialized training or practice. So long as [the witness] qualifies as an expert the weight to be accorded his [or her] testimony is for the [fact-finder]." ***Riehl v. De Quaine***, 24 Wis.2d 23, 32, 127 N.W.2d 788, 793 (1964).

Jordan was also permitted to testify as to the meaning of the doctor's notation that Danielle exhibited "no obvious distress." Heppner claims that Jordan should not have been allowed to render an opinion as to the meaning of a report prepared by another health care professional. The argument is not sufficiently

[5] Jordan testified that other sexual assault victims she had examined did not exhibit bruises, forcible marks or injuries in the pelvic area and that Danielle's controlled behavior, steady voice and lack of crying were consistent with the behavior of other sexual assault victims.

developed so we need only summarily address it. The record establishes that the phrase "no obvious distress" had a common meaning to health care professionals. We find no error in permitting Jordan to explain what that common meaning was. She was not rendering an opinion about someone else's observations.

Heppner argues that the trial court erroneously exercised its discretion in allowing the prosecution to attack his credibility by forcing him to admit that he had been convicted of a crime seven previous times.[6] "Whether to allow prior-conviction evidence for impeachment purposes under § 906.09, STATS., is within the discretion of the trial court." ***State v. Kruzycki***, 192 Wis.2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). In deciding the issue, the trial court should consider the lapse of time since the conviction, the defendant's rehabilitation, the gravity of the crime, the involvement of dishonesty or false statement in the crime, and whether the probative value of the evidence of the crime is substantially outweighed by the undue prejudice. *See* ***id.***

Heppner claims that because his prior convictions were very old and did not involve sex crimes, the probative value was outweighed by undue prejudice. The trial court considered these very factors at the hearing conducted on the admissibility of the prior convictions. The record demonstrates that the trial court properly exercised its discretion.

The final issue concerns the testimony given by Danielle's friend, Jodi. Danielle had been with Jodi earlier in the evening before the assault.

[6] On direct examination, Heppner admitted to having been convicted seven times. On cross-examination, the prosecution questioned Heppner about the nature of his convictions. Heppner does not appear to argue that it was improper to explore the nature of the crimes. To the extent that issue is raised, we reject it. Heppner testified that none of his convictions was for sex crimes. This opened the door for the prosecution to explore the nature of the convictions.

Danielle went to Jodi after the assault and asked to be taken home. Jodi testified about what she observed before and after the assault. She repeated that Danielle had said that Heppner raped her.

Heppner wanted to have his investigator testify that Jodi told him that Danielle was a dishonest person. Heppner contends that Jodi's statement to the investigator was a prior inconsistent statement about Jodi's opinion of Danielle's honesty. His claim fails, however, because Jodi was never asked to give an opinion about Danielle's honesty and she was not asked whether she had told Heppner's investigator that she believed Danielle to be dishonest.[7] Jodi's trial

[7] Jodi was asked whether she told a police officer that Danielle had lied to her on a number of occasions. Jodi acknowledged that she had told the officer that. The following exchange also occurred:

> Q But your opinion is she's not honest?
>
> A I wouldn't say that.
>
> Q Did you say that before to a representative of the Lake Geneva Police Department?
>
> A Not exactly in those words.
>
> Q You didn't use the words that she's not honest, or the phrase?

(continued)

testimony never affirmatively stated that she believed Danielle to be honest. Jodi admitted that her friend had lied to her on some occasions and that she did not know what to believe about what happened the night of the assault. The trial court properly concluded that the investigator's testimony about what Jodi told him was not inconsistent with Jodi's trial testimony.

By the Court.—Judgment affirmed.

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

A I don't remember.