

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 31, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

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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. 97-3314-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

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STATE OF WISCONSIN,

**PLAINTIFF-RESPONDENT,**

V.

CHANG N. JU,

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

HOOVER, J. This is an appeal of a judgment of conviction and an order denying postconviction relief.<sup>1</sup> Chang N. Ju contends that the issue on

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<sup>1</sup> The basis for postconviction relief was ineffective assistance of counsel. Specifically as relates to the question of severance, Ju contended that trial counsel failed to “satisfactorily and properly move to sever ....” Ju’s appellate brief does not address the Sixth Amendment issue and is therefore deemed abandoned. See *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis.2d 305, 306 n. 1, 306 N.W.2d 292, 294 n. 1 (Ct. App.1981). This court does not, therefore, address the basis for the trial court’s denial of the postconviction motion.

review is whether the charges against him should have been severed so as to have a separate trial for each of the two complaining witnesses. He claims that the trial court's failure to sever was an erroneous exercise of its discretion. Ju did not, however, pursue the issue of severance before the trial court. This omission constitutes waiver of the issue for appeal purposes and the judgment of conviction is therefore affirmed.

Ju was charged with two counts of having nonconsensual sexual contact with M.M. on November 28, 1995. An amended complaint added one count of prostitution involving M.M. on the same date and one count of fourth-degree sexual assault of H.C.M. on July 19, 1995. Ju moved the trial court for an order severing the charges pursuant to, inter alia, §§ 971.31(2) and (5) and 971.12, STATS. He contended that severance should be ordered because of the dissimilarity of the charges in terms of character and the underlying acts, their remoteness in time and nature, the likelihood that a joint trial would create substantial prejudice through the cumulative effect and otherwise, and each charge had limited probative value in relation to the others because the evidence of each did not, under *State v. Hoffman*, 106 Wis.2d 185, 208-09, 316 N.W.2d 143 (Ct. App. 1982), “overlap” with any other counts.

Ju concedes on appeal that trial counsel merely argued improper joinder under § 971.12(1), STATS., and not severance under § 971.12(3). Trial counsel did contend that joinder of the charges for trial would be prejudicial to his client. The focus of his argument at the motion hearing, however, was on the issue of misjoinder. When the court asked for clarification or conformation of the issue before it, Ju's counsel indicated that the basis of his request for relief was improper

joinder under § 971.12(1).<sup>2</sup> The district attorney confined her arguments to the question of proper joinder. In rebuttal, Ju's attorney again indicated to the court that "The question before the court is whether or not there's a misjoinder." In its ruling the trial court considered each of the factors under § 971.12(1) and concluded that joinder was proper. At the end of the court's ruling, Ju's trial counsel did not ask that it address, nor did the court consider, the question of proper but prejudicial joinder.

Section 971.12, STATS., provides in relevant part:

(1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint ... in a separate count for each crime if the crimes charged ... are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

....

(3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes ... in a complaint ... or by such joinder for trial together, the court may order separate trials of counts ... or provide whatever other relief justice requires.

The issues of misjoinder and severance are treated separately because, as the statutory language demonstrates, they are analytically distinct. *Hoffman*, 106 Wis.2d at 208, 316 N.W.2d at 156. When a motion for severance is made, the trial court must determine what, if any, prejudice would result due to a trial on the

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<sup>2</sup> The following colloquy occurred:

THE COURT: So your argument is based on the argument that these are not of the same or similar character, under 971.12(1), right, the language that we're talking about, as interpreted under Hoffman.

[DEFENSE COUNSEL]: That is correct, Your Honor.

joined charges. *State v. Bettinger*, 100 Wis.2d 691, 696, 303 N.W.2d 585, 588 (1981). The court must then weigh this potential prejudice against the interests of the public in conducting a trial on the multiple counts. *Id.* As indicated, the court did not make these determinations because it was not asked to do so. Ju nonetheless argues that once the trial court held that joinder was proper, it “erroneously exercised its discretion by ... not severing the case into two cases ...” Ju does not offer any authority for the propositions implicit in his argument that the trial court is responsible for unilaterally advancing or developing a position on behalf of a litigant or that failure to do so is an erroneous exercise of discretion. In the absence of such authority, this court concludes that the case is controlled by the doctrine of waiver. A defendant not only must specifically seek severance, but must do so on specific grounds or the claimed error is waived. *See State v. Nelson*, 146 Wis.2d 442, 457, 432 N.W.2d 115, 122 (Ct. App. 1988) (defendant's failure to seek severance on particular ground waived any error).

In summary, the trial court determined that the charges against Ju were properly joined. It was not asked to undertake a specific analysis of severance of the counts so joined. This omission constitutes a waiver of the issue on appeal. The judgment of conviction is therefore affirmed.

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

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

