COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3849

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

IN THE INTEREST OF BRETT R.T.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRETT R.T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

ANDERSON, J. The only issue open to question is whether a juvenile may be adjudicated to have committed a lesser-included delinquent act. Brett R. T. maintains that under the Juvenile Justice Code (JJC) a circuit court cannot find that a juvenile committed a delinquent act which had not been set forth in the delinquency petition. We reject Brett's claim and affirm the

order finding him delinquent. When a juvenile is charged with a delinquent act, he or she is automatically put on notice that he or she is subject to an adjudication of delinquency for any lesser-included act.

Brett originally raised four issues on appeal. In his first issue, he challenged the denial of his demand for a jury trial during the adjudicative phase of these proceedings. He contends that because the JJC is punitive in nature he has a constitutional right to a jury trial. This issue was disposed of by the Wisconsin Supreme Court in ***State v. Hezzie R.***, ____Wis.2d ____, ____, 580 N.W.2d 660, 675 (1998), where the court held that when a juvenile is not subject to placement in an adult prison, there is no federal or state constitutional violation for failure to provide juveniles with a trial by jury under under ch. 938, STATS.[1] Brett was not subject to potential placement in an adult prison under § 938.538(3)(a), STATS.; therefore, he was not entitled to a jury trial.

Brett raises two issues that are moot. He asserts that he was improperly detained in secure custody; however, he acknowledges that his release from secure detention prior to this appeal makes this a moot issue. He also contends that the circuit court erred in ordering him to submit to HIV testing under § 938.296, STATS., but he admits that he did comply with the order before the factfinding hearing was conducted in the circuit court. Citing ***State ex rel. La Crosse Tribune v. Circuit Court***, 115 Wis.2d 220, 228-29, 340 N.W.2d 460, 464

[1] The supreme court concluded that "[d]ue to the potential placement in an adult prison under Wis. Stat. §§ 938.538(3)(a)1, 938.538(3)(a)1m, and 938.357(4)(d), … those provisions in the JJC violate Article I, § 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution because they essentially subject a juvenile to the consequences of a 'criminal prosecution' without the right to a trial by jury." ***State v. Hezzie R.***, ___ Wis.2d ___, ___, 580 N.W.2d 660, 674 (1998). The court severed those provisions from the JJC.

(1983), Brett requests that we address both issues because they are matters of serious public concern.

It is an elementary rule of law that an issue "is moot when 'a determination is sought which, when made, cannot have any practical effect upon an existing controversy.'" *See* ***City of Racine v. J-T Enters. of Am., Inc***., 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974) (quoted source omitted). We will not decide moot issues because it requires a determination of abstract principles of law. *See* ***id***. We will decide moot issues in exceptional and compelling circumstances; however, this is not such a case because the issues Brett raises do not present matters of serious public concern.

We make a final observation regarding mootness. This court recently spoke to the burgeoning caseload in the court of appeals and the lack of judicial resources to deal with it. *See* ***State v. Stefanovic***, 215 Wis.2d 309, 318-19, 572 N.W.2d 140, 144-45 (Ct. App. 1997). In light of that unfortunate condition, it is far better that we commit our limited resources to the backlog of cases in which the rights and obligations of the litigants are actually at stake rather than to those in which our decision will have no practical or legal effect.

We turn now to Brett's assertion that the JJC does not allow for the adjudication of a lesser-included act not otherwise alleged in the delinquency petition. Brett was originally alleged to have committed the delinquent act of second-degree sexual assault in violation of § 940.225(2)(a), STATS. At the conclusion of a two-day bench trial, the State requested that the court consider the lesser-included delinquent act of third-degree sexual assault, in violation of § 940.225(3), if it was not satisfied that Brett had used force against the victim. Brett objected, arguing that seeking an adjudication on a lesser-included act

violated the notice requirements of the JJC. The circuit court concluded that Brett had committed third-degree sexual assault because it was satisfied that the State had failed to establish that Brett used force. Addressing Brett's argument that he was denied notice of the lesser-included act, the court held that allowing the petition to conform to the evidence was not prejudicial to Brett because the elements of (1) sexual intercourse and (2) without consent of the victim are the same in third-degree sexual assault and second-degree sexual assault.[2]

Brett renews his argument on appeal. Relying upon various provisions of the JJC, Brett weaves a facially appealing argument in which he contends that a circuit court can only find the juvenile named in a delinquency petition committed the delinquent act specifically alleged. Brett contends that the concept of a lesser-included act is found in § 939.66, STATS., and that the rules of criminal procedure are not to be engrafted on the JJC.[3]

Brett's argument raises a question of law—whether a juvenile under the JJC may be adjudged to have committed a lesser-included delinquent act other than the act alleged in the petition. To answer this question requires an interpretation of various provisions of the JJC and their application to undisputed facts. This presents a question of law that this court reviews de novo. *See* ***State v. Keith***, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993).

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[2] The circuit court did not address Brett's argument that he was denied notice of the charge until it considered Brett's Motion for Dismissal filed more than nine months after the finding of delinquency.

[3] In pertinent part, § 939.66, STATS., provides:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> **(1)** A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

Brett's argument lacks substance.[4] The concept of lesser-included acts is a common law rule that serves an important function in protecting the rights of the accused and the integrity of the justice system. *See* ***State v. Myers***, 158 Wis.2d 356, 363, 461 N.W.2d 777, 780 (1990).

> The doctrine of lesser included offenses simultaneously serves the prosecutor, the defendant, and the public. The doctrine originated at common law as an aid to the prosecutor in cases in which the evidence failed to establish some element of the offense initially charged. The doctrine helps ensure that the defendant has notice of the crimes of which he may be convicted thereby enabling the defendant to prepare an adequate defense. The doctrine [gives the court] an option [of] convicting or acquitting the defendant of the greater offense, when the evidence shows that the defendant may be guilty of a crime similar to but not necessarily the same as the one charged; a conviction may thus conform more accurately to the offense committed.

State v. Carrington, 134 Wis.2d 260, 263, 397 N.W.2d 484, 485-86 (1986).

Brett asserts that § 939.66, STATS., the criminal procedure code's rule on lesser-included offenses, cannot be applied to proceedings under the JJC. However, the codification of the common law rule in the code of criminal procedure does not prevent its use in other areas of Wisconsin law, including the JJC.[5]

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[4] Although this is the first appeal that challenges the authority of the court to adjudge that a juvenile committed a lesser-included delinquent act, the practice has been implicitly approved before. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 367-68, 497 N.W.2d 141, 150 (Ct. App. 1992) (Trial court did not err in denying juvenile's request for a lesser-included delinquent act instruction because the evidence did not warrant the submission of a lesser-included delinquent act to the jury.).

[5] Article XIV, § 13 of the Wisconsin Constitution provides:

> Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Brett contends that if a juvenile is to be adjudicated as having committed delinquent acts, he or she must have actual notice of the alleged delinquent acts in the petition. His argument ignores the general rule that "[w]hen a defendant is charged with a crime he is automatically put on notice that he is subject to an alternative conviction of any lesser included crime; the whole contains all its parts." ***Kirby v. State,*** 86 Wis.2d 292, 299-300, 272 N.W.2d 113, 116 (Ct. App. 1978) (quoted source omitted).

Permitting a court to find that a juvenile committed a lesser-included delinquent act is in accord with § 938.263(2), STATS., which permits amendment of the delinquency petition to conform to the proof after the plea hearing if the amendment is not prejudicial to the juvenile. The finding that a juvenile committed a lesser-included delinquent act at the conclusion of the factfinding hearing is the same as an amendment to conform to the proof presented at the plea hearing.

Finally, Brett has failed to present any evidence or argument as to how he was prejudiced. He was charged with second-degree sexual assault.[6] Brett's defense was that the sexual intercourse took place. It was consensual; but, he did not use or threaten the use of force. Brett's defense was partially successful, the circuit court found that the State failed to prove beyond a reasonable doubt that Brett used or threatened to use force. He has not made any

[6] The three elements of second-degree sexual assault in violation of § 940.225(2)(a), STATS., are: (1) the defendant had sexual intercourse with the victim, (2) the victim did not consent to the sexual intercourse, and (3) the defendant had sexual intercourse with the victim by use or threat of force or violence. *See* WIS J I—CRIMINAL 1208.

argument as to how his defense to an allegation that he committed third-degree sexual assault would have been any different.[7]

By the Court.—Order affirmed.

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

[7] The two elements of third-degree sexual assault in violation of § 940.225(3), STATS., are (1) the defendant had sexual intercourse with the victim; and (2) the victim did not consent to the sexual intercourse. *See* WIS J I—CRIMINAL 1218.