COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2383-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Moffett appeals a judgment convicting him of false imprisonment and four counts of sexual assault. He also appeals an order denying his postconviction motion. He argues that: (1) he is entitled to a new trial because the trial court failed to inform him of the unanimous jury requirement at the time Moffett elected to have a court trial; (2) the sexual assault

charges are multiplicitous; and (3) he was denied effective assistance of trial counsel because his attorney failed to object to the multiplicitous charges, failed to call an expert witness and failed to force Moffett to accept a plea bargain. We reject these arguments and affirm the judgment and order.

¶2 When the circuit court accepts a defendant's waiver of his right to a jury trial without reminding him that the jury must be unanimous, the defendant is entitled to a postconviction hearing to determine his knowledge and understanding of the rights being waived. *See* ***State v. Grant***, 230 Wis. 2d 90, 93, 601 N.W.2d 8 (Ct. App. 1999). The defendant must make a (prima facie) showing that he did not understand the unanimity requirement. *See* ***id.*** at 99. If he makes such a (prima facie) showing, the burden then shifts to the State to show by clear and convincing evidence that he did in fact voluntarily and intelligently waive his right to a jury trial. If the State meets this burden, the defendant is not entitled to a new trial. *See* ***id.***

¶3 Moffett did not allege that he was unaware of his right to a unanimous jury verdict. Based on the testimony of his trial counsel that he informed Moffett that all twelve jurors would have to find him guilty beyond a reasonable doubt, the trial court found that Moffett understood the unanimity requirement. That finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98). Because Moffett was aware of the unanimous jury requirement when he waived his right to a jury, he is not entitled to a new trial.[1]

[1] Moffett argues that the trial court declared a mistrial because jury selection had commenced before Moffett chose a court trial. He argues that the court was required to get a second waiver of a jury trial from Moffett because, in essence, the proceedings started over and the waiver of the jury trial related to the first trial only. We are satisfied that the waiver applied to the second proceeding, regardless of whether it was appropriate to declare a mistrial based solely on the timing of Moffett's decision to be tried by the court.

¶4 Moffett argues that the decision in ***Grant*** is inconsistent with the Wisconsin Supreme Court's decision in ***State v. Resio***, 148 Wis. 2d 687, 696, 436 N.W.2d 603 (1989) and that this court lacks the authority to overrule ***Resio***. We perceive no inconsistency. In ***Resio***, the court created the requirement that the trial court remind the defendant of the unanimous jury requirement before accepting waiver of a jury trial. That rule is a matter of judicial administration, not constitutional necessity. ***Resio*** does not address the remedy when the trial court fails to remind the defendant of the unanimous jury requirement. It does not suggest that automatic reversal is required without any showing that the defendant actually lacked that knowledge.

¶5 Next, we conclude the sexual assault charges are not multiplicitous. Multiplicitous charges violate a defendant's double jeopardy rights by breaking down a single course of conduct into separate offenses. *See* ***State v. Sauceda***, 168 Wis. 2d 486, 492-93, 485 N.W.2d 1 (1992). Whether charges are multiplicitous is a question of law that we review de novo based on a two-fold test. First, we examine whether the offenses charged are identical in law and fact. Second, we consider whether the legislature intended to allow multiple charges. *See* ***State v. Kruzycki***, 192 Wis. 2d 509, 521-22, 531 N.W.2d 429 (Ct. App. 1995). Whether the offenses are different in fact involves several factors: whether they are different in nature or separated in time, whether the perpetrator utilized separate threats or distinct uses of force to accomplish the particular acts, whether the perpetrator had time to reconsider his course of conduct between each offense, and whether the acts resulted in separate injury, pain, danger, fear or humiliation to the victim. *See* ***State v. Carol M.D.***, 198 Wis. 2d 162, 170, 542 N.W.2d 476 (Ct. App. 1995); ***State v. Eisch***, 96 Wis. 2d 25, 37, 291 N.W.2d 800 (1980).

¶6 The victim testified that Moffett performed four separate acts of intercourse with her. First, he penetrated her vagina and had intercourse that lasted about five minutes while holding her arms down. He then removed his penis and turned her over on her stomach and anally penetrated her. She told him to stop because it hurt, but he refused. After about three minutes, he again withdrew his penis, turned her over and had vaginal intercourse. She asked him to wear a condom but he refused. This intercourse lasted longer than the first time. Eventually, he rolled her over on her stomach and again had anal intercourse with her. These acts are not comparable to the nearly simultaneous act of touching the victim's vagina and anus described in ***State v. Hirsch***, 140 Wis. 2d 468, 470, 474-75, 410 N.W.2d 638 (Ct. App. 1987). Rather, the acts were separated by several minutes. Moffett could have reconsidered his conduct in light of the victim's pleas, but chose not to do so. The victim's additional pain and humiliation for each separate intrusion also justify the separate charges. The four charged offenses are sufficiently different in fact to pass the first part of the multiplicity test. Therefore, it is presumed that the legislature intended to permit cumulative punishments. *See* ***Sauceda*** at 495. Moffett has presented no evidence of legislative intent to the contrary.

¶7 Moffett has not established ineffective assistance of his trial counsel. To establish ineffective assistance, he must show deficient performance that prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The reasonableness of counsel's actions is judged in part on Moffett's own statements and actions. *See* ***id.*** at 691. Trial counsel was not ineffective for failing to challenge the charges as multiplicitous because they were not multiplicitous.

¶8 Moffett has not established any prejudice from his counsel's failure to call an expert witness to support his testimony that he could not obtain an erection and did not penetrate the victim. To establish prejudice, Moffett would have to show that an expert would have verified his testimony. He has never identified any expert witness willing to testify on his behalf and the postconviction testimony of his trial counsel demonstrates that it is unlikely that any medical personnel would have supported his testimony.

¶9 Finally, trial counsel was not ineffective for failing to force Moffett to accept a plea bargain. Counsel presented the prosecutor's offer and discussed it with Moffett. Moffett continued to deceive his attorney at that time, claiming that he was never alone in his bedroom with the victim. Counsel has no obligation to persuade his presumptively innocent client to accept a plea bargain offering forty years in prison. Counsel provided the information necessary for Moffett to make an informed choice. Counsel's assistance was not ineffective.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).