

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3127-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. LAWRENCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Michael Lawrence appeals a judgment convicting him on three counts of sexual assault of a child and one count of false imprisonment. He contends that the sexual assault charges were multiplicitous and that trial court errors tainted his trial. We conclude that the charges were not

multiplicitous, and that Lawrence waived the trial court's alleged errors. We therefore affirm.

¶2 The victim, Keri O., testified that Lawrence grabbed her, pinned her down, pulled up her shirt, and put his mouth on her breasts. Then, while Keri struggled, he unbuttoned her pants and pulled them off her. He inserted his fingers and then his penis in her vagina. He then released her. There was no testimony as to how long the episode lasted. Keri stated that the sexual intercourse was of short duration. Lawrence contends that this conduct constituted an uninterrupted continuous event that should have resulted in only one sexual assault charge and conviction.

¶3 Multiplicity results when the defendant is charged on more than one count for a single offense. *See State v. Rabe*, 96 Wis. 2d 48, 61, 291 N.W.2d 809 (1980). The test for multiplicity is whether the charged offenses are identical in the law and in fact. *See id.* at 63. The charges are not identical in fact if each count requires proof of an additional fact which the other counts do not. *See id.* Multiplicitous charges violate the double jeopardy provision of the state and federal constitutions. *See id.* at 61-62.

¶4 The sexual assault charges against Lawrence were not multiplicitous. Each of the three required proof of a separate and distinct sexual act outlawed by statute. Consequently, the fact that the conduct occurred as part of a continuous course of action over a relatively short period is not relevant. *See State v. Eisch*, 96 Wis. 2d 25, 31-33, 291 N.W.2d 800 (1980).

¶5 Lawrence also contends that the trial court erred by allowing the prosecution to call a witness after Lawrence began his defense, and by allowing expert testimony from an unqualified witness. These issues were not raised in the

trial court, and are therefore waived. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶6 Appellate counsel acknowledges trial counsel's failure to raise these issues in the trial court. Lawrence therefore contends, additionally, that trial counsel was ineffective. However, we do not address that issue because it is first raised in Lawrence's reply brief. *See In re Estate of Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981).

By the Court.—Judgment affirmed.

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

