COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

Nos. 99-3291-CR, 99-3292-CR & 99-3293-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH DWIGHT SPAULDING,

DEFENDANT-APPELLANT.

APPEAL from judgments and order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 FINE, J. Kenneth D. Spaulding appeals from judgments entered on jury verdicts convicting him of: two counts of first-degree sexual assault of a child (appeal number 99-3291-CR), one count of first-degree sexual assault of a child (appeal number 99-3292-CR), and one count of first-degree sexual assault of

a child (appeal number 99-3293-CR), *see* WIS. STAT. § 948.02(1), and from the trial court's order denying his motion for postconviction relief. He asserts three claims of trial-court error: 1) that the trial court erroneously exercised its discretion in not severing the various incidents, which had been joined for trial; 2) that the trial court erroneously permitted the State's expert on child sexual-assault victims to testify; and 3) that the trial court erroneously exercised its sentencing discretion. The cases, all tried together, were consolidated for purposes of this appeal. We affirm.

I.

¶2 Spaulding was a minister. He was accused of sexually assaulting young girls whom he met during his ministry.

¶3 In case number 99-3291-CR, he was accused of touching the breast of then twelve-year-old Mickey B. between June 1, 1997, and July 31, 1997, of touching the breast of then thirteen-year-old Monica S., sometime during December, 1997, and of touching the breast of then ten-year-old Amaidea E. sometime during November, 1997. He was convicted of the first-degree-sexual-assault charges involving Mickey B. and Amaidea E., and was acquitted of the second-degree-sexual-assault charge involving Monica S.

¶4 In case number 99-3292-CR, he was accused of touching the vagina of then ten-year-old Lola P. between December 1, 1991, and January 5, 1992. He was convicted of this first-degree-sexual-assault-of-a-child charge.

¶5 In case number 99-3293-CR, he was accused of touching the vagina of then eleven-year-old Debra B., Mickey B.'s sister, between July 1, 1997, and September 30, 1997, and of enticing then seventeen-year-old Jennifer K. into his

van with the intent to cause her to engage in prostitution, *see* WIS. STAT. § 948.07(2), between November 1, 1997, and November 30, 1997. He was convicted of the first-degree-sexual-assault-of-a-child charge involving Debra B., and was acquitted of the charge involving Jennifer K.

II.

1. Severance.

¶6 The cases were consolidated for trial, pursuant to WIS. STAT. § 971.12(1) & (4), which provide, as material here:

> **(1)** JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, 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.
>
> **(4)** TRIAL TOGETHER OF SEPARATE CHARGES. The court may order 2 or more complaints, informations or indictments to be tried together if the crimes ... could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment.

Although the headings of the argument sections in Spaulding's main and reply briefs challenge the joinder of the charges, he only *argues* that the trial court should have severed the charges once joined. Thus, his brief-in-chief states: "Defendant's position on appeal is that, even if the charges here were *arguably* properly joined, they should nevertheless have been severed to avoid jury confusion." (Emphasis in original.) The State, noting this limitation of Spaulding's appellate argument, points out in its brief that Spaulding "complains

only about the *failure to sever* the charges after they were joined." (Emphasis in original.) Spaulding's reply brief does not contradict the State's characterization of his argument. Thus, we analyze his complaint about all the charges being presented to the same jury in one case in the context of the trial court's refusal to sever the counts. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (argument not rebutted is admitted); ***Reiman Assocs. v. R/A Advertising***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issue not argued is waived).

¶7 Severance of joined charges is governed by WIS. STAT. § 971.12(3), which, as material here, provides: "If it appears that a defendant or the state is prejudiced by a joinder of crimes ... for trial together, the court may order separate trials of counts ... or provide whatever other relief justice requires." Appellate review of a trial court's denial of a motion to sever is governed by the following standards:

> Whether to sever otherwise properly joined charges on grounds of prejudice is within the trial court's discretion, and in making its decision the trial court must balance any potential prejudice to the defendant against the public's interest in avoiding unnecessary or duplicative trials. We will not interfere with that decision unless the court has abused its discretion, and we will uphold the trial court's ruling if there is any reasonable basis for it.

State v. Nelson, 146 Wis. 2d 442, 455–456, 432 N.W.2d 115, 121 (Ct. App. 1988) (citations omitted). A trial court does not erroneously exercise its discretion in refusing to sever unless "the defendant can establish that failure to sever the counts caused 'substantial prejudice'" to his or her defense; a showing of "some prejudice" is not enough. ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143, 157 (Ct. App. 1982).

> "Any joinder of offenses is apt to involve some element of prejudice to the defendant, since a jury is likely to feel that a (defendant) charged with several crimes must be a bad individual who has done something wrong. However, if the notion of involuntary joinder is to retain any validity, a higher degree of prejudice, or certainty of prejudice, must be shown before relief will be in order."

Id., 106 Wis. 2d at 209–210, 316 N.W.2d at 157 (quoted source omitted).

¶8 Generally, defendants claim prejudice from joinder because when a jury considers more than one charge there is the potential that the jury will look at the multiple charges as evidence that the defendant is a "bad" person. ***Id.***, 106 Wis. 2d at 210, 316 N.W.2d at 157. Then, the analysis focuses on whether evidence of each of the charges would be admissible in a trial on any charge, if the charges were severed. ***Id.*** This case is, therefore, somewhat unusual because Spaulding eschews the argument that the many charges make him out to be a bad person and that this supplies the requisite prejudice to mandate severance. He also does not contend that the evidence of any of the charges would not be admissible in a trial of any other charge. Rather, he contends that not severing the charges was prejudicial because tying so many together in one trial made the case too confusing for the jury to follow accurately.

¶9 In support of his argument that the many charges presented a confusing jumble of evidence, he points to a number of instances during the trial when the trial court and the lawyers were discussing the evidence and order of proof in conferences held outside the jury's presence where some confusion seemed apparent. But Spaulding presents no evidentiary support—other than these conferences to which the jury was not privy—supporting his contention that *the trial* was mired in what he calls a "sea of confusion." (Quoting from ***Harrell v. State***, 88 Wis. 2d 546, 569, 277 N.W.2d 462, 471 (Ct. App. 1979)).

Significantly, the "sea of confusion" to which ***Harrell*** referred was the situation where "multiple offenses are charged and some of the offenses are voluntarily dismissed by the prosecution or involuntarily dismissed by the court *after the reception of testimony*." ***Id.*** (emphasis added). Under *that* circumstance, not present here, ***Harrell*** recognized, "the jury may be left in a sea of confusion with regard to the evidence that is applicable to a specific charge"—that is, the jury would be confused between charges that were dismissed and charges that were not. ***Id.***

¶10 The record here demonstrates that the trial court, both the judge who heard Spaulding's original motion to sever and the successor judge who considered Spaulding's motion for reconsideration on the severance issue, considered all of the appropriate factors relating to severance; indeed, Spaulding does not argue that it did not. Rather, as noted, he merely contends that the trial court insufficiently considered the possibility of juror confusion. But giving broad berth to a trial court's exercise of discretion recognizes that an appellate judge may have decided the issue differently, without making what the trial court did erroneous. ***State v. Jeske***, 197 Wis. 2d 905, 912, 541 N.W.2d 225, 227 (Ct. App. 1995); *see* ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903, 907 (1983) (trial court exercising discretion has "'limited right to be wrong ... without incurring reversal'") (quoted source omitted). Thus, a trial court's exercise of discretion will be upheld if it is a reasonable product of a demonstrated rational mental process based upon facts of record and the applicable law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Under this test, we cannot conclude that the trial court erroneously exercised its discretion in refusing to sever the charges. Moreover, the trial court carefully ensured that the jury would *not* be confused, by crafting verdicts so the jury could

consider each charge on its own merits—each verdict form had the name of the alleged victim, her birth date, the period during which Spaulding is alleged to have either assaulted her or enticed her, and the place where each alleged crime occurred. Indeed, as noted earlier, the jury acquitted Spaulding of two of the charges. We reject Spaulding's claim of trial-court error in connection with its refusal to sever the charges lodged against him.

2. Testimony of expert.

¶11 As part of its case in chief, the State called a social worker at Children's Hospital to testify about typical reactions of child sexual-assault victims and how and to whom they report their assaults.[1] The trial court rejected Spaulding's attempt to have the witness precluded from testifying because the witness had not given the defense a report or written summary of her testimony, and permitted the witness to testify.[2] There was no error.

¶12 WISCONSIN STAT. § 971.23(1)(e) requires that the State disclose to the defendant "any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony." Here, the witness's reports *were* given to the defense. Thus, Spaulding's arguments that he

[1] For some reason, the State at trial attempted to characterize the social worker as a lay witness who would testify based on her specialized experience. This, of course, is a jumbling of words and concepts. As Spaulding points out, and as the State on appeal concedes, testifying based on specialized experience and knowledge is the *sine qua non* of expert testimony. *See* WIS. STAT. RULE 907.02.

[2] In his caption to his appellate brief's argument on this point, Spaulding argues: "The trial court erred by allowing the State to present testimony from an expert witness where the State did not furnish to the defense a report or written summary of the expert's proposed testimony." (Upper casing omitted.)

was entitled to a written summary of the witness's testimony are without merit; the requirement that a written summary be given is triggered only if the witness does not prepare a report. In his reply brief on appeal, Spaulding complains that the witness's "reports are merely a narrative of her interviews with the children," and that nothing in them "'alerted' defense counsel 'to the fact' that she would be testifying as an expert at trial, or what the substance of her expert testimony would be." (Quoted source omitted.) The argument is not otherwise developed and it is impossible for us to weigh even this bare-bones contention because Spaulding did not include the reports as part of the appellate record. [This latter statement is not true—see the last part of footnote 3]. Thus, we cannot conclude that the trial court erred. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986) (appellant's burden to ensure that record is sufficient to address issues raised on appeal); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (we will not address undeveloped arguments).[3]

[3] We are perplexed by the concurrence. The crux of Spaulding's contention on appeal was that the trial court should have excluded testimony of the social worker, whom the concurrence identifies as Liz Ghilardi, because she was testifying as an expert witness *and* the State had not adequately disclosed her report. As can be seen from footnotes 1 and 2, we assume, correctly in our view, that Ghilardi *was* testifying as an expert; there was no error because, as we have explained, the required reports *were* turned over to the defense.

Further, contrary to the flat statement "The State concedes error," in the concurrence, the State did no such thing. Rather the State argued, in the alternative, as expressed in its brief on this appeal: "Even if the disclosure of Liz Ghilardi's reports were [*sic*] somehow insufficient to satisfy the state's obligations under WIS. STAT. § 971.23(1)(e), it does not follow that the trial court was required to exclude her testimony."

(continued)

Additionally, the implication in the concurring opinion that the trial court prevented the State from calling Dr. Anna Salter as a witness because of her failure to properly disclose her report is wrong; the trial court ruled that Dr. Salter's testimony would not be helpful to the jury, which is a prerequisite to the admission of any testimony under WIS. STAT. RULE 907.02. Spaulding does not argue on appeal that Ghilardi's testimony was not "helpful" to the jury within the meaning of Rule 907.02, and, accordingly, the trial court's exclusion of Dr. Salter's testimony is not material to this appeal, which is why we did not mention it.

Our original decision was released on May 8, 2001. On that date, Spaulding's appellate counsel sent to the clerk of this court a letter disputing our statement that the record did not contain reports by Ghilardi that the State had turned over to trial defense counsel. In fact, the reports *are* in the record, as supplemented on November 15, 2000. But Spaulding's last brief submitted to us is dated November 10, 2000, and he never alerted us that the reports were in the record even though his motion to supplement the record was granted on November 1, 2000. True, the reports could have been located had we examined every document in the voluminous file, but it is the responsibility of counsel to ensure that the court is referred to the place in the record *where* things are; it is not our responsibility to sift through the record to locate materials that may or may not be there. ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214, 217 (Ct. App. 1991); WIS. STAT. RULE 809.19(1)(d). The judge granting the motion to supplement the record was the motions judge, and he was not a member of the panel that decided this appeal. The concurring judge apparently believes that the panel should daily re-check the record to ensure that nothing new has been added. We respectfully disagree, and, in this case, it would have been easy for counsel to alert us in his reply brief that the record had been supplemented with the documents discussed in that reply brief, and, in conformity with the rules, given us the record references. In any event and on the merits now that we have read the reports, WIS. STAT. § 971.23(1)(e) requires that the State disclose to the defendant, on demand:

> the following materials and information, if it is within the possession, custody or control of the state: … any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony.

At trial, the prosecutor represented to the trial court that Ghilardi's reports with which Spaulding's appellate counsel has supplemented the record were, together with copies of the taped interviews of the victims referred to in those reports, not only turned over to Spaulding's trial counsel but were all the State had in connection with Ghilardi's testimony. Although both Spaulding's trial and appellate counsel complain that the reports did not go into the reasons for Ghilardi's social-work assessment that the children presented "high level[s] of suspicion of sexual abuse," (her experience, her interviewing techniques, and the way child-victims of sexual abuse generally react), the reports satisfied the statute, which, as we have seen, merely requires that the reports, if made, be "made in *connection* with the case," or, if not in existence, be "a written summary of the expert's *findings* or the *subject matter* of his or her testimony." (Emphasis added.) The reports satisfied these latter requirements as well. These general and limited requirements are in stark contrast to, for example, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, which requires that expert reports:

> shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other

(continued)

3. Sentencing.

¶13 The trial court sentenced Spaulding to incarceration for a total of eighty years. He claims that the trial court erroneously exercised its discretion and punished him because he refused to admit his guilt after the jury decided that he was guilty of all but two of the charges. We disagree.

¶14 Sentencing is vested in the trial court's discretion, and a defendant who challenges a sentence has the burden to show that it was unreasonable; it is presumed that the trial court acted reasonably. ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912, 925 (1998). The primary factors considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for the public's protection. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559, 561 (1980). If the trial court exercises its discretion based on the appropriate factors, its sentence will not be reversed unless it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

> information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

For the foregoing reasons, we adhere to our original opinion. Judge Schudson respectfully dissents from the entirety of footnote 3.

¶15 Spaulding, who waived his right to personal allocation, points to isolated comments made by the trial court to the effect that he has "shown a total, total lack of responsibility and remorse," and that he has "made no admissions, not to yourself, not to your family, not to your friends, not to your community." But Spaulding takes these comments out of their clear context. For example, the trial court noted that his failure to admit to his crimes precludes "effective treatment" for his predatory propensity because "[a]ny sexual offender treatment requires the foundation to be acceptance of responsibility, admission," and that, accordingly, he was, in the trial court's words, "extremely dangerous." The trial court considered and applied all the appropriate factors: the seriousness of the crimes, a seriousness that Spaulding's appellate brief does not dispute; that his crimes were "devastating" to his victims and their families, especially because he betrayed their trust in him as a minister in their faith; and that his character was that of a predator who used his special access to children by virtue of his position to, as the trial court expressed it in sentencing, "violate and have access to young, vulnerable children ... for his own selfish, sexual reasons." The trial court also noted that by betraying the faith that the community had in him by virtue of his ministerial position, he had "undermined the position of people in this community who have true religious vocations, because people will look at them with less trust, and they will have less access to children who do need mentors, who do need spiritual guides, because parents fear that you will be who [*sic*] they will reach out to and that they will be abused as well." In sum, it is clear from the totality of the trial court's sentencing rationale, which spans some 135 numbered lines in the trial transcript, that the trial court's isolated comments about Spaulding's lack of remorse and his unwillingness to come to grips with his crimes, which accounted for only some thirty-one numbered lines, were not only permissible, *see* ***State v. Baldwin***, 101 Wis. 2d 441, 458–459, 304 N.W.2d 742, 751–752 (1981), but were

highly appropriate and perceptive. The trial court's sentence was well within the ambit if its discretion.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

¶16 SCHUDSON, J. *(concurring).* The majority has failed to identify and distinguish the trial court's rulings disallowing the "expert" testimony of Dr. Anna Salter but allowing the "non-expert" testimony of Child Protection Center social worker Liz Ghilardi. Consequently, the majority's discussion in part II. 2. does not adequately relate the facts of the case, Spaulding's arguments, or the applicable law. *See* Majority at ¶¶11-12. The majority incorrectly concludes that "[t]here was no error." ***Id.*** at ¶11.

¶17 The State concedes error. On appeal, the State acknowledges that both the prosecutor and trial court, asserting and concluding that Ghilardi was not offering "expert" testimony, misconceived her role and the nature of her testimony. The error, however, was harmless. As the majority recognizes, Spaulding was provided with the reports to which he would have been entitled, under WIS. STAT. § 971.23(1)(e), if the trial court had treated Ghilardi as an expert witness. *See* Majority at ¶12.

¶18 Accordingly, I respectfully concur.[4]

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[4] Now I should explain why I also dissent from footnote 3 of the majority's corrected and re-issued opinion.

The majority notes that "Spaulding's last brief submitted to us is dated November 10, 2000," Majority at ¶12 n.3, and scolds Spaulding's appellate counsel because he "never alerted us that the reports were in the record even though his motion to supplement the record was granted on November 1, 2000," ***id.*** The majority points out that "it is the responsibility of counsel to ensure that the court is referred to the place in the record *where* things are." ***Id.***

(continued)

But what more should counsel have done? Should he have filed a supplemental brief asking this court to pay attention to his earlier motion, to our order granting his motion, and to the supplemental materials filed pursuant to our order? The problem was not that counsel failed to point us to "the place in the record *where* things are," *see* ***id.***, but that the majority declared, apparently without either checking the record or noticing the materials in the record, that "Spaulding did not include the reports as part of the appellate record," ***id.*** at ¶12. Could not counsel reasonably rely on this court to be cognizant of its own orders and record?

The majority, in its expanded footnote, also notes that "[t]he judge granting the motion to supplement the record was the motions judge, and he was not a member of the panel that decided this appeal." ***Id.*** at ¶12 n.3. So what? Lawyers and litigants have every reason to expect that, when one judge grants a motion in an appeal, the three judges who decide the case become aware of the motion and order.

We all make mistakes. When we do, it is best to admit them, apologize for them, and correct them as best we can. Confidence in our courts comes not because we judges are infallible; obviously we are not. But confidence can come when we judges do our best and, when we make mistakes, candidly acknowledge them without attempting to deflect responsibility.