COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2494-CR

Cir. Ct. Nos. 01CF002173
01CF006053

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER L. ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. Peter L. Adams appeals *pro se* from a judgment entered after a jury found him guilty of eight counts of first-degree sexual assault of eight different male minors contrary to WIS. STAT. § 948.02(1)

(2001-02).[1] He also appeals from an order denying his postconviction motion. He claims the trial court erred by: (1) joining the charges of two separate complaints; (2) denying that his due process rights were violated by the State's closing argument; (3) admitting into evidence the victims' statements to parents and police officers; (4) admitting other acts evidence; (5) ruling that the evidence was sufficient to sustain the verdict on count seven; and (6) imposing an unduly harsh sentence. Because the trial court's rulings, with two exceptions, were not erroneous and, where erroneous, constituted harmless error, we affirm.

BACKGROUND

¶2 On April 20, 2001, the State of Wisconsin filed a complaint in Case No. 01-CF-2173 charging Adams, a Milwaukee public school teacher, with six counts of first-degree sexual assault of a child and one count of child enticement. The victims were former students of Adams's when he taught the fourth grade at Benjamin Carson Elementary School and Congress Elementary School in the City of Milwaukee. On November 16, 2001, after further investigation, the State filed an additional complaint in Case No. 01-CF-6052 charging Adams with six counts of first-degree sexual assault of a child. All thirteen counts involved separate victims at both schools. The trial court granted the State's motion to join the two cases. Prior to trial, the State dismissed two of the counts. The remaining eleven counts were tried beginning on April 15, 2002. The jury found Adams guilty of eight counts of first-degree sexual assault of a child, and acquitted him of three counts.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 The trial court sentenced Adams to two determinate sentences, each consisting of ten years of initial confinement and ten years of extended supervision, consecutive to each other because those incidents occurred after December 31, 2000. In contrast, the court sentenced Adams on the six remaining counts to indeterminate terms of no more than ten years, consecutive to each other and to all of the other counts. The net effect was that Adams was sentenced to 100 years in the Wisconsin state prison system.

DISCUSSION

A. Joinder.

¶4 Adams first claims the trial court erred by granting the State's motion to join the two cases containing the charged eleven counts. He alleges that the joinder decision caused prejudice and denied him his right to a fair trial.

Standard of Review

¶5 Review of a challenged joinder is a two-step process on appeal. ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993). First, we independently examine the propriety of the initial determination of joinder as a matter of law. "The joinder statute is to be construed broadly in favor of initial joinder." ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Joinder may be obtained when two or more crimes "are of the same or similar character or are based on the same act or transaction …." WIS. STAT. § 971.12(1). To be of the "same or similar character," crimes must be the same type of offense occurring over a relatively short period of time and the evidence as to each must overlap. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct.

App. 1988). In ***Hamm***, we held that acts two years apart can be considered as "occurring over a relatively short period of time." ***Id.*** at 140.

¶6 Second, whether joinder is improper due to prejudice to Adams is a question of trial court discretion. *See* ***State v. Nelson***, 146 Wis. 2d 442, 455, 432 N.W.2d 115 (Ct. App. 1988). Although Adams did not challenge the joinder of the offenses contained in each complaint, he did contest the charges in the two complaints being joined. We deem this challenge to be the functional equivalent of a motion to sever. Thus, the trial court was obliged to weigh the potential prejudice against the interests of the public in conducting a trial on multiple counts. In balancing these competing interests, we will not find an erroneous exercise of discretion unless the defendant can establish that he or she will suffer substantial prejudice should joinder be effectuated.

¶7 If evidence of the counts that are sought to be joined, or contrariwise, severed, are admissible in separate trials "'the risk of prejudice arising due to a joinder of offenses is generally not significant.'" ***State v. Hall***, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981) (citation omitted). This threshold question then requires an other acts evidence analysis under WIS. STAT. § 904.04(2), and ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

¶8 Under these rubrics, the trial court must consider: (1) whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. ***Sullivan***, 216 Wis. 2d at 772-73. Superimposed on these requirements is the "longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like

occurrences.'" ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted).

Analysis

¶9 With these standards in mind, we now review the hearing affecting the joinder of the thirteen charges, also keeping in mind the obligation imposed upon this court to independently review the record to ascertain whether there is a reasonable basis for the trial court to have admitted other acts evidence. *See* ***State v. Hunt***, 2003 WI 81, ¶4, 263 Wis. 2d 1, 666 N.W.2d 771.

¶10 Although the trial court's oral ruling on the motion consisted of only two and one-quarter pages of transcript, it contained enough reference points to the briefs of the parties and their oral argument that our independent review of the record is facilitated.

¶11 The first step in our analysis is to determine whether WIS. STAT. § 971.12, the joinder statute, has been satisfied. The statute provides that crimes may be charged in the same complaint if they 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." ***Id.***

¶12 To support its motion for joinder, the State, in its brief and at oral argument, first stressed that due to the number of witnesses—thirty-eight—and the fact that some witnesses would be required to testify in both cases, judicial economy dictated that joinder would be appropriate. Adams, however, contends that the two cases are not connected nor part of the same transaction. In response, the State proffers that both cases involve multiple instances of exploiting the

relationship between a teacher and a student. The two sites involved in both cases are a school-hour setting in either a classroom or in the boys' bathroom. The conduct consisted of three types: either fondling the students while they were sitting on Adams's lap, following the students into the bathroom and fondling them while they were urinating, or taking a boy to a secluded area of a classroom, having the boy drop his pants, and then touching the boy's penis. Additionally, these series of incidents all occurred between November 1998 and December 2000, a timeframe of two years, which has been deemed acceptable for other acts evidence admissibility. *See* ***Locke***, 177 Wis. 2d at 596.

¶13 Adams claims there was a failure to show that the evidence overlapped as to each count. The State countered that among the thirty-eight witnesses scheduled to be called, were the principals of both schools and the investigating officers who would be called upon to testify in both cases. In addition, there would be testimony from students who would describe the type of actions that took place between Adams and the victims, along with the physical settings of the two schools in which the incidents occurred. From this narrowly focused examination of the record, we are satisfied that the calls of WIS. STAT. § 971.12 have been satisfied. Having concluded this portion of our independent review, we now examine the application of the ***Sullivan*** and WIS. STAT. § 904.04(2) criteria.

¶14 We begin by ascertaining whether the evidence supporting the thirteen counts is offered for a proper purpose. At the motion hearing for joinder, the State contended that the charges in the first complaint would be admissible in the trial of the charges in the second complaint to show absence of mistake or accident. From an independent review, we conclude that within the record there

exists reasonable bases for two acceptable purposes for the admission of other acts evidence.

¶15 First, to realize a conviction on each of the thirteen charges in the original two complaints, the State had to prove intent that Adams committed the alleged acts for the purpose of sexual gratification. *See* WIS. STAT. §§ 948.02(1), 948.07(3), 948.10; WIS JI—CRIMINAL 2103; WIS JI—CRIMINAL 2140. Thus, the admission of the evidence supporting the various allegations would be allowed to show "intent," "motive," "lack of mistake," or "accident."

¶16 Second, in all of the incidents, Adams used his teacher-student relationship to create a milieu favorable to satisfy his prurient desires. He did this to isolate the individual male student and impose himself on the victim. The presence of this overpowering relationship, when coupled with the peculiar physical circumstance present in each of the two schools, provides ample proof of the existence of both a "scheme" and "opportunity."

¶17 We must next examine whether the evidence of the other charges was relevant under WIS. STAT. § 904.01. The trial court did not expressly articulate in what manner it believed evidence of the other crimes was relevant. We therefore independently determine whether there is any reasonable basis for the trial court to conclude that the evidence of the charges was relevant.

¶18 We conclude there is a reasonable basis to determine the evidence was relevant. Because the similarities of the offenses are not in dispute, similarities that appear in each complaint are probative of whether the alleged touching occurred for the purpose of sexual gratification. In the circumstances of this consolidated case there can be little gainsay that the evidence supporting the individual allegations was relevant.

¶19 Having concluded that the evidence of the other charges was offered for proper purposes under WIS. STAT. § 904.04(2), and that evidence was relevant under WIS. STAT. § 904.01, we must now determine whether under WIS. STAT. § 904.03 the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

> "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case."

State v. Gray, 225 Wis. 2d 39, 64, 590 N.W.2d 918 (1999) (citation omitted).

¶20 Unfair prejudice was the major thrust of Adams's opposition to the joinder of the two cases. He contended that joinder of the two cases resulted in an inference of propensity for guilt (being accused by two children of multiple acts makes it more likely he is guilty); therefore, the joinder caused unfair prejudice. He argues that submission of the evidence on all eleven counts, when tried as a whole, had such a profound prejudicial effect that it tainted the jury. He further argues that "the record provides robust evidence that the prejudice resulting from joinder infected the proceedings to the point where Adams was denied his right to a fair trial." Based on the decision of the trial court and our independent review of the record, we are not persuaded for several reasons.

¶21 Adams is correct in pointing out that during *voir dire*, a number of jurors reflected concern that because of the number of counts lodged against Adams, he must be guilty of at least one of the counts. For this reason, and other reasons of a more personal and sensitive nature, at the behest of counsel, the trial court, in agreement with both counsel, conducted individual *voir dire* in chambers

of some of the venire persons. Both counsel were at liberty to suggest who should be questioned in addition to those venire persons who had requested an in chambers *voir dire*. Two venire persons, Nos. 27 and 28, indicated in open court that they might be prejudiced by the number of counts. Neither the State nor Adams responded to this answer. For Adams to now claim an impropriety injecting prejudice into the jury process by not individually examining venire persons Nos. 27 and 28 is bereft of merit, for it either smacks of sheer speculation or constitutes a waiver of a missed opportunity. Of the remaining venire persons who voiced concern about the number of counts, they were either struck for cause or eliminated by preemptive strikes.

¶22 The trial court more than adequately instructed the jury that it was to examine each count independently and render a guilty verdict on the individual counts only if the evidence warranted it beyond a reasonable doubt. In the absence of a showing to the contrary, it is presumed the jury followed the trial court's instructions. ***State v. Knight***, 143 Wis. 2d 408, 414, 421 N.W.2d 847 (1988). That the jury acquitted Adams on three of the eleven counts demonstrates that it did indeed follow the trial court's instructions.

¶23 We conclude that the record amply sets forth a reasonable basis for the trial court's determination that the probative value of the other crimes evidence in the form of the other charges was not substantially outweighed by the danger of prejudice under WIS. STAT. § 904.03.

B. Impermissible Closing Argument.

¶24 Next, Adams claims the State's impermissible rebuttal closing argument denied him his due process right to a fair trial and should have warranted a new trial. Adams, while recognizing that when a jury is instructed that other acts

evidence is admissible, any danger of unfair prejudice is alleviated, nevertheless argues that:

> [I]n view of (a) the sheer number of charges, (b) the multiple comments of the jurors in open court and in chambers, and [c] the impermissible and explicit comments of the prosecution in its closing argument, that instruction was insufficient to overcome the taint of the prosecutor's argument.

See ***State v. Murphy***, 188 Wis. 2d 508, 523, 524 N.W.2d 924 (Ct. App. 1994).

¶25 Adams further claims the jury should have been immediately admonished to disregard the prosecutor's comment and given a cautionary instruction to avoid the potential influence of the invitation to disregard the court's instruction. For reasons to be stated, we reject this claim.

Standard of Review

¶26 "The line between permissible and impermissible final argument is not easy to follow and is charted by the peculiar circumstances of each trial. Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial." ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The line of demarcation to which we refer is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrived at a verdict by considering factors other than the evidence. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "Argument on matters not in evidence is improper." ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980).

Analysis

¶27 The main thrust of Adams's theory of defense suggested overtones of a conspiratorial nature. In closing argument, Adams's counsel described him as "strict," a "tough teacher." "These kids made fun of Peter Adams. They thought he was gay …. But he was also tough, and … not liked." Contrary to the State's argument, Adams's counsel strongly suggested that the many tongues of rumor in both the student and teaching community played a significant role in this prosecution to weave a web of lies about Adams's conduct with his young fourth and fifth grade students.

¶28 To counter this theory, the State offered in rebuttal a reply that consumed sixteen pages of transcript. There are two and one-half paragraphs to which Adams objects. The argument Adams finds objectionable reads:

> And, you know, if someone said something, or if there is an analogy that was drawn with a machine. If one part is broken then you might think, well, this is kind of an analogy, that there is something that is kind of just strange, out of the ordinary. When there's four parts that are broken then you might think something is really wrong, something might be wrong with that machine. When there's 11 parts broken to that machine, you know that machine is not working, and you know that something happened to that machine.
>
> The same thing holds true here. While you must decide each count separately, these boys do not stand in isolation. They do not stand in isolation. They present to you what really happened at that school, and they told you what happened. And again, there's no middle ground.

¶29 For reasons known only to Adams, he did not include the final portion of the second paragraph that concluded the State's rebuttal argument. We cite it for the purposes of completeness.

> If you believe those boys and what they told you, you must find the defendant guilty. And what they told you was the truth. What they told in the early disclosures was the truth. And what the truth was is that inspite of the outward appearances of this defendant being a wonderful teacher and just teaching good things, what really happened in that school show him to be anything but. It showed him to be an individual who manipulates children, who betrayed our trust, and sexually abused our children that were placed in his care.
>
> Take away his shield. Remember what really happened. Hold him accountable. For all of those actions, find him guilty.

¶30 The State spent its entire rebuttal attempting to demonstrate the improbability of students, teachers, and administrators conspiring against Adams. Near the end of its argument, the State used the analogy stated above that was only vaguely similar to one that had been suggested by one of the venire persons during the *voir dire*. For rhetorical purposes, most analogies or metaphors limp badly. The State's point of emphasis is not clear. When, however, one considers the analogy in the context of the final portion of the State's response to Adams's theory of defense, the argument in its totality, is essentially one of cumulative activities reported in a credible fashion. The State did not propose that only some of the students were giving a true account of Adams's machinations, but rather that all eleven were telling the truth. Contrary to the defense claim that the students had "ganged-up" on Adams, the victims individually were telling the truth and collectively demonstrated the motive, scheme, plan, and absence of mistake of Adams's activities. Here, the State, in its rebuttal argument, did not cross over the impermissible line of evidentiary demarcation.

C. Hearsay Objections.

¶31 Next, Adams claims the trial court erred in admitting the testimony of parents and police officers recounting the statements made to them by the alleged victims. He bases this erroneous exercise of discretion on the failure to meet the "premotive" requirement of WIS. STAT. § 908.01(4)(a)2. Under this statute, an out-of-court statement is not subject to the hearsay objection if it is "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence of motive." ***Id.*** He further argues that through counsel, he made standing objections to the introduction of this hearsay.

Standard of Review

¶32 On appeal, this court, even applying a rule of leniency with *pro se* litigants, is not required to sift the record for facts which support a party's contention. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). Arguments not developed and only supported by general statements are inadequately presented and may be rejected. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Furthermore, at trial to properly preserve an objection, it is required that particularized objections be made to the trial court to give the trial court an opportunity to correct its errors. ***Herkert v. Stauber***, 106 Wis. 2d 545, 560, 317 N.W.2d 834 (1982). We decline to consider this claim of error in its entirety for two reasons.

Analysis

¶33 Adams contends he made a standing objection, which preserves the basis for this claim of trial court error. To the contrary, the record reflects the

following: the State called Carcella J., the mother of one of the alleged victims, Frank D.; after Carcella had completed her testimony, the trial court noted that there had been a number of sidebar conferences off the record and that trial counsel had a standing objection with respect to the parents of the victims testifying about what the victims had told them regarding the incidents in question. It is further noted that the court's last sidebar conference related to witnesses commenting about the credibility or whether they believed the other witnesses, an issue that had been addressed in an earlier *in limine* motion. This related to a question put to Carcella as to why she did not call the police. The State objected before the answer was given. The objection was addressed at sidebar. The trial court then asked if anything else needed to be put on the record. The State replied, "no." Adams's counsel told the court he would think about it and inform the court the following morning. When the trial resumed the next morning, Adams's counsel declined the opportunity to supplement the record.

¶34 As noted above, Adams fails woefully to specifically identify the exact testimony he objects to but, rather, refers only to the testimony offered by "the parents and police officers." We agree with the State that "Adams[']s arguments are conclusory and general and he fails to adequately argue what statements and testimony he is objecting to and apply the facts to the law …." We agree with the statement of Judge Neal Nettesheim that "[w]e sometimes … make allowances for appellant counsel's failure to abide by these rules. However, the Court of Appeals of Wisconsin is a fast-paced, high-volume court. There are limits beyond which we cannot go in overlooking these kinds of failings." ***Pettit***, 171 Wis. 2d at 647. In light of Adams's inadequate briefing, we decline to address this claim of error. *See* WIS. STAT. § 809.83(2).

¶35 Adams does, however, specifically discuss testimony offered by Theresa B. regarding Devontae B., Nicole G. regarding Tony G., and Dyriece S. regarding Rondell S. Their testimony is not specifically addressed in his hearsay argument, but rather appears intermingled with the other acts and sufficiency of the evidence arguments. Accordingly, we address the parent testimony when those issues are analyzed in subsequent parts of this opinion.

D. Other Acts Evidence.

¶36 Next, Adams claims the trial court erred in allowing the admission of testimony from Devontae B., his mother Theresa B., Tony G., his mother Nicole G., and Tony G.'s stepfather, Calvin M. The State represented that the testimony of Devontae and his mother would show that in July 1999, Adams approached Devontae on the street outside of school and invited him to go for an ice cream to celebrate his birthday. He told his mother about the offer. She gave him permission, but he did not want to go and therefore he did not go.

¶37 The second piece of evidence was the testimony of Tony G., Nicole G., and Calvin M. The State represented that this testimony would establish that some time in November of 1999, Adams accidentally met Tony's family in a barbershop. Adams asked Nicole for her phone number, which she gave him. Within one hour of this chance meeting, Adams called Nicole's residence twice. He was told by Calvin to leave Nicole's family alone. The State further claimed the testimony would show that Adams gave hugs to the other children at the meeting, but when Adams approached Tony for a hug, Tony became "reserved and stiffened." At the motion *in limine*, the State argued, based on ***Sullivan***, that the evidence is relevant, offered for a permissible purpose, and not unduly

prejudicial. Adams responded that the testimony offered by the State fails with respect to all three criteria and must be excluded.

Standard of Review

¶38 We review a trial court's decision to admit other acts evidence under the erroneous exercise of discretion standard. *See* ***State v. Veach***, 2002 WI 110, ¶8, 255 Wis. 2d 390, 648 N.W.2d 447. Discretion contemplates a reasoned application of proper principles of law to the facts of the case. ***Resong v. Vier***, 157 Wis. 2d 382, 387, 459 N.W.2d 591 (Ct. App. 1990). Stated another way, "[w]e will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

Analysis

¶39 It is a recognized precept of review that "testimony regarding other bad conduct on the part of a defendant is not inadmissible merely because this other conduct does not amount to a crime in and of itself." ***Cheney v. State***, 44 Wis. 2d 454, 460, 171 N.W.2d 339 (1969), *overruled on other grounds*, ***Byrd v. State***, 65 Wis. 2d 415, 222 N.W.2d 696 (1974). It is also established "that evidence of this other conduct does not have to be limited to prior to the crime charged but can be, and often is, related to conduct occurring after the crime charged but prior to the trial." ***Id.*** (footnote omitted).

¶40 The purposes for which the State offered this testimony was to demonstrate that both acts tend to show Adams's motive to commit the crime of sexual assault and a plan to create opportunities to get close to children and/or get

them in situations where they are alone which leads to the commission of sexual assaults.

¶41 The trial court ruled that the other acts were permissible to show Adams's motive or reason to desire the result of the crime and to show the context of the relationship between Adams and the victims. On appeal, the State has adopted the same rationale. For reasons to be stated, we conclude there was an erroneous exercise of discretion in admitting this testimony but, for other reasons, the error was harmless.

¶42 The record reveals that the factual hypothesis upon which the trial court made its ruling is considerably different than the evidence that eventually appeared in the record. In both instances, the evidentiary context is considerably less than detailed. We first examine the "ice cream" incident with Devontae B. Devontae's home was located four blocks from the Congress school, which he attended, and where Adams was his teacher. July 29th was Devontae's birthday. The exact circumstances of the encounter are not clear. All that we can glean from the record is that Devontae was outside playing when Adams drove by in a red van. Upon seeing Devontae, Adams stopped the van, rolled down the window and said: "Hey I'm going to come pick you up later." Devontae then said: "Hey it's my birthday." Adams then responded: "It is?" He then said: "I'm going to—I'll probably come pick you up later on for your birthday and come take you to get you some ice cream." According to the transcript, Adams was going home. Adams, however, never came back. There was no report of any additional contact.

¶43 In the instance of the barbershop incident, the actual testimony reveals that on the day in question, Adams was already in the White Barbershop when Nicole, accompanied by her fiancé Calvin, and her four children including

Tony, entered. Adams knew the family, and was surprised to see them there. Contrary to the representations made by the State, no testimony suggested that hugs were attempted or exchanged between Adams and the children. Adams asked about Tony who now was attending school in Sussex. Adams asked Nicole for her telephone number, which she gave to him. She thought he was "hitting on her," and had afterthoughts about giving him the information. Within an hour of the chance meeting, Adams called Nicole. He did not ask for Tony. There is no record of the content of the conversation. After a short period of time, Adams called again, but Calvin interrupted the call and told Adams to stop bothering them and hung up. Adams did not call Tony or contact him.

¶44 The trial court, in rendering its oral ruling, properly set forth the statutory and ***Sullivan*** standards for evaluating admissible other acts evidence. The problem, however, was the failure to apply the standards to the actual facts as demonstrated by the evidence. Counsel for Adams had placed a standing objection to this series of evidence. To a degree, the trial court foreshadowed the absence of the exercise of discretion when referring to the two incidents in ruling on the motion, "I'm uncertain as to who is going to testify to that activity …." The trial court was blindsided by the State's representations. It engaged in a process of reasoning on representations by the State as to what the facts would be. As it turned out, however, the facts were considerably different than represented. Thus, the process of applying discretion never occurred.

¶45 To conclude that an off-hand comment to pick someone up for an ice cream treat is equivalent to seeking to isolate a young victim for the purpose of sexual gratification, or is indicative of a motive to stalk is only speculative at best. Adams never returned to even attempt the connecting act. Furthermore, the testimony concerning the barbershop incident provides no relevant element

whatsoever for admissibility. There was no testimony that Adams acted in a way to isolate Tony. No one testified that Adams approached Tony in the barbershop or asked to speak with him on the telephone. The only testimony suggested that Adams was interested in Nicole.

¶46 Based on this analysis, we conclude that the trial court should not have admitted these two incidents into evidence. Nevertheless, in evidentiary matters, we shall not reverse an erroneous exercise of discretion ruling unless it is prejudicial to the adverse party. ***First Fed. Fin. Serv., Inc. v. Derrington's Chevron, Inc.***, 230 Wis. 2d 553, 566, 602 N.W.2d 144 (Ct. App. 1999). A ruling that is harmless is not prejudicial. Error is harmless "if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Hunt***, 263 Wis. 2d 1, ¶77 (citation omitted).

¶47 There is no gainsay that the admitted other acts were not criminal or indecent in nature. The jury heard the testimony of both Devontae and Tony and, in the process, had the opportunity to observe the demeanor of both. Doubtless, each described their encounters with Adams, i.e., Adams touching their penises in various circumstances. Their individual testimony, which was essentially unchallenged, provided more than sufficient evidence to find Adams guilty of sexual assault of both Devontae and Tony beyond a reasonable doubt. We therefore conclude that the other acts evidence did not affect the jury's verdict. Even if the trial court had excluded the testimony related to both incidents, the result of the jury's conclusion would have been the same.

E. Sufficiency of the Evidence.

¶48 Adams's fifth claim of error is that the evidence was insufficient to sustain his conviction for first-degree sexual assault of Rondell S. in count seven

of the information. As noted earlier in this opinion, we deem Adams's explication of the basis of this claim sufficiently developed and referenced in the record to examine its merits. *See* WIS. STAT. § 809.19. We reach this conclusion because Adams posits record citations and sets forth precise testimony, which he argues is the basis for his claim of error. In essence, Adams argues that because Rondell's statement to his mother was inadmissible hearsay, his testimony alone was insufficient to find Adams guilty of the charge. We are not persuaded.

Standard of Review

¶49 The test for reviewing whether the evidence is sufficient to sustain a criminal conviction is not whether the evidence is sufficient to exclude every reasonable hypothesis of innocence, but whether the trier of fact could have been reasonably convinced of the accused's guilt beyond a reasonable doubt by any direct or circumstantial evidence upon which it had a right to rely. ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). In this role, the finder of fact is free to determine which testimony it finds credible regardless of any conflicts in the testimony and is permitted to piece together any evidence it finds credible to construct a chronicle of the alleged crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 665-66, 348 N.W.2d 527 (1984). Here, the evidence is more than sufficient to sustain the conviction.

Analysis

¶50 An out-of-court statement made by a declarant that is discrepant with the declarant's statement made during a trial is a prior inconsistent statement which is not hearsay and is therefore admissible under WIS. STAT. § 908.01(4)(a)1.

¶51 During Rondell's direct examination, he testified that Adams was his fourth grade teacher at Benjamin Carson school. When Rondell requested permission to go to the bathroom, Adams granted the request and then followed Rondell to the bathroom. Rondell stated that while in the bathroom, Adams reached into Rondell's pants to see if he used the bathroom. He said that Adams was touching and rubbing on him. He further stated that Adams touched his leg but did not touch him anywhere else and touched him over his clothes. Rondell also stated that upon another occasion in the bathroom, Adams put his hand inside Rondell's pants and rubbed his leg. Rondell, however, denied telling a police officer that Adams squeezed his penis and his "nuts," or telling his mother that Adams touched his penis.

¶52 Dyriece, Rondell's mother, was called by the State as a witness. She testified that her son was a fourth grade student of Adams's at Benjamin Carson school. After the initial charges had been lodged against Adams, she saw a report about the incidents on television. The report prompted her to ask Rondell whether Adams had ever done anything to him. She stated that Rondell told her about an occasion when he requested to go to the bathroom and Adams followed him there. Before he was able to use the bathroom, Adams asked him, "did you use it; did you pee on yourself?" During this questioning by Adams, Rondell told his mother that Adams put his hand into his privacy area and fondled him. Dyriece testified that the privacy area meant penis.

¶53 In summary, Dyriece's testimony relating her son's statement to her was reasonably inconsistent with his trial testimony. Succinctly put, Rondell denied during his direct examination that Adams touched him anywhere but on his leg. Contrariwise, he told his mother that Adams touched him and fondled his penis. As an inconsistent prior statement, Dyriece's relation of Rondell's prior

statement to her was admissible as a prior inconsistent statement which is not considered hearsay.

¶54 As part of its case relating to Rondell, the State called police officer Jacquelyn Christian. She testified that she interviewed Rondell in April 2001 regarding any incidents involving Adams from November through December of 2000. Christian stated that Rondell told her he had asked Adams's permission to go to the bathroom, which he received. Adams followed him into the bathroom. Rondell told Christian that before he could achieve his purpose, Adams reached inside his pants and fondled his penis and his "nuts." Adams told Rondell he was checking to see whether he had peed on himself. Christian stated Rondell never indicated that Adams only touched his thigh. For the very same reason that Rondell's statement in court was inconsistent with the statement he gave to his mother, so too was Rondell's statement inconsistent with the statement he gave to Officer Christian and therefore admissible.

¶55 In assessing the evidence submitted regarding this charge, the jury had to decide whether to give more weight and credibility to Adams's contention that Rondell and other witnesses had fabricated the reported incidents and to Rondell's in-court version of what happened, or to Rondell's statement to his mother and the police officer. The jury quite obviously gave greater credibility to Rondell's statements to his mother and Officer Christian. Under our standard of review, we conclude the record is reasonably sufficient to uphold the conviction on this count.

F. Unduly Harsh Sentence.

¶56 Lastly, Adams claims his sentence is unduly harsh. He concedes his acts were serious, but at the low to intermediate range for first-degree child sexual

assault. He asserts he had no prior convictions or contacts with the criminal justice system and, aside from the charges, was by all accounts a stellar member of the community who had performed countless good acts.

Standard of Review

¶57 There is a "consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***State v. Paske***, 163 Wis. 2d 52, 61-62, 471 N.W.2d 55 (1991) (citation omitted). This policy is based on the great advantage the trial court has in considering the relevant factors and the demeanor of the defendant. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Furthermore, the trial court is presumed to have acted reasonably. The burden is "on the appellant to 'show some unreasonable or unjustifiable basis in the record for the sentence complained of.'" ***State v. Thompson***, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992) (citation omitted). A trial court's sentence is reviewed for an erroneous exercise of discretion. ***Paske***, 163 Wis. 2d at 70.

¶58 It is similarly well-established, that trial courts must consider three primary factors in passing sentence. Those factors are the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. ***Id.*** at 62.

¶59 The sentencing court may also consider additional factors, including

> the defendant's criminal record, history of undesirable behavior patterns, personality and social traits, results of a presentence investigation, the aggravated nature of the crime, degree of culpability, demeanor at trial, remorse, repentance and cooperativeness, educational and employment history, the need for close rehabilitative control and the rights of the public.

State v. Lewandowski, 122 Wis. 2d 759, 763, 364 N.W.2d 550 (Ct. App. 1985).

¶60 The weight to be given to each of the primary factors and any of the secondary factors, however, is a determination particularly within the discretion of the trial court. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). The sentencing court must base its reasons on a logical rationale, and articulate its reasons for imposing a particular sentence. ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992).

¶61 Because the trial court is in the best position to determine the relevant factors in each case, we allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993). A reviewing court presumes that the trial court's exercise of discretion is reasonable, and should not interfere with a sentence absent an erroneous exercise of discretion. ***Id.*** at 681-82.

¶62 Finally, the length of the sentence imposed by a trial court will be disturbed on appeal only "where the sentence 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***, 70 Wis. 2d at 185. A sentence, however, well within the limits of the maximum sentence is presumptively not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. On appeal, the defendant has the burden of demonstrating that his sentence is excessive. *See* ***State v. Lechner***, 217 Wis. 2d 392, 427-28, 576 N.W.2d 912 (1998).

Analysis

¶63 The trial court's sentencing remarks were both circumspect and comprehensive. That the court paid heed to the nature of the offenses and their impact on the victims was self-evident from the record. The court referenced letters of support for Adams's contribution to both the school community and to individuals whom he had assisted in their time of need. It is not difficult to surmise that the court placed most of its sentencing emphasis on Adams's character flaw and the risk to the community by his continued presence, with more stress placed upon the latter. Although the court did not expressly so state, its remarks clearly implied that Adams led two distinct lives. By his good works in the community, he created an ominous aura of trust that served well his darker side of manipulating his young victims for the purposes of sexual gratification.

¶64 The individual nature of each predatory incident created a reasoned basis for consecutive sentences. The trial court concluded that to not consider each conviction separately for the purposes of sentencing would unduly depreciate the seriousness of each offense. Thus, in the mind of the sentencing court, concurrent sentencing was not reasonable. Furthermore, the number of incidents required extensive treatment that could only be accomplished within a substantial timeframe.

¶65 The trial court was aware that six of the counts were governed by the old indeterminate sentencing law; whereas, two of the counts were subject to the provisions of the determinate sentencing law. Under the old law, six of the counts were Class B Felonies subject to a maximum possible penalty of forty years of imprisonment. On each of these counts the State recommended twenty years of incarceration consecutive, but the trial court only imposed sentences of ten years

consecutive. As for the two counts subject to the new law, the maximum possible penalty was sixty years with a maximum term of initial confinement of forty years. On each of these counts the court followed the State's recommendation, and sentenced Adams to a total sentence of twenty years with ten years of initial confinement and ten years of extended supervision.

¶66 Under the old law, the sentences are only one-fourth of the maximum possible penalty and, under the new law, they are only one-third of the maximum possible penalty. Adams was convicted of eight counts, all of which could have been charged and tried and sentenced separately. Furthermore, from our reading of the entire record of additional incidents read into the record and evidence of more than one separate incident involving several of the victims, the sentences rendered do not "violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.