COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1997

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 97-0188-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. GANEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] James E. Ganey appeals from a judgment of conviction entered after a jury found him guilty of four counts of fourth degree sexual assault, contrary to § 940.225(3m), STATS. He claims the trial court erred: (1) in refusing to sever a fifth count of third degree sexual assault (on which he

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

was acquitted) from the other four counts; (2) in erroneously instructing the jury on "alternate" theories of intent; and (3) in considering the evidence relative to the acquitted count when imposing sentence. Because the trial court did not erroneously exercise its discretion in denying Ganey's motion for severance, because the trial court did not erroneously instruct the jury, and because the trial court did not erroneously exercise its sentencing discretion, this court affirms.

I. BACKGROUND

Ganey was a lieutenant with the Milwaukee County Sheriff's Department for twenty years prior to this case. On January 13, 1995, a party was held at a tavern, The Lower Box, in the city of St. Francis to honor Lisa Riley, who was leaving employment at the sheriff's department to work as a City of Milwaukee police officer.

Ganey was at this party as were the three victims of the fourth degree sexual assaults. Karen Holderman, a member of the sheriff's department, attended the party. Holderman testified that while she was conversing with Ganey at the bar, he touched her buttocks. She thought it was an accident, but nevertheless ended the conversation and walked away. She also described two later instances where Ganey touched her buttocks and her breast. These incidents formed two of the four counts of fourth degree sexual assault.

Debbie Paulow, a friend of Holderman's, also attended the party. She testified that during a conversation with Ganey, he reached out and placed his hand on her breast on two separate occasions. These incidents formed the basis for another count of fourth degree sexual assault.

Bridgett Wendorff, also employed at the sheriff's department on January 13, was present at the party. She testified that during a conversation with Ganey, he reached over, grabbed her buttock and said "I know what you're like." This incident formed the basis for another count of fourth degree sexual assault.

Jodi Nehmer was the victim of the alleged third degree sexual assault. She testified that she was fired from her job as a clerk-stenographer with the sheriff's department because of excessive absenteeism and tardiness. She said that some time prior to and on October 12, 1995, she was discussing her employment problems with Ganey. The latter conversation occurred in a back hallway. Nehmer began to cry and Ganey placed his hand on her shoulder almost like a hug. She testified that he then touched her lips with his fingers, pulled her to her knees, forced his exposed penis into her mouth and she performed oral sex on him. Nehmer testified that the act was non-consensual. Ganey denied that it had even occurred.

Prior to trial, Ganey filed a motion to sever the third degree count from the other four. The trial court denied the motion. The case proceeded to trial. The jury returned a verdict finding the defendant not guilty of the third degree sexual assault, and guilty of the four counts of fourth degree sexual assault.

Ganey was sentenced to 120 days in the House of Correction on one count, six months in the House of Correction consecutive to the previous count, but stayed the sentence in favor of an eighteen-month period of probation. He was sentenced to a six-month term on each of the two remaining counts to be served concurrently with the latter count. Again, these sentences were stayed in favor of an eighteen-month probation concurrent with the latter probation time.

Ganey now appeals.

II. DISCUSSION

A. Motion to Sever.

Ganey claims that the trial court erred when it denied his motion to sever the third degree sexual assault count from the remaining four counts. This court is not persuaded.

Whether charges are properly joined in a criminal complaint is a question of law, which this court reviews independently. ***State v. Hamm***, 146 Wis.2d 130, 138, 430 N.W.2d 584, 588 (Ct. App. 1988). Section 971.12(1), STATS., permits joinder of multiple crimes when those crimes 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."

Based on this standard, this court concludes that joinder was proper. The State argued that the October 1995 act was connected to the January 1995 incidents because it constituted a part of a common scheme or plan. The State's theory was that Ganey used or attempted to use his position to take advantage, sexually, of people with whom he worked or who were associated with people who worked for him. Accordingly, initial joinder was proper.

The next question is whether the trial court erroneously exercised its discretion in refusing to sever the October count from the January count. ***State v. Hall***, 103 Wis.2d 125, 140, 307 N.W.2d 289, 296 (1981). This court concludes that the trial court did not erroneously exercise its discretion.

A defendant may file a motion to sever otherwise properly joined crimes if it appears that he may be prejudiced as a result of trying the separate

crimes together. Section 971.12(3), STATS. "The danger of prejudice in the trial together of two … charges can be overcome by the giving of a proper cautionary instruction." ***Peters v. State***, 70 Wis.2d 22, 31, 233 N.W.2d 420, 425 (1975). This is exactly what the trial court in the instant case did.

The jury was instructed that each count charged a separate crime and each count had to be considered separately. The jury was instructed that Ganey's guilt or innocence as found with respect to one crime must not affect the verdict on the other counts. The jury was also told that it should not conclude that Ganey is guilty of offenses on one date simply because it found him guilty of certain conduct on another date.

Any potential prejudice as a result of the joinder of the crimes was cured by these instructions. Accordingly, there was no erroneous exercise of discretion in denying Ganey's motion for severance.

B. Intent Instruction.

Ganey next argues that the trial court erroneously instructed the jury when it charged the jury as to the second element of fourth degree sexual assault that "the defendant had such sexual contact with the intent to become sexually aroused or gratified or the intent to sexually degrade or humiliate the victim alleged for that count." Ganey claims that the alternate intent—intent to become sexually aroused *or* to sexually degrade—violated his constitutional protection to a unanimous verdict. This court is not persuaded.

A trial court has wide discretion in deciding what instructions to give to a jury. ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). If

the instructions of the court adequately cover the law applicable to the facts, this court will not reverse the conviction. ***Id.***

Ganey argues that the trial court should have included only one of the alternate intents when instructing the jury. In other words, the instruction should have included *only* "the intent to become sexually aroused" or "the intent to sexually degrade or humiliate the victim," but not both. This court rejects Ganey's contention.

It is clear from § 940.225(3m), STATS., that the legislature drafted the fourth degree sexual assault language so that a conviction could only occur if a defendant actually *intended* to commit a sexual contact. Without the intent element, some innocent or accidental types of contact might otherwise be construed to be fourth degree sexual assault, i.e., accidental contact in a crowded elevator, stadium, bus, etc.

With this concern in mind, the focus becomes whether Ganey had intent to cause the contact. Therefore, the instruction given is not unconstitutional because whether the jury concluded that his intent was for sexual gratification or to sexually humiliate, they still unanimously agreed that he formed the requisite intent to be guilty of fourth degree sexual assault. The two alternatives are "equivalent means to satisfy the *mens rea* element of a single offense." ***Schad v. Arizona***, 501 U.S. 624, 643 (1991). Therefore, this court rejects Ganey's contention that the trial court erroneously exercised its discretion when it instructed the jury.

C. Sentencing.

Finally, Ganey alleges that the trial court erroneously exercised its sentencing discretion when it considered the facts of the count on which he was acquitted in determining an appropriate sentence. This court rejects Ganey's contention.

When a defendant challenges his sentence, this court's review is limited to a two-step inquiry. This court first determines whether the trial court properly exercised its discretion in imposing the sentence and, if so, this court then considers whether that discretion was erroneously exercised by imposing an excessive or unduly harsh sentence. ***Id.***

A trial court must consider three primary factors when imposing sentence: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need to protect the public. ***State v. Echols***, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993).

Ganey does not contend error with respect to the trial court's consideration of these general factors. Instead, he argues that the trial court erred when it considered the facts of the offense on which Ganey was acquitted. Ganey claims that this consideration "supplanted the jury's determination." This court does not agree.

A trial court may consider the conduct of a defendant on an acquitted charge where appropriate. ***State v. Bobbitt***, 178 Wis.2d 11, 17-18, 503 N.W.2d 11, 14-15 (Ct. App. 1993). An acquittal does not mean that the event did not happen. ***Id.*** It simply means that the jury did not find proof of the event

beyond a reasonable doubt. ***Id.*** It was not improper for the trial court to consider the conduct surrounding the acquitted charge when imposing sentence.

This court disagrees with Ganey's contention that the trial court substituted its judgment for that of the jury. The fact that the trial court was convinced that the victim of the acquitted charge accurately described what happened does not mean it supplanted the jury's determination. The trial court considered this conduct in order to determine what sentence was appropriate. Such consideration was relevant to the character of the defendant and the need to protect the public. Accordingly, the trial court's actions did not constitute an erroneous exercise of discretion or a denial of due process.

By the Court.—Judgment affirmed.

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