COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1459

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

IN THE INTEREST OF ANDREW D.W.,

A PERSON UNDER THE AGE OF 17:
STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ANDREW D.W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: DONN H. DAHLKE, Reserve Judge. *Affirmed.*

¶1 CANE, C.J. Andrew D.W., a juvenile, appeals from a dispositional order finding him delinquent of second-degree sexual assault of a child; first-degree sexual assault of a child, as party to a crime; causing a child under the age

of thirteen to view or listen to sexual activity; contributing to the delinquency of a child; and second-degree sexual assault by use of force, as party to a crime, contrary to §§ 948.02(2), 948.02(1) and 939.05, 948.055(1), 948.40(1), 940.225(2)(a) and 939.05, STATS., respectively.[1]

¶2 Andrew argues that: (1) the trial court erred by denying Andrew a substitution of judge pursuant to § 938.29(1), STATS.; (2) the trial court erred by failing to comply with § 938.30(8), STATS., when it relied on stipulated facts to find Andrew delinquent of second-degree sexual assault; (3) there was insufficient evidence at the fact-finding hearing to prove that Andrew was delinquent of first-degree sexual assault of a child, as party to a crime; (4) there was insufficient evidence at the fact-finding hearing to prove that Andrew was delinquent of causing a child under the age of thirteen to view or listen to sexual activity; (5) there was insufficient evidence at the fact-finding hearing to prove that Andrew contributed to the delinquency of a minor; (6) finding Andrew delinquent of first-degree sexual assault of a child, as party to a crime, is fatally inconsistent with finding Andrew delinquent of second-degree sexual assault by use of force, as party to a crime; (7) finding Andrew delinquent of counts 5, 7 and 8 (i.e., first-degree sexual assault of a child, as party to a crime, intentionally contributing to the delinquency of a minor and second-degree sexual assault by use of force, as party to a crime) is multiplicitous; (8) the trial court's findings of fact were insufficient to satisfy the requirements of § 938.31(4), STATS.; (9) the trial court erred by holding the dispositional hearing immediately after completion of the fact-finding hearing without complying with the requirements of § 938.31(7),

[1] Although Andrew D.W.'s notice of appeal indicates that he is appealing from both the fact-finding and dispositional hearing, this court construes his appeal to be from the dispositional order. A party appeals from a final order or judgment, not from a hearing. *See* § 808.03, STATS.

STATS.; (10) the dispositional report failed to comply with § 938.33, STATS., and its preparation before Andrew was adjudicated delinquent violated not only his rights under ch. 938, but also his due process rights; and (11) the trial court's written findings of fact and conclusions of law in support of its dispositional order did not sufficiently comply with § 938.355(2)(a), STATS.[2] Because any errors were harmless, this court affirms the trial court's dispositional order.

BACKGROUND

¶3 This case arose out of an incident occurring sometime between December 22, 1998, and January 4, 1999, in Shawano County. At the fact-finding hearing, Andrew's cousin J.L., eleven years old at the time of the incident, testified that Andrew, then fifteen years old, physically forced another cousin, R.C., then eight years old, to perform oral sex on J.L.'s brother, R.L., who was then ten years old. The basic facts surrounding the incident, as described by J.L., were verified by R.C. and R.L., but denied by Andrew, who claimed that R.C. and R.L. engaged in oral sex of their own volition.

¶4 After a bench trial, the trial court, based on its assessment of the credibility of Andrew's trial testimony, as compared to that of his three cousins, adjudicated Andrew delinquent of four of the seven counts charged.[3]

[2] Andrew additionally argues that: (1) the trial court erred by proceeding without a petition and failing to release Andrew pursuant to § 938.21(1), STATS.; and (2) there was insufficient evidence produced at Andrew's detention hearing to allow for his continued detention pursuant to § 938.205(1), STATS. The issue of whether Andrew should have remained in secured detention before the fact-finding hearing is now moot, as he was ultimately adjudicated delinquent. Because these issues regarding Andrew's hearing detention are now moot, this court declines to address them. *See* ***State ex rel. WED v. Joint Comm.***, 73 Wis.2d 234, 236, 243 N.W.2d 497, 498 (1976).

[3] The trial court found there to be insufficient evidence to prove three counts alleging that Andrew had exposed himself to his cousins, contrary to § 948.10(1), STATS., and dismissed those three counts.

Additionally, based on stipulated facts, Andrew was found delinquent of second-degree sexual assault of a child. Immediately following the fact-finding hearing, the parties proceeded to disposition on both the instant case and an unrelated case. Consistent with the dispositional report's recommendations, the trial court ordered Andrew committed to the serious juvenile offender program at Lincoln Hills School, for a period not to exceed five years. This appeal followed.

SUBSTITUTION OF JUDGE

¶5 Andrew initially argues that the trial court erred by denying his right to substitution of judge pursuant to § 938.29(1), STATS. Andrew further argues that the trial court failed to advise him of his right to substitution of judge, in violation of § 938.30(2), STATS.[4] At Andrew's initial appearance, before the Honorable Earl W. Schmidt, the following discussion occurred:

> THE COURT: Does anyone know—On the record, does he have a right to substitute a judge? I sort of recognize his name.
>
> [DEFENSE COUNSEL]: That is what I was just asking him, Your Honor. I would save that line of analysis.
>
> THE COURT: I just thought maybe I should inquire. I know I've seen this young man before.
>
> All right. So you have now read the Complaint, have you not [defense counsel]?
>
> [DEFENSE COUNSEL]: I have. At this time, Your Honor, we would enter denials.
>
> THE COURT: All right. We'll enter denial. He doesn't have the right to substitute the judge. And he is in secure detention, isn't he?
>
> [DEFENSE COUNSEL]: Yes, he is.

[4] Section 938.30(2), STATS., provides, in pertinent part, that "the juvenile and the parent … shall be informed that the hearing shall be to the court and that a request for a substitution of judge under s. 938.29 must be made before the end of the plea hearing or be waived."

¶6 Given this exchange, the court did not deny Andrew his right to substitution of judge under § 938.29(1), STATS. This section provides that "the juvenile, either before or during the plea hearing, may file a written request … for a substitution of the judge assigned to the proceeding." Section 938.29(1), STATS. This court's review of the record reveals no such request, nor does Andrew assert that he made such a request. It follows, therefore, that because the court did not refuse any actual request for substitution of judge there was no violation of Andrew's rights under § 938.29(1).

¶7 The court did, however, err by failing to advise Andrew that a request for substitution of judge must be made before the end of the plea hearing or be waived. *See* § 938.30(2), STATS. In fact, the record reveals that the court was uncertain if Andrew even had a right to substitution of judge. However, a trial court's failure to inform a juvenile of the right to judicial substitution is reversible error only where actual prejudice to the juvenile is shown. *See* ***In re Kywanda F. v. State***, 200 Wis.2d 26, 41, 546 N.W.2d 440, 447-48 (1996).

¶8 ***Kywanda*** sets forth a multi-part test for determining whether a juvenile has suffered actual prejudice. In essence, "the prejudice suffered by the juvenile in such an instance is the loss of the opportunity to exercise the right to substitution due to the lack of knowledge of that right." ***Id***. at 37, 546 N.W.2d at 446. In the instant case, however, the court's error in failing to inform Andrew of his right to judicial substitution is harmless because a reserve judge ultimately presided over the fact-finding and dispositional hearing on this matter.

STIPULATED FACTS AS THE BASIS FOR COUNT I

¶9 Andrew argues that the trial court erroneously relied on stipulated facts to find him delinquent of second-degree sexual assault of a child without complying with § 938.30(8), STATS., which provides, in relevant part: "Except when a juvenile fails to appear in response or stipulates to a citation before accepting an admission or plea of no contest of the alleged facts in a petition or citation, the court shall [engage in a plea colloquy with the juvenile]."

¶10 In essence, Andrew asserts that because the stipulated facts dispensed with the necessity for a fact-finding hearing on the second-degree sexual assault charge, the stipulations were tantamount to either an admission or a no contest plea. Andrew argues that the court should, therefore, have engaged in a plea colloquy with Andrew, as is required by § 938.30(8), STATS.

¶11 During the fact-finding hearing, the parties stipulated "that sexual intercourse did take place between the juvenile [Andrew—date of birth 3-27-83], and L.K., date of birth 1-15-84 … somewhere between November 1st, 1998 and December 14, 1998," and that "it was mutually agreeable at the time it occurred between the two juveniles." Counsel for Andrew added, "We'd stipulate to [these] facts, and the Court can use that at the end of the trial for [its] determination … in the fact finding process of whether the violation has occurred."

¶12 Despite Andrew's contentions, the stipulated facts were not tantamount to an admission of the offense or a no contest plea. Because Andrew offered to stipulate to these facts, it became unnecessary to call L.K. to testify regarding the incident. Andrew cannot now attempt to characterize these stipulations as a plea, especially when he offered to stipulate and clarified that his

stipulations were *to be used by the court to determine* whether he was delinquent of the charged offense.

PARTY TO A CRIME

¶13 Andrew argues that there was insufficient evidence to prove that he was delinquent of first-degree sexual assault of a child, as party to a crime. Andrew's argument here is two-fold: (1) that he could not assist R.C. in the commission of the crime because R.C., by virtue of the fact that he was eight years old, was statutorily incapable of committing either a crime or a delinquent act; and (2) that if Andrew forced R.C. to perform oral sex on R.L. (or alternatively had nothing to do with the incident), he could not have also "aided" R.C. in the commission of the act. His arguments are not persuasive.

¶14 First, under § 938.02(3m), STATS., a delinquent is defined, in pertinent part, as "a juvenile who is 10 years of age or older who has violated any state or federal criminal law." The State correctly points out, however, that under § 938.13(12), STATS., a child under the age of ten is capable of committing a delinquent act.[5] Therefore, and contrary to Andrew's assertion, R.C. is not statutorily incapable of committing either a crime or a delinquent act.

¶15 Turning to Andrew's second contention, § 939.05, STATS., provides in part:

> **(1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person

[5] Section 938.13(12), STATS., provides that the "court has exclusive original jurisdiction over a juvenile alleged to be in need of protection or services which can be ordered by the court, and: … (12) Who, being under 10 years of age, has committed a delinquent act as defined in s. 938.12."

> did not directly commit it and although the person who directly committed it has not been convicted …
>
> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

Andrew contends that if he forcibly participated in the sexual assault of R.L., he could not have "aided" R.C. in its commission, as that term is contemplated under § 939.05. Andrew relies on the dictionary definition distinctions between the words "force" and "aid" to bolster his argument.

¶16 Charging a person as a party to a crime "is a way of establishing criminal liability separate from proving the elements of the underlying offenses." ***State v. Horenberger***, 119 Wis.2d 237, 243, 349 N.W.2d 692, 695 (1984). Our supreme court has held that "[t]he manner of participation in a crime is not an element of the offense to which one is charged as party to a crime." ***Id***. Here, although Andrew *forcibly* participated in the sexual assault of R.L., he nevertheless participated. To hold otherwise would result in an absurd interpretation of § 939.05, STATS. This court must interpret statutes to avoid absurd results. *See* ***Miesen v. DOT***, 226 Wis.2d 298, 308, 594 N.W.2d 821, 827 (Ct. App. 1999).[6]

[6] Similar to his "party to a crime" argument, Andrew asserts that he could not have forced R.C. to commit the delinquent act while simultaneously encouraging or contributing to the act. Section 948.40(1), STATS., provides, in pertinent part that "[n]o person may intentionally encourage or contribute to the delinquency of a child." Contrary to Andrew's assertions, forcing R.C. to commit second-degree sexual assault clearly contributed to R.C.'s delinquency, because were it not for Andrew's conduct, R.L. would not have been sexually assaulted.

(continued)

CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY

¶17 Andrew argues that there was insufficient evidence to prove that he was delinquent of causing J.L., a child under the age of thirteen, to view or listen to sexual activity, contrary to § 948.055, STATS. Under this section, "[w]hoever intentionally causes a child who has not attained 18 years of age to view or listen to sexually explicit conduct may be penalized … if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child." Section 948.055, STATS. To commit an offense under this section, the following four elements must be satisfied: (1) the defendant caused a child to view or listen to sexually explicit conduct; (2) the defendant intentionally caused the child to view or listen to sexually explicit conduct; (3) the child had not attained the age of thirteen; and (4) the defendant acted with the purpose of sexually arousing or gratifying the defendant or humiliating or degrading the child. *See* WIS J I—CRIMINAL 2125.

¶18 Andrew concedes the first and third elements. As to the second element, Andrew argues that because he did not physically prevent J.L. from leaving or otherwise encourage or threaten him to stay in the room, the intent necessary to satisfy the second element is lacking. Testimony established, however, that Andrew was not only older, but physically bigger and stronger than

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Additionally, Andrew asserts that he may not be adjudicated delinquent for both second-degree sexual assault of a child, as party to a crime and second-degree sexual assault by use of force, as party to a crime. Again, the crux of his argument on this issue is that he could not aid R.C.'s delinquent act while contemporaneously forcing its commission. As noted in this court's discussion of the "party to a crime" statute, although Andrew forcibly participated in the sexual assault of R.L., he nevertheless participated, thereby aiding R.C., as that term is contemplated under § 939.05, STATS. Because he forced R.C. to commit the sexual assault, Andrew may additionally be adjudicated delinquent of second-degree sexual assault by use of force, as party to a crime. Contrary to Andrew's assertions, a finding of delinquency on both charges is not inconsistent.

his three cousins. In fact, although J.L. testified that he was not prevented from leaving the room, he was afraid because of what was happening to his brother, R.L., and his cousin, R.C.

¶19 While all three cousins were in the room, Andrew forced one to perform oral sex on another, while knowing that the third cousin, J.L., was in the room. If Andrew had not intended J.L. to watch, he would have ordered him out and although he may not have physically forced J.L. to remain in the room, J.L. was nevertheless forced to remain in the room out of intimidation and fear of Andrew.

¶20 Andrew further asserts that the fourth element of § 948.055, STATS., has not been satisfied. This element is similar to that of element two in that it involves the purpose behind Andrew's act. By forcing this sexually explicit act in front of J.L., Andrew's intent to have J.L. view the act is established. The purpose behind Andrew's act—to humiliate or degrade J.L.—is evidenced by the fear J.L. felt at seeing Andrew force their eight-year-old cousin to perform oral sex on J.L.'s ten-year-old brother. J.L.'s humiliation and degradation is further established by J.L.'s testimony that he did not immediately tell anyone about the incident for fear of getting in trouble, because what happened "was something nasty." Accordingly, this court holds that the evidence was sufficient to find Andrew delinquent of causing J.L. to view or listen to sexually explicit activity, contrary to § 948.055.

MULTIPLICITY

¶21 Andrew argues that it is multiplicitous and therefore a violation of double jeopardy to adjudicate him delinquent of contributing to the delinquency of a child, second-degree sexual assault of a child and second-degree sexual assault

by use of force, the latter two as party to a crime. "When a defendant is charged with more than one count for a single offense, the charges are multiplicitous." ***State v. Church***, 223 Wis.2d 641, 648, 589 N.W.2d 638, 641 (Ct. App. 1998). Further, multiplicitous convictions violate the double jeopardy protections of the state and federal constitutions. *See* ***State v. Reynolds***, 206 Wis.2d 356, 363, 557 N.W.2d 821, 823 (Ct. App. 1996). The determination of whether multiple convictions violate double jeopardy protections is a question of law that this court decides de novo. *See* ***Church***, 223 Wis.2d at 649, 589 N.W.2d at 641. In ***Reynolds***, this court outlined the test used to analyze claims of multiplicity:

> We employ a two-step test to analyze claims of multiplicity. We first apply the "elements only" test of ***Blockburger v. United States***, 284 U.S. 299 (1932), to determine whether each charged offense requires proof of an additional element or fact which the other does not. … The analysis focuses entirely on the statutes defining the offenses and has been codified in § 939.66(1), STATS., which provides that a defendant "may be convicted of either the crime charged or an included crime, but not both," and defines "included crime" as one "which does not require proof of any fact in addition to those which must be proved for the crime charged."

Reynolds, 206 Wis.2d at 363-64, 557 N.W.2d at 823 (citing ***State v. Johnson***, 178 Wis.2d 42, 48-49, 503 N.W.2d 575, 576 (Ct. App. 1993)). "Under ***Blockburger***, the existence of separate criminal statutory provisions requiring proof of separate facts gives rise to a presumption that the legislature intended multiple punishments, although that presumption may be rebutted by a clear legislative expression to the contrary." ***Church***, 223 Wis.2d at 652, 589 N.W.2d at 643.

¶22 Here, Andrew first asserts that it is multiplicitous to find him delinquent of both second-degree sexual assault of a child, as party to a crime and second-degree sexual assault by use of force as party to a crime. Specifically,

Andrew argues that a district attorney does not have discretion to prosecute a sexual assault against a child under the age of thirteen under both chs. 940 and 948, STATS. Conceding that he cannot prevail under the elements-only test of ***Blockburger***, Andrew contends that the legislature intended that the prosecution of sexual assaults against children under the age of thirteen should proceed only under ch. 948. This court determines that there is no such intent to rebut the presumption that the legislature intended multiple punishments. *See* ***Church***, 223 Wis.2d at 653, 589 N.W.2d at 643. In fact, pursuant to § 939.65, STATS., the legislature has provided: "Except as provided in s. 948.025(3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." The instant facts are not excluded by § 948.025(3), as that section addresses repeated acts of sexual assault of the same child. Additionally, this court has recognized that:

> The legislature made a concerted effort to create statutory provisions through which both the use of force and the age of the victim operated independently. The changes made it possible to commit both sexual assault on a child and sexual assault with the use of force. … This statutory development, from a scheme that precluded the possibility of committing both the crime of sexual assault of a child and sexual assault with the use of force to a scheme that permits committing both offenses, leads us to the conclusion that the legislature intended multiple punishments for those crimes.

State v. Selmon, 175 Wis.2d 155, 164-65, 498 N.W.2d 876, 879 (Ct. App. 1993). Accordingly, the findings of delinquency under both chs. 940 and 948 were not multiplicitous.

¶23 Andrew further contends that it is multiplicitous to find him delinquent of both second-degree sexual assault of a child, as party to a crime and contributing to the delinquency of a child. Turning to the ***Blockburger*** test, we

must first determine whether each charged offense requires proof of an additional element or fact which the other does not. *See* ***Blockburger***, 284 U.S. at 304.

¶24 For Andrew to be found delinquent of contributing to the delinquency of R.C., the following two elements had to be satisfied: (1) that he intentionally encouraged or contributed to the delinquency of R.C.; and (2) that R.C. had not attained the age of eighteen years at the time of the alleged offense. *See* WIS J I—CRIMINAL 2170. In order to adjudicate Andrew delinquent of second-degree sexual assault of a child as party to a crime, the court had to find that Andrew had aided R.C. in the commission of the assault. *See* § 939.05, STATS. Although R.C. happened to be a child, the "party to a crime" statute does not require that Andrew *aid a child* in committing the crime. In contrast, under § 948.40, STATS., Andrew had to contribute to the delinquency of a child—the fact that R.C. was a child under the age of eighteen is a necessary element of § 948.40. Because § 948.40 includes a proof of age element, while the party to a crime statute does not, there is "a presumption that the legislature intended multiple punishments, although that presumption may be rebutted by a clear legislative expression to the contrary." ***Church***, 223 Wis.2d at 652, 589 N.W.2d at 643. This court determines that there is no such legislative expression to rebut the presumption. Accordingly, it was not multiplicitous to find Andrew delinquent of both second-degree sexual assault of a child, as party to a crime, and contributing to the delinquency of a child.

SUFFICIENCY OF FINDINGS OF FACT

¶25 Andrew argues that the trial court's findings of fact at the conclusion of the fact-finding hearing were insufficient to meet the requirements of § 938.31(4), STATS., which provides:

> The court shall make findings of fact and conclusions of law relating to the allegations of a [delinquency petition]. In cases alleging a juvenile to be delinquent or in need of protection or services under s. 938.13(12), the court shall make findings relating to the proof of the violation of law and to the proof that the juvenile named in the petition committed the violation alleged.

Andrew interprets this statute as requiring "*specific* findings of fact and conclusions of law with respect to the elements of the violations alleged in the petition." Contrary to Andrew's interpretation, this court does not read any such specificity requirement into § 938.31(4).

¶26 As both Andrew's defense counsel and the trial court noted, this case required the court to weigh the credibility of the witnesses against that of Andrew. The trial court, not the appellate court, determines the weight of evidence and credibility of witnesses. *See* § 805.17(2), STATS. Although the trial court found that there were some discrepancies among the witnesses, it found that "the basic elements of what happened [had] been set forth in full." The trial court, finding the three witnesses to be more credible than Andrew, discussed their relative sizes, their demeanor and their corroboration.

¶27 With respect to the first count of the petition, alleging second-degree sexual assault of a child, the court made the following finding: "The court will find the … juvenile delinquent on the first count based on the stipulation that was entered into this morning." The trial court then stated that it would "find him delinquent of the remaining counts except for 2, 3, and 4, which [had] been dismissed upon credible evidence," and further added that it found "the evidence beyond a reasonable doubt [showed] that he [was] delinquent on all the remaining charges except for the ones that were previously thrown out." Because the trial court's determination of credibility was sufficient to support the petition's

allegations, this court holds that the trial court's findings of fact and conclusions of law satisfied § 938.31(4), STATS.

THE DISPOSITIONAL HEARING

¶28 Andrew contends that the trial court violated § 938.31(7), STATS., when it held the dispositional hearing immediately after the fact-finding hearing. Andrew correctly notes that the dispositional hearing must be held "no more than 10 days after the fact-finding hearing for a juvenile in secure custody." Arguing that a juvenile's parent must submit a financial statement at least five days before the dispositional hearing, Andrew asserts that where an out-of-home placement is contemplated, the statute requires holding the dispositional hearing no sooner than five days after the fact-finding hearing. *See* § 938.31(7), STATS. Andrew's argument, however, ignores the statutory language providing:

> If it appears to the court that disposition of the case may include placement of the juvenile outside the juvenile's home, the court shall order the juvenile's parent to provide a [financial statement] at least 5 days before the scheduled date of the dispositional hearing *or as otherwise ordered by the court*.

Id. (emphasis added). As such, this court does not interpret the statute as requiring a dispositional hearing to be held no sooner than five days from the fact-finding hearing. Further, the statute plainly states that "[i]f all parties consent, the court may immediately proceed with a dispositional hearing." ***Id***.

¶29 Regarding consent, Andrew's argument is two-fold: (1) that Andrew's counsel cannot consent to immediately proceeding with a dispositional hearing unless the record reflects that Andrew made a knowing waiver of his right to prevent an immediate dispositional hearing; and (2) that assuming Andrew's

counsel could consent on his behalf, the record is devoid of whether the condition precedent to Andrew's consent was satisfied. This court disagrees.

¶30 In criminal cases, certain decisions are so fundamental that they require personal waiver by a defendant, "even where no statute requires a personal waiver." ***State v. Brunette***, 220 Wis.2d 431, 443, 583 N.W.2d 174, 179 (Ct. App. 1998). Included in these decisions are "whether to plead guilty, whether to request a trial by jury, whether to appeal, whether to forego the assistance of counsel, and whether to obtain counsel and refrain from self-incrimination." ***Id***. Given the fundamental nature of these decisions, they "may only be waived in open court, on the record by the defendant personally." ***Id***.

¶31 The rights afforded a juvenile in a delinquency proceeding are fewer in number than those afforded a criminal defendant. Among these limited rights are the right to effective assistance of counsel, the right of confrontation and the right to remain silent. *See* § 938.23, STATS.; *see also* ***Schall v. Martin,*** 467 U.S. 253, 263 (1984); ***In re Gault***, 387 U.S. 1, 36, 47 (1967). As in criminal proceedings, a juvenile's waiver of his or her right to counsel must be knowing and voluntary. *See* §§ 48.23(1)(a), (1)(b), (2), and (4); 938.23(1)(a), (1)(b) and (4), STATS.

¶32 Although ***Brunette*** involved a criminal proceeding, the ***Brunette*** court recognized that with the exception of certain fundamental decisions, such as whether to waive one's right to counsel, "when a defendant accepts counsel, the defendant delegates to counsel the decision whether to assert or waive constitutional rights … as well as the myriad tactical decisions an attorney must make during a trial." ***Id***. Further, "[w]hen the decision whether to assert or waive a right is delegated to counsel, it may be waived by counsel; the defendant need

not personally make a statement waiving the right." ***Id***. at 444, 583 N.W.2d at 180. It follows, therefore, that because the decision of whether to proceed immediately with the dispositional hearing is not fundamental in nature, Andrew did not need to personally waive his right to refuse to consent to proceed immediately to the dispositional hearing.

¶33 Because Andrew's counsel could, as a tactical matter, consent to proceed immediately to the dispositional hearing, this court must address whether the condition precedent to this consent was satisfied. At the end of the fact-finding hearing, the State requested an immediate dispositional hearing. Defense counsel indicated that if the dispositional hearing were to be held immediately, attorney Steve Weerts would need to be present. Weerts was representing Andrew on a separate case that awaited disposition pending the outcome of the fact-finding hearing on the instant case. Defense counsel noted:

> We also have to get Attorney Steve Weerts here, who would be involved in the disposition of the other matter. I know I spoke with him over the noon hour and told him we might be able to go to disposition today. He indicated to me that he would be available in the other branch at 2:30. I note it's now about 2:30, but as soon as he's free, we maybe could proceed to disposition. We maybe need a brief recess of 15 to 20 minutes until he's free in the other court.

Andrew asserts that his consent to proceed immediately to the dispositional hearing was conditioned upon the presence of Weerts and that the record does not indicate that this condition was met. On the contrary, this court's review of the minutes taken by the court's clerk reveals that Weerts was present at the

dispositional hearing.[7] After a thirty-minute recess, the court reconvened at 3:10 p.m. for the dispositional hearing. The minutes for Case No. 96-JV-35A, in which Weerts represented Andrew, noted the start time of the disposition hearing as 3:10 p.m. and further noted Weerts' appearance. Accordingly, this court holds that the condition precedent to Andrew's consenting to proceed immediately to the dispositional hearing was satisfied.

THE DISPOSITIONAL REPORT

¶34 Andrew asserts that preparation of the dispositional report before Andrew was adjudicated delinquent violated not only his due process rights, but his rights under ch. 938, STATS. He additionally asserts that the dispositional report failed to comply with the requirements of § 938.33. This court disagrees.

¶35 Section 938.33(1), STATS., provides that "[b]efore the disposition of a juvenile adjudged to be delinquent … the court shall designate an agency … to submit a report" containing, among other things, a social history of the juvenile, a recommended plan of rehabilitation, a recommendation of specific services for the juvenile or family, a statement of the plan's objectives and a plan for the provision of educational services to the juvenile. Section 938.33(3), which addresses "correctional placement reports," requires an indication that a less restrictive alternative is not appropriate and a recommendation for an amount of child support to be paid by either or both of the juvenile's parents or for referral to the county child support agency for the establishment of child support. Section

[7] On October 1, 1999, this court ordered that the clerk's minutes from the dispositional hearings be made a part of the record, with copies forwarded to this court and counsel for both sides.

938.33(3r), addresses the "serious juvenile offender report" and provides, in pertinent part, that:

> [i]f a juvenile has been adjudicated delinquent for committing a violation for which the juvenile may be placed in the serious juvenile offender program … the report shall be in writing and, in addition to the information specified in sub. (1) and in sub. (3) ... shall include an analysis of the juvenile's suitability for placement in the serious juvenile offender program.

¶36 Andrew argues that § 938.33(3r), STATS., mandates an order of events and that to prepare the report before an adjudication of delinquency presumes guilt rather than innocence. This court disagrees. All the statute requires is that a report be prepared before the dispositional hearing. Although it may be unusual to prepare the report before Andrew was adjudicated delinquent, that it was done here does not void the report.

¶37 Turning to the dispositional report itself, Andrew asserts that the report fails to comply with the mandates of § 938.33, STATS. Specifically, Andrew argues that: (1) the report contains no provision of educational services;[8] (2) the report does not sufficiently describe an objective of plan;[9] (3) the report contains no recommendation on the amount of child support to be paid by the family;[10] and (4) the report contains no real analysis of Andrew's suitability for

[8] Section 938.33(1)(e), STATS., requires: "[a] plan for the provision of educational services to the juvenile, prepared after consultation with the staff of the school in which the juvenile is enrolled or the last school in which the juvenile was enrolled."

[9] Section 938.33(1)(d), STATS., requires: "[a] statement of the objectives of the plan, including any desired behavior changes and the academic, social and vocational skills needed by the juvenile."

[10] Section 938.33(3)(b), STATS., requires: "[a] recommendation for an amount of child support to be paid by either or both of the juvenile's parents or for referral to the county child support agency under s. 59.53 (5) for the establishment of child support."

placement in the serious juvenile offender program. Andrew asserts that the report's failures to comply with the provisions of § 938.33, "render the report an improper vehicle for use at the dispositional hearing in this case." This court disagrees and holds that any errors were harmless to the trial court's disposition of Andrew.

¶38 With regard to the plan for provision of educational services, the dispositional report recognizes that Andrew's academic functioning is average/below average and further notes that he has poor attendance. The report meets the requirement to include a plan for the provision of educational services by recommending placement at Lincoln Hills School. This court is therefore satisfied that the provision for Andrew's educational services has been sufficiently addressed.

¶39 Andrew next argues that the report does not contain a sufficient "objective of plan." The report, under the heading "Objective of Plan," states that the objective is "to deter any further delinquent behavior." Under the "Recommendation" section, the report continued:

> [I]f Andrew does not receive the intensive counseling which will be needed to deal with his perpetrator issues … he will be a substantial risk of perpetrating again. It is therefore the recommendation of this worker that due to the seriousness of the offense, the need for long and intensive counseling for Andrew and to protect the community, that Andrew be placed in the Serious Juvenile Offender Program at Lincoln Hills School … It is believed that placement of Andrew in the Serious Juvenile Offender Program will ensure that he receives the structure and supervision needed to protect society, as well as for him to receive the counseling and services needed in an effort to create change.

This court is satisfied that these sections, read together, sufficiently satisfy the objective of plan requirement.

¶40 Andrew further argues that the report failed to recommend an amount of child support to be paid by either or both of his parents or for referral to the county child support agency for the establishment of child support. Although the report fails to make such a recommendation, this court holds that its absence from the report is harmless as it does not prejudice Andrew or otherwise affect the validity of the report as a useful tool for the trial court in making its disposition.

¶41 Andrew finally argues that the report contains no real analysis of Andrew's suitability for placement in the serious juvenile offender program. Under the heading of "Past or Current Services" the report detailed the following:

> Andrew was placed at Ethan House in Green Bay on May 11, 1995, and remained there until January 18, 1996. The placement at Ethan House was a result of being a victim of physical and sexual abuse by his father. While at Ethan House, Andy received individual, group and family counseling in the areas of taking responsibility for his actions, cooperating with his educational program behaviorally and academically, eliminating his delinquent behavior, cooperating with staff and participating [in] his therapy, developing appropriate coping skills and ceasing any type of aggressive behavior including verbal abuse, threats, and intimidation by direct physical aggressiveness or self-directed. According to Andrew's discharge summary, Andrew did make some progress during his stay there in the area of improving his coping skills, eliminating aggressive behavior in some parts of his life and anger management.
>
> Lutheran Social Services Intensive In-Home Treatment Team provided services to Andrew and his family from February 12, 1997, to September 4, 1997. Issues which were dealt with while working with Andrew included anger management and past sexual abuse issues. Andy struggled in therapy and had difficulty in expressing his feelings, especially during family meetings.

> Andrew and his mother also attended counseling at the Dept. of Community Program in 1996. However, both Andy and his mother failed to keep scheduled appointments and to follow through with the counseling.

This court holds that this section, read in conjunction with the "Recommendation" section, provides a sufficient analysis of Andrew's suitability for placement in the serious juvenile offender program, as contemplated under § 938.33(3r), STATS.

DISPOSITIONAL ORDER—FINDINGS OF FACT AND CONCLUSIONS OF LAW

¶42 Andrew argues that the trial court's findings of fact and conclusions of law in support of its dispositional order failed to comply with § 938.355(2)(a) and (b), STATS. Andrew contends that: (1) the statute requires written findings of fact and conclusions of law separate from the dispositional order; (2) the dispositional order failed to specify the particular services or continuum of services to be provided Andrew and his family; and (3) there was no written order naming the place or facility where Andrew was to be placed.

¶43 Section 938.355(2)(a), STATS., provides, in pertinent part, that: "[i]n addition to the order, the court shall make written findings of fact and conclusions of law based on the evidence presented to the court to support the disposition ordered." Contrary to Andrew's contentions, the plain language of this section reveals that there is no requirement of a separate writing for findings of fact and conclusions of law—the only requirement is that the findings of fact and conclusions of law be "written." *See* § 938.355(2)(a), STATS. Here, in the dispositional order, the court found specifically that: (1) Andrew had committed an act making him a serious juvenile offender; (2) given the serious nature of the act for which Andrew was found delinquent, his current residence would not safeguard either his welfare or that of the community; and (3) placement in the

home would be contrary to Andrew's health, safety and welfare and would not be in his best interests. These findings of fact and conclusions of law are sufficient to satisfy the requirements of § 938.355(2).

¶44 Regarding Andrew's contention that the order failed to specify the particular services or continuum of services to be provided Andrew and his family, extensive counseling for Andrew and additional services for him and his family are implicit in his placement in the serious juvenile offender program. *See* § 938.538, STATS. Further, the court ordered that the agency responsible for these services would be the Department of Corrections.

¶45 Finally, at the dispositional hearing, the trial court, accepting the recommendations of the dispositional report, ordered Andrew into the serious juvenile offender program at Lincoln Hills School. In its dispositional order, the trial court again ordered Andrew into the serious juvenile offender program, naming the Department of Corrections as program overseer. Although the trial court erred by not specifying in writing Andrew's placement in Lincoln Hills School, this error was harmless, as the order, read in conjunction with the trial court's oral disposition, sufficiently clarifies Lincoln Hills School as the facility to which Andrew was to be placed.

By the Court.—Order affirmed.

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