

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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OF WISCONSIN**

Appeal Case No. 2013AP001229-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

EVAN K. SAUNDERS,

Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF CONVICTION  
AND SENTENCE IMPOSED, ENTERED IN THE  
CIRCUIT COURT OF MILWAUKEE COUNTY, THE  
HONORABLE ELLEN R. BROSTROM, PRESIDING

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BRIEF OF PLAINTIFF-RESPONDENT

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ON APPEAL FROM A JUDGMENT OF CONVICTION AND  
SENTENCE IMPOSED, ENTERED IN THE CIRCUIT  
COURT OF MILWAUKEE COUNTY, THE HONORABLE  
ELLEN R. BROSTROM, PRESIDING

---

BRIEF OF PLAINTIFF-RESPONDENT

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**ISSUES PRESENTED**

- I. Did the circuit court properly deny Saunders' postconviction motion to dismiss on sufficiency of evidence grounds?

The circuit court answered: yes.

- II. Did the circuit court properly deny Saunders' motion for severance?

The circuit court answered: yes.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State requests neither oral argument nor publication. The parties' briefs will adequately address the issues presented, and oral argument will not significantly assist the court in deciding this appeal. The appeal can be resolved by applying well-settled case law to the particular facts of this case, and as a case decided by one judge, it will not meet the criteria for publication.

## **STATEMENT OF THE CASE**

Defendant-appellant Evan Saunders appeals from an order of the Milwaukee County Circuit Court denying his motion for postconviction relief. (R44:1-3).

On September 13, 2011, a criminal complaint was signed charging Saunders with four counts of fourth degree sexual assault and four counts of disorderly conduct. The criminal complaint alleged that with respect to four different women, Saunders had committed the crime of fourth degree sexual assault and that his conduct, as to each woman, was disorderly. (R2:1-7).

Prior to trial, Saunders filed a motion for severance (R6:1-2) and a supporting memorandum. (R7:1-5). The State filed a response to that motion. That response included a copy of an unpublished decision and appellate decisions from three other states. (R8:1-80). On May 3, 2012, the circuit court, Judge Rebecca Dallet, issued an oral decision denying Saunders' motion for severance. (R47:4-12).

The case proceeded to trial and the jury returned verdicts finding Saunders guilty of all eight counts. (R17-24). On March 15, 2013, Saunders filed a motion to dismiss or in the alternative for a new trial. (R38:1) In his supporting memorandum, Saunders argued that there was insufficient evidence to support the jury verdicts (R39:3-12), and that the circuit court erred in failing to grant his pretrial motion for severance. (R39:12-18). On April 25, 2013, the State filed a response to the motion for postconviction relief. (R42:1-27).

On May 14, 2013, the circuit court issued a written order denying Saunders' motion for postconviction relief. (R44:1-3).

## **STANDARD OF REVIEW**

Saunders' first complaint is that the circuit court erred in denying his motion to dismiss for insufficient evidence.

The standard of review in determining whether the evidence was sufficient to support a conviction is that

“an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilty beyond a reasonable doubt.”

[A reviewing court's] review of sufficiency of the evidence claim is therefore very narrow. [The reviewing court] gives great deference to the determination of the trier of fact. [The reviewing court] must examine the record to find facts that support upholding the jury's decision to convict.

State v. Hayes, 2004 WI 80, ¶¶ 56-57, 273 Wis. 2d 1, 681 N.W.2d 203 (citation and footnotes omitted).

A reviewing court “will affirm, if there is any credible evidence, or reasonable inference therefrom, upon which the [factfinder] could have based its decision.” State v. Randall, 222 Wis. 2d 53, 60, 586 N.W.2d 318, 321 (Ct. App. 1998). “[I]f more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.” Bautista v. State, 53 Wis. 2d 218, 223, 191 N.W.2d 725, 728 (1971). It is the jury's task, not that of a reviewing court, to “sift and winnow the credibility” of witnesses.” State v. Toy, 125 Wis. 2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985).

Saunders' second complaint is that the trial court erred in denying his motion for severance. A reviewing court will not reverse a circuit court's denial of severance absent an erroneous exercise of discretion. See State v. Hall, 103 Wis. 2d 125, 140-41, 307 N.W.2d 289, 296 (1981).

## ARGUMENT

**I. The trial court properly denied Saunders' motion to dismiss for insufficient evidence because sufficient evidence was presented at trial for the jury to find Saunders guilty of the four counts of fourth degree sexual assault and the four counts of disorderly conduct.**

The crime of fourth degree sexual assault requires the State to prove two elements: (1) The defendant had sexual contact with the victim, and (2) The victim did not consent to the sexual contact. Sexual contact is defined as

an intentional touching by the defendant of the intimate part of the victim. The touching may be of the intimate part directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to cause bodily harm to the victim, become sexually aroused or gratified, or sexually degrade or humiliate the victim.

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

WI-JI Criminal 1219.

The crime of disorderly conduct requires the State to prove two elements: (1) The defendant engaged in "otherwise disorderly conduct", and (2) The conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance. (R59:59).

With respect to each of the four convictions for fourth degree sexual assault, Saunders' claim is that the evidence was insufficient to prove that the nonconsensual touching was done for one of the prohibited purposes—to become sexually aroused or gratified or to sexually humiliate the person being touched. (Brief of Defendant-Appellant, pgs. 11-12).

Sufficient evidence was presented at trial for the jury to find that the touching of an intimate part of each woman was done without consent and for a prohibited purpose, and, accordingly, to find Saunders guilty of the four counts of fourth degree sexual assault.

With respect to each of the four convictions for disorderly conduct, Saunders' claim is that the evidence was insufficient to prove that he engaged in any prohibited conduct and the evidence was insufficient to prove that his conduct tended to cause or provoke a disturbance. (Brief of Defendant-Appellant, pg. 17).

Sufficient evidence was presented at trial for the jury to find that Saunders engaged in "otherwise disorderly conduct" and that his conduct tended to cause or provoke a disturbance, and, accordingly, to find Saunders guilty of the four counts of disorderly conduct.

Count 1 of the criminal complaint charged Saunders with committing the crime of fourth degree sexual assault against Candice Dziedzic. Count 2 of the criminal complaint charged Saunders with disorderly conduct based upon his examination of Candice Dziedzic. Saunders was convicted of committing both of those crimes. An examination of the record to find facts that support the jury's decision to convict on those two counts shows the following facts that support that decision:

1. Candice Dziedzic saw Saunders because of complaints of vaginal discharge, abdominal pain, and diarrhea. (R50:6).
2. While in the first examination room, and while alone with Saunders, he was performing a vaginal exam. During that exam, he asked her whether she had troubles having an orgasm,



he asked her if she masturbated, and, while rubbing her clitoris, he was asking her if she was feeling pleasure. While this was happening, she was wondering why this was going on. She said she was wondering if she had a problem. (R50:9-16).

3. While Saunders' finger was on her vagina, he pushed on a "certain spot" and told her that is where her boyfriend should have his penis and that is how she would start to have a climax. (R50:17).
4. She was not seeing Saunders for any type of sexual issue, and she told Saunders that she was not currently sexually active. (R50:18).
5. Saunders told her that most women her age should be having an orgasm every day, and that not having an orgasm would be like someone not having a bowel movement or urinating. (R50:18).
6. At that point in the examination, she was thinking "What the hell is going on?" (R50:19).
7. At Saunders' direction, they then moved to a different examination room. While in that room, Saunders told her that he wanted to check to see if she had a loss of feeling or sensation in her vagina/clitoris. She and Saunders were the only people in the room. (R50:21-22).
8. In the second examination room, Saunders told her that he wanted to test why she was not able to climax. She had not discussed with him any type of sexual dysfunction. (R52:8).

9. In both examination rooms, Saunders, in one room with his fingers on the outside and inside of her vagina and in the other room with the ultrasound probe inside of her, told her that she should be climaxing. (R52:10).
10. Saunders then put on object on her clitoris (identified later in the trial as a nerve distractor), and she started to feel vibrations. Saunders did not show nor explain to her what the object was. As a result of what Saunders was doing, she was wondering what was going on and she was shaking. She was shaking because she was nervous and did not know what was going on. She told him she was uncomfortable. (R52:12-14).
11. Saunders told her that he was checking to see if she had a loss of sensation in her vagina. (R52:14-15).
12. Saunders was moving the object (the nerve distractor) on her clitoris for about five minutes and he was asking her if she was being pleased, if it felt good. Saunders was telling her that she should be having an orgasm. He told her that women he has done this to would have had at least two orgasms. While this was happening, she was thinking “[W]hen is he going to stop? Why is he doing this?” (R52:18-19).
13. The touching stopped when she threw her body up from the stirrups and sat up. (R52:19).
14. She did not schedule another appointment with Saunders because she knew something was wrong. After she left his office, she called her mom to tell her what had happened. When she left, she felt violated. (R52:23-24).

15. When she met with Saunders on September 19, she had not discussed with him any issue regarding sexual intercourse. (R52:30-31).

Count 3 of the criminal complaint charged Saunders with committing the crime of fourth degree sexual assault against Alyssa Scott. Count 4 of the criminal complaint charged Saunders with disorderly conduct based upon his examination of Alyssa Scott. Saunders was convicted of committing both of those crimes. An examination of the record to find facts that support the jury's decision to convict on those two counts shows the following facts that support that decision:

1. In November of 2010, Alyssa Scott had an ectopic pregnancy and Saunders performed surgery to remove that pregnancy. The day after the surgery she was told that she needed to see him for post-surgery check-up, and that check-up was scheduled for November 30. (R54:83-88).
2. At the follow-up examination, and while alone with Saunders, she was on the examination table and her feet were in the stirrups, Saunders began "fondling [her] breasts" He was touching her breasts and nipples in a way she had not experienced with other medical professionals. Saunders was rubbing her nipples. He was rolling them through his index finger and thumb. When he did that, she gasped, thinking "[W]hat was that?" In spite of her reaction, she thought that maybe this was part of the examination. (R54:90-94).
3. Prior to touching her breasts, he had moved both of his hands up the sides of her body (one hand on each side), and he then put his hands under her breasts so that he was cupping, from the bottom, each of her breasts. He then rolled her nipples through his index finger and thumb. Although she did not say anything, she gasped, because it was weird. (R56:5-8).

4. Saunders then began an internal examination. She felt him feeling inside of her vaginal cavity and he then removed his hand, and put his hands on the inside of her thighs, near her vaginal area. He then rubbed his thumb over her clitoris. (R56:10-11).
5. She described the touching of her clitoris as not being an accident—"it was firm." "It wasn't a brush. It was a firm touch." When she felt him rub her clitoris, her reaction was "[W]hat just happened?" "What is going on." (R56:12).
6. When he rubbed her clitoris, she scooted back and was thinking "I got to get out of here." She knew she had to get out of there "[b]ecause it was uncomfortable, and I was alone, and I felt like something is – something's not right." (R56:13).
7. Saunders then said to her "I'm sure you want to know when you can have sex again. Right away, huh?" She had not asked him any questions about resuming sexual activity. (R56:14).
8. After leaving Saunders' office, and over the next couple of days and weeks, she told everybody "[b]ecause I just felt so conflicted about it, and I just felt, you know, like did that really happen? Like is this—It's such a hard feeling, and, you know, it's a serious thing." (R56:18).

Count 5 of the criminal complaint charged Saunders with committing the crime of fourth degree sexual assault against Diane Coolidge. Count 6 of the criminal complaint charged Saunders with disorderly conduct based upon his examination of Diane Coolidge. Saunders was convicted of committing both of those crimes. An examination of the record to find facts that support the jury's decision to convict on those two counts shows the following facts that support that decision:

1. In 2010 Diane Coolidge saw Saunders because of vaginal dryness and he prescribed a cream for her. In 2011, she saw him for a follow-up appointment. She told him that the cream was working but she still had some issues with lack of sensitivity. (R51:82-86).
2. At the appointment in February of 2011, the examination began with a breast exam. During the exam, she was alone with Saunders. At the end of the breast exam, Saunders pinched/twisted her nipples. He did so in a way she had never experienced before in a breast exam. (R51:90-92).
3. After examining her breasts, Saunders began a pelvic examination. He began by stroking the inside of her vagina. He then began to stroke her labia. She described the stroking as a slow motion, unlike previous exams. "It was a stroking motion. It was – it felt purposeful as if it was intended to stimulate something." (R51:93).
4. Saunders then began to stroke her clitoris, something that had never happened during an examination. Although she had never had her clitoris stroked during an OBGYN exam, she thought that maybe she should expect this because she was seeing Saunders for a different reason. As he was stroking her clitoris, he was asking her if she was feeling pleasure. Saunders was rubbing her clitoris in a circular rubbing motion. As he was doing so, he was asking her if she was feeling pleasure. (R51:94-95).
5. She began to wonder "whether or not he was touching himself at the same time that he was rubbing my clitoris" "[b]ecause of the way he was talking. It was more of the way I would expect my husband to talk to me when we would be in an intimate situation." (51:96).

6. She counted how long the touching was happening because she started to feel uncomfortable. By her estimate, the touching of her vaginal area and clitoris last for one and one-half minutes. During that time, Saunders was touching and rubbing her and he was asking her if she was experiencing any pleasure. Saunders then asked her how long it would take for her to become aroused, and she said half of an hour. He then began to slowly rub her clitoris and he asked her how long it would take for her to reach a climax. She felt as though Saunders was trying to make her reach a climax. (R51:96-97).
7. Saunders then began to demonstrate where she needed to apply the testosterone ointment. She described him rubbing her clitoris. She said that he kept “rubbing it, and rubbing it, and rubbing it.” He then began to rub her labia, telling her not to apply it there, and he then returned to rubbing her clitoris. He was doing this even though she had not asked him to show her how to apply the ointment. She was thinking that she needed to get out of his office. (R51:98-99)
8. She felt as though Saunders was trying to stimulate her during the examination. She was shocked. “[A]s the exam went on, it was becoming more and more of a sexual experience and I was becoming a little bit—I was intimidated. I was a little afraid. I’m in his environment.” (R51:100).
9. When she left Saunders’ officer, she was flustered, embarrassed, and feeling shameful. She said that she “knew for a fact that I left there and something just did not feel right.” (R51:104).

Count 7 of the criminal complaint charged Saunders with committing the crime of fourth degree sexual assault against Roksana Skrzeca. Count 8 of the criminal complaint charged Saunders with disorderly conduct based upon his examination of Roksana Skrzeca. Saunders was convicted of committing both of those crimes. An examination of the record to find facts that support the jury's decision to convict on those two counts shows the following facts that support that decision:

1. Roksana Skrzeca made an appointment with Saunders for the purpose of a pap smear. She had not seen Saunders before and she was seeing him because of a change in her insurance. (R53:6-11).
2. Once in the examination room with Saunders, only she and Saunders were in the room, he began to ask her if she had a boyfriend and he asked her if she had trouble in bed with him. She did not know what to say in response to those inquiries, and Saunders then said: "I can show you ways that what he could do to you so you can orgasm." (R53:13-14).
3. When she met with Saunders, she did not think that she expressed to him any concerns regarding her sexuality. (R51:9).
4. Saunders asked her if she had any troubles having sex, and she responded "I don't know." She testified that she did not want to talk about it. He told her he could show her things her boyfriend could do so she could orgasm. He was, at that time, doing motions on her vagina and asking her how it felt. As a result of Saunders' actions, she was in "complete shock." She testified that she did not know what to do. (R51:11-12).
5. Saunders was touching her vagina, labia, and "just every part down—every part." He was asking how does it feel. He kept asking her that question, along with asking her if it felt

good. She testified that she did not know what to say, and that she was in complete shock. She said that she did not know if what he was doing was normal, “but at the same time I knew it didn’t feel right. It made me feel very uncomfortable. I felt taking – taken advantage of. I was so embarrassed I didn’t even – I didn’t even tell my mom. I couldn’t even talk about it until a couple weeks after it happened. I was ashamed more of what had happened than – it was embarrassing.” (R51:13-14).

6. She did not see Saunders for any tips, advice, or help regarding her sexuality. She did not mention to him any type of sexual dysfunction. (R51:14).
7. Saunders also performed a breast examination, but she said it was unlike any prior breast exam. He mentioned her nipples and told her that she might have trouble breast feeding. He started rubbing her nipples and doing things that were “obviously inappropriate.” He was rubbing her nipples in a circular motion, and he was rubbing right on the nipple. She felt disgusted and knew it was wrong. (R51:15-18).

In addition to the testimony of the four women, the State presented the testimony of Dr. Fredrik Broekhuizen, an obstetrician gynecologist. (R55). Dr. Broekhuizen testified that it is important to explain to patients what you, the examining doctor, is going to do. (R55:34). During his testimony, Dr. Broekhuizen was asked to assume four different factual scenarios. Each of those factual scenarios mirrored the reason(s) each of the victims saw Saunders. (R55:35-43). After asking Dr. Broekhuizen to assume those factual scenarios, he was asked whether there was a reasonable medical explanation for the defendant’s conduct, as described by each of the victims. Dr. Broekhuizen testified that with respect to each of the described factual scenarios, there is no reasonable medical explanation of the actions—the touching and the statements—of Saunders. (R55:35-43).



The evidence described above support the jury's decision to convict on all eight counts. The role of a reviewing court is not to substitute its opinion for that of the trier of fact, but rather to "examine the record to find facts that support upholding the jury's decision to convict." State v. Hayes, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203.

Although there was no direct evidence regarding Saunders' intent, direct evidence is not required. As the jury was instructed, "[i]ntent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent." (R59:58). The above-described facts provide sufficient support to uphold the jury's decision to find that Saunders acted with a prohibited purpose and, accordingly, to convict.

Likewise, sufficient evidence was presented to show that the actions of Saunders did cause a disturbance. There is no requirement that the disturbance involve more than one person. As a result of Saunders' actions, each of the victims described their reaction, and their described reactions do describe a disturbance.

**II. The trial court properly denied Saunders' motion for a new trial on the ground that the charges should have been severed because the trial court did not abuse its discretion in denying the pretrial motion for severance.**

On May 3, 2012, the trial court issued an oral decision denying Saunders' motion for severance. (R47:4-12). A review of the circuit court's decision denying Saunders' pretrial severance motion leads to the conclusion that the circuit court did not erroneously exercise its discretion.

The circuit court began its analysis at the proper starting point: Wis. Stat. § 971.12(1). (R47:5). The circuit court then noted "the operative case ... State v. Hamm, 146 Wis. 2d 130 1980 court of appeals case." (R47:6). The circuit court concluded that the charges issued against Saunders are "the same type of offense. The allegations are very similar in each of those with respect to each of those victims." (R47:6-7). The

circuit court then considered the requirement that the charges have happened over a “relatively short period of time.” The circuit court concluded that the charged crimes did happen over a relatively short period of time. (R47:7-8). Finally, The circuit court then found that the evidence did overlap in that the allegations involved “similar behavior and similar settings”. (R47:8). The circuit court properly concluded that the charges were properly joined under § 971.12(1).

The circuit court then analyzed the proper second step: “whether or not there is prejudice that is so great that it is – so great that it is certainly beyond any probative value that there would be.” (R47:8) The circuit court referred to appropriate considerations with respect to severance, and appropriately recognized that “[o]ne of the biggest factors in looking at the prejudice is whether or not the evidence would be admissible in each of the trials if they were, in fact, separate.” (R47:8-9) The circuit court then undertook an analysis of the evidence pursuant to the holding in State v. Sullivan, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). (R47:9-11). The court concluded, based upon that analysis, that evidence regarding each of the victim’s would be admissible as other act evidence if the charges were severed. (R47:11) Having reached that conclusion, the circuit court ruled that Saunders had not met his burden to show the necessary degree of prejudice “that would require the severance.” (R47:11).

In denying Saunders’ severance motion, the circuit court did consider the facts of record under the proper legal standard and did reason its way to a rational conclusion. By doing so, the circuit court properly exercised its discretion. See Sullivan, 216 Wis. 2d at 780-81, 576 N.W.2d at 36 (“An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.”)

## **CONCLUSION**

For the reasons stated herein, the State requests that this court deny Saunders' motion to dismiss based upon insufficient evidence and affirm the circuit court's order denying the motion for severance.

Dated this \_\_\_\_\_ day of September, 2013.

Respectfully submitted,

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## **CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 4,221.

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Date

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**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19 (12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

\_\_\_\_\_  
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