COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1570-CR **Cir. Ct. No. 2008CF332**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. TISLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This case involves two acts of the legislature, 2005 Wis. Act 430 and 2005 Wis. Act 437, both of which amended WIS. STAT. §§ 948.02 and 948.025 (2003-04) and were enacted on the same day in 2006. Robert J. Tisland appeals a judgment of conviction, following a jury trial,

of one count of repeated sexual assault of a child, in violation of §§ 948.02(1)(b) and 948.025(1)(a) (2005-06)[1] and a circuit court order denying his postconviction motion for relief. He seeks dismissal of the charge.

¶2 Tisland contends that he was charged and convicted under the Act 430 versions of WIS. STAT. §§ 948.02(1)(b) and 948.025(1)(a), which he asserts were not in effect during the applicable time period.[2] Rather, Tisland argues that the Act 437 versions of §§ 948.02 and 948.025 were in effect. Tisland takes the position that because he was charged with violating statutes that were not in effect, he was charged with an offense unknown to law, thereby depriving the court of subject matter jurisdiction. In the alternative, Tisland argues that if the court had subject matter jurisdiction, it lacked competency to proceed with the case. For the reasons that follow, we conclude that reference to the Act 430 amendments in the charging documents was a technical charging error, and that Tisland has not shown that he was prejudiced by the error. Consequently, because Tisland was charged with a crime known to law, we conclude that the court had subject matter jurisdiction and competency to proceed with this prosecution. We affirm.

BACKGROUND

¶3 The State charged Tisland with one count of repeated sexual assault of the same child, citing WIS. STAT. §§ 948.02(1)(b) and 948.025(1)(a), as affected by Act 430. The complaint alleged that Tisland committed "repeated sexual

[1] Act 437 renumbered WIS. STAT. § 948.025(1)(a) to § 948.025(1)(ar). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] The State appears to concede in its response brief that Tisland was charged under WIS. STAT. § 948.02 and 948.025, as affected by Act 430.

assaults involving the same child," born "03/11/1997," between December 30, 2006, and March 7, 2007. The complaint stated that the offense was "a Class B Felony, and upon conviction [Tisland] may be sentenced to a term of imprisonment not to exceed sixty (60) years." The complaint also stated that, pursuant to WIS. STAT. § 939.616(1), upon conviction, Tisland was subject to a term of confinement of at least twenty-five years. The child victim was nine-years-old at the time of the assaults.

¶4 The case proceeded to trial. After a two-day trial, the jury returned a guilty verdict.

¶5 Tisland filed a motion for postconviction relief asking that the judgment of conviction be vacated and the case dismissed or, in the alternative, that the court grant him a new sentencing hearing. In the motion, Tisland asserted that he was charged under the Act 430 version of WIS. STAT. §§ 948.02 and 948.025, which he argues was not in effect during the time period alleged in the complaint and information. Tisland maintained that, because Act 430 was not in effect, he was convicted under an offense unknown to law and the court lacked subject matter jurisdiction to try and convict him. In support, Tisland argued that Acts 430 and 437 were mutually inconsistent, and because of the inconsistencies, the earlier Act, Act 430, was superseded by the later enacted Act 437. Tisland relied on the rule that "the last act governs." *See* WIS. STAT. Preface, v, 6. (2009-2010). Accordingly, Tisland argued, the Act 437 amendments to §§ 948.02 and 948.025 controlled, and therefore, the judgment was void. In the motion, Tisland also argued that he was entitled to a new sentencing hearing because his sentence was based on the Act 430 version of §§ 948.02(1)(b) and 948.025(1)(a), which carried a mandatory minimum of twenty-five years, which Act 437 did not contain.

¶6 The circuit court rejected Tisland's argument that he was charged and convicted of a crime that did not exist on the ground that Acts 430 and 437 were not inconsistent, and denied Tisland's motion to vacate and dismiss the charge. However, with respect to Act 430's mandatory minimum penalty provision, the court found the two acts were inconsistent and granted Tisland's motion for resentencing. Applying the Act 437 penalty provision, the court resentenced Tisland to thirty-five years of confinement and twenty years of extended supervision. Tisland appeals the judgment and the order denying his postconviction motion.

DISCUSSION

¶7 Tisland presents two arguments in support of his contention that his conviction was invalid. First, the circuit court lacked subject matter jurisdiction because he was charged and convicted under WIS. STAT. §§ 948.02 and 948.025 as amended by Act 430, which he asserts were not in effect during the applicable time period and therefore he was charged with an offense unknown to law. Rather, Tisland contends that §§ 948.02 and 948.025 as amended by Act 437 were in effect. Tisland's underlying argument is Act 430 and Act 437 are inconsistent and therefore, because Act 437 was enacted last, although each act amended the same child sexual assault statutes on the same day, Act 437 impliedly repealed the statutes as amended by Act 430. Tisland's second argument is closely related to the first. Tisland's contends that even if the court had subject matter jurisdiction, the court was not competent to proceed with the prosecution because there was a failure to comply with a statutory mandate necessary to acquire jurisdiction. According to Tisland, that mandate was to charge him with an existing crime.

¶8 The State presents two arguments in response. First, the State argues that the acts are not inconsistent and therefore Act 437 did not supersede Act 430. Second, the State contends that even if Act 437 superseded Act 430, Tisland's prosecution and conviction were valid because references to WIS. STAT. §§ 948.02(1)(b) and 948.025(1)(a) as amended by Act 430 were technical charging errors that did not prejudice Tisland. We agree.

¶9 Assuming without deciding that meaningful inconsistencies exist between the two acts, and assuming without deciding that Tisland should have been prosecuted under WIS. STAT. §§ 948.02(1)(b) and 948.025(1)(ar) as amended by Act 437, we conclude that the errors were nothing more than harmless technical charging errors and that Tisland has failed to show that he was prejudiced. Accordingly, it follows that Tisland was charged with a crime known to law, thereby giving the court subject matter jurisdiction and competency to proceed with the case. We base our conclusions on the following reasons.

¶10 First, Tisland was plainly charged with the sexual assault of a child under a then existing statutory scheme, WIS. STAT. §§ 948.02 and 948.025. Act 437 did not even arguably repeal these statutes. At most it made amendments to them that, with the sentencing exception we discuss below, had no effect on Tisland. In this regard, as we will explain, Tisland's reliance on ***State v. Christensen***, 110 Wis. 2d 538, 329 N.W.2d 382 (1983), is misplaced.

¶11 Tisland argues that, like the defendant in ***Christensen***, Tisland was charged with a crime that had been effectively repealed. In ***Christensen***, the defendant was charged under WIS. STAT. § 940.29 with a particular type of inmate abuse, abuse of an inmate in an institution defined in WIS. STAT. § 146.32(2), as provided for in § 940.29(9). ***Christensen***, 110 Wis. 2d at 539-40. Thus, under

§ 940.29(9), the victim had to be in an institution defined in § 146.32(2). However, prior to the defendant's alleged abusive activity, § 146.32(2) had been repealed. ***Id.*** at 539. The question, then, was whether the legislature had effectively repealed § 940.29(9) by repealing the statute that gave it meaning. The ***Christensen*** court concluded that the legislature had, by repealing § 146.32(2), implicitly repealed § 940.29(9). ***Id.*** at 546.

¶12 It is readily apparent that ***Christensen*** addresses a different situation. In ***Christensen***, the repeal of WIS. STAT. § 146.32(2) wholly removed the basis for charging a person under WIS. STAT. § 940.29(9), which read in its entirety: "A residential care institution under s. 146.32(2)." § 940.29(9). The situation here is far different. Act 437 made changes, but there is no doubt that both WIS. STAT. §§ 948.02 and 948.025 survived. And, as we explain below, the changes to these statutes had no effect on Tisland that has not already been remedied by the circuit court.

¶13 The elements of the statutes under WIS. STAT. §§ 948.02 and 948.025 as amended by Act 430 and as amended by Act 437 are essentially the same, and to the extent that they differ, the differences are immaterial under the facts of this case. *See* ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1026-27, 480 N.W.2d 842 (Ct. App. 1992) (citation to a successor statute in the charging documents was a technical charging error). Here, under both acts, the State was required to prove that Tisland had sexual intercourse with the victim more than three times, that the victim was under the age of twelve, and that at least three sexual assaults took place during a specified time period. *See* 2005 Wis. Acts 430, 437; *see also* WIS JI—CRIMINAL 2107. The two pertinent differences between the two acts are that (1) Act 437 includes the additional elements that the defendant did not cause bodily harm to the victim, and (2) under Act 437 the victim must be

less than thirteen years of age, rather than less than twelve years of age as specified in Act 430. However, these are differences that had no effect on Tisland. Under both acts, Tisland was not burdened with having to defend against the allegation that he caused bodily harm to the victim and it is undisputed that the victim in this case was nine-years-old at the time of the offenses, thus rendering the age limit a nonissue.

¶14 Although not similar in all respects to the circumstances of this case, we fail to perceive a meaningful difference between the charging error that we assume, without deciding, occurred here and the charging error in ***Wachsmuth***. In ***Wachsmuth***, the State charged the defendant with a violation of WIS. STAT. § 948.02(1), the successor statute to WIS. STAT. § 940.225. ***Wachsmuth***, 166 Wis. 2d at 1026. At the time of the alleged offense and charging, § 948.02(1) had not yet taken effect. ***Id.*** at 1026. Thus, Wachsmuth was charged with a statute not in effect at the time the alleged incident occurred. We concluded that the error was a technical charging error that "was clearly harmless to Wachsmuth" because the charged nonexistent statute had the same elements as the correct statute. ***Id.*** at 1027.

¶15 Here, similar to ***Wachsmuth***, the Act 430 amendments to WIS. STAT. §§ 948.02 and 948.025 were, we assume for purposes of this decision, not in effect during the applicable time period. In addition, it appears that the charging error arose both in ***Wachsmuth*** and in this case out of the prosecutor's failure to correctly cite in the charging document the statute in effect during the applicable time period. And, finally, as in ***Wachsmuth***, the charged crime and the "correct" crime were substantively the same—the difference did not cause prejudice. We perceive no meaningful difference between charging that erroneously identifies a

nonexistent statute (***Wachsmuth***) and charging that erroneously references elements with differences that do not matter to the defendant (Tisland).

¶16 As for Tisland's contentions that the circuit court did not have subject matter jurisdiction and competency to proceed with this case, these contentions rest on his allegation that he was charged with a crime unknown to law. *See* ***State v. Bush***, 2005 WI 103, ¶18, 283 Wis. 2d 90, 699 N.W.2d 80 (a court is without jurisdiction where a complaint states a crime unknown to law); ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶9, 273 Wis. 2d 76, 681 N.W.2d 190 (a court's competence refers to the court's ability to adjudicate the particular case before it). Tisland's contention that the court lacked competency rests on the same allegation, that he was charged with a crime unknown to law. However, as explained in ¶10 above, Tisland was plainly charged with the sexual assault of a child under a then existing statutory scheme, WIS. STAT. §§ 948.02(1)(b) and 948.025(1)(a) and Act 437 did not even arguably repeal these statutes. That makes the situation before us very different than the cases Tisland relies on, such as ***Christensen***, where the crime charged was not in existence during the relevant time period. It follows that the court had subject matter jurisdiction and competency to proceed.

¶17 Turning to the State's contention that Tisland has not shown that he was prejudiced by the charging error, under WIS. STAT. § 971.26, "[n]o indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not tend to the prejudice of the defendant." *See* ***Wachsmuth***, 166 Wis. 2d at 1027; ***Craig v. State***, 55 Wis. 2d 489, 493, 198 N.W.2d 609 (1972) ("[T]he failure to correctly cite the specific statutory subsection in the information and subsequently issued certificate of conviction is a

technical defect governed by [identically worded predecessor of § 971.26].”). Tisland does not claim, let alone argue, that he was prejudiced by the charging error, nor could he. Tisland was put on notice about the charges against him and was given ample information to mount an adequate defense. He does not argue that he was misled by the information or that he did not understand the nature and cause of the accusations brought against him. *See* ***Wachsmuth***, 166 Wis. 2d at 1026; ***Craig***, 55 Wis. 2d at 493. Tisland does not dispute that the narrative section of the complaint, the testimony at trial, and the arguments of counsel, all described or related to an alleged violation of the applicable subsections of WIS. STAT. §§ 948.02 and 948.025, under both acts. Tisland does not argue that the allegations in the complaint were insufficient to support the charge of repeated sexual assault of the same child, or that the evidence at trial was insufficient to support his conviction under the statutes as amended by Act 437. Finally, Tisland provides no reason for us to believe that his defense strategy would have changed had the complaint or information referred to the Act 437 amendments or that the State gained some unfair advantage by proceeding under the Act 430 amendments.

¶18 Although the State discusses ***Wachsmuth*** at length, Tisland offers no argument as to why we should ignore the similarities between ***Wachsmuth*** and this case, or this court’s holding in ***Wachsmuth*** that the error was a technical charging error made by the State and that the error was harmless. ***Wachsmuth***, 166 Wis. 2d at 1027.

¶19 At minimum, Tisland provides this court with no reason to believe that any aspect of the prosecution of this case and its outcome would have changed had the Act 437 amendments been cited in the criminal complaint and information. In the absence of any showing of prejudice, Tisland cannot demonstrate he was harmed by the technical charging error.

¶20 We do note there is one difference in the acts which, as the circuit court concluded, could not be "overcome." As we indicated, the Act 430 amendments to WIS. STAT. §§ 948.02 and 948.025 carried a twenty-five mandatory minimum period of confinement. *See* WIS. STAT. § 939.616(1).[3] In contrast, under the Act 437 amendments to §§ 948.02 and 948.025, a violation did not carry with it a mandatory minimum period of confinement. However, as we noted, the circuit court resolved this inconsistency when it granted Tisland's motion for resentencing and resentenced Tisland under the penalty provisions of Act 437. The court's grant of Tisland's motion for a new sentence removed the only inconsistency between the two acts that had the potential to prejudice Tisland.

¶21 For the foregoing reasons, we conclude that Tisland was properly charged and convicted of repeated sexual assault of the same child, in violation of WIS. STAT. §§ 948.02 and 948.025. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[3] WISCONSIN STAT. § 939.616 provided: "(1) If a person is convicted of a violation of s. 948.02(1)(b) or (c) or 948.025(1)(a), the court shall impose a bifurcated sentence under 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years…."