COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP997-CR **Cir. Ct. No. 2011CF97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTRE K. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and STEPHANIE G. ROTHSTEIN, Judges. *Affirmed*.

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Dontre K. Johnson appeals from a judgment of conviction, entered upon a jury's verdicts, on two counts of repeated sexual assault of a child. Johnson also appeals from that part of an order denying his

postconviction motion to vacate and dismiss those counts.[1] The circuit court rejected Johnson's argument that the delay in charging and the broad period of time charged for each offense was inadequate to allow Johnson to prepare a defense. We affirm.

BACKGROUND

¶2 A criminal complaint was filed against Johnson on January 7, 2011. Count 1 alleged repeated sexual assault of a child relative to victim T.J. for a period from August 7, 2000, through August 6, 2006. Count 2 alleged first-degree sexual assault of a child under age thirteen relative to victim D.J., occurring between June 7, 2008, and June 6, 2009. Counts 3 and 4 alleged Johnson had exposed his genitals to D.J. The information filed in January 2011 repeated those counts, but an amended information filed in March 2011, changed the first-degree sexual assault charge to another count of repeated sexual assault of a child, for a period between June 7, 2008, and January 1, 2011.

¶3 One of the exposing counts was dismissed by the State during trial. The jury returned guilty verdicts on the remaining three counts. The circuit court imposed sentences of thirteen years' initial confinement and seven years' extended supervision on each of the repeated sexual assault convictions and nine months' imprisonment on the exposing conviction, all to be served consecutively.

¶4 Johnson filed a postconviction motion, seeking primarily to vacate the two sexual assault convictions. He alleged that "[t]he delay in charging and

[1] The Honorable Rebecca F. Dallet presided over trial, entered judgment on the jury's verdicts, and imposed sentence. The Honorable Stephanie G. Rothstein entered the order on the postconviction motion.

broad periods of time in which Counts 1 and 2 are alleged to have occurred deprive [him] of his right to adequate notice so as to be able to prepare a defense[.]" Johnson further alleged ineffective assistance of trial counsel for failure to make appropriate objections to the purported inadequate notice, and that the inadequate notice was plain error. Alternatively, if the circuit court declined to vacate the sexual assault convictions, Johnson asked that the court vacate the remaining exposure conviction, arguing that the conviction was contrary to WIS. STAT. § 948.025(3) (2013-14).[2]

¶5 The circuit court denied the motion to vacate the repeated sexual assault charges, explaining that neither the time periods alleged nor the charging delay hampered a defense. However, the circuit court agreed that the exposing genitals conviction had to be vacated. Accordingly, the circuit court denied the motion in part and granted it in part. Johnson appeals. Additional facts will be discussed herein as necessary.

DISCUSSION

I. The ***Holesome*** Test.

¶6 A criminal defendant has a due process right to notice of the nature and the cause of the accusation against him. *See* ***Holesome v. State***, 40 Wis. 2d

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WISCONSIN STAT. § 948.025 is the statute under which repeated sexual assault of the same child is charged. Section 948.025(3) provides, in part, "The state may not charge in the same action a defendant with a violation of this section and with a violation involving the same child under … [WIS. STAT. §] 948.10 [which prohibits exposing one's genitals], unless the other violation occurred outside of the time period" charged under § 948.025(1). In this case, the alleged exposure occurred within the same time period.

95, 102, 161 N.W.2d 283 (1968); ***State v. Kempainen***, 2014 WI App 53, ¶8, 354 Wis. 2d 177, 848 N.W.2d 320, *affirmed*, 2015 WI 32. Two factors are considered in determining the sufficiency of the charge: "whether the accusation is such that the defendant [can] determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense." *See* ***Holesome***, 40 Wis. 2d at 102. The sufficiency of the pleading is a question of law we review *de novo*. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

¶7 ***Holesome*** "arguably states nothing more than the constitutional right to notice and the constitutional protection against double jeopardy in different terms." ***Fawcett***, 145 Wis. 2d at 251. Thus, to determine whether the ***Holesome*** standard is satisfied, ***Fawcett*** adopted seven factors we may consider.

> These factors include: (1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the crime and the defendant's arrest; (6) the duration between the date of the indictment and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Id., 145 Wis. 2d at 253.

¶8 On appeal, Johnson reiterates his claim that "[t]he delay in charging and broad periods of time in which Counts 1 and 2 are alleged to have occurred deprived [him] of his right to adequate notice so as to be able to prepare a

defense[.]"[3] He further renews his claims that trial counsel was ineffective for never challenging the adequacy of the notice and that, in any event, the inadequate notice was plain error warranting reversal whether or not trial counsel objected.

A. The notice prong.

¶9 Count 1 of the complaint and information alleged that Johnson assaulted T.J. at least three times between August 7, 2000, and August 6, 2006. This charge was not filed until January 2011. In reviewing the ***Fawcett*** factors, though, we conclude that Johnson had sufficient notice such that he could enter a plea to the charge and prepare a defense.

¶10 T.J. was between six and twelve years of age when she was assaulted, based on the dates in the complaint, although the actual time period might not have been so long: the factual recitation in the complaint indicates that T.J. reported that Johnson started abusing her when she was in the first grade and stopped when she was in the fourth grade. T.J. was Johnson's *de facto* stepdaughter—he was in a relationship with T.J.'s mother, with whom he fathered three younger children, including the other victim in this case, D.J. For a considerable period, Johnson assaulted T.J. while living in the same home with her, often assaulting her in bedrooms, and he told her not to tell anyone about the assaults.

[3] The State suggests that Johnson may not have direct review of his due process/notice claim because it was not properly preserved by trial counsel. To the extent that this is a forfeiture argument, *see* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612, we note that we may disregard possible forfeiture and consider the issue on the merits anyhow, s*ee* ***Rice Lake Harley Davidson v. LIRC***, 2014 WI App 104, ¶20 n.5, 357 Wis. 2d 621, 855 N.W.2d 882.

¶11 Though T.J. may not have been able to "particularize the date and time" by a calendar or clock, she recalled specific assaults relative to other events, like assaults that occurred while her mother was in jail for a short period of time. Further, although repeated sexual assault of a child is itself a single offense, at least three violations of other sexual assault statutes must have been committed for repeated sexual assault to be charged. *See* WIS. STAT. § 948.025(1). The complaint alleged that Johnson assaulted T.J. at least ten times that she could recall.[4] Five of those instances are detailed in the complaint.

¶12 Count 2, as charged in the amended information, alleged that Johnson assaulted D.J. at least three times between June 7, 2008, and January 1, 2011.[5] D.J. was between ten and twelve years of age when she was assaulted, and D.J. is Johnson's biological daughter. D.J. said she was usually abused when she went to her grandmother's house after her mother and Johnson broke up: her mother would drop her off and Johnson would pick her up and take her to his home across the street. In D.J.'s case, the charged period ended on January 1, 2011, just days before the complaint was filed on January 7, 2011, which means very little time had passed since the alleged period of the crime's commission.

¶13 For both charges, the nature of the offense is also highly relevant. "Child molestation often encompasses a period of time and a pattern of conduct." *See* ***Fawcett***, 145 Wis. 2d at 254. It "is not an offense which lends itself to

[4] At trial, T.J. testified that there might have been as many as twenty instances of Johnson touching her vagina with his hand or putting his fingers in her vagina, and more than three instances when he touched her vagina with his mouth or tongue.

[5] At trial, the time period for count two was expanded on the State's motion to encompass June 7, 2007, through January 1, 2011. There is no argument to suggest that this particular amendment was erroneous.

immediate discovery." ***Id.*** Indeed, WIS. STAT. § 948.025, which prohibits repeated sexual assault of the same child, was enacted to facilitate prosecution of offenders "in cases where a child is the victim of a pattern of sexual abuse and assault but is unable to provide the specifics of an individual event of sexual assault." *See* ***State v. Nommensen***, 2007 WI App 224, ¶15, 305 Wis. 2d 695, 741 N.W.2d 481. Cases involving a child victim require "a more flexible application of notice requirements[.]" ***Fawcett***, 145 Wis. 2d at 254. Based on the foregoing, we conclude that Johnson had sufficient notice of the charge against him, including the underlying facts and timeframe. *See* ***id.*** at 253.

¶14 Indeed, we are unpersuaded that the broadness of the time period deprived Johnson of sufficient notice and left him unable to prepare an adequate defense. It is unlikely that Johnson would have had an alibi or identification defense. *See* ***California v. Jones***, 792 P.2d 643, 657 (Cal. 1990) ("[O]nly infrequently can an alibi or identity defense be raised in resident child molester cases. Usually, the trial centers on a basic credibility issue."). As the circuit court explained, Johnson "presented a vigorous defense predicated upon a theory that the victims' mother … made up the allegations." Defense counsel highlighted inconsistencies in the victims' and their mother's prior statements, encouraging the jury to weigh the lack of specificity against them. *See* ***Fawcett***, 145 Wis. 2d at 254 ("The vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than the legality of the prosecution in the first instance."). Johnson does not tell us what other defense he might have raised if only the complaint had been more specific.

¶15 We also do not consider ***State v. R.A.R.***, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1998), or ***State v. Miller***, 2002 WI App 197, 257 Wis. 2d 124, 650 N.W.2d 850, to be determinative in this case. In ***R.A.R.***, the defendant

was alleged to have committed four sexual assaults: two "'during the spring of 1982,'" one "'during the summer of 1982,'" and one "'during the summer of 1983.'" *See* ***id.***, 148 Wis. 2d at 409. The defendant was charged on August 18, 1987. *See* ***id.*** This court concluded that the four counts were not sufficiently definite: the complaint did not state the ability of the victim to specify dates or times of the offenses and more than five years had passed since the earliest period of offenses and the defendant's arrest and filing of charges. ***Id.*** at 412-13. In ***Miller***, the defendant was charged in 1998 for assaults between 1989 and 1993. *See* ***id.***, 257 Wis. 2d 124, ¶5. This court concluded that, nevertheless, Miller had been adequately apprised of the charges against him. *See* ***id.***, ¶37.

¶16 While Johnson asserts that his case is more like ***R.A.R.*** and, thus, we should hold the notice was inadequate, neither ***R.A.R.*** nor ***Miller*** is overwhelmingly persuasive relative to Johnson's case. The seven ***Fawcett*** factors are fact-intensive inquiries, necessarily dependent on details unique to each case, but this court in ***R.A.R.*** determined it should not consider the first three ***Fawcett*** factors. *See* ***R.A.R.***, 148 Wis. 2d at 411. However, courts may consider *all* of the ***Fawcett*** factors in attempting to determine whether the ***Holesome*** test is met. *See* ***Kempainen***, 2015 WI 32, ¶¶26-29 (overruling ***R.A.R.***). In ***Miller***, the defendant was a therapist who assaulted his victim during regular appointment times. Thus, despite the extended timeframe alleged in the complaint, Miller's opportunities to commit a crime were easily ascertainable by reference to his own treatment records and notes about the victim. *See* ***id.***, 257 Wis. 2d 124, ¶35. When aggregated, the appointment times totaled a span of about three days. *See* ***id.***, ¶32.

¶17 This simply brings us back to our earlier conclusion. When we consider the factors in ***Fawcett*** relative to this case, we conclude that Johnson had

adequate, ample notice of the charges against him to allow him to construct a defense.

B. Double jeopardy prong.

¶18 The second prong of the test set out in ***Holesome*** is whether the charging language somehow violated a defendant's double jeopardy protections. *See* ***Fawcett***, 145 Wis. 2d at 255. This is somewhat speculative, *see* ***id.***, and, in any event, Johnson does not develop an argument on this prong of the test. Moreover, we do not perceive double jeopardy to be a serious threat here; any potential violation can be addressed, in the event of a future charge covering the same time periods as the current charges, at the time of the future prosecution, when the State will have to "endure a rigid double jeopardy analysis." *See* ***id.***

II. Plain Error and Ineffective Assistance of Trial Counsel.

¶19 Having concluded that there is no ***Holesome*** notice violation, we necessarily reject Johnson's plain-error and ineffective-assistance arguments. There is no error warranting reversal, and an attorney is not ineffective for failing to raise a meritless objection. *See* ***State v. Maloney***, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.