COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2477-CR **Cir. Ct. No. 2011CF6149**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ABRAHAM RODRIGUEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Kessler, Brennan and Bradley, JJ.

¶1 PER CURIAM. Abraham Rodriguez appeals from a judgment of conviction and from an order denying his postconviction motion. He raises arguments regarding his charges, sufficiency of the evidence, and his belief he should be resentenced. We affirm.

BACKGROUND

¶2 On December 27, 2011, the State charged Rodriguez with one count of attempted first-degree sexual assault of a child under sixteen by an act of intercourse with use or threat of force or violence and one count of first-degree sexual assault of a child under sixteen by an act of intercourse with use or threat of force or violence. Victim N.G.R., who was thirteen years old at the time of the complaint, alleged that sometime during late July or August 2011, Rodriguez, her uncle, took her into a room and touched her vagina over her clothes. He made her suck on his penis by pushing her head down. He also attempted to have penis-to-vagina intercourse with her, but she kept pulling up her pants. The complaint further recited N.G.R.'s report that the first time something ever happened, she was eight or nine years old, and Rodriguez took her into a closet during a game of hide-and-seek, pulled her pants down, and had penis-to-vagina intercourse with her. An arrest warrant was issued; Rodriguez was arrested in December 2012.

¶3 An information filed in January 2013 repeated the two charges from the complaint; those charges were for the 2011 events. On April 30, 2013, the State moved to amend the information and add three counts: two counts of first-degree sexual assault of a child (counts three and five) and one count of child enticement (count four), for the events that happened when N.G.R. was eight or nine. The motion noted that Rodriguez "was notified of the State's intention to file" the additional charges in an offer letter from January 18, 2013. The trial court granted the motion after a hearing. The amended information was filed on May 6, 2013, just before trial began that day. A jury convicted Rodriguez on all five charges.

¶4 The trial court imposed five concurrent sentences. The longest sentence, twenty-five years' initial confinement and ten years' extended supervision, was imposed on count two, the first-degree sexual assault, and is the mandatory minimum sentence for that offense. Rodriguez filed a postconviction motion, making the same arguments he makes on appeal. The trial court denied the motion without a hearing.

DISCUSSION

I. Amending the Information

¶5 Rodriguez first contends the trial court should not have granted the State's motion to amend the information. He asserts that allowing the State to amend the information "moments before the jury trial was about to begin" denied him due process, and he makes four different attacks on the amendment.

A. The Statute of Limitations

¶6 Rodriguez first argues that the trial court lacked subject matter jurisdiction to try him on the three additional charges because they were "filed in violation of the Statute of Limitations." However, Rodriguez's analysis in this regard is wholly incorrect.

¶7 Count three of the information charged Rodriguez with a violation of WIS. STAT. § 948.02(1) (2003-04)[1] for having sexual intercourse with a child

[1] WISCONSIN STAT. § 948.02(1) was amended twice in May 2006. *See* 2005 Wis. Act 430, §§ 3-4 & 2005 Wis. Act 437, §§ 1-2. Both amendments took place and became effective after the events with which Rodriguez is charged, so we refer to the earlier 2003-04 version of the statute for the text that was in effect at the time of Rodriguez's offenses.

under the age of the thirteen. Count four charged Rodriguez with child enticement, contrary to WIS. STAT. § 948.07(1) (2005-06). Count five charged another violation of WIS. STAT. § 948.02(1) (2003-04). Counts three and four allegedly occurred between April 14 and August 30, 2006. Count five allegedly occurred earlier, between April 14, 2005, and April 13, 2006.

¶8 In general, prosecution of a felony must begin within six years of the felony's commission. *See* WIS. STAT. § 939.74(1) (2003-04), (2005-06), & (2011-12). This generality is subject to certain specified exceptions. In 2003-04, the statute of limitations for violations of WIS. STAT. § 948.02 and WIS. STAT. § 948.07(1) required prosecution for such offenses to begin "before the victim reaches the age of 45 years[.]" *See* WIS. STAT. § 939.74(2)(c) (2003-04). By 2011-12, the statute of limitations for violations of § 948.02(1) permitted prosecution for that offense to "be commenced at any time." The statute of limitations for violations of § 948.07(1), however, remained unchanged, and still required charges to be brought before the victim reaches age forty-five. *See* WIS. STAT. §§ 939.74(2)(a)1. & (2)(c) (2011-12).

¶9 The change to the statute of limitations for violations of WIS. STAT. § 948.02 occurred with 2005 Wis. Act 248, which took effect on April 20, 2006. Section 1 of that act moved violations of 948.02(1) (first-degree sexual assault) into the group of felonies for which prosecution may begin at any time, and WIS. STAT. § 939.74(2)(c) was amended to add violations of § 948.02(2) (second-degree sexual assault) to the group of offenses covered by the forty-five-year-old-victim limitation.

¶10 Rodriguez notes the April 20, 2006 effective date of 2005 Wis. Act 248 and argues:

> [i]f the offense [in count three and four] had occurred on April 15, 16, 17, 18 or 19, 2006, the statute allowing prosecution of the offense at any time had not yet taken effect. The state never made a motion to clarify the actual date that the offense had occurred and for that reason, the defendant is entitled to a presumption that it was alleged to have occurred before the Statute of Limitations had been changed. Further, the offenses alleged in Count 5 was alleged to have occurred "between approximately April 14, 2005 and April 13, 2006" and, therefore, was alleged to have occurred completely before the Statute of Limitations had been changed.
>
> Since the newly adopted Statute of Limitations allowing for prosecution of sexual assault in the first degree to be commenced at any time had not yet become effective when the acts alleged in Counts 3, 4 or 5 were alleged to have occurred, the Statute of Limitations that existed before that statute had taken effect applied to those three Counts. That statute was the general statute, § 939.741(1), that provides that the prosecution of those three Counts had to commence within six years after the commission of the offenses.

It is unfathomable why, in light of the plain text of WIS. STAT. § 939.74(2)(c) (2003-04),[2] Rodriguez believes the general six-year statute of limitations is, or ever was, applicable. Even if the "at any time" limit that began on April 20, 2006, for charging first-degree sexual assault does not apply, "the Statute of Limitations that existed before that statute had taken effect" permits prosecution of all three additional offenses until the victim reaches age forty-five, something that will not happen here until 2042.

[2] As with WIS. STAT. § 948.02(1), we refer to the 2003-04 version of the statute of limitations for the pre-amendment text that was in effect at the time of Rodriguez's offenses. WISCONSIN STAT. § 939.74(2)(c) (2003-04) provided: "A prosecution for violation of s. 948.02, 948.025, 948.03 (2)(a), 948.05, 948.06, 948.07(1), (2), (3), or (4), 948.075, 948.08, or 948.095 shall be commenced before the victim reaches the age of 45 years or be barred, except as provided in sub. (2d)(c)."

B. Timeliness

¶11 Rodriguez next asserts that allowing the amendment to the information on the day of trial is impermissible. He claims it violated his "constitutional right to notice and profoundly prejudiced his right to a fair trial."

¶12 An information may be amended at any time before the arraignment without the court's approval. *See* WIS. STAT. § 971.29(1) (2013-14).[3] After arraignment but before trial, the information may be amended with the court's permission. *See* ***Whitaker v. State***, 83 Wis. 2d 368, 373, 265 N.W.2d 575 (1978). We do not reverse the trial court's decision to allow an amendment to the information unless the trial court erroneously exercised its discretion. *See* ***State v. Neudorff***, 170 Wis. 2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992). An erroneous exercise of discretion exists if a defendant is prejudiced by a permitted amendment. *See* ***id.***

¶13 "The purpose of the information is to inform the defendant of the charges against him. Notice is the key factor." ***Whitaker***, 83 Wis. 2d at 373. "Notice to the defendant of the nature and cause of accusations is a key factor in determining whether an amended charging document has prejudiced a defendant." ***Neudorff***, 170 Wis. 2d at 619.

¶14 The State pointed out that Rodriguez had been advised of the petition for the new charges in January 2013, when it sent its offer letter. The State also noted that the changes were specified in the motion to amend that was

[3] This and all subsequent references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

filed on April 30, six days before trial and the filing of the amended information. The trial court, in permitting the amendment, found that Rodriguez had notice: there was related testimony at the preliminary hearing, there was related material in discovery, and Rodriguez "has been on notice since January that this was going to be the trial posture for trial should there not be a resolution."

¶15 Rodriguez's only response to the adequate-notice finding is an argument, made without citation to authority, that "notice of the specific charges that the defendant must prepare to defend against does not take place until the actual Information or Amended Information had been filed." He additionally contends that ***Neudorff*** held "it is a fundamental denial of due process to file an Amended Information on the very morning the jury trial is about to begin."

¶16 We do not consider arguments unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Further, ***Neudorff*** at best held that it was a violation of Neudorff's due process rights when the amended information was filed on the morning of trial. *See* ***id.*** at 619-21. It does not establish a blanket rule for presuming prejudice or finding a due process violation. *See* ***State v. Derango***, 2000 WI 89, ¶49, 236 Wis. 2d 721, 613 N.W.2d 833.

¶17 We discern no error in the trial court's conclusion that Rodriguez had adequate notice of the coming charges. All necessary information, including discovery material, to prepare or begin to prepare a defense to those charges appears to have been provided. Indeed, some facts were even alleged in the original criminal complaint. Rodriguez demonstrates no prejudice from the lateness of the formal amendment to the information.

C. Good Cause

¶18 Rodriguez asserts that the State "failed to provide good cause for the Amendment" to the information. He contends that "the prosecutor may not bring charges 'of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense'" and that it is a denial of due process "to amend an Information to add totally new charges to those originally charged in the Information for the sole purpose of coercing a defendant to waive his right to a jury trial in regard to the charges in the original Information."

¶19 First, we note that Rodriguez cites no legal authority to show that "good cause" is the applicable legal standard for permitting an amendment to the information. However, it is indeed "a violation of due process when the State retaliates against a person 'for exercising a protected statutory or constitutional right.'" ***State v. Cameron***, 2012 WI App 93, ¶10, 344 Wis. 2d 101, 820 N.W.2d 433. Thus, a presumption of vindictiveness applies when a court imposes a greater sentence after a successful appeal, or when a prosecutor increases the charges after a defendant secures a new trial. *See* ***id.***, ¶¶21-22. But a similar presumption does not apply to a pre-trial filing of increased charges. *See* ***id.***, ¶¶24-32; *see also* ***Bordenkircher v. Hayes***, 434 U.S. 357, 358-59 (1978).

¶20 "'[J]ust as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.'" ***Cameron***, 344 Wis. 2d 101, ¶13 (citation omitted; brackets in ***Cameron***). Thus, Rodriguez "must show actual vindictiveness motivated by some constitutionally impermissible consideration by the prosecutor." ***Id.***, ¶14. To show actual vindictiveness, "'there must be

objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights.'" ***Id.*** (citation omitted). Rodriguez makes no such showing.[4]

D. Juvenile Court Jurisdiction

¶21 Rodriguez's last challenge to the amended information is his claim that the trial court should not have granted the amendment "because the Defendant had only been 13-14 years old at the time of the alleged incidents [in counts three through five] and was, therefore, a juvenile." He thus believes the trial court in this case, as it was not the juvenile court, lacked jurisdiction.

¶22 "In general, exclusive jurisdiction is vested in the juvenile court over any juvenile alleged to be delinquent for violating a state law." ***State v. Bergwin***, 2010 WI App 137, ¶10, 329 Wis. 2d 737, 793 N.W.2d 72; WIS. STAT. § 938.12(1). "For prosecution purposes, a 'juvenile' is any person under the age of seventeen *at the time the criminal complaint is filed*." ***Bergwin***, 329 Wis. 2d 737, ¶10 (emphasis added); WIS. STAT. § 938.02(10m). "'[J]urisdiction in a criminal court cannot be maintained on a charge brought after the child becomes eighteen, unless it is affirmatively shown that the delay was not for the purpose of manipulating the

[4] Rodriguez also asserts, again without citation to authority, that the State "is required to charge the defendant with the offenses for which it has evidence at the time the original Information has been filed." He claims that the need to have the court approve amendments to the information after the arraignment "constitutes a check on the power of the state to file new charges after arraignment when it has no good cause."

To the extent that this argument challenges the charges on which the State may not have expressly presented evidence during the preliminary hearing, it is well-established that once a defendant is bound over, the State may issue additional charges "'so long as they are not wholly unrelated to the transactions or facts considered or testified to at the preliminary [hearing].'" *See* ***State v. Williams***, 198 Wis. 2d 516, 528, 544 N.W.2d 406 (1996) (citation omitted).

system to avoid juvenile court jurisdiction.'" ***Bergwin***, 329 Wis. 2d 737, ¶11 (citation omitted).

¶23 The State pointed out that it had no knowledge of N.G.R.'s allegations until she spoke to police in November 2011, when Rodriguez was nineteen years old. Clearly, the State can have no manipulative intent to avoid juvenile court jurisdiction when it is unaware that the juvenile has committed any crimes.

¶24 Rodriguez does not dispute the State's assertion in that regard. Instead, he argues that "there was a different type of manipulative intent on the part of the state.… [T]he state had chosen not to charge the defendant [in the complaint] with crimes that the victim had already told them had occurred…. It then manipulated the charging of the defendant for those crimes by waiting until the very day of the jury trial to see whether he would accept the plea bargain offer." However, this argument is addressed in the previous section; whether the State added charges after a plea bargain was rejected has nothing to do with juvenile versus adult court jurisdiction in this case.[5] The trial court made no error in allowing the amendment to the information.

II. Sufficiency of the Evidence

¶25 Count two of the complaint alleged Rodriguez committed first-degree sexual assault of a child when he used force to make N.G.R. perform

[5] Rodriguez also argues that charging him as an adult "many years after the crimes had allegedly occurred when he had only been 13-14 years old was just as unfair as manipulating the system to assure he would turn 18 before he was charged." The State's ability to charge an adult "many years after the crimes" that were committed as a juvenile is not governed by what the defendant perceives to be fair.

fellatio on him. He claims "there was no evidence that he had actually used force or threatened the use of force in order for her to perform that act. The only thing he had done, she said, was to push her head back and forth, pulling her hair[.]"

¶26 The standard of review for the sufficiency of the evidence is well-known and we need not repeat it here. *See, e.g.*, ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Rodriguez's argument is premised on a belief that "[i]t was obvious that the legislature had much more in mind when it included the element of the use of force" and that force must be akin to choking, shoving, tearing clothes, or breaking bones. *See* ***State v. Hayes***, 2004 WI 80, ¶31, 273 Wis. 2d 1, 681 N.W.2d 203.

¶27 There is no threshold level of intensity required for a showing of force. The force element is satisfied if the force "is directed to compelling the victim's submission." *See* ***id.***, ¶59; ***State v. Bonds***, 165 Wis. 2d 27, 32, 477 N.W.2d 265 (1991). N.G.R.'s testimony established that Rodriguez was using his hand to hold her against his body, pulling her in as she tried to push away, and that he pulled her to a sitting position. She testified that Rodriguez "told me to suck his penis and I told him that I didn't want to, and then that's when he pulled my head, and I did it." She also testified that he was pulling her hair, which hurt, and which made her mouth "end up touching his penis" even though she kept trying to move away from him. In other words, Rodriguez's pulling on N.G.R.'s head and hair compelled her submission to his desired sex act. This is sufficient to

constitute force.[6] *See, e.g.*, ***State v. Long***, 2009 WI 36, ¶25, 317 Wis. 2d 92, 765 N.W.2d 557 ("forceful" and "very tight" hug constituted force).

III. Illegal Sentence

¶28 Count one originally charged Rodriguez with attempted first-degree sexual assault by use or threat of force or violence. Rodriguez does not explain why or when, but the charge was amended during trial to attempted second-degree sexual assault because there was inadequate testimony from N.G.R. about force during the attempted event. Second-degree sexual assault is punishable by forty years' imprisonment, so the maximum penalty for the attempted offense is twenty years' imprisonment, broken down as twelve and one-half years' initial confinement and seven and one-half years' extended supervision. *See* WIS. STAT. §§ 948.02(2), 939.50(3)(c), 939.32(1g)(b)1., 939.32(1m)(a)1. & (1m)(b), & 973.01(2)(b)3. & (2)(d)2. (all 2011-12).

¶29 The trial court imposed a sentence of twelve and one-half years' initial confinement and eight years' extended supervision for count one. The Department of Corrections noticed the overage and wrote to the court for clarification. The trial court responded by commuting the extended supervision term to seven and one-half years.[7] Rodriguez believes he is entitled to a resentencing hearing at which his presence is required.

[6] We therefore need not address whether threats to tell N.G.R.'s father, who supposedly beat *her* when he found out about Rodriguez's prior assaults, constituted a threat of force or violence.

[7] The order commuting the sentence was entered by the Honorable Stephanie G. Rothstein.

¶30 WISCONSIN STAT. § 973.13 provides that, "[i]n any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." However, the State "concedes" that the statute does not apply because it believes that in ***State v. Volk***, 2002 WI App 274, ¶¶46-49, 258 Wis. 2d 584, 654 N.W.2d 24, "this court held that § 973.13 does not authorize the commutation of the extended supervision portion of an excessive bifurcated sentenced and that a resentencing is required."

¶31 We question this interpretation of ***Volk***. In that case, the sentencing court had applied a penalty enhancer to both the initial confinement and extended supervision portions of Volk's sentence. *See* ***id.***, ¶¶2, 28-29. We concluded this was error, as the penalty enhancer statute clearly only permits enhancement of the maximum term of confinement. *See* ***id.***, ¶¶35-36. We also concluded that WIS. STAT. § 973.13 did not apply to Volk because "a crucial component" of his sentence had been overturned, requiring "the sentencing court to revisit the entire question." *See* ***id.***, ¶¶47-48.

¶32 Regardless, any error in imposing the sentence, or in commuting it instead of ordering a resentencing hearing, is harmless. *See* ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500 (error is harmless if it does not affect defendant's substantial rights). Rodriguez received concurrent sentences for all five counts. The controlling sentence of twenty-five years' initial confinement and ten years' extended supervision was imposed on count two and is not challenged on appeal. We therefore conclude that resentencing is not required. *See* ***id.***, ¶12 (resentencing not required if overall sentence structure remains intact).

IV. Cruel and Unusual Punishment

¶33 Rodriguez argues that the mandatory minimum sentence of twenty-five years' initial confinement and ten years' extended supervision, *see* WIS. STAT. § 939.616(1r), is cruel and unusual punishment, disproportionate to his offense because: first-degree sexual assault of a child "only constituted one crime and not repeated crimes," physical force was not used, N.G.R. was not physically harmed, and there was no "violation of the victim's own person."

¶34 Rodriguez's argument is preposterous. This was not his first assault on his niece; he used physical force—by pulling her body and head, and by pulling her hair and causing her pain—to make her perform fellatio on him; and forced penis-to-mouth fellatio is a "violation of the victim's own person" every bit as much as forced penis-to-vagina intercourse.

¶35 If a sentence is within the statutory limits, we will not interfere unless the sentence is clearly cruel and unusual. *See* ***State v. Ninham***, 2011 WI 33, ¶85, 333 Wis. 2d 335, 797 N.W.2d 451. "A sentence is clearly cruel and unusual only if the sentence is 'so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Id.***, ¶85 (citations and one set of quotation marks omitted). The maximum possible sentence Rodriguez could have received was sixty years' imprisonment. The thirty-five year sentence is therefore neither unduly harsh, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, nor shockingly

unconscionable,[8] *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

V. The Right to Appeal

¶36 WISCONSIN STAT. § 973.18(2) provides that the trial court "shall personally inform the defendant at the time of sentencing of the right to seek postconviction relief and, if indigent, the right to the assistance of the state public defender." Rodriguez's final complaint is that the trial court failed to personally inform him of the right to seek postconviction relief because at the end of sentencing the trial court stated, "All right. Please advise him of his appeal rights." He thus claims entitlement to resentencing.

¶37 In ***State v. Argiz***, 101 Wis. 2d 546, 305 N.W.2d 124 (1981), the trial court told Argiz's attorney, "Now … I think it is understood that these -- the rights of appeal will be discussed with your client and he will be given a copy of his rights of appeal, and I would expect that he sign this before he leaves the courtroom. Is that understood?" *See* ***id.*** at 548. Argiz subsequently commenced his appeal late, and this court declined to take jurisdiction, despite Argiz's argument that the trial court failed to properly tell him of his appeal rights. *See* ***id.*** at 551-53.[9]

¶38 Argiz had, however, been given an appeal instruction form. The supreme court concluded that the signed and filed form, bearing Argiz's and his

[8] We decline to consider Rodriguez's conclusory and unsupported argument that WIS. STAT. § 939.616(1r) is unconstitutional on its face.

[9] At the time, the equivalent of WIS. STAT. § 973.18(2) was codified in WIS. STAT. RULE 809.30(1)(b) (1979-80).

counsel's signatures, plus the trial court's statements that the form contained his appeal rights, satisfied the notice statute. *See* ***id.*** at 558.

¶39 Here, Rodriguez completed the CR-233 form, the "Notice of Right to Pursue Postconviction Relief." He indicated on the form that he planned to pursue postconviction relief. This notice was timely filed by trial counsel, who also timely filed a notice of intent to pursue postconviction relief, the necessary first step in pursuing such relief. *See* WIS. STAT. RULE 809.30(2)(b). Arguably, under ***Argiz***, Rodriguez had adequate notice of his appeal rights.

¶40 In any event, Rodriguez cites no authority for the proposition that his remedy for the trial court's failure to advise him of his appeal rights is resentencing. Instead, "if a trial judge fails to inform a convicted defendant of his appeal rights as required, the defendant will be permitted to pursue a late appeal." ***Argiz***, 101 Wis. 2d at 556. Clearly, Rodriguez has been permitted to have his appeal. He has no need for a remedy.

By the Court.—Judgment and order affirmed.

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