COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0328

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

IN THE INTEREST OF BRIAN E.F.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

V.

BRIAN E.F.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Reversed and cause remanded.*

NETTESHEIM, J. The State of Wisconsin appeals from a juvenile court order dismissing a delinquency petition against Brian E.F. The petition charged Brian with second-degree sexual assault pursuant to § 948.02(2), STATS. The court dismissed the petition on equal protection grounds because the State had not similarly charged the fourteen-year-old female with whom Brian had sexual

intercourse. We reverse the order and remand for further proceedings on the petition.

The facts are undisputed. On November 13, 1998, the State filed a delinquency petition against Brian alleging that he had engaged in sexual contact with Amanda J.[1] At the time of the incident, Brian was fifteen and Amanda was fourteen.

Brian brought a motion to dismiss based on gender discrimination grounds. Specifically, Brian contended that the Winnebago County District Attorney's Office had discriminated against him on the basis of gender because Amanda had not been charged. Brian's motion concluded, "On information and belief, Winnebago County routinely charges males with sexual assault and fails to do the same for females when both parties are under the age of 16."

At the hearing on the motion, Brian called Pat Stockli, a clerk in the office of the Winnebago County Juvenile Court. On direct examination, Brian asked Stockli about the State's charging pattern in sexual assault cases based on court records. Stockli replied, "I don't have any exact numbers to provide the Court with, but it is primarily, I have noticed, that the young males are being charged. I don't recall many young ladies that are charged for that offense also." When asked if there was a large disparity in the numbers between males and females being charged, Stockli answered, "Yes, it leans more towards males."

On cross-examination, Stockli admitted that she did not have precise numbers as to cases involving males and females. She also acknowledged that the

[1] Although the delinquency petition alleged an act of sexual contact against Brian, the reports attached to the petition recited that an act of sexual intercourse took place.

petitions from which she gleaned her information did not include information as to why the male and not the female had been charged.

At the conclusion of the hearing, the juvenile court granted Brian's motion to dismiss. However, the court's ruling was not based on any gender-based discriminatory pattern of charging as alleged by Brian. In fact, the court said that it did not put any weight on Stockli's testimony. Rather, the court's ruling was based only on the uneven charging in this case and on the further fact that Brian was already on supervision. The court said:

> You would like to send the proper message to the juvenile that we're trying to conduct ourselves in a fair and reasonable manner and not leave the parties with the idea that things aren't fair in the judicial process.
>
> He's being singled out, so-to-speak, to respond to this complaint when the other party isn't…. But here we've got [Brian] already on supervision, and I think it's important to demonstrate that we're treating everybody in a reasonable and equitable and fair manner.
>
> … [W]e've got a disparity of some sort, and if the other party isn't being charged there is no real reason to charge [Brian] because he's already on supervision; and I think the best message that we can send at this point to all the parties involved is that we'll treat them equally under the circumstances…. [W]e have to demonstrate some equal protection under the law.

The State appeals, arguing that the juvenile court encroached upon the discretion vested in the prosecution.

In ***State v. Johnson***, 74 Wis.2d 169, 246 N.W.2d 503 (1976), our supreme court said:

> The district attorney in Wisconsin is a constitutional officer and is endowed with a discretion that approaches the quasi-judicial. It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals,

> it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial….
>
> ….
>
> The prosecuting attorney has wide discretion in the manner in which his duty shall be performed, and such discretion cannot be interfered with by the courts unless he is proceeding, or is about to proceed, without or in excess of jurisdiction. Thus, except as ordained by law, in the performance of official acts he may use his own discretion without obligation to follow the judgment of others who may offer suggestions; and his conclusions in the discharge of his official liabilities and responsibilities are not in any wise subservient to the view of the judge as to the handling of the state's case.

Id. at 173-74, 246 N.W.2d at 506-07 (quoted sources omitted; citation omitted).

At the outset of the hearing on Brian's motion to dismiss, the prosecutor explained why she had chosen not to charge Amanda. The prosecutor reported that she had spoken personally with Amanda, that Amanda was pregnant, that Amanda had the support of her family with respect to the pregnancy, and that Amanda "is a girl that seems to have it very much together." The prosecutor concluded that Amanda was "not the type of person that needs to be on supervision for this type of offense." In contrast, the prosecutor reported that Brian was already on supervision, had been in and out of home placement, and had significantly higher needs than Amanda.

While the juvenile court acknowledged the prosecutor's substantial discretion, the court nonetheless concluded that the State's uneven charging in this case constituted an equal protection violation. The court also concluded that because Brian was already on supervision, any additional supervision resulting from this case would be superfluous.

Although we ultimately reverse the juvenile court's dismissal order, we agree with the juvenile court that Brian failed to establish a pattern of discriminatory charging by the State. When such a pattern is alleged, the defendant must establish that similarly situated persons are generally not prosecuted for the same conduct. *See* ***State v. McCollum***, 159 Wis.2d 184, 197, 464 N.W.2d 44, 49 (Ct. App. 1990). When gender, or any other suspect classification, is the basis for a challenge, the defendant must show that the charging pattern had both a discriminatory effect and that it was motivated by a discriminatory purpose. *See* ***id***. at 196, 464 N.W.2d at 48 (quoting ***Wayte v. United States***, 470 U.S. 598, 608 (1985)).

Stockli's testimony fell woefully short of demonstrating either a discriminatory effect or a discriminatory purpose. Stockli merely established that more males than females were charged in these kinds of situations. She provided no hard numbers in support of her testimony. She acknowledged that the petitions from which she garnered her information did not reveal why the State had charged as it did. She also acknowledged that she was not familiar with any deferred prosecutions in these kinds of cases. In sum, Stockli's testimony was very general and very vague. The court properly discounted her testimony.

Without any evidence that the State's charging of Brian had a discriminatory effect or discriminatory purpose, the only remaining question was whether the prosecutor had misused her discretion in charging Brian and not Amanda under the particular facts of this case. On this issue, Brian failed to provide the court with any evidence in support of his claim. By contrast, the prosecutor provided the juvenile court with the reasons, which we have previously recited, for her charging decision. That explanation reflects a reasoned and proper exercise of prosecutorial discretion, particularly given the substantial deference

which the courts must accord a prosecutor's charging decision. *See* ***Johnson***, 74 Wis.2d at 174, 246 N.W.2d at 506-07. We do not doubt that Brian perceives the State's charging in this case as unfair. But Brian's subjective perception cannot trump the State's proper exercise of discretion in choosing to charge him and not Amanda.[2]

By the Court.—Order reversed and cause remanded.

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

[2] In further support of his argument that the State's charging in this case is gender based, Brian notes that another male with whom Amanda had sexual intercourse in a separate incident was not prosecuted. But this argument runs counter to Brian's contention that the State charges only males in these kinds of situations.

Brian also notes that the other male was not prosecuted because he was already on supervision while Brian, who was also on supervision, was prosecuted. Brian's argument in the juvenile court was limited to a claim of gender-based discrimination, and this alleged discrimination is not gender based. We do not address issues raised for the first time on appeal. *See* ***State v. Holland Plastics Co.,*** 111 Wis.2d 497, 504, 331 N.W.2d 320, 324 (1983). Moreover, Brian's "argument" on this point is limited to three sentences which simply recite the disparate charging. Brian provides no legal argument or citations in support of this claim. The issue is inadequately briefed. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981).