COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2202-CR **Cir. Ct. No. 2010CF901**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD J. DETTLOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Todd Dettloff appeals a judgment, entered upon a jury's verdict, convicting him of repeated first-degree sexual assault of the same child. Dettloff challenges the circuit court's denial of his pre-trial motion to

dismiss the complaint, claiming that a lack of specificity in the charging documents precluded him from preparing a defense. Alternatively, Dettloff claims he is entitled to a new trial in the interest of justice. We reject Dettloff's arguments and affirm the judgment.

BACKGROUND

¶2 In November 2010, the State charged Dettloff with one count of repeated sexual assault of a child. The complaint alleged Dettloff "raped" a child with whom he lived thirty to forty times "between 2004 and 2006," when the child was in fourth through sixth grade, "which would have made him between 9 and 11 years old." Dettloff moved to dismiss the complaint on the ground it was "not sufficiently definite" and, thus, prevented him from preparing an adequate defense. The circuit court denied the motion after a hearing. A jury ultimately found Dettloff guilty of the crime charged, and the court imposed a thirty-five-year sentence, consisting of twenty years' initial confinement and fifteen years' extended supervision. This appeal follows.

DISCUSSION

¶3 Dettloff challenges the sufficiency of the complaint, arguing that the three-year period of time in which the assaults are alleged to have occurred was too expansive to allow him to prepare an adequate defense. Due process includes the right to be informed of the nature and cause of the accusation. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250-51, 426 N.W.2d 91 (Ct. App. 1988). A criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense; however, "where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged." ***Id.*** at 250. Time is not of the essence in sexual assault cases. ***Id.*** Further, child sexual abuse "often

encompasses a period of time and a pattern of conduct." ***Id.*** at 254. Therefore, in a case involving a child victim, a "more flexible application of notice requirements is required and permitted," as "[t]he vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance." ***Id.*** A challenge to the sufficiency of a complaint presents a question of law that we review independently. ***Id.*** at 250.

¶4 In reviewing the sufficiency of a complaint, a court considers two main factors: (1) whether the accusation is such that the defendant can determine whether it states an offense to which he or she is able to plead and prepare a defense; and (2) whether conviction or acquittal is a bar to another prosecution for the same offense. ***Holesome v. State***, 40 Wis. 2d 95, 161 N.W.2d 283 (1968). When evaluating the notice prong of the ***Holesome*** test, there are seven factors that may be considered:

> (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.

Fawcett, 145 Wis. 2d at 253.

¶5 Dettloff concedes that the first three ***Fawcett*** factors, which apply when a more specific date could have been obtained through diligent efforts, do not support his challenge to the sufficiency of the complaint. Turning to the next

factor—the alleged period of time in relation to the number of individual criminal acts alleged—Dettloff argues that the complaint recited only one occasion "without sufficient facts related to 'when' to support the complaint." Dettloff further contends that although the victim stated the assaults occurred more than once, the complaint lacked "specifics as to 'when' in the 2004 to 2006 time period" the assaults occurred. The complaint, however, alleged thirty to forty sexual assaults by Dettloff over the subject time span. Given the large number of alleged assaults, the length of the alleged time period was not unreasonable in relation to the number of criminal acts alleged.

¶6 With respect to the factor addressing the victim's ability to particularize the date and time of the alleged transaction or offense, Dettloff contends that the complaint alleged only one incident with "any type of specificity," yet "that single recitation lacked any contextual time reference within the 2004-2006 time period." Likewise, with respect to the thirty to forty assaults alleged, Dettloff challenges the victim's inability to put any events into a reasonable time context. Child molestation, however, "often encompasses a period of time and a pattern of conduct." ***Id.*** at 254. Consequently, "a singular event or date is not likely to stand out in the child's mind." ***Id.***

¶7 Here, the complaint described one occasion in which the victim was sleeping on the floor, while his brother slept on a bottom bunk bed. The victim alleged that he awoke, felt Dettloff's penis inside of his anus, and told Dettloff to "knock it off" and to "get off" of him. The victim alleged there were numerous other occasions where he would wake up with Dettloff's penis inserted into his anus. When asked how many times this occurred, the victim estimated between thirty to forty times. Because the numerous assaults were alleged to have occurred

in the same place and manner, it is unreasonable to expect that the victim would be able to specify dates on which the assaults occurred.

¶8 Dettloff nevertheless likens his case to ***State v. R.A.R.***, 148 Wis. 2d 408, 412, 435 N.W.2d 315 (Ct. App. 1988). There, we affirmed the dismissal of a sexual assault complaint that alleged only that the offenses occurred in the "spring" and "summer" some four and five years prior to the time the complaint was filed. ***R.A.R.***, however, is distinguishable on its facts. In that case, the defendant was charged with four discrete incidents of sexual contact with the victims, and the government failed to address the ability of the victims to particularize the dates of the offenses. ***Id.*** at 412.

¶9 Here, the reason for the failure to particularize the dates of the offenses is obvious, given the frequency of the assaults alleged to have occurred in the same place and manner. Moreover, a charge for the repeated sexual assault of a child under WIS. STAT. § 948.025[1] is different in nature from the discrete charges of child sexual assault in ***R.A.R.***'s case. "WISCONSIN STAT. § 948.025 was enacted to address the problem that often arises 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." ***State v. Nommensen***, 2007 WI App 224, ¶15, 305 Wis. 2d 695, 741 N.W.2d 481.

¶10 The final ***Fawcett*** factors address the passage of time between the alleged period of the crime and the defendant's arrest, as well as the duration between the date of the indictment and the alleged offense. The State concedes

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that the four-year delay between the last of the sexual assaults and the initiation of prosecution weighs in Dettloff's favor. As the ***Fawcett*** court recognized, however, "child molestation is not an offense which lends itself to immediate discovery" and "[r]evelation usually depends upon the ultimate willingness of the child to come forward." ***Fawcett***, 145 Wis. 2d at 254. Further, a four-year time interval is not, by itself, enough to render a complaint insufficiently definite. *See* ***R.A.R.***, 148 Wis. 2d at 412. As noted above, the other factors do not lend substantial support to Dettloff's challenge to the sufficiency of the complaint. Therefore, we conclude the complaint provided adequate notice to satisfy the first prong of the ***Holesome*** test.

¶11 Turning to the second prong of the ***Holesome*** test, Dettloff contends that because "the complaint recites a single incident" alleged at some unspecified time, he "faces the real possibility that his double jeopardy rights would be violated should the [victim] raise new allegations." The ***Fawcett*** court, however, rejected a similar argument, noting that it did not deem a double jeopardy violation to be a realistic threat. ***Fawcett***, 145 Wis. 2d at 255. There, as here, the State's brief conceded that any future prosecution for similar acts during that subject time period would be barred by double jeopardy. The ***Fawcett*** court added:

> Courts may tailor double jeopardy protection to reflect the time period charged in an earlier prosecution. Therefore, Fawcett's double jeopardy protection can also be addressed in any future prosecution growing out of this incident. If the State is to enjoy a more flexible due process analysis in a child victim/witness case, it should also endure a rigid double jeopardy analysis if a later prosecution based upon the same transaction during the same time frame is charged.

Id. Because the State acknowledges the double jeopardy bar to future prosecution for similar acts during the same time period, and any attempts at such prosecution

would be subject to a rigid double jeopardy analysis, we conclude the second prong of the ***Holesome*** test is satisfied.

¶12 Claiming there has been a miscarriage of justice, Dettloff alternatively seeks a new trial under WIS. STAT. § 752.35. To establish a miscarriage of justice, Dettloff "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶13 Dettloff contends "justice was miscarried because the complaint did not meet the minimum constitutional sufficiency necessary" to provide him with fair notice. Dettloff renews his claim that the complaint lacked the specificity necessary to prepare his defense. Because we have already rejected this challenge to the complaint, his argument for a new trial on the same ground likewise fails. To the extent Dettloff contends he did not receive a fair trial, this conclusory assertion does not warrant a new trial in the interest of justice.

By the Court.—Judgment affirmed.

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