COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP762-CR **Cir. Ct. No. 2004CF1222**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. WAKEFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Daniel L. Wakefield appeals pro se from a judgment of conviction and an order denying his motion for postconviction relief.[1] He contends that (1) his prosecution was barred by the six-year statute of limitations governing felony offenses, (2) his trial counsel was ineffective, (3) he was entitled to counsel on appeal, (4) he was unlawfully charged with multiple counts of the same crime, and (5) he is entitled to a plea withdrawal due to a manifest injustice. We reject Wakefield's claims and affirm the judgment and order.

¶2 On January 15, 2004, M.P. was sexually assaulted in her home. She reported the assault the same day and described the man who assaulted her as being "between 18 and 22 years old." Ultimately, biological samples taken from M.P.'s bed sheet yielded a DNA profile of her assailant. The profile was entered into the Wisconsin DNA Databank Casework Index and searched against multiple indices. The search did not produce a match at that time.

¶3 On November 8, 2004, the State filed a "John Doe" complaint and warrant for arrest. The complaint identified John Doe by a description of his DNA profile. The State charged him with one count of first-degree sexual assault. It also charged him with one count of armed burglary and one count of armed robbery for his actions of entering M.P.'s home with a knife and taking money from her after the assault.

[1] Although the notice of appeal cites only the judgment of conviction, both parties have proceeded on the belief that Wakefield also appeals from the circuit court order denying his motion for postconviction relief. Accordingly, we construe the notice of appeal to include the order.

¶4 Over five years later, the DNA databank produced a match between John Doe's DNA profile and Daniel Wakefield's. After the match was verified, the State filed an amended complaint on June 1, 2010, naming Wakefield as the defendant. Wakefield was born on September 18, 1988, making him fifteen years old at the time of the original complaint and twenty-one years old when the amended complaint was filed.

¶5 Wakefield waived the preliminary hearing. Afterward, the State filed an information charging him with five counts of first-degree sexual assault, one count of armed burglary, and one count of armed robbery. All of the counts were based on the January 15, 2004 incident.

¶6 Wakefield, by counsel, moved to dismiss the case. The motion maintained that the prosecution was barred by the statute of limitations. It further maintained that because Wakefield was a juvenile when the original complaint was filed, the circuit court lacked jurisdiction to try him as an adult. Relatedly, the motion noted that no hearing had been held pursuant to ***State v. Becker***, 74 Wis. 2d 675, 247 N.W.2d 495 (1976).[2]

¶7 The circuit court held a hearing on Wakefield's motion to dismiss. After considering the arguments of counsel, the court concluded that the prosecution was timely commenced with the filing of the original John Doe

[2] In ***State v. Becker***, 74 Wis. 2d 675, 678, 247 N.W.2d 495 (1976), our supreme court held that before an adult defendant could be tried for an offense committed before he was eighteen years of age where no juvenile proceedings were instituted, the State was required to show at a hearing that the prosecution was not delayed manipulatively so as to avoid the juvenile justice system.

complaint. The court then conducted a ***Becker*** hearing to address Wakefield's remaining arguments.[3]

¶8 At the ***Becker*** hearing, Kenosha County Deputy District Attorney Mike Graveley testified for the State and addressed why the original complaint was filed in adult court rather than juvenile court. Graveley explained that when the case was referred to the district attorney's office, "all of the materials contained within that file … indicated an individual between the ages of 18 and 22 years old…." He further explained that the DNA profile developed in the investigation "did not reveal a particular person's identity." Moreover, Graveley said that he was "not aware of any means in which [the State Crime Laboratory] can test DNA and essentially age the person who provided the DNA." Finally, Graveley noted that the DNA profile developed was not identified as Wakefield's until 2010.

¶9 The circuit court found Graveley's testimony to be credible and concluded that the State's prosecution of Wakefield was not delayed manipulatively so as to avoid the juvenile justice system. Accordingly, the court denied Wakefield's motion to dismiss.

¶10 Wakefield subsequently pled guilty to one count of first-degree sexual assault and one count of armed burglary. The remaining charges against him were dismissed.

[3] In his brief, Wakefield complains that he did not receive a ***Becker*** hearing. The record belies this assertion.

¶11 Following sentencing, Wakefield filed a notice of intent to pursue postconviction relief. Assistant State Public Defender Donna Hintze was appointed to represent him on appeal. Hintze later filed a motion to withdraw as appellate counsel. The motion indicated that Hintze had met with Wakefield and discussed with him his appellate options. Wakefield told Hintze that he wished to represent himself. Hintze advised Wakefield that his decision to represent himself and have her withdraw was final and that her office would not appoint another attorney. After receiving this explanation, Wakefield reiterated his preference for self-representation. The circuit court granted Hintze's motion to withdraw.

¶12 Proceeding pro se, Wakefield filed a postconviction motion in the circuit court. That motion reiterated the arguments made in the earlier motion to dismiss. Additionally, it raised new issues including ineffective assistance of counsel, multiplicity, and plea withdrawal.

¶13 Wakefield then moved this court for the appointment of new counsel to assist him at the hearing on his postconviction motion. In response, we asked the Office of the State Public Defender (SPD) to clarify the status of its representation in the case. After it did so, we indicated that we would not interfere with the SPD's decision regarding the appointment of new counsel. Moreover, because no appeal was pending in our court, we declined to exercise our inherent authority to appoint counsel.

¶14 Ultimately, the circuit court held a hearing on Wakefield's postconviction motion and denied it. This appeal follows.

¶15 On appeal, Wakefield first contends that his prosecution was barred by the six-year statute of limitations governing felony offenses. Accordingly, he maintains that the circuit court lacked personal jurisdiction over him.

¶16 We conclude that Wakefield's first argument is governed by ***State v. Dabney***, 2003 WI App 108, 264 Wis. 2d 843, 663 N.W.2d 366. In ***Dabney***, this court examined whether a John Doe complaint and arrest warrant identifying a defendant solely by a DNA profile were sufficient to commence a criminal prosecution. ***Id.***, ¶9. Specifically, the court considered whether such documents satisfied the requirements of particularity and reasonable certainty. ***Id.***, ¶13. The court held that they did and determined that such documents were "sufficient to confer personal jurisdiction." ***Id.***, ¶¶15, 17, 18. Likewise, the court determined that the John Doe complaint, which was filed before the statute of limitations expired, was timely. ***Id.***, ¶21.

¶17 Applying ***Dabney*** to the facts of this case, we conclude that the criminal complaint and arrest warrant filed on November 8, 2004, which identified Wakefield solely by his DNA profile, were sufficient to confer personal jurisdiction over Wakefield. We further conclude that the timely filed complaint and arrest warrant satisfied the statute of limitations for Wakefield's crimes.

¶18 Wakefield next contends that his trial counsel was ineffective. Specifically, he complains that his trial counsel permitted the State to prosecute him unlawfully after the statute of limitations had expired for his crimes.

¶19 Wakefield's second argument fails for several reasons. To begin, it is insufficiently developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts need not address inadequately developed arguments). Moreover, it fails on the merits because (1) trial counsel moved to dismiss the case on statute of limitations grounds and (2) Wakefield's prosecution was not barred by the statute of limitations for the reasons discussed above.

¶20 Wakefield next contends that he was entitled to counsel on appeal. He submits that he needed counsel to review transcripts and bring all of his issues in this appeal.

¶21 In considering this third argument, we do not dispute that Wakefield was constitutionally entitled to be represented by counsel at public expense in this appeal. *See* ***State v. Thornton***, 2002 WI App 294, ¶13, 259 Wis. 2d 157, 656 N.W.2d 45. However, the record makes clear that Wakefield knowingly, intelligently, and voluntarily waived that right by dismissing Attorney Hintze and electing to represent himself. As a result, we do not discuss this issue further.

¶22 Wakefield next contends that he was unlawfully charged with multiple counts of the same crime. In particular, he objects to the State charging him with five counts of first-degree sexual assault.

¶23 The issue of multiplicity arises when a defendant is charged in more than one count for a single offense. ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. The test to determine whether multiple counts are permissible is first, whether the charges are identical in law and fact, and second, whether the legislature intended to allow more than one unit of prosecution. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). If the offenses are different in law or fact, then there is a presumption that the legislature intended multiple punishments. ***Id.*** at 751. The presumption may be rebutted only by showing clear intent to the contrary. ***Id.***

¶24 Here, Wakefield was accused of five separate acts of forcible sexual intercourse: two acts of fellatio, and three acts of penis-vagina intercourse. The narrative portion of the amended criminal complaint included the following allegations:

> After [M.P.] took off her clothes, the man told [M.P.] to "suck my dick." The man lowered his pants and [M.P.] complied with his demand. After approximately one minute, the man told [M.P.] to lay down. She lay down on her back and the man got on the bed on top of her and proceeded to have penis to vagina intercourse with [M.P.]. [M.P.] stated she was crying and hyperventilating. After a couple of moments, the man got off [M.P.], laid down and made [M.P.] get on top of him and had sexual intercourse again with her. The man then made [M.P.] masturbate him. The man then forced [M.P.] to get on top of him facing away from him and had intercourse with her that way for several minutes. He then made [M.P.] masturbate him again. The defendant then forced [M.P.] to suck on his penis again and told her to "swallow the nut."

¶25 Reviewing these allegations, we are satisfied that the five counts of first-degree sexual assault were not the same in fact. That is because each count was different in nature and required a separate volitional act. *See* ***State v. Eisch***, 96 Wis. 2d 25, 42, 291 N.W.2d 800 (1980) (multiple acts of sexual intercourse that are different in kind may be separately charged although arising out of the same assaultive episode).

¶26 Turning to the second prong of the analysis, we begin with the presumption that the legislature intended for multiple punishments for the different offenses. ***Anderson***, 219 Wis. 2d at 751. Because Wakefield makes no effort to demonstrate that multiple punishments are contrary to legislative intent, we conclude that he has failed to meet his burden of showing that the charges were multiplicitous. Accordingly, we reject his fourth argument.

¶27 Finally, Wakefield contends that he is entitled to a plea withdrawal due to a manifest injustice. According to Wakefield, he should be allowed to withdraw his plea because he "did not know he was pleading to multiplicity counts that needed no additional proof."

¶28 We conclude that Wakefield has not demonstrated that a manifest injustice occurred. We have already shown that the five counts of first degree sexual assault were not multiplicitous. In reaching this determination, we are satisfied that each count required proof of an additional fact not required for proof of the other four, whether it included a different fact about the physical contact involved or a different fact about Wakefield's use of force or threat to gain M.P.'s involuntary compliance with his wishes. As a result, we are not persuaded that Wakefield is entitled to a plea withdrawal.

¶29 For the reasons stated, we affirm the judgment and order.[4]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[4] To the extent we have not addressed an argument raised by Wakefield on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").