COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2095-CR **Cir. Ct. No. 2011CF121**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERNEST D. RIMSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Ernest Rimson appeals a judgment, entered upon a jury's verdict, convicting him of two counts of first-degree sexual assault of a child by sexual intercourse; two counts of first-degree sexual assault of a child by sexual contact; one count of soliciting a child for prostitution; and one count of exposing a child to harmful material, all six counts as a habitual criminal. Rimson

argues the circuit court erred by denying his motion to dismiss the information on the ground of vindictive prosecution. We reject Rimson's arguments and affirm the judgment.

BACKGROUND

¶2 In October 2011, the State filed a complaint charging Rimson with four crimes: (1) first-degree sexual assault of a child, occurring September 27, 2011; (2) first-degree sexual assault of a child, occurring between June 1, 2009, and July 9, 2009; (3) repeated sexual assault of a child, occurring between June 1, 2011, and September 26, 2011; and (4) exposing a child to harmful material, occurring between June 1, 2011, and September 27, 2011. The penalty portions of counts one, two and three alleged exposure to a twenty-five-year mandatory minimum sentence under WIS. STAT. § 939.616(1r), and a maximum sixty-year sentence.

¶3 Rimson subsequently filed a motion to dismiss portions of the complaint, asserting that because counts one and two alleged sexual contact rather than sexual intercourse, the twenty-five-year mandatory minimum sentence did not apply. Rimson further argued that the complaint failed to state probable cause for the repeated sexual assault of a child charge, and the time frames alleged in counts two and three prevented him from preparing an adequate defense. After a hearing on the motion, the prosecutor acknowledged deficiencies in the complaint and indicated that he would file an amended complaint.

¶4 The State then filed an amended complaint charging Rimson with seven crimes: four counts of first-degree sexual assault of a child by sexual intercourse; one count of first-degree sexual assault of a child by sexual contact; soliciting a child for prostitution; and exposing a child to harmful material. All

seven counts in the amended complaint now alleged Rimson's status as a habitual offender. The amended complaint added 185 years to the maximum possible penalty Rimson had faced under the initial complaint.

¶5 After Rimson was bound over for trial, the State filed an information alleging the same seven counts contained in the amended complaint. Rimson filed a motion to dismiss the information based on prosecutorial vindictiveness. After a hearing, the circuit court denied the motion. At trial, one of the first-degree sexual assault counts was dismissed on the prosecutor's motion, and another was amended to allege sexual contact rather than sexual intercourse. Six charges went to the jury and Rimson was found guilty on all counts. The court imposed concurrent sentences totaling forty years, consisting of thirty years of initial confinement and ten years of extended supervision. Rimson appeals, renewing his claim of prosecutorial vindictiveness.

DISCUSSION

¶6 "[T]he United States Supreme Court's prosecutorial vindictiveness decisions 'have all been rooted in a relatively simple proposition: one may not be punished for the exercise of a protected right.'" ***State v. Johnson***, 2000 WI 12, ¶38, 232 Wis. 2d 679, 605 N.W.2d 846 (quoted source and emphasis omitted). To establish a claim of prosecutorial vindictiveness, the defendant "bears the burden of establishing that under the circumstances of his [or her] case a realistic likelihood of vindictiveness exists, giving rise to a presumption of vindictiveness." ***Id.***, ¶33. "Once a presumption of vindictiveness is established, the prosecutor may rebut it with an explanation of the objective circumstances that led the prosecutor to bring the additional charges." ***Id.***, ¶45.

¶7 If we conclude no presumption of vindictiveness applies, we next must determine whether the defendant has established actual prosecutorial vindictiveness. ***Id.***, ¶17. Actual vindictiveness is shown by "'objective evidence that a prosecutor acted in order to punish the defendant for standing on his [or her] legal rights.'" ***Id.***, ¶47 (quoted source omitted). The legal principles surrounding prosecutorial vindictiveness claims present questions of law that we review independently. ***Id.***, ¶18. "However, we review the lower court's finding of fact regarding whether the defendant established actual vindictiveness under the clearly erroneous standard." ***Id.***

¶8 Rimson contends the prosecutor added charges, thereby increasing his penalty exposure, in retaliation for Rimson's successful challenge to the original complaint. Because the only intervening act between the filing of the original and amended complaints was Rimson's challenge to the complaint, he asserts that prosecutorial vindictiveness should be presumed. Citing ***United States v. Goodwin***, 457 U.S. 368 (1982), the State argues that because the complaint was amended pretrial, Rimson should not benefit from the presumption of vindictiveness developed in the post-trial context. Even assuming, without deciding that Rimson was entitled to the presumption of vindictiveness and that the amended complaint was presumptively vindictive, we conclude the presumption was overcome.

¶9 "In reviewing a prosecutorial vindictiveness claim, we are mindful of the fact that a prosecutor has great discretion in charging decisions and is generally answerable for those decisions to the people of the state and not the courts." ***Johnson***, 232 Wis. 2d 679, ¶16. Further, "before trial, the prosecutor must remain free to exercise his or her broad discretion to determine which charges properly reflect society's interests," so long as probable cause supports

any charged offenses. ***Id.***, ¶¶26, 29. At the hearing on Rimson's vindictive prosecution motion, the prosecutor acknowledged his agreement with defense counsel that the original complaint was not well written. The prosecutor explained that after Rimson's motion, he "started from scratch and looked at everything in a more timely and took-my-time-at-it manner." The prosecutor added: "I went through … more thoroughly than we had time at the beginning, and found the right charging documents. Also looked more thoroughly at his record, which he would be a repeat offender."

¶10 The circuit court rejected Rimson's contention that the prosecutor "piled on" in retaliation for Rimson's successful challenge to the original complaint, and the record supports the court's decision. Rimson's motion caused the prosecutor to further review the record, leading to the discovery of Rimson's habitual offender status. As a result of this more thorough review of the record, the prosecutor re-examined his original charging decision and re-determined the appropriate extent of prosecution without any retaliatory motive. The prosecutor reasonably exercised his discretion when adding and amending the charges after a renewed review of the record, thus rebutting any presumption of retaliatory vindictiveness.

¶11 Rimson alternatively claims there is objective evidence of actual vindictiveness by the prosecutor. Rimson emphasizes that at the hearing on his motion to dismiss, the prosecutor stated: "I guess sometimes you got to be careful what you ask for." That statement was made during the course of the prosecutor's explanation for the additional and amended charges. Taken in context, the prosecutor's statement does not demonstrate animus against Rimson for challenging the complaint. Rather, it referred to the opportunity the prosecutor

took in response to Rimson's motion to review and reassess the appropriate extent of prosecution.

¶12 Rimson also points out that during a sentencing hearing in an unrelated case, the prosecutor disclosed that he had been sexually victimized as a child. Rimson, however, concedes "it would be difficult to show vindictive prosecution merely because the prosecutor was a victim." Further, Rimson cites no authority for the proposition that prior victimization of the prosecutor is direct evidence of vindictiveness and, taken to its logical conclusion, no crime victim could ever represent the State in pursuing charges against a defendant accused of the same crime for which the prosecutor was a victim. We reject Rimson's contention as it would lead to unworkable and impractical extremes. See ***State v. Tappa***, 2002 WI App 303, ¶14, 259 Wis. 2d 402, 655 N.W.2d 223 (court will reject an argument that leads to unworkable and impractical extremes). Ultimately, we fail to see any connection between past victimization of this prosecutor and the charging decisions in this case.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).