COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1023-CR **Cir. Ct. No. 2010CF965**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE M. GARCIA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jose M. Garcia appeals from a corrected judgment of conviction for one count of repeated sexual assault of the same child (at least

three violations of first- or second-degree sexual assault), contrary to WIS. STAT. § 948.025(1)(e) (2003-04, 2005-06, 2007-08, 2009-10).[1] Garcia argues that the trial court's decision to grant the State's motion during trial to expand the offense period by two years violated his due process rights concerning fair notice and an opportunity to defend himself. We reject Garcia's arguments and affirm.[2]

BACKGROUND

¶2 In March 2010, Garcia was charged with repeatedly sexually assaulting his girlfriend's daughter over a four-year period, from February 2006-February 2010, when the child was age six through ten. The complaint alleged that on numerous occasions, Garcia entered the bathroom while the child was showering and touched her breasts, vagina, and buttocks. The complaint further alleged that on about five occasions, Garcia grabbed the child's buttocks over her clothes. Finally, the complaint alleged that on one occasion, when the child was eight years old, she was lying on a bed and Garcia "got on top of her and was 'humping' her."

¶3 Garcia waived the preliminary hearing and the case proceeded to trial. The child testified that the abuse began soon after Garcia came to live with her family. The jury also watched a videotaped interview of the child in which she said that Garcia had abused her for "six years." The child's mother testified that

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] At issue on appeal is the trial court's decision to amend the applicable timeframe to February 2004-February 2010. However, the corrected judgment of conviction reflects the original timeframe: February 2006-February 2010. We direct the circuit court to correct this scrivener's error in the corrected judgment of conviction upon remittitur. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

Garcia lived with the family from 2004 through October 2007, and again from October 2009 through February 2010.

¶4 Before the State presented its final witness, as the parties and the trial court discussed the jury instructions during a break in the trial, the State moved to amend the offense period listed in the information to conform to the trial evidence. *See* WIS. STAT. § 971.29(2) ("At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant."). Specifically, the State moved to amend the offense period to January 2004 through October 2007, and October 2009 through February 2010. In response, the trial court suggested that it could simply amend the start of the offense period to 2004. Trial counsel objected to any amendment, stating:

> The preparation for the defense has always been from February 2006 to February 2010, and that's why I went and I investigated the case to try to determine exactly … who was living there within those periods of time that … the allegations were being made against my client.[3]
>
> Right now essentially what they're asking for is to extend the amount of time, so I would object, and I would request to just leave it.

¶5 After hearing additional arguments from the parties, the trial court granted the State's request and amended the offense period to February 2004 through February 2010.[4] The trial court explained:

---

[3] There was trial testimony that the girl's mother, two older children, and one adult child lived at the residence during some of the time that Garcia lived there.

[4] While the State originally suggested the date should be January 2004, the trial court determined that February 2004 was more appropriate in light of the testimony presented.

> The motion … is asking to conform to the evidence … which is that these alleged assaults or incidences occurred during the time frames in which [Garcia] was indeed living in the residence.
>
> And again those dates are consistent with what [the mother testified] -- this isn't an identification type of case; that is, the alleged victim knows and is familiar with Mr. Garcia, so it's not a circumstance where I see this as … a question of who may have committed the assault in the home or her inability to perceive or identify … something occurring in the dark or that type of thing.

The trial court also said it believed that "the defense has had an opportunity to investigate … whether or not there could be other potential assaults." The trial court continued:

> I don't see a distinction or it being material to investigate it from February '06 forward or since January '04 forward. Again, whatever information that would exist would already become apparent….
>
> I do view this … as not a circumstance where the amendment would cause prejudice to the defense or whether it would compromise the defense's ability to investigate and [be] in a position to meaningfully defend against the charge, but rather a circumstance of simply amending the start dates to conform with the evidence that was presented.

¶6 The defense did not offer any witnesses at trial. In closing, trial counsel said that Garcia had not sexually assaulted the child and instead had used "really bad judgment" when he helped her bathe. Trial counsel also implied that the girl's statements should not be believed because the girl "was made to feel the center of attention" when she was interviewed and because the officer "was in charge of that interview."

¶7 The jury found Garcia guilty of repeated sexual assault of the same child. Garcia was sentenced to five years of initial confinement and five years of extended supervision. This appeal follows.[5]

DISCUSSION

¶8 Pursuant to WIS. STAT. § 971.29(2), the trial court may amend the information "to conform to the proof where such amendment is not prejudicial to the defendant." Whether to allow the amendment is subject to the trial court's discretion and, on appeal, we will not reverse the trial court's decision absent an erroneous exercise of discretion. ***State v. Flakes***, 140 Wis. 2d 411, 416-17, 410 N.W.2d 614 (Ct. App. 1987).

¶9 Garcia does not challenge the trial court's discretionary decision to allow the amendment on grounds that there was insufficient evidence to support it. Instead, he appears to challenge whether he was prejudiced by the amendment and specifically asserts that the amendment violated his due process rights by creating an offense period that was "unconstitutionally broad." (Bolding and uppercasing omitted.) "Whether the time period alleged in a complaint and information is sufficient to provide notice to the defendant is a question of constitutional fact that we review *de novo*." *See* ***State v. Kempainen***, 2015 WI 32, ¶16, __ Wis. 2d __, __ N.W.2d __ (italics added). ***Kempainen*** continued:

> In order to satisfy the requirements of the United States and Wisconsin Constitutions, the charges in the complaint and information "must be sufficiently stated to allow the defendant to plead and prepare a defense." When reviewing the sufficiency of the complaint and information,

[5] A no-merit report was filed by the attorney first appointed to represent Garcia on appeal. We rejected the no-merit report and new counsel was appointed.

> we consider two factors: "whether the accusation is such that the defendant [can] determine whether it states an offense to which he [can] plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense."

Id., ¶17 (citations omitted; bracketing in original). The two factors referenced in ***Kempainen*** are known as the two ***Holesome*** factors. *See* ***Holesome v. State***, 40 Wis. 2d 95, 161 N.W.2d 283 (1968). In this case, Garcia concedes that only the first ***Holesome*** factor is at issue: whether Garcia could plead and prepare a defense.

¶10 ***Kempainen*** reiterated that when determining whether a defendant was able to plead and prepare a defense in a child sexual assault case, courts may consider the seven reasonableness factors outlined in ***State v. Fawcett***, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988). *See* ***Kempainen***, 2015 WI 32, ¶24 ("We agree that these are proper factors to apply in cases involving child sexual assaults, in that they provide guidance to courts when applying the ***Holesome*** test and help determine whether a complaint and information are sufficient to satisfy due process."). Those factors are:

> "(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."

Id. (quoting ***Fawcett***, 145 Wis. 2d at 253; formatting added by ***Kempainen***). ***Kempainen*** also overruled case law suggesting that the first three factors need not be applied in every case. *See* ***id.***, ¶28.

¶11 Considering those factors here, we conclude that the information as amended to reflect a six-year time period over which the assaults occurred "provided adequate notice and thus did not violate [Garcia's] due process right to plead and prepare a defense." *See* ***id.***, ¶31.

¶12 We begin with the first three factors. The child testified that she was assaulted during the time Garcia lived with the family, which Garcia does not dispute was 2004-2007 and 2009-2010. The child was age four to age ten during that six-year time period. The child said that Garcia would assault her when her mother was at work and her brothers were in another area of the house or away from the home. We agree with the State that the circumstances of the assaults—which included everything from quick contact with the child's buttocks to touching her while she showered—would not have allowed Garcia to make an alibi or mistaken identity defense. As the State explains: "The general defense available to Garcia was a credibility defense," which is what he chose to present. These three factors weigh in favor of a conclusion that Garcia was given adequate notice of the charges against him.

¶13 The fourth factor, "'[t]he length of the alleged period of time in relation to the number of individual criminal acts alleged,'" *see* ***id.***, ¶24 (citation omitted), also weighs in favor of a conclusion that Garcia had adequate notice despite the two-year extension of the applicable time period. Garcia notes that

increasing the offense period by two years resulted in a fifty percent increase in the time period at issue, and he argues that a six-year time period is longer than time periods permitted in other reported cases. However, creating a six-year offense period does not automatically render a defendant unable to mount a defense. ***Kempainen*** notes that "'where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged,' nor is time 'of the essence in sexual assault cases.'" ***Id.***, ¶34 (quoting ***Fawcett***, 145 Wis. 2d at 250). We are not convinced that adding two years to the offense time period deprived Garcia of notice in this case, where the allegations were that the child was assaulted by Garcia over a period of years during which he lived with the family.

¶14 The fifth and six factors relate to the period of time between the dates of the alleged offense and the date when the defendant was arrested and when the criminal complaint was filed. *See* ***id.***, ¶35. In this case, Garcia was arrested and charged within weeks of the victim's disclosures to the police. Some of the assaults were alleged to have occurred within the last two years, while others were alleged to have occurred earlier. We are to consider how the passage of time impacted Garcia's ability to prepare a defense. *See* ***id.***, ¶¶36-39. Garcia does not assert that the original offense period impacted his ability to defend himself. Instead, Garcia argues that extending the four-year period over which the assaults were alleged to a six-year period hindered his ability to prepare a defense because "the question of exactly when in 2004 Garcia moved in to his girlfriend's residence, cannot be accurately answered." This is not a compelling argument. When Garcia moved into the residence is information within his possession. Further, because Garcia was charged with assaulting the girl over a multi-year

period, it is unclear how knowing the precise date he moved into the residence would affect his ability to prepare a defense.

¶15 Garcia also argues that "the [trial] court's assumption that the defense's investigation of 2006 events would uncover events from 2004, flies in the face of common sense." He explains:

> If the defense had known that the earlier time period was at issue, the timing of events in 2004 would have been investigated. This would have established a more accurate date for when Garcia actually moved in and may have uncovered exculpatory evidence or at least provided for additional attacks on the victim's credibility.

We are not persuaded that the amendment of the offense period hindered Garcia's ability to prepare a defense. Garcia offers no details of what an investigation of the years 2004 and 2005 would have revealed and how his defense would have been different. The fifth and sixth ***Fawcett*** factors weigh in favor of a conclusion that Garcia had adequate notice of the charges against him.

¶16 The final factor is the victim's ability "to particularize the date and time of the alleged transaction or offense." ***Id.***, ¶24. The child in this case was not able to offer specific dates, but was able to provide some details, such as the grade she was in school when some assaults occurred and the fact that the "humping" incident happened when the weather was warm. Garcia argues that he was unable to adequately defend the longer time period because the amendment occurred toward the end of trial, after the child and her mother had already testified. We are not convinced that Garcia was given insufficient notice to prepare his defense. As noted, he has not identified any information that he could have discovered if he had been given more time to investigate those earlier two years. Further, Garcia could have called the mother and the child as witnesses in

the defense case if he had additional questions to ask concerning those earlier years.

¶17 In sum, having considered the ***Fawcett*** factors, we are not convinced that the trial court's decision to amend the offense period to conform to the evidence at trial rendered Garcia unable to plead and prepare a defense.

¶18 To the extent Garcia is making a separate argument that the trial court erroneously exercised its discretion in granting the State's request to amend the offense period, we likewise reject his argument. Garcia has not shown that he was prejudiced by the amendment. The longer time period continued to include the time during which Garcia lived in the child's home. Further, the videotaped interview of the child indicated that the assaults began shortly after Garcia moved in, so Garcia was on notice that the child could testify about events as early as 2004. Garcia has not shown what he would have done differently had he known that the time period of the alleged assaults would be expanded. In short, he has not demonstrated prejudice. The trial court did not erroneously exercise its discretion when it granted the State's motion.

By the Court.—Judgment affirmed.

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