COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1930

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

IN THE INTEREST OF KEITH B.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

KEITH B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

DYKMAN, P.J.[1] Keith B., a fifteen year old, appeals from a finding of delinquency. He was found guilty of one count of sexual assault of his

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

seven-year-old cousin, contrary to § 948.02(1), STATS. The assault occurred on six occasions over a one-year period. Keith argues that: (1) charging one count was so indefinite and inspecific as to deprive him of his due process right to notice; (2) the trial court erred in admitting other acts evidence; and (3) the trial court erred in improperly admitting hearsay evidence under the excited utterance exception. We conclude that: (1) the prosecution did not erroneously exercise its discretion in charging one count for a series of individual offenses; (2) the court properly admitted evidence of events giving rise to one continuing offense; (3) the trial court did not erroneously exercise its discretion in admitting hearsay evidence under the excited utterance exception. Accordingly, we affirm.

FACTS

Keith was entrusted with the care of D.R., a seven-year-old female, on weekend evenings from April 1996 to April 1997. Keith allegedly touched D.R.'s genitalia on six separate occasions while Keith was alone with D.R. in her bedroom. In July 1997, D.R. revealed these allegations to her baby-sitter, Elizabeth K., and later repeated them in response to questions by her mother, Dawn B.

Keith was charged with one count of sexual assault of a child for the period of April 1996 to April 1997, contrary to § 948.02(1), STATS. Keith objected to the introduction of evidence that he committed more than one act of touching D.R.'s genitalia at the fact-finding hearing. He argued that by charging one count for several separate incidents, the State violated his due process right to notice. Keith also argued that such evidence constituted other acts evidence, which should not have been admitted without the court first ruling on it.

The trial court overruled the objection and concluded that it was permissible for the prosecution to charge one continuing offense. It found that Keith touched D.R.'s genitalia on six occasions based upon the testimony of D.R., Elizabeth K. and Dawn B.

DISCUSSION

A. WHETHER THE PROSECUTION ERRONEOUSLY EXERCISED ITS DISCRETION IN CHARGING KEITH WITH ONE CONTINUING OFFENSE

It is within the State's discretion to determine the appropriate charging unit for a particular criminal episode. *See* ***State v. Lomagro***, 113 Wis.2d 582, 589, 335 N.W.2d 583, 588 (1983). A prosecutor's charging decision is a quasi-judicial act, which the prosecutor is entrusted to perform without undue encroachment by the courts. *See* ***State v. Hooper***, 101 Wis.2d 517, 536, 305 N.W.2d 110, 119-20 (1981). We apply a standard of review which, absent an erroneous exercise of discretion, reaffirms the discretionary judgment of the prosecutor. *See* ***id.***; *see also* ***State v. Glenn***, 199 Wis.2d 575, 583-84, 545 N.W.2d 230, 234 (1996) (court reviewed prosecutor's charging decision directly).

In ***Lomagro,*** the court set out principles to determine when several criminal acts can be properly charged as a single continuing offense. *See* ***Lomagro***, 113 Wis.2d at 589, 335 N.W.2d at 588. The court adopted a flexible rule allowing the State to determine the proper charging unit. However, this flexibility was limited to situations where several criminal acts are properly viewed as "one continuous occurrence," and only if doing so would not violate the prohibition against duplicity. ***Id.***

The first question is whether six acts of sexual assault of a seven-year-old child, occurring over a one-year period, may be characterized as one continuous transaction. The court in ***State v. McMahon***, 186 Wis.2d 68, 519 N.W.2d 621 (Ct. App. 1994), addressed an analogous fact situation. The defendant was accused of committing eleven separate acts of sexual assault of a sixteen-year-old child over a six-week period. *See* ***id.*** at 75, 519 N.W.2d at 624. The court considered two factors in determining whether the criminal acts could be characterized as a single, continuous criminal transaction. The first factor was the time span of the acts. The second was whether the acts involved the same parties. ***Id.*** at 82, 519 N.W.2d at 627.

We agree with ***McMahon*** that, in general, there may be some temporal limitations upon the characterization of separate acts, occurring over an extended period of time, as a single continuing offense. However, we conclude that under the circumstances of this case, the prosecution did not erroneously exercise its discretion by characterizing six separate incidents of sexual assault of a child as a single continuing offense.

In ***State v. Molitor***, 210 Wis.2d 415, 565 N.W.2d 248 (Ct. App. 1997), we concluded that charging a continuous offense for the sexual assault of a child is permissible under § 948.025(1), STATS.[2] In ***Molitor***, the defendant was

[2] Section 948.025, STATS., entitled, "Engaging in repeated acts of sexual assault of the same child," states:

> (1) Whoever commits 3 or more violations under s. 948.02(1) or (2) within a specified period of time involving the same child is guilty of a Class B felony.
>
> (2) If an act under sub.(1) is tried to a jury, in order to find the defendant guilty the members of the jury must agree that at least 3 violations occurred within the time period applicable

(continued)

charged with engaging in sexual intercourse with a fifteen-year-old girl "on more than three occasions" between April 1 and May 21, 1995. *See* ***id.*** at 418, 565 N.W.2d at 250. In interpreting § 948.025(1), we held that "the legislature may, like prosecutors, aggregate conceptually similar acts in a single 'course of conduct,' crime albeit for acts committed over an indefinite and presumably longer period of time." ***Id.*** at 421, 565 N.W.2d at 281.

It is true that the prosecutor in this case did not charge Keith under § 948.025(1), STATS. But, we conclude that in enacting § 948.025 the legislature evinced a policy that a series of violations of § 948.02(1), STATS., may properly be viewed as a single continuing offense. Moreover, we note that Keith was accused of a series of offenses involving the same victim, as is required by § 948.025 and approved by the court in ***McMahon***. *See* ***McMahon***, 186 Wis.2d at 82-83, 519 N.W.2d at 627. Therefore, we conclude that the prosecution did not erroneously exercise its discretion in so characterizing the offense.

Next, we consider whether the purposes underlying the prohibition of duplicity were violated by charging a single continuing offense. The court in

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> under sub. (1) but not agree on which acts constitute the requisite number.
>
> (2m) If a person violates sub. (1) and the person is responsible for the welfare of a child who is the victim of the violation, the maximum term of imprisonment may be increased by not more than 5 years.
>
> (3) The state may not charge in the same action a defendant with a violation of this section and with a felony violation involving the same child under ch. 948.07, 948.08, 948.10, 948.11 or 948.12, unless the other violation occurred outside the time period applicable under sub. (1). This subsection does not prohibit a conviction for an included crime under s. 939.66 when the defendant is charged with a violation of this section.

Lomagro stated that the purpose for the prohibition against duplicity, which is the joining of a single count of two or more separate offenses, is as follows:

> (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity.

Lomagro, 113 Wis.2d at 586-87, 335 N.W.2d at 588 (citations omitted). A complaint may be found duplicitous if any of these dangers are present and cannot be cured by instructions to the jury. *See* ***id.*** at 589, 335 N.W.2d at 588.

Keith frames the issue as a challenge to the charging document. Therefore, the last three purposes stated above are not at issue in this case. Nor is the second purpose at issue, because a future court must bar prosecution for similar offenses committed during the period of time charged. *See* ***State v. Chambers***, 173 Wis.2d 237, 253, 496 N.W.2d 191, 197 (Ct. App. 1992). Thus, the only remaining issue is whether the defendant was afforded sufficient notice by the complaint. The sufficiency of a complaint of the sexual assault of a minor is controlled by ***State v. Fawcett***, 145 Wis.2d 244, 426 N.W.2d 91 (Ct. App. 1988).

In ***Fawcett***, the defendant challenged the sufficiency of a complaint alleging that he engaged in two instances of sexual contact with a ten year old over a span of six months. *See* ***id.*** at 247, 426 N.W.2d at 93. The court stated:

> The criminal complaint is a self-contained charge which must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. The sufficiency of a pleading is a question of law

> which we review independently on appeal. Whether a depravation of a constitutional right has occurred is a question of constitutional fact which we also independently review as a question of law.
>
> 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. Time is not of the essence in sexual assault cases, and the pertinent statute, § 940.225(1)(d), STATS., does not require proof of an exact date.

Id. at 250, 426 N.W.2d at 94 (citations omitted).

The court in ***Fawcett*** acknowledged the inherent difficulties of prosecuting sexual assaults of children. *See* ***id.*** at 249, 426 N.W.2d at 94. The court articulated a seven-factor test to determine whether the complaint is such that the defendant may determine if the complaint states an offense to which the defendant is able to plead and prepare a defense. *See* ***id.*** at 251-53, 426 N.W.2d at 94-95.[3] These factors include: (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 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. *See* ***id.***

[3] The second prong of the ***Holesome*** test, whether conviction or acquittal would bar prosecution for the same offense, is assured by the courts holding in ***State v. Chambers***. *See* ***State v. Chambers,*** 173 Wis.2d 237, 253, 496 N.W.2d 191, 197; ***Holesome v. State,*** 40 Wis.2d 95, 102, 161 N.W.2d 283, 287 (1968).

Applying these factors to the present case, we conclude that Keith was provided with constitutionally sufficient notice to plead and prepare a defense. In reaching this conclusion, we are persuaded that the complaint sets forth the facts as specifically as a child of D.R.'s age and normal intelligence could be expected to provide. The complaint alleges that all instances of sexual assault occurred while Keith provided baby-sitting services to D.R. on Friday and Saturday nights from April 1996 to April 1997. Moreover, the complaint set out the specific conduct that Keith was alleged to have committed. We also conclude that the familial relationship between the appellant and the victim is significant in explaining any delay between the time of the alleged incidents and the time of the complaint.

Keith was properly charged with one continuing offense of § 948.02(1) STATS., without violating any of the purposes of the prohibition against duplicity. Keith's second argument that the testimony concerning all of the incidents except the one charged were of other acts, is therefore rendered moot.

B. WHETHER HEARSAY EVIDENCE WAS IMPROPERLY ADMITTED UNDER THE EXCITED UTTERANCE EXCEPTION

The admission of out-of-court statements under the excited utterance exception to the hearsay rule is a determination left to the discretion of the trial court. *See* ***State v. Huntington***, 216 Wis.2d 671, 680, 575 N.W.2d 268, 272 (1998). Because the trial court is better able to weigh the reliability of circumstances surrounding out-of-court statements, we look to see if the trial court exercised its discretion in accordance with accepted legal standards and the facts of the record. *See* ***id.*** If we can discern a reasonable basis for its evidentiary

decision, then the circuit court has not committed an erroneous exercise of discretion. *See* ***id.***

On August 2, 1997, D.R. first revealed the alleged abuse to Elizabeth K., a life-long friend and baby-sitter. The trial court admitted Elizabeth K.'s testimony relating D.R.'s out-of-court statements under the excited utterance exception. Keith contends that the trial court erred because it failed to find that D.R. was under the stress of the sexual assault at the time of the hearsay declaration. Keith also argues that the time period between the end of the time period charged and the time of the declaration, three months, was too long for D.R. to have still been under the stress of the alleged sexual assaults.

The excited utterance exception is based upon the premise that the spontaneity and stress under which the statements was made serves as a sufficient guarantee of the statement's truthfulness. ***Huntington***, 216 Wis.2d at 681, 575 N.W.2d at 273. The excited utterance exception requires that: (1) there is a startling event or condition; (2) the declarant makes an out-of-court statement relating to the startling event or condition; and (3) the declarant is still under the stress of excitement caused by the startling event or condition at the time the statement is made. *See* ***id.*** at 681-82, 575 N.W.2d at 273. Wisconsin appellate courts have liberally construed the excited utterance exception where a child states an allegation of sexual assault, because there is a compelling need for the admission of such statements where the victim and perpetrator are likely to be the only witnesses to the crime. ***Id.***

In ***State v. Gerald L.C.***, 194 Wis.2d 548, 557, 535 N.W.2d 777, 779 (Ct. App. 1995), the court noted three characteristics common to the admission of out-of-court statements under the excited utterance exception concerning

allegations of the sexual assault of a child: (1) that the declarant is less than ten years old; (2) the statement is made to the declarant's mother; and (3) the statement is made less than one week after the last incident of abuse. However, the ***Gerald L.C.*** court acknowledged that there may be facts and circumstances which indicate a sufficient reliability to allow the admission of out-of-court statements but do not conform to these characteristics. *See* ***id.*** at 558-59, 535 N.W.2d at 779. Subsequently, the supreme court in ***Huntington*** declined to utilize these characteristics to create a "bright-line" rule. *See* ***Huntington***, 216 Wis.2d at 684, 575 N.W.2d 274.

In ***Huntington***, the hearsay statements of an eleven-year-old sexual assault victim made to a policeman two weeks after the last incident occurred were admitted under the excited utterance exception. *See* ***id.*** The court stated that the admittance of this evidence was a close call but concluded that there was sufficient evidence in the record to suggest that the child was still under the stress or excitement caused by the event at the time the victim made the statement. ***Id.*** Specifically, the court noted that the declarant was "crying, hysterical, and scared" as she described the incidents of abuse. ***Id.*** The court also concluded that the declarant's prior relation of the allegations to her sister and mother did not defeat the application of the excited utterance exception, because the declarant was still under the stress of the startling event when the statements were made to the police officer. *See* ***id.***

We conclude that D.R.'s statements to a baby-sitter, Elizabeth K., were properly admitted in the discretion of the trial court. Our decision is guided by ***State v. Huntington***, 216 Wis.2d at 680-84, 575 N.W.2d 272-74 (1998).

The trial court concluded that D.R. was still under the stress of the startling event at the time the statement was made. The court received an offer of proof that the declarant was crying and had difficulty relating the events because of her distress. The trial court considered the ***Gerald L.C.*** factors, and observed that a hearsay "statement may still be admissible if the declarant was still under the stress … of the event at the time he or she made the statement," and concluded that the statement was admissible. Because the trial court reasonably applied the law to the facts we may only reverse its decision if it was based upon an erroneous view of the law. Because the trial court focused on the same evidentiary factors as the ***Huntington*** court, we cannot conclude that the trial court's act of discretion was based upon an erroneous view of the law. Accordingly, we affirm.

Finally, Keith argues that the testimony of Dawn B. was improperly admitted under the excited utterance exception. We agree that Dawn B.'s testimony was not admissible on that basis, however, Keith's objection was not made in response to hearsay testimony. Instead appellant objected to the admittance of testimony concerning the number of times which Dawn B. observed redness in D.R.'s vaginal area over the period of time charged. Appellant's objection at that point concerned the admittance of other acts evidence, which we have addressed previously. ***Id.*** Therefore, to the extent that any of Dawn B.'s testimony constituted hearsay evidence, that argument is waived.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.