COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2948-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY TATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Gary Tate appeals from a judgment of conviction of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)

(1997-98),[1] and from an order denying his motion for postconviction relief. In addition to challenging the constitutionality of § 948.025 as applied, Tate argues that the complaint was inadequate to give him notice of the crimes, that trial counsel was deficient for not challenging the sufficiency of the complaint and raising the issue of jury unanimity, and that the trial court erroneously exercised its discretion in limiting cross-examination of the victim's mother. The constitutionality of § 948.025 was confirmed in ***State v. Johnson***, 2001 WI 52, ¶3, 243 Wis. 2d 365, 627 N.W.2d 455.[2] We reject Tate's remaining issues and affirm the judgment and order.

¶2 In 1997, Tate was charged under WIS. STAT. § 948.025 with having sexually assaulted his former stepdaughter, Dana L., a person under the age of thirteen, on three or more occasions "on and between August of 1993 and August of 1996." Tate acknowledges that § 948.025 is constitutional in the face of a challenge that it violates a defendant's right to a unanimous jury verdict.[3] ***State v. Molitor***, 210 Wis. 2d 415, 418, 565 N.W.2d 248 (Ct. App. 1997). In upholding the relaxed jury unanimity requirement in § 948.025, the ***Molitor*** court recognized that the unanimity requirement is satisfied where multiple acts constitute one continuous course of conduct. ***Molitor***, 210 Wis. 2d at 420. Tate argues that § 948.025 is unconstitutional as applied to him because the three-year time frame

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] By orders of July 12 and August 31, 2000, this appeal was held in abeyance pending a decision in ***State v. Johnson***, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455.

[3] WISCONSIN STAT. § 948.025(2) provides in part: "in order to find the defendant guilty the members of the jury must unanimously agree that at least 3 violations occurred within the time period applicable under sub. (1) but need not agree on which acts constitute the requisite number."

utilized in the complaint is so expansive that the notion that the assaults are a continuous course of conduct is strained fiction.[4] He contends that ***Molitor***, and the precedents it cites, permit a continuous course of conduct analysis only when the time period is of short duration and that the rationale cannot be stretched to permit a three-year course of conduct.[5]

¶3 In ***Johnson***, 2001 WI 52 at ¶27, the Wisconsin Supreme Court considered whether the ***Molitor*** rationale was abrogated by the decision in ***Richardson v. United States***, 526 U.S. 813, 818-20 (1999), which held that for a conviction under the federal "continuing criminal enterprise" statute, the jury must be unanimous not only on whether the defendant committed a continuous series of violations, but also on the specific violations in the continuum. The ***Johnson*** majority concluded that ***Molitor*** remains good law and adopted its rationale in concluding that WIS. STAT. § 948.025 is not unconstitutional on unanimous

[4] The State contends that Tate waived his right to challenge the constitutionality of the statute and the sufficiency of the complaint by not objecting to the jury instructions, by failing to object to the charge as duplicitous, and by not moving for dismissal or a more definite statement of the charges before trial. We may review despite waiver under our broad discretionary power of reversal pursuant to WIS. STAT. § 752.35. ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992). Also, we may reach the merits of the issues under Tate's claim that trial counsel was ineffective; only if there was actual error could counsel's performance be deemed deficient or prejudicial. ***Id.***

[5] Tate suggests that in ***State v. Molitor***, 210 Wis. 2d 415, 565 N.W.2d 248 (Ct. App. 1997), the court reserved the question of whether application of the statute may be unconstitutional under some circumstances. ***Molitor***, 210 Wis. 2d at 423 n.4, notes:

> Molitor hypothesizes that, given the statute of limitations for the offense, § 939.74(2)(d), STATS., a defendant could be charged under § 948.025, STATS., for three assaults spanning a period of sixteen years and occurring up to twenty-five years in the past. Molitor, however, was charged with the offense for a two month period immediately preceding his arrest. Moreover, as we have discussed, we review his challenge as an attack on the facial validity of the statute, not its application to his or any specific circumstances. We do not address whether the application of the statute under certain circumstances may be amenable to challenge on constitutional grounds.

verdict or due process grounds. ***Johnson***, 2001 WI 52 at ¶¶27, 28. ***Johnson*** quotes with approval that portion of the ***Molitor*** decision explaining that the duration of the course of conduct is not legally significant and that the legislature may aggregate conceptually similar acts in a course of conduct crime, "albeit for acts committed over an indefinite, and presumably longer, period of time." ***Johnson*** at ¶21 (quoting ***Molitor***, 210 Wis. 2d at 420-21).

¶4 We note that Tate's claim that an expanse of three years cannot be considered a continuous course of conduct is the position taken by the ***Johnson*** dissent. The dissent states that the majority defeats the concept of continuity that is the backbone of the continuous criminal course of conduct analysis. ***Id.*** at ¶48 (Bradley, J., dissenting). Adhering to the view that a continuous criminal episode is limited in time and circumstances, the dissent concludes that the offenses for which Johnson was convicted were "interrupted significantly by time and space. They occurred on different days, in different months, and in different places. They do not represent a single episode, but multiple episodes. As such, they must be viewed as multiple offenses, not a single 'continuous' offense."[6] ***Id.*** at ¶49.

¶5 "A dissent is what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993). Tate's constitutional claim, identical to the ***Johnson*** dissent, has been rejected as the law.

¶6 Tate argues that the allegations in the complaint are so vague as to the time of the alleged sexual assaults that the complaint violates his due process right to fair notice of the charges and a fair opportunity to defend. The sufficiency

[6] Johnson was charged for sexual contact that occurred on different days between July 1 and August 21, 1997.

of the complaint and whether a constitutional right has been violated both present questions of law which we review independently on appeal. ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

¶7 A defendant is entitled to be informed of the underlying facts constituting the charge against him or her, including the time frame in which the assaults allegedly occurred. ***Id.*** at 253. The ultimate test is whether the complaint enables the defendant to determine whether it states an offense to which he or she is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense. ***Id.*** at 251. Seven factors are helpful in evaluating the complaint and assessing overall reasonableness:

> (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. at 253. The first three factors apply when, as here, the defendant claims that more definite dates could have been obtained by the prosecution through diligent efforts. ***State v. R.A.R.***, 148 Wis. 2d 408, 411, 435 N.W.2d 315 (Ct. App. 1988). A more flexible application of these factors is appropriate when dealing with a child victim. ***Fawcett***, 145 Wis. 2d at 254.

¶8 Considering these factors, we conclude that the complaint provides sufficient notice to Tate. Dana L. was fourteen years old when she reported the assaults. She indicated that commencing in August 1993, when she was ten years

old, Tate engaged in sexual contact with her on a regular basis. This contact occurred as the two of them watched movies on television. The complaint reflects that by the time Dana L. was in fifth grade, the sexual contact occurred every other Friday night, the Friday nights she did not sleep at her natural father's residence; by age twelve, Tate began to insert his tongue into her vagina; and by age thirteen, the assaults occurred approximately five to six times per month. Even accepting Tate's assertions that Dana L. was, at the time she reported the assaults, of sufficient age to reflect on the dates of occurrence, where the assaults encompass a great period of time and become a pattern of conduct, the victim's inability to particularize the dates is understandable. *See* ***id.*** The complaint indicates that the assaults were continuing and frequent so as to make a specification as to dates nearly impossible. The assaults occurred when other family members were asleep or not present so immediate discovery was not likely. *See* ***id.*** Delay in reporting the assaults is also reasonable given that Tate was married to Dana L.'s mother and resided in the house with her. The assaults were reported after Tate moved out of the family residence. Tate was charged within three months of Dana L.'s report to the police.[7]

¶9 Tate's suggestion that the State could have obtained more definite dates for some of the assaults based on the dates videos were rented and Dana L.'s memory that something happened on an evening a particular babysitting job was cancelled does not upset the sufficiency of the complaint. These were two isolated occurrences out of a pattern of conduct over three years that may have involved as

[7] Tate moved away from Dana L. at the end of March 1997 when the family residence was sold as part of a divorce proceeding. Tate was divorced from Dana L.'s mother in May 1997. Dana L. first reported the assaults in August 1997. Police interviewed Tate on September 3, 1997. The complaint and warrant for Tate's arrest were filed on November 4, 1997.

many as 180 assaults. To the extent the prosecution may have been neglectful in investigating or disclosing the details of the probable date of those two occurrences, it was harmless error. *See* ***State v. Stark***, 162 Wis. 2d 537, 547-48, 470 N.W.2d 317 (Ct. App. 1991) (constitutional error depriving a defendant of the right to notice is considered harmless if the court can declare the belief that it was harmless beyond a reasonable doubt because there is no reasonable possibility that the error contributed to the conviction). Even with two of the assaults defined by date because of confirmed video rentals and the cancelled babysitting job, Tate would be hard pressed to develop an alibi defense for the remainder of the alleged assaults when he resided with the victim, had continuous access to her, and there was an allegation of a continuous course of conduct. Any error is harmless because there is no attendant consequence to the lack of a more precise statement of those two dates.[8] *See* ***id.*** at 548.

¶10 Tate argues that trial counsel was constitutionally deficient for not challenging the sufficiency of the complaint or the constitutionality of the application of WIS. STAT. § 948.025, so as to preserve the issues for appeal. In order to establish ineffective assistance of counsel, the defendant must demonstrate both deficient performance of counsel and prejudice to his or her defense resulting from the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. ***State v. Kuhn***, 178 Wis. 2d 428, 438,

[8] The same is true of Tate's claim that the period of time alleged in the complaint included two months after Dana L.'s thirteenth birthday. Tate was aware of Dana L.'s date of birth and that the charges only encompassed assaults while she was under thirteen years of age. The jury instructions and verdict limited the assaults to those occurring while she was under thirteen years of age.

504 N.W.2d 405 (Ct. App. 1993). We have resolved both claims which Tate faults counsel for not raising. Tate was not prejudiced by counsel's failure to raise issues which were ultimately unsuccessful. ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶11 The final issue is whether the trial court erroneously exercised its discretion in limiting Tate's cross-examination of Dana L.'s mother. During cross-examination, Tate began to ask the mother about a police contact she initiated the day after Dana L. was interviewed. By an offer of proof, Tate explained that Dana's mother went to the police station with two pictures of Tate to suggest that he was the man depicted in a poster utilized in an investigation three years earlier about a suspicious man driving by children and leering at them. She told the investigating officer that on occasions Tate would squint his eyes and stare at her in a manner similar to that described by the children in the earlier investigation. In eliciting this testimony, the defense sought to show the mother's bias and her willingness to tailor her statements to get Tate into trouble. It was to bolster the defense theory that Dana L.'s mother manipulated her daughter to make the sexual assault allegations. The trial court refused to permit the mother's cross-examination on this point, concluding that it was collateral and would create a "trial within a trial."

¶12 The scope of cross-examination for impeachment purposes is within the sound discretion of the trial court. *See* ***State v. McCall***, 202 Wis. 2d 29, 35, 549 N.W.2d 418 (1996). We must defer to the trial court's determination if a reasonable basis exists for it. *See* ***id.*** at 36. It is the duty of the trial court to "curtail any undue prejudice by limiting cross-examination, including the exclusion of bias evidence which would divert the trial to extraneous matters or confuse the jury by placing undue emphasis on collateral issues." ***Id.*** at 41-42.

Even the constitutional right to confront witnesses is not absolute and does not restrict the trial court's latitude to impose reasonable limits on cross-examination based on concerns about prejudice, confusion, or relevancy. *See* ***id.*** at 43-44.

¶13 We conclude that the trial court properly exercised its discretion in limiting Tate's cross-examination of Dana L.'s mother. Inquiry into the mother's belief that Tate was the man depicted in the poster would have necessarily launched a trial within a trial. To demonstrate that the mother would tailor her statements to get Tate in trouble, the nature of the allegations in the unrelated investigation would have been published to the jury. Moreover, in order to avoid prejudice resulting from the suggestion that he was indeed the man who had leered at the children, Tate would have sought to demonstrate that another man had been arrested for the crime of which the mother accused Tate. This was far afield from the sexual assault allegations. The trial court's ruling had a reasonable basis.

By the Court.—Judgment and order affirmed.

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