COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP438 **Cir. Ct. No. 2002CF1249**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT A. SCHWEINER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LINDA VAN DE WATER, Judge. *Affirmed.*

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

¶1 PER CURIAM. In 2003, Robert A. Schweiner was convicted of the repeated sexual assault of the same child in violation of WIS. STAT. § 948.025(1)

(1999-2000).[1] He now appeals from an order denying his motion for postconviction relief under WIS. STAT. § 974.06. We affirm the order.

¶2 A person violates WIS. STAT. § 948.025(1) if he commits three or more violations of WIS. STAT. § 948.02(1) or (2) within a specified period of time involving the same child. Schweiner was convicted of violating § 948.025(1) at a jury trial in June 2003.[2] The jury found that he sexually assaulted Danielle D. on three or more occasions between July 1, 2002 and August 8, 2002.[3] Danielle was the daughter of Schweiner's friend and turned thirteen years old on July 20, 2002.

¶3 In his motion for postconviction relief under WIS. STAT. § 974.06, Schweiner sought a new trial on the ground that a supplemental instruction given by the trial court in response to two jury questions permitted the jury to convict him without finding all facts necessary for conviction beyond a reasonable doubt. Specifically, he contended that the instruction broke a single act of sexual contact into two separate offenses, and thereby allowed the jury to convict him of the repeated sexual assault of a child based on only two acts, rather than three, as required by WIS. STAT. § 948.025(1). He contends that the supplemental instruction deprived him of due process, and warrants reversal under WIS. STAT.

[1] All references to the statutes underlying Schweiner's conviction are to the 1999-2000 version of the Wisconsin Statutes. All remaining references are to the 2005-06 version of the statutes.

[2] Although the WIS. STAT. § 974.06 motion was decided by the Honorable Linda Van De Water, the Honorable Patrick C. Haughney presided at the trial.

[3] The judgment of conviction and an order denying Schweiner's original postconviction motion were affirmed by this court in ***State v. Schweiner***, No. 2004AP1296-CR (Wis. Ct. App. March 30, 2005).

§ 752.35 in the interest of justice. He also contends that his trial counsel rendered ineffective assistance by failing to object to the supplemental instruction.

¶4 We conclude that the supplemental instruction was not erroneous. Trial counsel therefore cannot be deemed ineffective for having failed to object to it, and Schweiner is not entitled to a new trial.

¶5 In his opening statement, the prosecutor explained to the jury that the State was required to prove that Schweiner had sexual contact with Danielle on three or more occasions for the purpose of sexual gratification. He indicated that the State would be alleging that "he touched Danielle's butt, he touched her vagina, and then he had her touch his penis. So we've got three times."

¶6 At trial, the primary witness against Schweiner was Danielle. She testified that on several occasions between July 1, 2002 and August 8, 2002, Schweiner drove her and one or two friends to a quarry in Waukesha county to swim. Danielle testified that the first time Schweiner took her and her friend, Mark, to the quarry, he repeatedly threw them up into the water. Danielle indicated that Schweiner threw her using a different method than he used to toss her friends, and that it was different from that she had experienced when her father or uncles launched her into the water at times that they went swimming.

¶7 Specifically, Danielle testified that when Schweiner was throwing her up, "it kind of felt like he was feeling up on my bootie," which she defined as her "butt." She indicated that Schweiner's hand squeezed and rubbed when it was on her butt, and that his hand would go down between her legs. She testified that it felt like Schweiner's hand would "kind of go like towards the front," meaning "like towards my, umm, vagina." Danielle indicated that Schweiner threw her up multiple times, and that the uncomfortable touching she described happened

"mostly" every time he threw her in the air. On cross-examination, the following colloquy occurred:

> Q. How many times did Mr. Schweiner touch your butt when he'd pick you up and toss you? Every time?
>
> A. Yes.
>
> Q. How many times would Mr. Schweiner touch your vaginal area when he'd pick you up and toss you? Every time?
>
> A. Mostly.

¶8 Danielle testified that on a subsequent visit to the quarry, Schweiner removed her swimsuit bottom, pulled her towards him by the ankle, and inserted two fingers into her vagina. Danielle also testified that at his apartment in August 2002, Schweiner asked Danielle to touch his penis with her hand and masturbate him, which she did.

¶9 Based upon Danielle's testimony, the prosecutor told the jury in his closing argument that it had four types of sexual contact to consider, including the touching of her vagina and the touching of her buttocks when Schweiner was tossing her in the air, the touching of her vagina after removing her swimsuit bottoms, and the touching by Danielle of Schweiner's penis. The prosecutor stated: "Two of them really relate to each other, because under the law, touching her vagina and touching her buttocks when he's tossing her in the air are—both of those can be distinct offenses. So you can look at both of those things, but you're going to have to look at them separately."

¶10 Before deliberating, the jury was instructed on the offense of repeated sexual assault of the same child. In addition, because of the possibility that the jury would find that Schweiner had sexual contact with Danielle fewer

than three times, it was also instructed on the lesser-included offense of second-degree sexual assault. In instructing on the lesser-included offense, the trial court stated in material part:

> [I]f you are satisfied beyond a reasonable doubt that the defendant committed one or two sexual assaults of Danielle but not three, you should find the defendant guilty of the lesser included offense of second degree sexual assault of a child.… Of the lesser included offense of second degree sexual assault of a child, you should consider each alleged contact separately. Before you may find the defendant guilty of the lesser included offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that:
>
> One, the defendant had sexual contact by an intentional touching by the defendant of the buttocks of Danielle … Or, number two, that the defendant had sexual contact by intentionally touching by the defendant of the vagina of Danielle …. Or, three, that the defendant had sexual contact by intentionally touching by Danielle of his penis.

¶11 The trial court submitted three separate special verdicts, one for finding Schweiner not guilty, one for finding him guilty of the repeated sexual assault of the same child, and the third for the lesser-included offense of second-degree sexual assault. The latter verdict had four questions:

> Question number one: Guilty of second degree sexual assault of a child by contact by intentional touching of the buttocks. Yes or no.
>
> Two: Guilty of second degree sexual assault of a child by contact by intentionally touching the vagina the first time. Yes or no.
>
> Question number three: Guilty of second degree sexual assault of a child by contact by intentionally touching of the vagina the second time. Yes or no.
>
> Number four: Guilty of second degree sexual assault of a child by contact by intentionally touching by Danielle of the penis of the defendant. Yes or no.

¶12 After deliberations began, the trial court summoned the parties and informed them that the jury had two questions. It stated:

> The first question says: On page two of form 2107—meaning of sexual contact—would the touching of the buttocks or vagina constitute one or two separate charges towards three sexual assaults.
>
> The second question: If we all agree to three of the four charges of the second degree form, does this constitute three sexual assaults and become repeated acts of sexual assault of a child.

¶13 After inviting objections and receiving none, the trial court gave the following supplementary instruction:

> If the State proved beyond a reasonable doubt that the defendant touched the buttocks of Danielle and that she was under 16 and that it was done with intent to become sexually aroused or gratified, that is one contact. If the State proved beyond a reasonable doubt that the defendant touched the vagina of Danielle on the first occasion and that she was under 16 and that it was done to become sexually aroused or gratified, that is a second contact. If the State proved beyond a reasonable doubt that the defendant touched the vagina of Danielle on the second occasion and that she was under 16 and that it was done with intent to become sexually aroused or gratified, that is a third contact. If the State proved beyond a reasonable doubt that the defendant intentionally caused or allowed Danielle to do the touching of – touching of the penis of the defendant …. And that Danielle was under 16 at the time and that it was done with intent to become sexually aroused or gratified, that is a fourth contact.
>
> It is for you to decide if there were no contacts, as I have defined that, or one contact or two contacts or three contacts or four contacts. If you find three or more contacts, as I have defined them, and you find that three or more occurred within the specified time frame, that makes up the offense of repeated acts of sexual assault of a child.

¶14 When it spoke of "the first occasion," the trial court was referring to Danielle's testimony regarding the first day she was tossed into the water by

Schweiner at the quarry. The trial court's reference to the touching of Danielle's vagina "on the second occasion" was a reference to her testimony that he removed her swimsuit bottom and put his fingers in her vagina.

¶15 Approximately thirteen minutes after the trial court gave the supplemental instruction, the jury returned its verdict finding Schweiner guilty of the repeated sexual assault of Danielle.

¶16 On appeal, Schweiner argues that the trial court's supplemental instruction misstated the law by permitting his conviction of the repeated sexual assault of Danielle based on jury findings of only two separate assaults. He contends that "[b]ecause the touching of the buttocks and the alleged 'touching the vagina the first time' occurred simultaneously as part of the tossing of Danielle into the water, they could not legally constitute two separate charges of second degree sexual assault because the touchings were the same, both in fact and in law." He contends that the "act of touching Danielle's vagina in the act of throwing her into the water was neither separated in time nor of a significantly different nature in fact than the simultaneous touching of her buttocks." Schweiner contends that by erroneously permitting the jury to separate the touching of Danielle's buttocks and vagina on the first occasion into two separate assaults, the supplemental instruction permitted the jury to convict him of the repeated sexual assault of a child even if it found that only one of the other alleged assaults (touching Danielle's vagina after removing her swimsuit and having her touch Schweiner's penis) occurred.

¶17 Although we agree that the supplemental instruction could have been clearer, we do not agree that it indicated to the jury that the *simultaneous* touching of Danielle's buttocks and vagina would constitute two acts of sexual contact. The

trial court did not refer to simultaneous touching, nor do we read the prosecutor's opening or closing statements as arguing that Schweiner's simultaneous touching of Danielle's buttocks and vagina could constitute two separate assaults. Most importantly, Danielle's testimony indicated that when he tossed her, Schweiner's hand would rub and squeeze on her buttocks, and would then "kind of go like towards the front," referring to her vagina. This evidence indicates that even if both contacts occurred within the context of a single toss, Schweiner engaged in two separate volitional acts, including a conscious decision to squeeze and rub Danielle's buttocks with his hand, and a conscious decision to move his hand forward to touch her vagina before tossing her.

¶18 The issue of whether a defendant's sexually assaultive course of conduct constitutes a single offense or separate and distinct offenses was discussed in ***Harrell v. State***, 88 Wis. 2d 546, 277 N.W.2d 462 (Ct. App. 1979), and ***State v. Eisch***, 96 Wis. 2d 25, 291 N.W.2d 800 (1980). The issue is whether the acts committed by the defendant "are so significantly different in fact that they may properly be denominated separate crimes although each would furnish a factual underpinning or a substitute legal element for the violation of the same statute." ***Eisch***, 96 Wis. 2d at 34.

¶19 "If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment." ***Harrell***, 88 Wis. 2d at 558. Factors to aid in determining whether a defendant has come to a "fork in the road" include the nature of the act, time, place, intent, cumulative punishment and number of victims. ***Id.*** at 572. The "different nature" inquiry is not limited to an assessment of whether the acts are different types of acts. ***State v. Koller***, 2001 WI App 253, ¶31, 248 Wis. 2d 259,

635 N.W.2d 838, *modified by* ***State v. Schaefer***, 2003 WI App 164, ¶¶46, 47, 52, 266 Wis. 2d 719, 668 N.W.2d 760. Even the same types of acts are different in nature if each requires a new volitional departure in the defendant's course of conduct. ***Id.*** Moreover, while time is an important factor, even a brief period separating acts may be sufficient if the facts indicate that the defendant had sufficient time between the acts to again commit himself. ***Id.*** The fact that the interval is merely minutes or even seconds is not the solely determinative factor. ***Harrell***, 88 Wis. 2d at 572.

¶20 Here, the first alleged assaults occurred at the quarry and involved the same victim, Danielle. However, Danielle's testimony permitted a finding that even within the context of one toss, two separate acts of sexual contact occurred, one consisting of hand-to-buttocks contact and one consisting of hand-to-vagina contact. The nature of the acts were different and, even assuming that both acts happened quickly, Danielle's testimony supports a conclusion that each discrete act required reflection and conscious deliberation on the part of Schweiner, followed by his execution of the choice to move his hand forward from her buttocks to her vagina. Because a jury could find that the acts were different in nature and involved a separate volitional choice by him, the jury could also find that Schweiner's decision to touch Danielle's buttocks, followed by his decision to touch her vagina, even within the context of a single toss at the quarry, constituted two separate sexual assaults.

¶21 In reaching this conclusion, we are cognizant of ***State v. Hirsch***, 140 Wis. 2d 468, 470, 410 N.W.2d 638 (Ct. App. 1987), in which the court found multiplicitous a three-count amended criminal complaint which alleged that the defendant touched the victim's "front butt," or vaginal area, then her "back butt," or anal area, and then her "front butt" a second time. The court held that the

alleged acts were extremely similar in character and nature and, given the obviously short time that lapsed between them, did not permit a determination that the defendant had sufficient time for reflection to again commit himself. ***Id.*** at 474-75. In contrast, Danielle's description of how Schweiner moved his hand from her buttocks to her vagina permitted a finding that he had time to reflect on his conduct and commit himself to having sexual contact with a second intimate body part of Danielle's.

¶22 In affirming the trial court, we also conclude that nothing in the instructions told the jurors that they could consider only one toss in determining whether Schweiner had sexual contact with Danielle's buttocks and vagina on the first occasion at the quarry. As set forth above, Danielle testified that Schweiner threw her up and into the water multiple times, and that every time or "mostly" every time he touched her buttocks or her vaginal area or both. The jury could clearly consider each toss to be a separate event involving a recommitment by Schweiner to touching Danielle's vagina or buttocks for purposes of sexual gratification. Because the jury was entitled to consider the evidence that Schweiner touched Danielle multiple times on her buttocks and vagina while tossing her, it was entitled to find that two acts of sexual assault occurred in two or more separate tosses at the quarry.[4] The trial court's supplemental instruction

[4] In making this determination, we note that when deciding whether a defendant has committed three or more sexual assaults of a child for purposes of convicting under WIS. STAT. § 948.025(1), a jury is required to unanimously agree that at least three violations occurred within the requisite time period, but does not have to agree on which acts constitute the required number. Sec. 948.025(2).

therefore did not misstate the law when it instructed the jury that it could find four separate contacts, and Schweiner is entitled to no relief on appeal.[5]

By the Court.—Order affirmed.

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

[5] Schweiner contends that the evidence that he tossed Danielle into the water multiple times is irrelevant because the jury was not instructed that each separate tossing could be deemed a separate sexual contact for purposes of the three required for conviction, and the State did not make such an argument. He also contends that an appellate court cannot affirm a criminal conviction on the basis of a theory not presented to the jury, citing ***Chiarella v. United States***, 445 U.S. 222, 236 (1980), and ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997).

In ***Wulff***, 207 Wis. 2d at 149-52, the jury was instructed solely as to the crime of committing sexual assault by attempted genital or anal intrusion, even though the record contained evidence of an attempted oral intrusion and the State had relied on that evidence in arguing at trial that the defendant should be found guilty. Because nothing in the record supported the charge of attempted anal and genital intrusion, the defendant's conviction was reversed on appeal on the ground that the conviction could not be affirmed on a theory not presented to the jury. ***Id.*** at 151-52. Similarly in ***Chiarella***, 445 U.S. at 235-36, the United States Supreme Court held that a verdict could not be sustained on appeal based on a defendant's breach of an alleged duty to an entity other than the sellers, because at trial the jury was instructed solely on the duty owed by the defendant to the sellers.

These cases are inapposite. The prosecutor did not argue to the jury that it could consider only one toss when determining whether Schweiner had sexual contact with Danielle's buttocks or vagina on the first occasion at the quarry. In addition, the jury was instructed that it could consider Schweiner's touching of Danielle's buttocks as one sexual assault, and his touching of her vagina on the first occasion at the quarry as a second sexual assault. Nothing in the instructions limited the jury to considering only one toss. Under the instructions as given, the jury could properly conclude that Schweiner touched Danielle's buttocks for the purpose of sexual gratification in one toss, and touched her vagina for purposes of sexual gratification in a different toss.