

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 26, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2983-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CF-147**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KARL P. BREITWEISER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Ozaukee County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Karl P. Breitweiser appeals from a judgment convicting him upon a guilty plea of one count of first-degree sexual assault of a

child in violation of WIS. STAT. § 948.02(1) (1999-2000),<sup>1</sup> and one count of engaging in repeated acts of sexual assault of the same child in violation of WIS. STAT. § 948.025(1). He has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Pursuant to WIS. STAT. § 948.025(1), “[w]hoever commits 3 or more violations under s. 948.02(1) ... within a specified period of time involving the same child is guilty of a Class B felony.” Section 948.025(3) further provides:

The state may not charge in the same action a defendant with a violation of this section and with a ... violation involving the same child under s. 948.02, ... unless the other violation occurred outside of the time period applicable under sub. (1).

¶3 By its express language, WIS. STAT. § 948.025(3) thus prohibits the State from relying on the same offense to charge a defendant under both § 948.025(1) and WIS. STAT. § 948.02(1). However, it does not prohibit the State from charging a defendant with a violation of § 948.02(1) which is outside the time frame for the alleged violation of § 948.025(1).

¶4 The information filed against Breitweiser alleged that he committed a first-degree sexual assault of M.L.K. “on and between April 1, 2000 and April 30, 2000.” It also alleged that Breitweiser sexually assaulted M.L.K. more than three times “on and between January 1, 1996 and April 1, 2000.” Because the date of April 1, 2000 is included in both counts, Breitweiser alleges that he was convicted in violation of WIS. STAT. § 948.025(3).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version.

¶5 The State contends that Breitweiser's claim is unfounded because the time period for the repeated acts charge was between January 1, 1996 and April 1, 2000, while the conduct that formed the basis for the first-degree sexual assault charge took place on Easter Sunday, April 23, 2000.<sup>2</sup> The State contends that because the record supports a determination that the conduct underlying the separately charged sexual assault took place on a date which does not overlap with the time period underlying the repeated sexual assault charge, no basis exists to disturb the judgment of conviction and the order denying postconviction relief. Based upon the testimony at the preliminary hearing and Breitweiser's entry of a guilty plea, we agree with the State's analysis.

¶6 The information filed against Breitweiser alleged that on and between January 1, 1996, and April 1, 2000, Breitweiser engaged in three or more acts of sexual intercourse with M.L.K., a child under the age of thirteen.<sup>3</sup> At the guilty plea hearing, Breitweiser admitted this charge, thus admitting that he engaged in three or more acts of sexual contact with M.L.K. between January 1,

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<sup>2</sup> The State also contends that Breitweiser waived his claim that the first-degree sexual assault charge violates WIS. STAT. § 948.025(3) by pleading guilty to the two charged counts. It relies on the general rule that a guilty plea, knowingly and understandingly made, waives all nonjurisdictional defenses and defenses occurring prior to the plea, including claims of constitutional error. *State v. Hubbard*, 206 Wis. 2d 651, 655, 558 N.W.2d 126 (Ct. App. 1996). However, an exception to the guilty plea waiver rule exists when the defendant raises a double jeopardy claim. *State v. Robinson*, 2002 WI 9, ¶13, 249 Wis. 2d 553, 638 N.W.2d 564. While the parties debate whether Breitweiser adequately developed his argument to allege a double jeopardy or multiplicity violation, it remains within our discretion to address an issue which was waived in the trial court. *Mack v. State*, 93 Wis. 2d 287, 296-97, 286 N.W.2d 563 (1980). Because the issue raised by Breitweiser is fully briefed and the record is adequately developed, we elect to address it on the merits. *See id.*

<sup>3</sup> When Breitweiser entered his guilty plea, the information was amended to allege sexual contact rather than sexual intercourse.

1996, and April 1, 2000. Breitweiser does not challenge this portion of the judgment of conviction on appeal.

¶7 The record also establishes a basis for determining that Breitweiser committed a separate sexual assault of M.L.K. outside the time period of January 1, 1996, through April 1, 2000. As acknowledged by Breitweiser, at the preliminary hearing M.L.K. expressly testified that Breitweiser touched his penis to her vagina on Easter Day of that year, which was April 23, 2000. At the guilty plea hearing, Breitweiser stipulated that the testimony at the preliminary hearing provided a factual basis for his guilty plea, and that the trial court could rely on that testimony. By entering his guilty plea to the sexual assault charge alleged under WIS. STAT. § 948.02(1), Breitweiser thus admitted that he sexually assaulted M.L.K. on April 23, 2000, a date which was outside the time frame alleged in the repeated sexual assault charge under WIS. STAT. § 948.025(1).<sup>4</sup> Because the record indicates that his plea was knowingly, voluntarily and intelligently entered, no basis exists to conclude that Breitweiser's conviction under § 948.02(1) overlapped in time with his conviction under § 948.025(1), or was otherwise encompassed in the repeated sexual assault charge in violation of § 948.025(3).

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<sup>4</sup> Breitweiser contends that the State “must take the bitter with the sweet,” and that if this court relies on M.L.K.'s testimony that Breitweiser had sexual contact with her on April 23, 2000, it must also accept her preliminary hearing testimony indicating that she did not know whether the other assaults by Breitweiser occurred before or after that date. However, M.L.K. also testified that, although she was eight years old at the time of the preliminary hearing, she was four years old when Breitweiser began having sexual contact with her, and that it occurred more than three times. Most importantly, Breitweiser's argument ignores the fact that he entered a guilty plea to count two of the information, admitting that he was guilty of three or more sexual assaults of M.L.K. on and between January 1, 1996, and April 1, 2000. Because he has not challenged the validity of that plea, he cannot dispute that he committed sufficient acts on or before April 1, 2000, to sustain the conviction under WIS. STAT. § 948.025(1).

¶8 Breitweiser contends that although the record provides evidence of a particular sexual assault outside the time frame for the repeated sexual assault charge, the validity of his conviction under WIS. STAT. § 948.02(1) must be determined only by looking at the dates alleged in the information. We disagree. Under WIS. STAT. § 971.26, “[n]o ... information ... shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.” Although the information included the date of April 1, 2000, in both counts, this one-day overlap in the dates listed in the information did not prejudice Breitweiser when, at the time he entered his guilty plea, it had been established that the actual date of the offense under § 948.02(1) fell outside the time period specified in the information for the repeated sexual assault charge. The technical deficiency in the alleged dates does not impair Breitweiser’s convictions. *See State v. Slaughter*, 200 Wis. 2d 190, 193 n.1, 546 N.W.2d 490 (Ct. App. 1996). Because Breitweiser was not prejudiced by the one-day overlap in the allegations, the validity of the information and judgment of conviction was maintained pursuant to § 971.26. *See Verser v. State*, 85 Wis. 2d 319, 326-27, 270 N.W.2d 241 (Ct. App. 1978).

*By the Court.*—Judgment and order affirmed.

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

