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DISTRICT II

November 5, 2025

To:

Hon. Anthony C. Nehls
Circuit Court Judge
Electronic Notice

Michelle Weber
Clerk of Circuit Court
Fond du Lac County Courthouse
Electronic Notice

Philip J. Brehm
Electronic Notice

Sarah Catherine Geers
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2025AP200-CR State of Wisconsin v. Brian G. Martinez (L.C. #2021CF888)

Before Neubauer, P.J., Gundrum, and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian G. Martinez appeals from a judgment of conviction for one count of second-degree sexual assault of a child under 16 contrary to WIS. STAT. § 948.02(2) (2023-24)[1] and one count of first-degree sexual assault of a child under age 13 contrary to § 948.02(1)(e) and from an order denying his postconviction claim of ineffective assistance of counsel. Martinez argues his counsel performed deficiently by failing to raise a duplicity challenge to the two sexual assault charges. Specifically, Martinez contends his trial counsel was ineffective by failing to object to the joinder of numerous acts of sexual assault into single counts, and thus, failing to protect his

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

right to a unanimous jury verdict. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Because the law on the issue of whether multiple acts of sexual assault occurring over a period of time could be joined in a single count is not well settled, Martinez's counsel did not perform deficiently by failing to raise a duplicity challenge. We affirm.

Martinez was charged with one count of sexual assault of a child under 16, Amy, and one count of first-degree sexual assault of a child under age 13, Bonnie, each as a repeater.[2] The complaint alleged that Martinez sexually assaulted Amy several times between July 4, 2021, and August 22, 2021, when Amy was 14 years old. The complaint also alleged that Martinez sexually assaulted Bonnie several times between August 1, 2020, and August 22, 2021, when she was 10 and 11 years old.

At trial, Amy testified that Martinez touched her breasts when they were sitting on the couch, that the touching lasted less than one minute, and that Martinez touched her this way twice per week for four weeks when she was 13 or 14 years old. Bonnie testified that Martinez touched her breast for a short period of time when she was in his bedroom, and he gripped her breast on multiple occasions in the living room when she was ten to eleven years old.

After a jury trial, Martinez was convicted on both counts which reflected the dates of the offenses as alleged in the complaint. Following his sentencing, Martinez filed a postconviction motion alleging that his trial counsel was ineffective. The trial court denied the motion after an

[2] Amy and Bonnie are pseudonyms.

evidentiary hearing. Martinez now appeals, renewing his claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced the defendant's defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if a defendant makes an inadequate showing on one. ***Id.*** at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

Martinez argues that the charges were duplicitous because while he was charged with a single count as to each child, the State alleged that each child was sexually assaulted multiple times and each victim testified to multiple acts. We understand Martinez's argument to be that his trial counsel should have objected to the two sexual assault counts, one for each child, because they allowed for a conviction for more than one act. Martinez argues that this violated his right to jury unanimity because the jury did not need to agree on which specific act Martinez committed in order to convict him on each of the two counts. The State responds that counsel did not perform deficiently by failing to raise a duplicity challenge because the law is unsettled regarding the circumstances in which multiple acts may properly be encompassed in a single sexual assault charge.

We conclude that trial counsel's performance was not deficient because the law in this area was unsettled. "When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶10,

333 Wis. 2d 665, 799 N.W.2d 461; ***State v. Hanson***, 2019 WI 63, ¶29, 387 Wis. 2d 233, 928 N.W.2d 607.

Martinez does not point to any case law that clearly answers whether jury unanimity is required in this situation. Our supreme court has previously held, when reviewing a conviction for first-degree sexual assault (not of a child), that unanimity was not required even though the victim testified to multiple acts of non-consensual sexual intercourse. ***State v. Lomagro***, 113 Wis. 2d 582, 584, 598, 335 N.W.2d 583 (1983). The court reached that conclusion because those acts were alternative means of committing that crime; the acts were conceptually similar; and the two-hour assault was "one continuous, unlawful event." ***Id.*** at 592-94. The court held that, in such situations, it is left to the State's discretion to decide whether to charge the acts separately or as one continuous offense. ***Id.*** at 587, 589.

Later, this court reviewed an ineffective assistance claim similar to the one made by Martinez in this case, and we ultimately concluded that the law was too unsettled to hold counsel's performance deficient. *See* ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994). In ***McMahon***, we reviewed a conviction for incestuous sexual intercourse and followed ***Lomagro*** to conclude that there were multiple means of committing that crime and they were conceptually similar. ***McMahon***, 186 Wis. 2d at 81-82. As to the time span involved, we concluded that, while McMahon's case might require unanimity because it was a longer time span of one and one-half months, rather than two hours as in ***Lomagro***, it would also be reasonable to extend the holding in ***Lomagro*** to conclude that unanimity was *not* required because a series of acts over one and one-half months was a continuous event. ***McMahon***, 186 Wis. 2d at 83-84. Accordingly, based on those alternative readings of ***Lomagro*** that we considered reasonable, we concluded that the law was unsettled about whether counsel should

have objected so as to protect the defendant's right to unanimity. ***McMahon***, 186 Wis. 2d at 84-85.

Martinez attempts to distinguish ***McMahon*** on the ground that the periods of time at issue in this case, particularly the one-year period of time testified to by Amy, are significantly longer than the period of weeks that was at issue in ***McMahon***. The actual length of time over which the episodes of incest occurred was not the deciding factor in ***McMahon***, however. Rather, the court focused on the nexus between the acts and whether those acts could reasonably be interpreted to be part of "one continuous story." ***Id.*** at 84.

McMahon ultimately concluded that "***Lomagro*** can be reasonably analyzed in two different ways [i.e., as requiring or not requiring a strict time constraint, and therefore] the law has not been settled." ***McMahon***, 186 Wis. 2d at 84. Martinez has not identified any case since ***McMahon*** where the court concluded there was a duplicity violation on facts similar to those here. Accordingly, the issue of whether multiple acts may be included in a single count remained unsettled under case law existing when this case was charged and tried. Just as in ***McMahon***, we conclude that counsel here cannot be deemed ineffective for failing to raise an objection based upon an unsettled point of law.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals