COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2236-CR **Cir. Ct. No. 2004AP002236**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN D. PIERCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO and MICHAEL B. BRENNAN, Judges. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Shawn D. Pierce appeals from a judgment entered on jury verdicts finding him guilty of two counts of second-degree sexual assault of a

child, *see* WIS. STAT. § 948.02(2), and from the trial court's order denying his motion for postconviction relief. Pierce claims that: (1) the criminal complaint was unconstitutionally vague; (2) the charges were multiplicitous; (3) the trial court erroneously admitted other-acts evidence; and (4) the trial court imposed an unduly harsh sentence. We affirm.

I.

¶2 In August of 1999, the State filed a complaint charging Pierce with one count of repeatedly sexually assaulting his cousin, K.W., between January 1, 1987, and January 1, 1993. *See* WIS. STAT. § 948.025(1) (1999–2000) (repeated acts of sexual assault of the same child). K.W. was born in 1980; Pierce, thirteen years older, was born in 1967. The prosecutor moved to amend the complaint to allege individual acts of sexual assault, explaining that she belatedly realized that § 948.025(1) did not apply to that period. *See* 1993 Wis. Act 227, §§ 30, 44 (§ 948.025(1) effective April 23, 1994). The trial court permitted the amendment.

¶3 In February of 2000, the State filed an amended complaint charging Pierce with two counts: (1) sexually assaulting K.W. between January 1994 and June 18, 1994, and (2) sexually assaulting K.W. between June 18, 1994 and October 31, 1994. *See* WIS. STAT. § 948.02(2). The State used K.W.'s fourteenth birthday, June 18, 1994, to distinguish when Pierce allegedly assaulted K.W.; the first count alleged assaults before that date, and the second count alleged assaults after that date.

¶4 According to the amended complaint, K.W. told a Milwaukee Police detective that Pierce had sexually assaulted him for years, starting when K.W. was but seven years old. Pierce pled not guilty to both counts. At the trial, the State was permitted to introduce evidence that Pierce had sexual contact and sexual

intercourse with K.W. from 1987 to 1993. The trial court admitted the evidence under WIS. STAT. RULE 904.04(2) to show the context of the charged assaults and, also, as evidence of Pierce's plan to use his young cousin for his own purposes.

¶5 K.W. testified at the trial and told the jury that Pierce had not only assaulted him during the times specified in the criminal complaint, but also during that earlier period, 1987 to 1993. Pierce also testified. He told the jury that he had never sexually assaulted K.W., claiming that K.W. only accused him of the sexual assaults after Pierce wrote K.W., then approximately eighteen years old, chastising him for being in prison.

¶6 As we have seen, a jury found Pierce guilty of both sexual-assault counts. The trial court sentenced Pierce to twenty years of imprisonment on both counts, to run consecutively. This exceeded the then maximum penalty, *see* WIS. STAT. §§ 948.02(2) (second-degree sexual assault of child Class C felony); 939.50(3)(c) (maximum term of imprisonment for Class C felony ten years) (1993–94), and, on Pierce's motion, the trial court modified the sentences. On resentencing, the trial court imposed the maximum, ten years of imprisonment on each count, to run consecutively. We address in turn Pierce's contentions of trial-court error.

II.

A. *Sufficiency of Complaint*.

¶7 Pierce claims that the five-and-one-half month and four-and-one-half month time periods alleged in the amended complaint were not specific enough to allow him to prepare an adequate defense. We disagree. The sufficiency of a

complaint is a question of law that we review *de novo*. ***State v. Fawcett***, 145 Wis. 2d 244, 249, 426 N.W.2d 91, 93 (Ct. App. 1988).

> 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 … does not require proof of an exact date.

Id., 145 Wis. 2d at 250, 426 N.W.2d at 94 (citations omitted).

¶8 To determine whether a complaint is sufficient, we consider "whether the accusation is such that the defendant [can] determine whether it states an offense to which he is able to plead and prepare a defense and whether conviction or acquittal is a bar to another prosecution for the same offense." ***Holesome v. State***, 40 Wis. 2d 95, 102, 161 N.W.2d 283, 287 (1968) (footnote omitted). The ultimate question is one of reasonableness of interpretation. *See* ***State v. Stark***, 162 Wis. 2d 537, 545, 470 N.W.2d 317, 320 (Ct. App. 1991). 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.

Fawcett, 145 Wis. 2d at 253, 426 N.W.2d at 95.

¶9 Applying these factors, we conclude that Pierce was provided with constitutionally sufficient notice. According to the amended complaint, Pierce began to assault K.W. on a regular basis when K.W. was seven years old. Although K.W. was a teenager when the charged assaults were said to have happened, the alleged assaults were continuing and frequent, making a specification of dates very difficult. *See* ***id.***, 145 Wis. 2d at 254, 426 N.W.2d at 95 ("Child molestation often encompasses a period of time and a pattern of conduct. As a result, a singular event or date is not likely to stand out in the child's mind."). Moreover, the nature and circumstances of the crimes made it unlikely that they would have been discovered by others immediately. *See* ***ibid.*** ("[C]hild molestation is not an offense which lends itself to immediate discovery. Revelation usually depends upon the ultimate willingness of the child to come forward."). Pierce is K.W.'s older cousin. He lived with K.W. and often babysat him, and told K.W. that he "would be in trouble" if he did not cooperate.

¶10 The charged acts of sexual assault were alleged to have happened over five-and-one-half month and four-and-one-half month time periods, identified by where K.W. was then going to school, and, significantly, separated by his fourteenth birthday on June 18, 1994. *See* ***id.***, 145 Wis. 2d at 254, 426 N.W.2d at 95–96 (two sexual assaults over six months acceptable time period). Although Pierce was arrested some five to five-and-one-half years after he allegedly last assaulted K.W., this, standing alone, does not make the charges constitutionally insufficient. *See* ***State v. R.A.R.***, 148 Wis. 2d 408, 412, 435

N.W.2d 315, 317 (Ct. App. 1988) (four-to-five-year intervals between alleged offense and arrest and complaint insufficient in combination with other factors). Pierce was sufficiently informed of the charges against him.

B. *Multiplicity*.

¶11 Pierce also argues in his brief-in-chief that the two counts of second-degree sexual assault were what he calls "duplicitous." He argues that, because the assaults represented "one continuous offense," the State should have charged him with one count of second-degree sexual assault occurring between January 1, 1994, and October 31, 1994. We disagree.

¶12 What is commonly referred to as "duplicitous" charging is the joining in a single count of two or more separate offenses. ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583, 587 (1983). The State points out, and Pierce's reply brief does not dispute, that Pierce's contention is really that the two counts are multiplicitous. We agree. Multiplicity exists when the defendant is charged in more than one count for a single offense. ***State v. Rabe***, 96 Wis. 2d 48, 61, 291 N.W.2d 809, 815 (1980). Indeed, Pierce's main brief on appeal cites authorities analyzing multiplicitous charging. Accordingly, we analyze this as a multiplicity claim.

¶13 To determine whether charges are multiplicitous, we apply a two-part test: (1) whether the charges are identical in law and fact, and (2) whether the legislative intent indicates that each count is an allowable unit of prosecution under the statute. ***Id.***, 96 Wis. 2d at 63, 291 N.W.2d at 816. Whether charges are multiplicitous is a question of law that we review *de novo*. *See* ***State v. Hirsch***, 140 Wis. 2d 468, 470–471, 410 N.W.2d 638, 639 (Ct. App. 1987).

¶14 Here, the State concedes and we agree that the sexual-assault charges are identical in law. Accordingly, we address only whether the offenses are identical in fact. In making this determination, we consider the nature of the acts charged, the time between the acts, where the acts are alleged to have taken place, whether each of the acts represented a separate volitional decision by the defendant to commit those acts, and, also, what the legislature intended to be the permissible extent of punishment. ***Harrell v. State***, 88 Wis. 2d 546, 572–574, 277 N.W.2d 462, 473–474 (Ct. App. 1979). Pierce focuses his argument on the time-interval element. He claims that because he was charged under what he views as a continuous-course-of-conduct theory, the assaults are not separate in time. We disagree.

¶15 In continuous-offense cases, the question turns on whether the defendant's repeated commission of the same offense at different places or at different times is an ongoing crime or several separate offenses. ***Rabe***, 96 Wis. 2d at 65, 291 N.W.2d at 817. The pertinent inquiry is whether the facts indicate that the defendant had "sufficient time for reflection between the assaultive acts to again commit himself." ***Harrell***, 88 Wis. 2d at 560, 277 N.W.2d at 467. Here, the fact that Pierce repeatedly assaulted K.W. does not make his conduct one continuing offense. Each act of sexual assault was alleged to have been a different volitional event, separated by time sufficient for Pierce to reflect on what he was doing and stop.

> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder,—an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Id., 88 Wis. 2d at 565, 277 N.W.2d at 469 (two acts of sexual intercourse separated by twenty minutes of conversation separate acts). Pierce's alleged crimes were different in fact. Accordingly, we turn to what the legislature intended.

¶16 Pierce does not address legislative intent except to claim that "[a]t the time of the alleged acts, the legislature did not intend to allow multiple charges and the repeated sexual assaults statute[, WIS. STAT. § 948.025,] had not yet been implemented." We disagree. The statute under which Pierce was charged, WIS. STAT. § 948.02, allows multiple punishments for separate volitional acts. *See* ***Harrell***, 88 Wis. 2d at 560–568, 277 N.W.2d at 467–471 (two counts of rape under WIS. STAT. § 944.01 (1973) not contrary to legislative intent); ***State v. Meehan***, 2001 WI App 119, ¶35, 244 Wis. 2d 121, 142, 630 N.W.2d 722, 733 (one count of second-degree sexual assault and one count of attempted second-degree sexual assault under § 948.02 not contrary to legislative intent).

C. *Other-Acts Evidence*.

¶17 Pierce claims that the trial court erroneously exercised its discretion when it allowed K.W. to testify about the sexual assaults that allegedly occurred from 1987 to 1993. ***State v. Sullivan***, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998), has separated the required analysis into three parts: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. RULE 904.04(2); (2) whether the evidence is relevant under WIS. STAT. RULE 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay, *see* WIS. STAT. RULE 904.03.

¶18 We apply a greater latitude rule to all three questions when reviewing the admissibility of other-acts evidence in sexual assault cases, especially those involving child-victims, ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 563, 613 N.W.2d 606, 619, and review a trial court's determination to admit or exclude other-acts evidence for an erroneous exercise of discretion, ***State v. Gray***, 225 Wis. 2d 39, 48, 590 N.W.2d 918, 925 (1999). Accordingly, we will sustain an evidentiary ruling if the circuit court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414–415, 320 N.W.2d 175, 184 (1982).

¶19 Here, the trial court concluded that the earlier sexual assaults were relevant and admissible to prove context: "I'm satisfied that it is evidence under 904.01 for a jury to understand why K[.]W[.] may not have a good recollection of the specifics and why he may have waited so very long to report." We agree. Other-acts evidence is permissible to show the context of the crime and provide an explanation of the case. ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983). The context of the other-acts evidence in this case provided an understanding of why K.W. could not remember specific dates and why he waited so long to report the assaults.

¶20 The trial court concluded that the earlier assaults were also relevant and admissible to show plan:

> I'm satisfied here there is a concurrence of common features. In fact, you have a progression of assaultive behavior. I mean if the jury only for example heard what happened during that six month timeframe at the beginning of '94 and the second four of five months of '94, they might wonder how could something like this just happen out of the blue?

Again, we agree. Evidence of other crimes may be admitted for the purpose of establishing a plan or scheme when there is a concurrence of common elements between the two incidents. ***Davidson***, 2000 WI 91, ¶60, 236 Wis. 2d at 567, 613 N.W.2d at 620. Here, the earlier assaults were strikingly similar to the charged assaults. They are relevant to show how Pierce groomed K.W. to perform increasingly intimate sexual acts.

¶21 Finally, the trial court concluded that the probative value of the evidence was not substantially outweighed by any unfair prejudice to Pierce. This, too, was not an erroneous exercise of discretion. The probative value of other-acts evidence depends on its nearness in time, place, and circumstances to the alleged crime. ***State v. Speer***, 176 Wis. 2d 1101, 1114, 501 N.W.2d 429, 434 (1993). Here, the earlier assaults, as a unit, reflected a continuum of Pierce's conduct with his young cousin to use the lad to satisfy his, Pierce's, sexual desires. Additionally, the trial court took significant steps to minimize any unfair prejudice to Pierce. The trial court told the State that it was going to have to present the other-acts evidence briefly and succinctly, and also instructed the jury twice that the earlier assaults, if they happened, were not to be used by the jury to conclude that the defendant was a bad person and for that reason was guilty. These instructions went far "to cure any adverse effect attendant with the admission of the [other-acts] evidence." ***State v. Fishnick***, 127 Wis. 2d 247, 262, 378 N.W.2d 272, 280 (1985).

D. *Sentencing*.

¶22 Pierce alleges that his sentence is unduly harsh in light of allegedly positive factors, including Pierce's minimal criminal history, what he claims were the non-violent nature of the assaults, Pierce's lack of drug or alcohol problems,

and Pierce's history of steady employment. He further complains that the trial court erroneously exercised its discretion because it did not explain why maximum consecutive sentences were warranted. We disagree.

¶23 Sentencing is committed to the discretion of the trial court. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). We will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶24 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted). The weight to be given to each of these factors is within the trial court's discretion. ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461.

¶25 The trial court considered the appropriate factors when it sentenced Pierce. It considered the devastating effect that the assaults had on K.W. and his family. Although it noted that the crimes were not "committed … in a particularly violent way," it found that Pierce had clearly violated K.W.: "You violated his body. You violated his mind. You violated his psyche, you violated his spirit." The trial court also considered Pierce's character. It observed that Pierce had both positive and negative qualities. The trial court noted that Pierce graduated from high school, held a number of "good jobs," had a supportive family, and did not have a drug or an alcohol problem. It indicated that it was concerned, however, with Pierce's "manipulative side." It noted that Pierce had a prior conviction for theft, and had tried to mislead his parole agent about his circumstances. The trial court concluded that Pierce was "an intelligent young man[, b]ut a frightening young man."

¶26 Finally, the trial court considered the need to protect the community. It determined that Pierce needed to be punished, and that the community needed to be protected from further assaults:

> [Y]ou deprived K[.]W[.] of his childhood. You robbed him of something that may be the most precious time in a person's life, because what goes on in your childhood affects people the rest of their lives, and you literally stole this young man's childhood from him. And as a result, you must be deprived of your freedom as punishment for what you did to him and to protect society so that it doesn't happen again.

The trial court explained that it was imposing the maximum sentence because it could not "envision a worse way that someone could be violated and their life taken from them the way you took K[.]W[.]'s life. … I sentence what I believe justice demands and requires. … [T]his is one of those maximum cases and that's why I've imposed it." The trial court considered the appropriate factors and explained why maximum consecutive sentences were warranted. It did not erroneously exercise its sentencing discretion.

¶27 Pierce also claims that the trial court erroneously exercised its discretion when it considered at sentencing K.W.'s allegation that Pierce had sexually assaulted him from 1987 to 1993. He concedes that, "a sentencing court may consider a defendant's involvement in uncharged and unproven offenses," *see* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377, 381 (1990), but maintains the sentencing court should not have considered K.W.'s allegations because there is no way to determine whether they are true. Again, we disagree.

¶28 Pierce appears to allege that the trial court violated his due-process right to be sentenced on the basis of true and correct information. To establish a due-process violation, the defendant has the burden of proving by clear and convincing evidence that the information used in sentencing was inaccurate and that he or she was prejudiced by the misinformation. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). Pierce has not pointed to anything beyond his assertion that the trial court erred in believing K.W. that Pierce had, indeed, assaulted him from 1987 to 1993.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.