COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2006

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. 2005AP1920-CR **Cir. Ct. No. 2004CF39**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL NELIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 PER CURIAM. Samuel Nelis appeals from a judgment convicting him as a repeat offender of one count each of battery, aggravated battery, and second-degree sexual assault by use of force. He also challenges the order denying his postconviction motion. We affirm for the reasons discussed below.

BACKGROUND

¶2 On February 28, 2004, police officers took Diane S. to the hospital after observing during a welfare check that she had two black and swollen eyes. She refused treatment, but eventually gave statements indicating that her boyfriend, Samuel Nelis, had thrown a beer can at her head and beaten her on February 21st and 23rd at Tony Deragon's house, and had also beat and raped her on February 25th at Amy Jensen's house. Based on Diane S.'s statements, the State issued a complaint charging Nelis with substantial battery, aggravated battery and second-degree sexual assault, alleging that each of the offenses had occurred on or about February 21st. After Nelis waived his preliminary hearing, the State filed an information continuing to allege that all of the incidents had occurred on or about February 21st.

¶3 On the morning of trial, the State moved to amend the information to charge that each of the offenses had occurred sometime in February. It informed the defense that Diane S. would testify that the aggravated assault had actually occurred on February 14, 2004. The trial court orally permitted the amendment[1] and denied Nelis's motion for a continuance.

¶4 The first battery charge was based on the allegation that Nelis had thrown a full beer can at Diane S., opening up a gash on her forehead. In addition to Diane S.'s testimony about the incident and a scar which was still visible and shown to the jury at trial, two additional witnesses testified that Diane S. did not have a gash on her forehead before she went into a bedroom with Nelis at Tony

[1] We note that the record on appeal does not contain an amended information.

Deragon's house, but came out with one. Nelis told the others that Diane S. had fallen in a closet. Diane S. told the others that Nelis had hit her with a beer can. Deragon said he taped up Diane S.'s wound and attempted to call the police, but Nelis pulled the phone wire out of the wall. All the witnesses agreed that Diane S. did not yet have black eyes at the time of this incident, but none of the witnesses knew the exact date they had been at Deragon's house.

¶5 The second and more serious battery charge was based on the allegation that Nelis had punched Diane S. in the head multiple times leaving her with a swollen face, black eyes and some blurred vision in her left eye. Diane S. testified that this incident took place on Valentine's Day, several days after the beer can incident,[2] at the home of Nelis' cousin Mike. Diane S. said she passed out from the pain, and that someone then gave her an ice pack for her eyes. Nelis and Diane S. subsequently told a number of people that she had sustained the black eyes in a car crash, although the vehicle involved in the supposed crash was never identified.

¶6 The sexual assault charge was based on the allegation that Nelis choked and beat Diane S., ripped off her clothes and forcibly had intercourse with her at Amy Jensen's house. Diane S. testified that this incident occurred not too long after she had gotten her black eyes. She said that someone came into the bedroom during the assault to see if she was all right because he heard her

[2] Nelis claims in his brief that Diane S. testified that the first and second batteries took place on the same day. Our reading of the record, however, is that she testified that a beating Nelis gave her later in the day after hitting her with the beer can was a separate, uncharged incident, and *not* when she got her black eyes. She explained that the incidents were blurred together in her statement to police because once she started talking, she just talked about everything all at once.

screaming. Jensen's boyfriend Steve Stone testified that he went back to check on Diane S. because he heard some noise or scuffling, but there was nothing there. After Stone denied on the stand that he saw Nelis on top of Diane S. with Diane S. crying and bleeding, the State introduced prior inconsistent statements Stone had made to police.

¶7 Officer Tony Williams testified that he had written down a verbal statement from Stone, which Stone then signed. The written statement, which was introduced into evidence and read to the jury, said:

> The night that Sam and his girlfriend were here, I heard muffled sounds coming from the back bedroom. I went to check on her. She was a bloody mess. I heard scuffling around. She was bloody and crying. When I turned on the light, everything stopped. I was passed out, but the noise from the back bedroom woke me up. The noise was not right.

Chief of Police Jim Stone[3] testified that in addition to the assertions included in the signed statement, Stone had told him that prior to going back to the bedroom, he had heard moaning and Diane S. saying no and stop; that upon entering the bedroom, he observed Nelis on top of Diane S. with Diane S. struggling to get away; and that after Nelis got off of Diane S., Stone saw that she had blood on her face. The police chief explained that he did not include these purported statements by Nelis in his own report because he had presumed Officer Williams would include them in the written statement he had prepared. Nelis objected to this testimony on confrontation grounds.

[3] Jim Stone was a second cousin to witness Steve Stone, who in turn was also a cousin of unspecified degree to another Jim Stone who was mentioned in the testimony. For clarity, we will refer to Steve Stone as Stone and Jim Stone as the police chief.

¶8 The jury convicted Nelis of a lesser included misdemeanor battery charge on the first count and both of the other charged offenses. We will discuss additional facts in the context of the arguments raised on appeal.

DISCUSSION

The Specificity of the Amended Information

¶9 When filing an information, the State has a duty "to inform a defendant, within *reasonable* limits, of the time when the offense charged was alleged to have been committed." ***State v. Stark***, 162 Wis. 2d 537, 545, 470 N.W.2d 317 (Ct. App. 1991). If a defendant can show "that the state knew of a specific date in time, but purposely did not allege the information … and there is no good cause for withholding that information, the charge should be dismissed," unless the State can show that the lack of notice was "harmless beyond a reasonable doubt because there is no reasonable possibility that the error contributed to the conviction." ***Id.*** at 546-48.

¶10 Nelis does not contend that the State knew the alleged date of the batteries was inaccurate at the time the original information was filed. He maintains, however, that when the State orally amended the information to allege that all of the offenses had occurred sometime during February, it knew that the complaining witness would testify more specifically that one of the batteries had occurred on February 14th. Therefore, he argues, the time frame given by the State in the amended information provided inadequate notice because it reached far beyond the specific date on which the State had knowledge that the incident had occurred.

¶11 The first problem with this theory is that the State informed Nelis that the witness would testify one of the batteries had occurred on the 14th at the same time it amended the information. Specifically, the prosecutor stated:

> I have had some difficulty making contact with the victim. I have now had a chance to make contact with her, and I was able to sit down with her on Friday [three days prior to trial] and at this time she was sober and attempting to recall what took place, and it seems that the incidents that have been alleged in the information [took] place approximately a week before that which was set forth in my information, somewhere around February 14 ….
>
> I am in a difficult situation here. I am dealing with an alcoholic. I am going to allege that the dates are in February, the 1st to the 28th.
>
> I have some information that it may be more specific as to the 14th, but I have had a witness who has been all over the map who is an alcoholic and is having a difficult time recalling the exact dates, so I am using that timeframe of February.

It is somewhat disingenuous to claim that the amended information did not give adequate notice that the State was going to provide evidence that one of the incidents had occurred on February 14th, when the prosecutor provided Nelis with actual notice of that fact at the time of the amendment.

¶12 In any event, the record shows that the State lacked a factual basis to allege a more specific timeframe, given the memory problems of its primary witness. As the prosecutor testified at the postconviction hearing:

> I wasn't able to narrow it down to February 21st … or February 24th. I couldn't do it. I knew it was in February. Honestly, I didn't know if she was going to say February 14th, 3rd or February 25th when she was on the stand. That wasn't known by the State when she took the stand. It was — I was really going to be surprised by whatever she said because she hadn't really locked it in for me.

The prosecutor's postconviction testimony was supported by the victim's trial testimony, where she explained that, "as far as dates and stuff, I am not sure of because I was drinking heavily," and "this happened within a matter of two or three weeks. … A lot of it was a blur."

¶13 In sum, we are satisfied that the timeframe alleged in the amended information informed the defendant, "within reasonable limits," of when the charged offenses were alleged to have been committed. The expanded timeframe conformed to both the knowledge within the state's possession and the evidence ultimately introduced at trial, and did not alter the nature of the charges against Nelis. Therefore, the trial court properly permitted the amendment pursuant to WIS. STAT. § 971.29(2) (2003-04).[4]

Continuance

¶14 The most troubling aspect of the amended information is not the expanded timeframe itself, but the fact that the amendment was made the morning of trial. Nelis contends the trial court should have granted his motion to postpone the trial under WIS. STAT. § 971.29(3) because the last-minute amendment impaired his opportunity to defend against the charges. More specifically, he asserts that he would have been able to establish an alibi defense if he had been given time to collect witnesses relating to the February 14th date. He made an offer of proof at the postconviction hearing that his witnesses would testify that Diane S. did not have black eyes when Nelis' sister Roxanne Bates saw her on the

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

afternoon of February 14th, but did have black eyes by the time she went on a trip to Michigan from February 14th to the 17th.

¶15 We conclude that the failure to grant a continuance, if error, was harmless error. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.).

¶16 First, with regard to the beer can incident, there was undisputed testimony from three people that Diane S. suffered the cut to her forehead while alone in a bedroom with Nelis at Deragon's house. Diane S. testified that this occurred a few days before the black-eye incident, which she said happened on Valentine's Day. So the fact that Diane S. may have been in Michigan from the 14th to the 17th of February provides no alibi for the first battery charge.

¶17 Similarly, regarding the sexual assault, Nelis did not contest that he was in a bedroom with Diane S. at Jensen's house when that alleged incident occurred. Nor did he dispute that Diane S. already had black eyes by that time. So the proffered testimony regarding Diane S.'s trip to Michigan would not have affected the trial testimony regarding the sexual assault.

¶18 Nelis focuses his frustrated alibi claim on the aggravated battery charge arising from the black-eye incident. He argues that, if Diane S.'s black eyes were first noticed on the 14th, they could not possibly have occurred on that day because "black eyes do not appear until the next day," and because he himself would have testified that he was not with Diane S. on the 12th through 17th of February. This argument is flawed in multiple respects.

¶19 To begin with, nothing prevented Nelis from taking the stand and testifying to his own whereabouts during the relevant timeframe if he wished to do so. Indeed, the trial court conducted a colloquy with Nelis to ascertain that Nelis understood that the decision whether or not to testify was his to make. His claim that he lacked time to gather witnesses does not apply to himself.

¶20 Similarly, Nelis cannot claim that he was prevented from producing Bates as a witness at trial because she did in fact testify for the defense, saying that Diane S. did not yet have black eyes when she saw her on February 14th. We further note that the offer of proof saying Bates would testify at a retrial that she spent the entire day of February 14th with Nelis contradicts Bates' trial testimony that Nelis and Diane S. "stopped by" together on February 14th. Therefore, Bates could not provide Nelis with a complete alibi.

¶21 Next, Nelis offered no medical testimony to show how soon discoloration from bruising is visible after an injury. He merely proposed to argue his theory as a reasonable inference. However, Diane S. herself testified that her face puffed up immediately after the beating and that she was given an ice pack for her eyes. In fact, the injury was so severe that officers were still concerned about the degree of swelling and discoloration around Diane S.'s eyes two weeks after the incident. Given the severity of the injury, we are not persuaded it would be a fair inference that the bruising took more than a day to show. Therefore, we do not see how the proffered testimony that Diane S.'s bruises were visible by the time she left for Michigan later in the day on February 14th undermines Diane S.'s testimony that the beating occurred sometime earlier that day.

¶22 Finally, Diane S. testified that she was not entirely certain of the date, because she had been drinking heavily throughout February, and many

events were blurred together. Because Nelis was not precluded from presenting himself or Bates as witnesses and because the proffered evidence from other witnesses that Diane S. was in Michigan from February 14th to the 17th would not have led a rational jury to reach a different result, we conclude the denial of a continuance to allow Nelis to muster that evidence was harmless error if it was error at all.

Newly Discovered Evidence

¶23 For the same reasons we deem the denial of a continuance to be harmless error, we conclude it is not reasonably probable that a different result would be reached at a new trial based on new evidence regarding Diane S.'s whereabouts on February 14th to the 17th. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). Therefore, Nelis is not entitled to a new trial based on the discovery of that evidence after trial.

Sufficiency of the Evidence on Aggravated Battery

¶24 When reviewing the sufficiency of the evidence, we will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762; *see* WIS. STAT. § 805.14(1).

¶25 Nelis contends there was insufficient evidence to convict him of aggravated battery, which is defined as intentionally causing "bodily harm to another by conduct that creates a substantial risk of great bodily harm." WIS. STAT. § 940.19(6). He essentially argues that the black eyes, blurred vision,

swollen face, and split lip which Diane S. testified resulted from her beating, do not constitute "great bodily harm."

¶26 The State did not need to show that Diane S. suffered great bodily harm, however. It merely needed to show that she suffered bodily harm, and that Nelis's *conduct* created *a substantial risk* of great bodily harm. A jury could easily find that Diane S.'s injuries constituted bodily harm; and that the conduct of punching Diane S. in the head multiple times until she passed out created a substantial risk of great bodily harm. In short, the evidence was more than sufficient to support the verdict.

Right to Confrontation

¶27 Nelis claims that the introduction of the out-of-court statements Stone made to police violated his right to confront the witnesses against him under ***Crawford v. Washington***, 541 U.S. 36 (2004), because the statements were testimonial in nature. However, the ***Crawford*** rule applies to the admission of statements from witnesses who are "absent from trial" and unavailable to testify. ***Id.*** at 59. Here, Stone did testify at trial, and was fully available for cross-examination. The statements he had made to police were not introduced until after he had given in-court testimony inconsistent with his prior account of the incident. Furthermore, Nelis was able to fully cross-examine the police chief who related Stone's prior statements regarding why the chief had not included those statements in one of his written reports. Therefore, there was no Sixth Amendment violation.

Sentence

¶28 Finally, Nelis challenges his sentence on the sexual assault count as unduly harsh. The trial court sentenced him to fifteen years of initial confinement and ten years of extended supervision, to be served concurrently with his sentences on the battery convictions. Nelis calls it "simply shocking that [he] would be warehoused for a period of [fifteen] years for a crime which he did not commit and given that he is a concerned, good-hearted, generous, caring well-meaning individual."

¶29 Aside from Nelis' failure to raise his sentence complaint in his postconviction motion, he has provided no grounds for relief. The jury plainly disagreed with his contention that he did not commit the crime, and the trial court disagreed with his view of his character. The trial court addressed all of the relevant sentencing factors. The fifteen-year period of incarceration it imposed was within the sentence guideline for the offense, and the total sentence was well below the forty-six-year term that could have been imposed. *See* WIS. STAT. § 940.225(2)(a) (Classifying second-degree sexual assault by use of force as a Class C felony); § 939.50(3)(c) (providing maximum imprisonment term of forty years for Class C felonies); § 939.62(1)(c) (increasing penalty by six years based on repeat offender status). In short, we see no misuse of the trial court's sentencing discretion.

By the Court.—Judgment and order affirmed.

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