COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2472-CR **Cir. Ct. No. 2004CF735**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. RADTKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Michael Radtke appeals from a judgment of conviction of repeated sexual assault of the same child and exposing a child to harmful materials. He argues that the charging period was too indefinite to permit a defense and that it was error to permit the videotaped statement of the child

victim to be shown to the jury before the child's testimony. We affirm the judgment.

¶2 Radtke was charged with repeatedly sexually assaulting his victim between January 1, 2002, and July 2004, a two-and-one-half-year period. In July 2004, the victim, then age eight, reported the abuse. Two days later the victim made a videotaped statement. Radtke was arrested that same day.

¶3 A defendant is entitled to be informed of the charges against him or her, including the time frame in which the assault allegedly occurred. ***State v. Fawcett***, 145 Wis. 2d 244, 253, 426 N.W.2d 91 (Ct. App. 1988). Whether a period of time alleged in a complaint and information is too expansive to allow the defendant to prepare an adequate defense is an issue of constitutional fact which we decide independently of the trial court's determination. ***Id.*** at 249. The factors to be considered in determining if the complaint states an offense to which the defendant is able to plead and prepare a defense are:

> (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.

Id. at 251, 253. Where, as here, the defendant contends that the charging period is unreasonable on its face, the last four factors are the most relevant inquiry.[1] ***Id.*** at 251 n.2 In a case involving a child victim, a more flexible application of notice requirements is required because numerous circumstances cause the exactness as to time of events to fade in the memory of a child. *See* ***id.*** at 249, 254.

¶4 The child was only eight years when she reported the assaults. She was primarily in Radtke's care. The assaults occurred in the victim's home. She indicated that sexual contact occurred almost on a daily basis. The charging period was started with the date the child's mother walked in on Radtke assaulting the child. The child remembered it only as a time when Radtke and her mother were still living together and her mother was attending school. Long after the incident, the child's mother made a report to police and indicated that it happened approximately two years prior to February 10, 2004. The charging period concluded with the date the child made her own report. Those are logical demarcations for the charging period.

¶5 We conclude that the length of the alleged period of time in relation to the number of individual criminal acts alleged is not unreasonable. Radtke was arrested within two days of the child's reporting of the assaults. There is no unreasonable passage of time between the alleged period for the crime and

[1] In his reply brief, Radtke states that the test set forth in ***State v. Fawcett***, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), has been rejected as a "fuzzy approach dominated by subjective considerations." ***Fawcett v. Bablitch***, 962 F.2d 617, 619 (7th Cir. 1992). Radtke's statement is a misreading of the Seventh Circuit's decision in ***Fawcett***. The quoted portion of the decision actually criticizes the approach used in ***People v. Morris***, 461 N.E.2d 1256, 1259-60 (N.Y. 1984), which adopted an open-ended inquiry into the reasons why the charge was drafted as it was. In ***Fawcett v. Bablitch***, the Seventh Circuit indicated that the better approach was that adopted in ***Hamling v. United States***, 418 U.S. 87, 117 (1974), with which our decision in ***State v. Fawcett***, 145 Wis. 2d at 251-253, is aligned.

Radtke's arrest and issuance of the complaint. Further, the assaults occurred with such frequency that it is unlikely that a specific date or event would stand out in the child's mind. The child lacked the ability to particularize the date and time of the alleged offenses. Applying the ***Fawcett*** factors, we conclude that the charging period did not violate Radtke's constitutional right to notice.

¶6 At trial the child's videotaped statement was shown to the jury. Then the child was put on the witness stand and subjected to cross-examination. Radtke argues that it was improper to show the videotaped statement before the child testified. However, that is the exact order of presentation authorized by WIS. STAT. § 908.08(5)(a) (2003-04),[2] to minimize the amount of time the child must spend on the witness stand. *See* ***State v. James***, 2005 WI App 188, ¶18, 285 Wis. 2d 783, 703 N.W.2d 727, *review denied*, 2005 WI 150, 286 Wis. 2d 100, 705 N.W.2d 661, *cert. denied*, 126 S. Ct. 1060 (2006).

¶7 Radtke does not argue that the videotaped statement was improperly admitted under the factors to be considered in WIS. STAT. § 908.08(3), a statute enacted for the purpose of minimizing the mental and emotional strain that child witnesses in criminal proceedings experience as a result of having to testify. ***James***, 285 Wis. 2d 783, ¶17. Rather, Radtke claims that the videotaped statement was improperly admitted as a prior consistent statement to bolster the child's credibility before it had even been attacked. He relies on ***State v. Johnson***, 149 Wis. 2d 418, 427, 439 N.W.2d 122 (1989) ("one cannot bolster a witness's credibility until such credibility is attacked"). Radtke ignores that the statement

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

was used as direct evidence of the crimes. The child was subjected to only a limited direct examination when she took the witness stand. Further, because use of the videotape statement satisfied the various requirements set forth in § 908.08(2) and (3), the trial court did not need to consider any other grounds for admitting it. ***State v. Snider***, 2003 WI App 172, ¶12, 266 Wis. 2d 830, 668 N.W.2d 784. The videotaped statement was not for the purpose of bolstering the child's credibility and ***Johnson*** has no application.

By the Court.—Judgment affirmed.

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