COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP605-CR **Cir. Ct. No. 2004CF839**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW J. WETTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 SNYDER, P.J. Matthew J. Wetter stands convicted of six felonies: three counts of sexual assault of a child and three counts of incest with a child. He

appeals from the judgment of conviction for one count of incest and from an order denying his motion for resentencing. Wetter contends that the incest conviction was based on insufficient evidence in relation to the jury instruction given. He further contends that he is entitled to resentencing because, after the original sentencing, the court allowed four of his convictions to be withdrawn and the State thereafter abandoned retrying him on those charges. He asserts that this new situation calls for a fresh review of the whole sentencing scheme. We agree with Wetter that the jury instruction on the incest charge lacked a key definition; however, our review of the record in light of ***State v. Harvey***, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189, leads us to conclude the error was harmless. Moreover, we are satisfied that the circuit court's decision not to revise Wetter's sentence was reasonable. Accordingly, we affirm the judgment and the order of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 We may be understating the situation when we describe the procedural history of this case as tortured. Fortunately, the relevant facts are undisputed. The State originally filed a complaint against Wetter on July 23, 2004. The complaint alleged that Wetter had committed ten felonies as a repeater. Wetter was charged with three counts of sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2003-04)[1], three counts of incest with a child in violation of WIS. STAT. § 948.06(1), one count of failing to prevent bodily harm to a child, contrary to WIS. STAT. § 948.03(4)(b), and three counts of causing bodily harm to

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

a child, contrary to § 948.03(2)(b). On August 4, the State filed an information charging the same ten crimes. All of the charges were related to conduct that occurred at Wetter's residence during July 2004 and involved a child not yet two years old.

¶3 The parties reached a plea agreement whereby Wetter agreed to plead guilty to one count of first-degree sexual assault of a child and one count of causing bodily harm to a child. In exchange, the State agreed to move to dismiss and read in the remaining eight charges and to dismiss all of the repeater penalty enhancers. The State agreed to recommend an initial confinement term of twenty years and stand silent on the term of extended supervision. Wetter was free to argue. The circuit court accepted Wetter's two guilty pleas and dismissed and read in the remaining eight counts.

¶4 Prior to sentencing, Wetter moved to withdraw his plea. He advised the court that he pled guilty to protect the real perpetrator and now wished to abandon the charade. The court heard arguments and granted Wetter's motion to withdraw his guilty pleas. It then reinstated not guilty pleas to all ten counts.

¶5 Wetter subsequently entered guilty pleas to one count of failure to prevent bodily harm to a child and three counts of causing bodily harm to a child, all as repeaters. There was no agreement in exchange for these pleas. The court accepted Wetter's guilty pleas and a trial ensued on the remaining six counts.

¶6 On the third day of trial, before closing arguments were made, the State filed an amended information that identified the particular conduct underlying each of the six disputed counts. The amended information specified "[p]enis to mouth" conduct for count one (sexual assault of a child) and count four (incest with a child). It specified "[p]enis to anus" conduct for count two (sexual

assault of a child) and count five (incest with a child). It specified "[f]inger to anus" conduct for count three (sexual assault of a child) and count six (incest with a child).[2] The jury returned six guilty verdicts and the court entered judgment accordingly.

¶7 On May 27, 2005, the circuit court imposed three consecutive bifurcated sentences for the sexual assault convictions, each consisting of twelve years' initial confinement and four years' extended supervision. The court imposed three bifurcated sentences on the incest convictions, each consisting of eight years' initial confinement and four years' extended supervision. The court made these three concurrent to each other, but consecutive to the sexual assault charges. Finally, the court imposed four bifurcated sentences on the remaining counts, which were based on Wetter's guilty pleas. The court stayed these four sentences and ordered five years' probation to be served consecutive to the terms imposed on counts one through six. The aggregate sentence, therefore, was forty-four years' initial confinement followed by sixteen years' extended supervision and then five years' probation.

¶8 Wetter moved for postconviction relief. He sought to withdraw his guilty pleas to counts seven through ten, asserting that he was told the maximum sentence for those counts was twelve years, but in fact it was only ten years. The State conceded the error and the court allowed Wetter to withdraw his guilty pleas. The State then moved to dismiss the four counts without prejudice and the court granted the motion.

[2] Wetter did not object to the amended information.

¶9 Wetter also moved to vacate the conviction for count four of the information, incest with a child based on penis to mouth conduct. He argued that, given the instruction provided to the jury, there was insufficient evidence to convict him. He moved for resentencing as well. The circuit court refused to vacate the conviction and denied Wetter's request for resentencing. Wetter appeals.

DISCUSSION

¶10 Wetter first contends that his conviction on count four of the information, which charged him with incest based on penis to mouth conduct, must be vacated. He argues that the jury could not have found him guilty of the "sexual intercourse" element of that crime based on the instruction provided. We will reverse a conviction if the evidence, viewed most favorably to the prosecution, has insufficient probative value to prove the theory of guilt submitted to the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990). However, a jury instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. ***Harvey***, 254 Wis. 2d 442, ¶37.

¶11 Of the six counts submitted to the jury, three were for sexual assault and three were for incest. With regard to the sexual assault charges, the jury was instructed that sexual intercourse is "any intrusion, however slight, by any part of a person's body or of any object, in the genital or anal opening of another…. Fellatio, the oral stimulation of the penis, is sexual intercourse." The jury instructions for the incest charges included a similar definition of sexual intercourse, but omitted the language regarding fellatio. Thus, Wetter concludes,

the jury could not have found him guilty of incest on count four, which specified penis to mouth conduct.

¶12 Wetter directs us to ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997), for support. In ***Wulff***, our supreme court held that where "there was insufficient evidence to support the genital or anal intrusion conviction, and because facts regarding the attempted fellatio were submitted to the jury without instructions as to the relevant law," the conviction must be vacated. ***Id.*** at 154. The supreme court concluded that "[t]he jury was not instructed on [fellatio], so we cannot affirm Wulff's criminal conviction based on the theory of attempted fellatio." ***Id.*** at 153.

¶13 Wetter asserts that his case is analogous to ***Wulff*** because the jury was not instructed to consider fellatio as an alternative means of sexual intercourse. Absent the more inclusive definition used for the sexual assault charges, Wetter argues, the theory upon which the jury found guilt is unclear and, more importantly, unsupported by the evidence. Were we to end our analysis with ***Wulff***, we would agree. However, subsequent case law makes clear that Wisconsin employs a harmless error analysis to erroneous jury instructions.

¶14 We first turn to ***Neder v. United States***, 527 U.S. 1 (1999), which states that omitting an element from a jury instruction is harmless error "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." ***Id.*** at 17. The ***Neder*** court explained:

> We have often applied harmless-error analysis to cases involving improper instructions on a single element of the offense. In other cases, we have recognized that

> improperly omitting an element from the jury can "easily be analogized to improperly instructing the jury on an element of the offense, an error which is subject to harmless-error analysis."

Id. at 9-10 (citations omitted).

¶15 Five years after ***Wulff***, our supreme court decided ***Harvey***, which embraced the federal harmless error rule employed in ***Neder***, finding it "almost identical" to Wisconsin law. ***Harvey***, 254 Wis. 2d 442, ¶39. Specifically, the court referenced WIS. STAT. § 805.18, applicable to criminal matters by operation of WIS. STAT. § 972.11(1), which prohibits reversal for error not affecting a party's substantial rights. ***Harvey***, 254 Wis. 2d 442, ¶39.

¶16 Harvey contended that his jury was presented with an improper mandatory conclusive presumption on an elemental fact. ***Id.***, ¶47. The jury should have been instructed that it may, but need not, accept the fact as true. ***Id.*** Nonetheless, the court concluded that "[t]he elemental fact on which the jury was improperly instructed is undisputed and indisputable …. Accordingly, it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found the defendant guilty …." ***Id.***, ¶48.

¶17 Our supreme court echoed this analysis in ***State v. Gordon***, 2003 WI 69, ¶40, 262 Wis. 2d 380, 663 N.W.2d 765, where it expressly rejected the contention that the harmless error analysis should not apply to an erroneous jury instruction.[3] The court observed that, except for a limited class of errors, most

[3] The State points out that the supreme court decided ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 753 (1997); the same year that it decided ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997). The ***Howard*** court held that the harmless error analysis does not apply to a jury instruction that omits an element of the offense charged. ***Howard,*** 211 Wis. 2d at 292. In ***State v. Gordon***, 2003 WI 69, ¶40, 262 Wis. 2d 380, 663 N.W.2d 765, our supreme court expressly overruled the "automatic reversal" rule of ***Howard***.

errors, including constitutional ones, are reviewed for harmlessness. ***Id.***, ¶35. The ***Gordon*** court clarified that the harmless error analysis should be used where the jury instruction contains a mandatory conclusive presumption and where it erroneously omits an element of the offense. ***Id.***, ¶40. Thus, we have a clear mandate to employ a harmless error analysis where, as here, a jury instruction definition is incomplete.

¶18 ***Harvey*** provides us with the proper test for whether Wetter is entitled to reversal of his conviction: Is it "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" ***Id.***, ¶49 (citation omitted). With this test in mind, we turn our attention to the record.

¶19 First, we conclude that the conduct upon which Wetter's conviction rests is supported by proof beyond a reasonable doubt. Wetter's written statement to investigators, which was admitted as evidence at trial, stated in part that he "would get so mad … he would put his "penis in [the child's] butt and mouth." The State's primary investigator interviewed Wetter on the morning after the child's mother discovered the injuries. At trial, the investigator testified that Wetter admitted he had "put his penis in the boy's mouth."

¶20 Further, we emphasize that the issue presented to the jury was not whether penis to mouth conduct occurred, but rather who performed the act on the child. As Wetter framed the issue during opening statements, "We don't dispute … that [the child] was sexually molested…. It's not an issue from the standpoint of the defense that has to be established by virtue of evidence because we agree with that…. This will devolve into a contest as to who's responsible for these events and this harm that was done to this little boy." Wetter argued to the jury that his roommate was the perpetrator; the State argued that it was Wetter.

Though Wetter argued that he was not the person who put his penis in the child's mouth, he never denied that such conduct occurred. The instructional error was unrelated to the identity of the perpetrator, which was the only disputed element of the charge.

¶21 Finally, the jury instructions, taken together, demonstrate that the jury had the necessary information before it to convict Wetter on count four based on penis to mouth conduct. The instructions for counts one through three, the sexual assault charges, defined sexual intercourse to include penis to mouth conduct. Sexual intercourse is an element of both the sexual assault and the incest charges. Also, the instructions told jurors to deliberate on whether Wetter was guilty "as charged in the fourth count of the information," which specifically described penis to mouth conduct.

¶22 Ultimately, the elemental fact upon which Wetter bases his appeal is undisputed. It is clear beyond a reasonable doubt that a properly instructed, rational jury would have found Wetter guilty of incest based on penis to mouth conduct. The error, therefore, cannot have contributed to the verdict. *See* ***id.***, ¶48.

¶23 Wetter's only other appellate issue is whether the circuit court erroneously exercised its discretion when it refused to resentence him. Wetter notes that he was sentenced on ten felony convictions. Following his plea withdrawal on counts seven through ten, and the State's decision to abandon those charges, he now stands convicted of only six felonies.[4] Though the quantitative difference appears striking, the qualitative difference is minimal. The four vacated

[4] Had he successfully argued for reversal of the conviction on count four, he would stand convicted of just five of the ten original charges.

convictions were for nonsexual offenses and carried with them four-year bifurcated sentences, imposed and stayed, and five years' probation.

¶24 The circuit court explained that "far more serious and egregious offenses" were reflected in counts one through six. It stated that the sentence was crafted to move from more restrictive to less restrictive circumstances, and that vacating counts seven through ten, the less serious abuse charges, did not "in any way affect the intent or the purpose of the sentences on the earlier counts." Where the overall dispositional structure of the original sentence is not affected, remand for resentencing on convictions that remain intact after vacation of one or more counts in a multi-count judgment is not necessarily required. ***State v. Church***, 2003 WI 74, ¶60, 262 Wis. 2d 678, 665 N.W.2d 141. We are satisfied with the court's rationale for denying Wetter's motion for resentencing.

¶25 Much of Wetter's appellate argument presupposes that this court would agree to vacate his conviction on count four. Had that been the case, we may have been persuaded that the overall sentencing structure should be revisited. However, Wetter's anticipatory argument fails because he remains convicted of six felonies.

CONCLUSION

¶26 The proper test for determining whether instructional error requires reversal is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Harvey***, 254 Wis. 2d 442, ¶49. Against this standard, the erroneous definition of sexual intercourse given to the jury on count four, incest based on penis to mouth conduct, was harmless beyond a reasonable doubt. Furthermore, Wetter's plea withdrawal for the less serious offenses of failing to prevent bodily harm to a child and causing bodily harm to a

child does not upset the overall sentencing structure, which clearly emphasized the more "serious and egregious offenses" for which Wetter remains convicted.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.