COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP539-CR **Cir. Ct. No. 2003CF1148**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM EDWARD WELLS,

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 PER CURIAM. William Edward Wells has appealed from a judgment convicting him after a jury trial of one count of repeated sexual assault

of a child in violation of WIS. STAT. § 948.025(1)(b) (2003-04),[1] and one count of incest with a child in violation of WIS. STAT. § 948.06(1). He has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Wells raises two issues on appeal. His first argument is that he is entitled to dismissal of count two (the incest charge) because the evidence and jury instructions improperly allowed the jury to convict him of both count one (the repeated sexual assault of a child charge) and count two based on incidents that were not from separate and distinct time frames. Specifically, he contends that the time frames for the two counts presented to the jury were sufficiently confused as to permit the jury to convict him of the charge of repeated sexual assault of a child based on the same conduct that formed the basis for the incest charge. We disagree.

¶3 Wells was charged in count one with the repeated sexual assault of his daughter in violation of WIS. STAT. § 948.025(1)(b). WISCONSIN STAT. § 948.025(1)(b) provides that a defendant is guilty of a Class C felony if he or she commits three or more violations of WIS. STAT. § 948.02(1) or (2) within a specified period of time involving the same child, but fewer than three of the violations were violations of § 948.02(1).

¶4 WISCONSIN STAT. § 948.025(2)(b) provides that, to find a defendant guilty when an action under (1)(b) is tried to a jury, the members of the jury must unanimously agree that at least three violations of WIS. STAT. § 948.02(1) or (2)

[1] All references to the Wisconsin Statutes under which Wells was convicted are to the 2003-04 version. All other references to the Wisconsin Statutes are to the 2005-06 version.

occurred within the specified period of time, but need not agree on which acts constitute the requisite number and need not agree on whether a particular violation was a violation of WIS. STAT. § 948.02(1) or (2). However, § 948.025(3) further provides that "[t]he state may not charge in the same action a defendant with a violation of this section and with … a violation involving the same child under s. … 948.06 … unless the other violation occurred outside of the time period applicable under sub. (1)."

¶5 In count two, Wells was charged with incest under WIS. STAT. § 948.06(1) with the same victim as in count one. Wells contends that, as presented to the jury, the act which formed the basis for the incest charge fell within the time frame for the repeated sexual assault charge, and permitted the jury to convict him of the repeated sexual assault charge by considering the same conduct that formed the basis for the incest charge. He contends that the conviction for count two must therefore be vacated under ***State v. Cooper***, 2003 WI App 227, 267 Wis. 2d 886, 672 N.W.2d 118.

¶6 Prior to voir dire, the prosecutor read the charges to the prospective jurors as follows:

> I … do hereby inform the Court that the defendant did commit … the following crimes. Count 1, repeated sexual assault of the same child. That on or about February of 2002 to October 2nd of 2003, …, unlawfully and feloniously commit three or more violations of sexual assault of a child. Count 2 reads as follows. Incest with a child. That on or about October 2, 2003, …, unlawfully and feloniously have sexual contact with a child that he knew was related, either by blood or adoption ….

¶7 Admittedly, as contended by Wells, this statement informed the prospective jurors that the date of commission of the incest charge was included in the date of commission of the acts constituting the repeated sexual assault charge.[2] However, we conclude that the evidence, jury instructions, and closing argument presented to the jury eliminated any confusion concerning the dates of the alleged offenses.

¶8 The victim's testimony at trial indicated that Wells committed an act of incest on October 2, 2003. The date was clear because she first reported Wells' conduct to school personnel and police on October 3, 2003, and informed them that Wells had sexually assaulted her "the night before." The videotaped statement of the victim and her testimony at trial also described numerous other acts of sexual assault that occurred between February 2002 and October 1, 2003.

¶9 Consequently, as presented to the jury, the evidence clearly established separate time frames for the charges. These separate and distinct time

[2] The prosecutor's statement apparently derived from the confusion in the original information, amended information, and second amended information as to the dates underlying the respective charges. The complaint and original information alleged that both counts occurred "on or about October 2, 2003." A first amended information filed on August 26, 2004, alleged that count one occurred "on or about February 2002 to October 2, 2003," and that count two occurred "on or about October 2, 2003." This was the version read to the jury by the prosecutor prior to voir dire.

The record indicates that a second amended information was filed on September 23, 2004, alleging that count one "occurred on or about February 2002 to October 1, 2003," and that count two occurred "on or about February 2002 to October 2, 2003." However, Wells concedes that this latter version was apparently a clerical error and was never presented to the jury. We also note that the first amended information includes a handwritten notation on count one, dated September 24, 2004, the last day of trial. It appears to be initialed by the trial court, and altered the allegation concerning count one to state that it occurred "on or about February 2002 to October 1, 2003." This is consistent with the statement made by the trial court to the jury in its final instructions, as discussed later in this decision.

frames were clarified for the jury through the trial court's final jury instructions and the closing arguments of counsel.

¶10 At the commencement of the jury instructions, the trial court stated to the jury:

> One thing first … is I have to inform you that the State moved and the Court granted an amendment to the information. So that Count 1 now reads that on or about February 2002 to October 1, 2003, the defendant did unlawfully and feloniously commit three or more violations of sexual assault of a child. So that that change has been made. Count 2 still reads the same date of offense on the incest charge is October 2nd of 2003.

¶11 The trial court then proceeded to instruct the jury on the elements of the charged offenses. It stated:

> The first count of the information in this case charges that on or about February 2002 to October 1, 2003, … the defendant did unlawfully commit three or more violations of sexual assault of a child, contrary to Section 948.02(1) or (2).
>
> …
>
> The specified period of time is from February of 2002 through October 1st of 2003.
>
> Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between February of 2002 and October 1st of 2003, but you need not agree on which acts constitute the required three.

¶12 After completing its instructions as to count one, the trial court instructed concerning the incest charge, stating:

> The second count in the information charges that on or about October 2, 2003, … the defendant did unlawfully have sexual contact with a child he or she knew was related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin.

¶13 The closing arguments of the parties also clarified to the jury that the October 2, 2003 sexual assault on which the incest charge was based could not be used to convict Wells of the repeated sexual assault charge. During closing argument, counsel for Wells told the jury:

> Count 1 alleges that Bill Wells engaged in repeated acts which a person is only guilty of if all twelve people think that there were three incidents within this specified time period. They have now moved the specified time period, and you cannot consider whether one of those three acts was what [the daughter] discussed on October 2nd. You cannot consider that. It's a separate action. It's a separate charge rather.

¶14 The prosecutor also discussed this issue in his rebuttal argument, stating:

> I want to address one and only one issue that was raised by the defense counsel and that is the change in the charging document.… [T]he District Attorney has the discretion to charge certain matters. In review of the various things together with what was on the record, it was decided to change the charging document, to move the date of the incest charge out of the time frame that I charged for the group of offenses. By doing that, there is still more than three offenses within the time period that I have alleged. The burden has not changed. The elements have not changed on the offense. They have their separate and distinct elements. Count 1 still has more than three charges or three events that occurred. So, therefore, that does not affect the charge in Count 1. Count 2 is a separate and distinct act, and you can make a decision on that charge.

¶15 As contended by the State, these statements echoed the trial court's instruction that the jury had to unanimously agree that at least three sexual assaults occurred from February 2002 to October 1, 2003, in order to convict Wells of the repeated sexual assault charge. They also underscored for the jury that it could not use the October 2, 2003 sexual assault on which the incest charge was based as grounds for convicting Wells of the repeated sexual assault charge.

¶16 On appeal, Wells objects that confusion arose because the trial court read WIS JI—CRIMINAL 255A (2000) to the jury, stating:

> If you find that the offense charged was committed by the defendant, it is not necessary for the State to prove that the offense was committed on a specific date. If the evidence shows beyond a reasonable doubt that the offense was committed during the time period alleged in the information, that is sufficient.

¶17 Wells' objection to this instruction was waived when he failed to object to it at the jury instruction conference or at any other point during trial. *See* ***State v. Koch***, 144 Wis. 2d 838, 850, 426 N.W.2d 586 (1988); WIS. STAT. §§ 805.13(3) and 972.11(1).

¶18 Even on the merits, we reject Wells' claim that the trial court's decision to read WIS JI—CRIMINAL 255A provides a basis for relief on appeal. Wells relies on ***Jensen v. State***, 36 Wis. 2d 598, 604-05, 153 N.W.2d 566 (1967), *rehearing denied*, 154 N.W.2d 769 (1967), which indicated that a related instruction, WIS JI—CRIMINAL 255, "was designed for a fact situation in which one offense only is alleged, or where, if there are multiple offenses, there is absolutely no confusion in anyone's mind as to their separateness in time."

¶19 We conclude that the evidence, argument and instructions, as presented to the jury, left no confusion as to the separateness in time of the incest and repeated sexual assault charges, and the separate acts that had to be found to convict Wells on both counts. In making this determination, we also reject Wells' argument that the trial court's use of the words "on or about" October 2, 2003

when it instructed the jury on the incest charge compels relief.[3] The evidence and jury instructions, when combined with the closing arguments, made clear to the jury that an incest conviction had to be based upon the incident that occurred on October 2, 2003, while a repeated sexual assault conviction had to be based upon three incidents occurring from February 2002 to October 1, 2003. No confusion therefore arose from the instruction as given by the trial court, and no basis exists to vacate the incest conviction on the ground that the jury may have felt free to use the same act as the basis for both convictions.

¶20 The second issue raised by Wells is whether the trial court erred when it permitted a videotaped statement of the victim to be admitted at trial. The videotape was a recording of an interview conducted at a hospital ten days after the victim first reported to school personnel and the police that Wells had sexually assaulted her.[4]

¶21 The victim was fourteen years old at the time of trial. The videotaped statement of a child who is at least twelve years of age but younger than sixteen years of age shall be admitted at trial if it satisfies the criteria of WIS. STAT. § 908.08(3)(b) through (e), and the interests of justice warrant its admission. WIS. STAT. § 908.08(3)(a)2. and (4). We will uphold a trial court's decision admitting a videotaped statement under § 908.08(4) when its reasoning process is

[3] Although we have considered the merits of Wells' objection to the trial court's use of the words "on or about" October 2, 2003 when it instructed the jury on the incest charge, we also conclude that Wells waived this argument by failing to object to the inclusion of this language in the information as amended at trial, and by failing to object to the instruction until after trial. *See* ***State v. Gove***, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989); ***State v. Koch***, 144 Wis. 2d 838, 850, 426 N.W.2d 586 (1988).

[4] After the videotape was played at trial, the prosecutor and defense counsel questioned the victim on direct examination, cross examination, and redirect and recross examination.

reflected in the record, and it exercised its discretion in accordance with the proper legal standards and the facts of the case. ***State v. Tarantino***, 157 Wis. 2d 199, 211, 458 N.W.2d 582 (Ct. App. 1990).

¶22 WISCONSIN STAT. § 908.08(4) lists nine factors that the trial court may take into consideration in determining whether the interests of justice are satisfied, including:

> (a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
>
> (b) The child's general physical and mental health.
>
> (c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
>
> (d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.
>
> (e) The child's familial or emotional relationship to those involved in the underlying proceeding.
>
> (f) The child's behavior at or reaction to previous interviews concerning the events involved.
>
> (g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.
>
> (h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares,

> enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.
>
> (i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

¶23 The trial court watched the videotape before deciding to admit it in this case. After viewing it, the trial court addressed all of the factors set forth in WIS. STAT. § 908.08(4), with the exception of (4)(h), upon which the State did not rely.

¶24 Based upon its viewing of the tape, the trial court concluded that the victim was capable of understanding the significance of the events and verbalizing them, and understood the taking of an oath. It concluded that the videotape revealed no issues of physical or mental health, that the victim was currently living outside of Wells' household, and that her biological mother believed her allegations and supported her. However, the trial court also noted that the victim was at a stage of life where she was still developing, including developing her own sense of sexuality, and that testifying against her father would be extremely emotional and stressful to her. It concluded that admitting the videotape would reduce the emotional and mental strain that the victim, like any child victim, would experience if she was required to testify against her father in the presence of strangers in a courtroom, and to give detailed information about the sexual contact and intercourse. It also noted that the sexual assaults described in the videotape had taken place over a long period of time, and that, while the victim's behavior in the tape indicated that she was willing to disclose the details, it also indicated that she did not want to.

¶25 The trial court also noted that at the time the victim made the allegations of assault, she lived with her father and his live-in girlfriend, who did not believe her. In addition, it considered the victim's statement that she was told by her father not to tell about the assaults, was told by others that they did not believe her, and was made aware that if she did tell, she would be removed from her father's home and probably have to live in foster care.

¶26 Based upon these factors, the trial court concluded that the interests of justice warranted admission of the videotape. When reviewing evidentiary issues, the question is not whether this court agrees with the trial court's ruling, but whether the trial court exercised discretion in accordance with accepted legal standards and the facts of record. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's determination. ***Id.*** Because the trial court's decision to admit the videotape was reasonable and based upon proper legal standards and facts of record or reasonably inferred from the record, we will not disturb it.[5]

By the Court.—Judgment and order affirmed.

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

[5] In upholding the trial court's decision, we also note that at sentencing the trial court judge described the victim's cowering and shaking on the witness stand, and stated that in thirty years as a lawyer and judge, he had never seen a victim more traumatized by what had happened to her. Although this statement was made after trial and the admission of the videotape, it provides additional support in the record for concluding that the trial court's discretionary decision to admit the videotape was reasonable.