COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2245-CR **Cir. Ct. No. 2007CF72**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BURTON S. BARTOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Burton S. Bartow appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues that the circuit court erred when it allowed the

State to amend the charges against him in the middle of his trial. Because we conclude that the amendment was reasonable, we affirm the judgment and order.

¶2 Bartow was charged with one count of repeated sexual assault of the same child, contrary to WIS. STAT. § 948.025(1)(b) (2005-06).[1] To prove repeated sexual assault of a child, the State must establish that the defendant committed at least three acts of sexual contact or intercourse. WIS. STAT. §§ 948.025(1) and 948.02(1). The victim testified at trial that Bartow sexually assaulted her "more than" three times. She then described two incidents when Bartow put "his thing" inside her "crotch." After the victim finished testifying and before the State rested, the State moved to amend the information from one count of repeated sexual assault of a child, a class C felony, to two counts of second-degree sexual assault of a child, also a class C felony. *See* § 948.02(2).

¶3 Defense counsel objected to the amendment, arguing that the fact that the witness testified differently than the State expected did not warrant amendment of the information. Further, counsel argued that the amendment would prejudice Bartow's defense, which would have been that the State had not proved three incidents, and doubled the potential sentence that Bartow faced. The court concluded that the amendment was not unfairly prejudicial because Bartow had notice of what the accusation was, and the amendment essentially was only a change in number, not in the actual accusation. Bartow filed a motion for

[1] Bartow was initially charged with violating WIS. STAT. § 948.025(1)(ar). After the preliminary hearing, this was amended to § 948.025(1)(b), because the victim testified that she was fifteen at the time of the assaults.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

postconviction relief. The circuit court held a hearing and concluded that Bartow had not been prejudiced by the amendment. Bartow appeals.

¶4 At trial, the circuit court may allow the amendment of the information to conform to the proof when the amendment is not prejudicial to the defendant. WIS. STAT. § 971.29(2) (2007-08). We review the circuit court's decision to make such an amendment for an erroneous exercise of discretion. ***State v. Malcolm***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918. A circuit court misuses its discretion when the defendant is prejudiced by the amendment. ***State v. Neudorff***, 170 Wis. 2d 608, 615, 489 N.W.2d 689 (Ct. App. 1992). "Rights of the defendant which may be prejudiced by an amendment are the rights to notice, speedy trial and the opportunity to defend." ***Id.*** (citation omitted).

¶5 The State must satisfy two tests to sustain the amendment: the wholly unrelated test and the constitutional notice test. ***Malcolm***, 249 Wis. 2d 403, ¶26. The State may add charges to an information as long as those charges are not "wholly unrelated to the transactions or facts considered or testified to at the preliminary hearing." ***Id.*** The charges, however, must be related in terms of the parties, witnesses, geographical proximity, time, physical evidence, motive, and intent. ***Id.*** Further, the defendant must have notice of the accusations. ***Id.*** "Notice to the defendant of the nature and cause of the accusations is the key factor in determining whether an amended charging document has prejudiced a defendant." ***State v. Wickstrom***, 118 Wis. 2d 339, 349, 348 N.W.2d 183 (Ct. App. 1984).

¶6 In ***Malcolm***, we concluded that the amendment made was not prejudicial because the defendant was not "caught unaware" of the facts

underlying the amended charge when the facts supporting that charge were the same as the facts supporting the amended charge. ***Malcolm***, 249 Wis. 2d 403, ¶28. We also concluded that the evidence did not show or suggest that Malcolm would have presented a different defense to the amended charge. ***Id.***

¶7 In this case, Bartow argues that he was prejudiced because he had not prepared a defense to the new charges and because the penalty he faced was doubled by the amendment. We conclude, however, that Bartow had notice of the accusations. The charge involved the same parties, witnesses, time, physical evidence, motive and intent. Bartow argued to the jury that he did not commit the offenses and that the victim's testimony was not credible. Bartow does not argue that there are other defenses he could have presented to the amended charge. He simply has not established that his preparation for the new charges would have been any different than his preparation for the original charge.

¶8 We also conclude that the increase in penalty was not prejudicial. Bartow asserts that he may have entered a negotiated plea if he had understood the penalty he would face by going to trial. Bartow has not established, however, that he attempted to negotiate a plea and was rebuffed by the State. We are not convinced that the increase in the potential penalty was prejudicial. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).