COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2579-CR **Cir. Ct. No. 2007CF262)**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL GARCIA-SOTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Garcia-Soto appeals a judgment convicting him of repeated sexual assault of a child and an order partially denying his postconviction motion. A jury convicted Garcia-Soto of that offense (Count 1) and a separate count of sexually assaulting the same victim (Count 3). The jury

acquitted Garcia-Soto of three other charges. In response to Garcia-Soto's postconviction motion, the State conceded the conviction on both Counts 1 and 3 violated WIS. STAT. § 948.025(3),[1] and elected to dismiss Count 3. The court vacated the conviction on Count 3 and denied Garcia-Soto's challenges to Count 1. Garcia-Soto contends the error in submitting Count 3 to the jury taints the verdict regarding Count 1 and his trial counsel was ineffective for failing to challenge the duplicitous charging, failing to object to the "generic verdict forms," and failing to demand a jury instruction on unanimity. We reject these arguments and affirm the judgment and order.

¶2 Count 1 of the Information charged Garcia-Soto with repeated sexual assault of K.J.C. consisting of at least three assaults between August 2000 and May 2001. Count 3 alleged a specific sexual assault in October or November 2000. Because the specific act alleged in Count 3 occurred during the time frame for Count 1, conviction of both offenses is not allowed under WIS. STAT. § 948.025(3).

¶3 The trial court correctly allowed the State to elect which of the charges to dismiss. *See* ***State v. Cooper***, 2003 WI App 227, ¶15, 267 Wis. 2d 883, 672 N.W.2d 118. The error caused by the duplicitous convictions was cured by the dismissal of Count 3.

¶4 Garcia-Soto argues Count 1 should also have been dismissed because presentation of evidence regarding Count 3 somehow deprived him of a unanimous jury. To convict Garcia-Soto of repeated sexual assault of a child, the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

jury was required to unanimously determine that he committed at least three sexual assaults. The jury did not have to agree on which three assaults composed the crime. *See* ***State v. Molitor***, 210 Wis. 2d 415, 423, 565 N.W.2d 248 (Ct. App. 1997). The fact the jurors unanimously agreed that he committed the offense described in Count 3 does not invalidate their finding that he committed the repeated sexual assaults alleged in Count 1. Nothing prohibits the jury from using its unanimous belief that he committed the crime described in Count 3 as one of the three acts that relate to Count 1. The jury was instructed to consider the crimes separately and that it must unanimously agree that at least three sexual assaults occurred between August 2000 and May 2001, but that it need not agree on which acts constitute the required three offenses. In light of that correct instruction, there is no basis to believe the jury was not unanimous as to Count 1.

¶5 Garcia-Soto argues that the "generic verdict forms" do not describe the acts the jury was to consider and do not set forth any time frame. That issue is forfeited because Garcia-Soto did not object to the verdict form. *See* ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). Garcia-Soto argues his counsel was ineffective for failing to make the objection. To establish ineffective assistance of counsel, Garcia-Soto must show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He has not established prejudice because the dates provided in the Information and the jury instructions adequately identified the time frame for Count 1.

¶6 Garcia-Soto also argues the court should have read the jury WIS JI—CRIMINAL 517 (2001), which provides that "All 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged." That issue is also forfeited because Garcia-Soto's counsel withdrew the request for that instruction. Garcia-Soto was not prejudiced

by his counsel's withdrawal of the request because that instruction does not apply to Count 1. ***Molitor***, 210 Wis. 2d at 423. While that instruction would have been relevant to Count 3, the ultimate dismissal of Count 3 removes any prejudice to the defense.

By the Court.—Judgment and order affirmed.

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