COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2135-CR **Cir. Ct. No. 99-CF-18**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. DEFLIGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 DEININGER, J. Robert DeFliger appeals a judgment convicting him of second-degree sexual assault. He also appeals an order denying his motion for postconviction relief. DeFliger claims the trial court erred in denying his motion to dismiss the information for lack of specificity and on double jeopardy grounds. He also contends that the trial court erred in denying a request for a

continuance, that a witness was permitted to improperly bolster the victim's testimony at trial, and that his trial counsel rendered ineffective assistance. Finally, DeFliger argues that there was insufficient evidence to support the jury's verdict and that he should be granted a new trial in the interest of justice. We find none of DeFliger's arguments persuasive, and accordingly, we affirm the appealed judgment and order.

BACKGROUND

¶2 After participating in a sex education class, J.W., a cognitively disabled seventeen-year-old boy who functions at the level of a six or seven-year-old, told his special education teacher that he had touched and rubbed DeFliger's penis. The teacher relayed J.W.'s report to the authorities, and a Marquette County detective interviewed J.W. about the incident he had reported to his teacher. J.W. repeated his statements to the detective and showed him locations in Marquette County, where J.W. resided with his grandparents, that the sexual contact had occurred. Because J.W. also stated that sexual contact had occurred in Columbia County, where DeFliger resided, Marquette County relayed the information to the Columbia County Sheriff's Department.

¶3 A Columbia County detective then met with J.W., and J.W. rode with the detective to show him where the activities had occurred in that county. The incident J.W. related to the Columbia County detective had occurred one evening in 1997 when J.W. went with DeFliger to see races at the Dells Motor Speedway and then spent the night at DeFliger's residence in Portage. The detective ascertained from J.W.'s description and locations he pointed out that sexual contact had taken place when DeFliger and J.W. left the speedway in DeFliger's vehicle, thus originating in Juneau County. The activity also occurred

enroute from Wisconsin Dells to Portage, and at DeFliger's residence in Portage, which locations were in Columbia County.

¶4 As a result of J.W.'s statements to investigators in February and March 1998, DeFliger was charged with sexual offenses involving J.W. in Marquette, Juneau and Columbia Counties. He was convicted in Marquette County of one count of sexual contact with a person who suffers from a mental deficiency, and one count of child enticement. We have affirmed that conviction. ***State v. DeFliger***, No. 00-2248-CR, unpublished slip op. (Wis. Ct. App. Jun. 6, 2002). DeFliger was acquitted of the Juneau County charges, which involved the activities in that county on the evening that DeFliger and J.W. attended the races at the Dells Motor Speedway.

¶5 The State filed a criminal complaint against DeFliger in Columbia County on January 21, 1999, charging him with one count of having sexual contact with a person who suffers from a mental deficiency, in violation of WIS. STAT. § 940.225(2)(c) (1999-2000).[1] The amended information alleged as follows:

> [I]n the summer of 1997, in the City of Portage, Columbia County, Wisconsin, the defendant did: have sexual contact with a person, to-wit: J.R.W., dob 10/26/80, who suffers from a mental deficiency ….

DeFliger moved to dismiss the information for lack of specificity because the term "summer" was too broad to provide notice of the actual date of the offense, thereby interfering with DeFliger's ability to defend himself. He also moved to

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

dismiss the information on double jeopardy grounds, citing the Marquette and Juneau Counties prosecutions. During argument, however, he conceded that the Marquette County conviction was for a separate crime. The trial court denied both motions, and the matter was tried to a jury.

¶6 J.W. testified at trial that he went to the races at the Dells with DeFliger in the summertime. He testified that on one occasion, DeFliger picked him up at his home in Marquette County, and after the races they went to DeFliger's home in Portage, Columbia County. According to J.W., at the conclusion of the race when they were leaving the speedway, DeFliger took down his pants and began rubbing himself. Only DeFliger and J.W. were present in DeFliger's truck, and DeFliger asked J.W. to "touch his private and rub it." J.W. testified that he did this "a long time," and that it happened "on the road between the Dells and Portage."

¶7 J.W. testified that when the two arrived at DeFliger's residence in Portage, DeFliger again "touched himself" in the bathroom and that he ejaculated. He also said that similar activity occurred on the bed in DeFliger's room, where J.W. again complied with DeFliger's request that J.W. touch his penis. J.W. reported further that DeFliger said "that feels good," and that J.W. should not tell anyone what the two of them did because they would "[t]hrow me [J.W.] in jail."

¶8 The State also presented testimony from J.W.'s teacher and a school psychologist, as well as from two detectives who interviewed J.W., and from J.W.'s grandparents. The grandparents verified that DeFliger had taken J.W. to the races in the Dells several times in 1996 and 1997, and that at least on one occasion, J.W. had spent the night at DeFliger's residence. During rebuttal testimony, J.W.'s grandmother was asked by the prosecutor how she would

"characterize [J.W.] in general as far as his truthfulness or not truthfulness?" She replied, "[h]e's very honest."

¶9 DeFliger did not testify, but the defense called a number of witnesses, including DeFliger's then fiancé. The fiancé testified that DeFliger had been with her during most, if not all Saturday evenings during July 1997, and that she was not aware of DeFliger having taken J.W. to the races while she had known him. The remaining witnesses testified to DeFliger's good character and to hearing statements from his ex-wife that she was going to get even with him or make him pay for divorcing her.

¶10 The jury found DeFliger guilty of the sexual assault. The court sentenced him to an eight-year prison term to be served consecutive to sentences imposed in the Marquette County case. DeFliger moved for postconviction relief, seeking a new trial on the grounds of newly discovered evidence. The trial court denied the motion and DeFliger appeals.[2]

ANALYSIS

¶11 DeFliger first claims that he was denied the opportunity to present a defense because the information lacked specificity as to the date of the offense for which he was charged and convicted. Both parties cite our decision in ***State v. Fawcett***, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), as setting forth the factors we are to consider in evaluating the sufficiency of a criminal complaint or

[2] We note that even though DeFliger's notice of appeal states that he is appealing the denial of his postconviction motion, he does not argue on appeal that he is entitled to a new trial on the grounds of newly discovered evidence, which was the ground relied upon in his motion to the trial court. DeFliger also moved for sentence modification, but likewise does not challenge the denial of that motion.

information, which is a question of law we decide de novo, as is whether DeFliger was deprived of a fair opportunity to defend himself. ***Id***. at 249-50.

¶12 We concluded in ***Fawcett*** that time is "not of the essence" in sexual assault cases, and proof of an exact date is not required. ***Id***. at 250. We acknowledged, however, that a defendant is nonetheless entitled to be informed of "the time frame in which the assault allegedly occurred" so that "a defense may be prepared." ***Id***. at 253. We pointed to seven non-exclusive factors which a court may consider in determining whether a charging document is sufficiently specific to allow a defense to be prepared and double jeopardy avoided:

> (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.

¶13 The State contends that an "examination of the ***Fawcett*** factors shows that the charges provided sufficient notice." We agree. The information alleges that the offense occurred "in the summer of 1997." This three-or-four-month period is shorter than the six-month period we deemed sufficient in ***Fawcett***, where we concluded that in cases "involving a child victim, … a more flexible application of notice requirements is required and permitted," due in part to the "vagaries of a child's memory" and to the fact that "child molestation is not an offense which lends itself to immediate discovery." ***Id***. at 254. DeFliger

acknowledges that J.W. "was functioning at an age much below his true age." We agree with the State that the record demonstrates that J.W. could not be more definite regarding the date of the charged offense, and that his reporting it to his teacher following a sex education class some six months later was not an unreasonable or unduly prejudicial delay under all of the circumstances.

¶14 DeFliger, however, points to ***State v. R.A.R.***, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988), where we concluded, after considering the ***Fawcett*** factors, that a complaint which charged offenses as occurring "during the spring of 1982" and "during the summer of 1982" were "not sufficiently definite" to adequately inform the defendant of the charges against him. ***Id***. at 409, 413. Just as in ***Fawcett***, we considered but did not discuss all of the factors or circumstances, *see* ***R.A.R.***, 148 Wis. 2d at 411-12, and we placed particular emphasis on the five-year interval between the alleged occurrence of the charged offenses and the filing of the complaint. ***Id***. We also noted that the victims in ***R.A.R.*** "were at least a year older than the victim in ***Fawcett***." ***Id***. at 412.

¶15 Here, the mental age of the victim was several years less than that of the victim in ***Fawcett***, and the interval between the offenses ("summer of 1997") and the filing of the complaint (January 1999) was about eighteen months, as opposed to the five-year interval in ***R.A.R.*** We agree with the State that DeFliger's telling J.W. that he, J.W., would be thrown in jail if he reported the sexual contact, easily explains why J.W. did not tell anyone about it for over six months. The record does not disclose why the State did not charge DeFliger in Columbia County until some ten months after J.W.'s statements in February and March 1998, but we do not deem the interval so lengthy as to prejudice DeFliger's defense or render the information deficient.

¶16 The delay in charging in Columbia County may have been due in part to the pendency of charges in Marquette and Juneau Counties, which the record indicates were filed as early as March of 1998. The allegations in the other cases involved offenses allegedly committed during the same time frame ("summer of 1997," Marquette County; "[f]rom the 19th day of April through the 30th day of August, 1997," Juneau County). DeFliger was well aware from the criminal complaints in this case and in the Juneau County case that J.W. had stated sexual contact with DeFliger occurred on a summer evening in 1997 when they attended races in the Dells and spent the night in Portage.

¶17 We conclude that the facts and circumstances present here are much closer to those in ***Fawcett*** than those in ***R.A.R.***, and that the information sufficiently apprised DeFliger of the charge against him so as to allow him to prepare a defense.[3] *See* ***Fawcett***, 145 Wis. 2d at 254.

¶18 DeFliger next claims that the instant conviction is for the same offense of which he was acquitted in Juneau County, thus abrogating constitutional and statutory prohibitions against double jeopardy in the form of multiple prosecutions for the same offense. He argued in the trial court that "you have one continuing allegation of one continuing sexual contact of the exact same nature in the exact same manner without any significant pause in the action. And they can't fractionate [sic] it into two crimes just because the county line was

[3] We note that, before this case was tried, DeFliger's counsel also had the opportunity to review transcripts of the trials conducted in the two adjoining counties. Despite J.W.'s inability to provide a precise date for the offense in question, DeFliger was well apprised of the allegations he would be required to defend against in Columbia County. He presented witnesses at trial tending to show that he did not take J.W. to the races in the Dells during July 1997, and suggesting that J.W. had been prompted to make false allegations against him.

crossed in the middle of it." We might well agree with DeFliger's proposition that if a single instance of sexual contact began a moment before a vehicle crossed a county line and terminated the moment after, identical charges in both counties would be multiplicitous, and the State would be required to choose its venue for prosecution of a single offense. Although the proposition may have merit in the abstract, the record contains no factual support for its application in this case.

¶19 The Juneau County charges involved DeFliger's sexual contact with J.W. immediately following the races at the speedway located in that county. J.W. told a Columbia County detective that DeFliger had him stop the activity as they traveled through the high-traffic commercial areas of Wisconsin Dells, lest a motorist observe it, and then instructed him to resume after they left the Dells and proceeded by highway to DeFliger's residence in Columbia County. J.W. testified that additional sexual contact took place after the two entered the residence, occurring in both the bathroom and the bedroom.

¶20 We are satisfied that the offense charged and successfully prosecuted in Columbia County was factually distinct from the Juneau County charges, in that considerable time and distance separated several episodes of sexual contact, giving DeFliger ample opportunity to reflect and reconsider his course of action with J.W. *See* ***State v. Carol M.D.***, 198 Wis. 2d 162, 170, 542 N.W.2d 476 (Ct. App. 1995) ("Offenses are separated in time if the defendant had time to reconsider his or her course of action between each offense."); ***Harrell v. State***, 88 Wis. 2d 546, 572-74, 277 N.W.2d 462 (Ct. App. 1979) (noting that separations in time and place are relevant to "whether an episode of sexually assaultive behavior constitutes a single offense or multiple offenses").

¶21 We next consider whether the trial court erred in denying DeFliger's request for a continuance made a week before the trial was scheduled to begin. DeFliger's first attorney asked to withdraw from representation on August 16, 2000, after DeFliger rejected a plea agreement counsel had negotiated with the State. The State opposed the withdrawal, stating it "has been ready to proceed numerous times on this case." The court granted the withdrawal motion and directed that immediate arrangements be made for the appointment of a public defender, stating that the court "will make every effort to get this back on the trial calendar as expeditiously as possible given the circumstances that have presented themselves here today with the manipulation of the Court and its calendar by the Defendant."

¶22 The record does not disclose when DeFliger's successor counsel was appointed, but on October 25, he filed a motion for continuance of the trial then set for November 2 and 3, 2000. The grounds for the motion were that counsel had just gained access to "fairly massive" discovery materials which had been in the possession of the State and DeFliger's first attorney. Counsel also noted that he had received transcripts of DeFliger's prior trials (see footnote 3) and needed time to review them for "information there that would be useful in the formulation of a defense." The State opposed the request, citing the history of delays it attributed to the defendant and the difficulties the delays caused for the victim.

¶23 The court denied the continuation request, expressly noting that it must "balance various considerations, the interest of the Defendant and a fair trial, the interest of the State, the interests of the victim, the interests of the sufficient administration of this matter as well." It concluded that because counsel had obtained the materials a week before trial, "that is ample time to review whatever is out there and prepare for trial." We conclude that the trial court applied the

correct legal standard, considered the relevant facts and reached a result that a reasonable judge could reach, fulfilling the standard under which we must uphold this discretionary decision. *See* ***State v. Echols***, 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993) ("The trial court's ruling on a motion for continuance will not be set aside unless we find that the trial court erroneously exercised its discretion."); ***Long v. Ardestani***, 2001 WI App 46, ¶28, 241 Wis. 2d 498, 624 N.W.2d 405 ("We affirm discretionary decisions when the trial court examines the relevant facts, applies the correct legal standard, and uses a rational process to reach a conclusion a reasonable judge could reach.").

¶24 DeFliger next seeks relief from his conviction on the basis of what he labels the State's improper bolstering of J.W.'s testimony at trial. He cites the following question to and answer by J.W.'s grandmother during rebuttal testimony:

> Q … [H]ow would you characterize [J.W.] in general as far as his truthfulness or not truthfulness?
>
> A He's very honest.

Acknowledging that the State's question and the grandmother's answer were not objected to at trial, DeFliger asks us to find "plain error" or ineffective assistance of his counsel in permitting the jury to hear this question and answer. We conclude, however, that it is neither, nor was it error at all.[4]

[4] We also note, as the State points out, that we are precluded from considering an appellate claim of ineffective assistance of counsel for failing to object to this testimony because the claim was not raised in DeFliger's postconviction motion and no testimony was taken from DeFliger's trial counsel regarding his failure to object. *See* ***State v. Giebel***, 198 Wis. 2d 207, 218, 541 N.W.2d 815 (Ct. App. 1995).

¶25 One aspect of DeFliger's defense was an attempt to suggest that his ex-wife conspired with her "good friend," J.W.'s grandmother, to have J.W. make false allegations against DeFliger. Thus, J.W.'s credibility was very much under attack. WISCONSIN STAT. § 906.08(1) provides as follows:

> **(1)** OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in [the "rape shield" statute], the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

The prosecutor's question to J.W.'s grandmother was framed precisely to come within the foregoing evidentiary rule. Unlike the response in ***State v. Tutlewski***, 231 Wis. 2d 379, 605 N.W.2d 561 (Ct. App. 1999), on which DeFliger seeks to rely, the grandmother's response was limited to a general statement of J.W.'s

"truthful character," as opposed to an opinion that he had testified truthfully at trial.[5]

¶26 DeFliger's penultimate claim is that there was insufficient evidence before the jury to permit it to find him guilty of the charged offense. His principal argument here is that the jury erred by believing J.W.'s testimony because his various prior statements to investigators contained inconsistencies. [blue 21] Although DeFliger recites the appropriate standard for our review, *see* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990), his argument misapprehends our role. We are not permitted to second-guess a jury's credibility determinations or reweigh the evidence—those functions are exclusively reserved to jurors. ***Id***. at 503-04. In order for us to reject J.W.'s testimony as a matter of law, it must be "inherently and patently incredible," or in conflict "with nature or the fully established facts." ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). J.W.'s testimony falls far short of being incredible as a matter of law, and based upon it, the jury, "acting reasonably, could have found guilt beyond a reasonable doubt." ***Poellinger***, 153 Wis. 2d at 507.

[5] The prosecutor in ***State v. Tutlewski***, 231 Wis. 2d 379, 605 N.W.2d 561 (Ct. App. 1999), asked a former special education teacher of two cognitively disabled witnesses whether she had "an opinion concerning their reputation for truthfulness and honesty?" ***Id***. at 383. The teacher responded that the two "are very honest, truthful young people," but then went on to say this: "I don't think it is within their capabilities to lie or be deceitful." ***Id***. It is the latter statement which prompted us to reverse the conviction for a violation of the rule stated in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), that one witness may not testify that another witness testified truthfully. ***Tutlewski***, 231 Wis. 2d at 389 ("[The teacher]'s testimony that Michelle and Jeremy were incapable of lying clearly crossed the line of admissibility articulated in ***Haseltine***."). We specifically noted, however, that because the defense had attacked their credibility, the State was entitled to call a witness to provide testimony regarding their "'general reputation for truthfulness.'" ***Id***. at 388 (quoting trial court decision with approval). That is precisely what J.W.'s grandmother testified to.

¶27 Finally, DeFliger asks us to reverse and grant a new trial "in the interest of justice" under WIS. STAT. § 752.35. In support of this request, he cites the claims of error we have discussed above and found lacking in merit. We decline to exercise our discretionary reversal authority on the present record. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989) ("Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; '[z]ero plus zero equals zero.'" (citation omitted)).

CONCLUSION

¶28 For the reasons discussed above, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.