COURT OF APPEALS DECISION DATED AND FILED

March 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 02-0455-CR
03-0495-CR

Cir. Ct. No. 01-CF-66

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK W. PFEIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Derek Pfeil appeals from a judgment convicting him of second-degree sexual assault and from an order denying a motion for postconviction relief. The issues are: (1) whether the circuit court erred in allowing the State to amend the information mid-trial; (2) whether Pfeil's counsel

ineffectively represented him by failing to introduce evidence attacking the credibility of the victim, Jamie O.; and (3) whether there should be a new trial in the interest of justice. We resolve these issues against Pfeil and affirm.

¶2 Pfeil was charged with second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(d) (2001-02).[1] The complaint alleged that Pfeil had sexual contact, including intercourse, with Jamie O., an unconscious person. Pfeil pleaded not guilty and proceeded to trial. At trial, the State moved to amend the information during Jamie's testimony to allege only sexual contact, not sexual intercourse, because Jamie could not remember specifically whether the sexual contact included penetration. She had been drunk during the attack and kept passing out.[2] The circuit court allowed the amendment. The jury convicted Pfeil.

¶3 Pfeil first argues that the amendment of the information substantially prejudiced him because he had to change his theory of defense and was unable to testify on his own behalf that he did not have sexual intercourse with Jamie, as he had intended to do.

¶4 "The purpose of a charging document is to inform the defendant of the acts he allegedly committed and to allow him to understand the offense charged so that he can prepare a defense." ***State v. Flakes***, 140 Wis. 2d 411, 419, 410 N.W.2d 614 (Ct. App. 1987). "At trial, the court may allow amendment of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] A charge of second-degree sexual assault in violation of WIS. STAT. § 940.225(2)(d) can be premised on either sexual contact or sexual intercourse with an unconscious person. The mid-trial amendment changed the facts on which the crime was based, but did not change the charge against Pfeil.

the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." WIS. STAT. § 971.29(2). "The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him." ***Flakes***, 140 Wis. 2d at 419. "Whether to allow amendment of the information to conform to the proof is discretionary with the trial court." ***State v. Frey***, 178 Wis. 2d 729, 734, 505 N.W.2d 786 (Ct. App. 1993).

¶5 We conclude that Pfeil was not prejudiced when the information was amended. After the information was amended, the allegations against Pfeil remained exactly the same, except the allegation of sexual intercourse was removed. Pfeil had notice from the day he was charged that Jamie alleged Pfeil had sexual contact with her when she was unconscious. Because Pfeil had notice of what he was accused of doing, he was able to prepare a defense based on the accusations. We agree with the State's perception that "Pfeil seems to think that if the amended information made it more likely that a jury would convict him, he was prejudiced." That is not the standard. Prejudice in these circumstances occurs when a defendant does not have notice and an opportunity to defend. Pfeil had both. Therefore, we conclude that the circuit court properly exercised its discretion in allowing the complaint to be amended.

¶6 Pfeil next argues that he received ineffective assistance of trial counsel because his counsel should have introduced evidence to attack Jamie's credibility. A defendant receives ineffective assistance of counsel when his trial lawyer makes unreasonable errors and those errors prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We will not, however, second-guess counsel's strategic or tactical decisions if those decisions are "based

upon rationality founded on the facts and the law." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶7 Pfeil contends that counsel should have introduced evidence that Jamie had previously lied to police during a forgery investigation. If counsel had attempted to do so—and it is not at all clear to us that the trial court would have allowed the evidence—counsel may have brought out the fact that Pfeil was also involved in the forgeries. At the postconviction motion hearing, Pfeil's counsel testified that he did not want to open a "Pandora's box" concerning Pfeil's admissions to police of wrong doing in the forgery scheme. Counsel reasonably made a strategic decision not to inquire into an act of dishonesty by Jamie where the act of dishonesty also involved Pfeil.

¶8 Pfeil also contends that his counsel should have brought out the fact that Jamie had been dishonest about her age with Pfeil's mother. This claim is also unavailing. As aptly explained by the State, "Pfeil never offered testimony from his mother that she had discussed any acts of dishonesty with his trial counsel or that she had a particular opinion concerning Jamie O.'s honesty." Because Pfeil has not established that the testimony he wanted introduced even exists, we need explore this claim no further.

¶9 Finally, Pfeil argues that he should be granted a new trial in the interest of justice. *See* WIS. STAT. § 752.35. He argues that a new trial in the interest of justice is warranted because he was prevented from taking the stand on his own behalf, when the information was amended, and had to alter his theory of defense mid-way through trial. He also argues that the matter was not fully tried because important evidence about Jamie's character was never presented to the jury. These claims simply restate previous arguments made by Pfeil, and nothing

about them, considered together, suggests to us that a new trial in the interest of justice is warranted.

By the Court.—Judgment and order affirmed.

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