COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2335-CR **Cir. Ct. No. 2007CF2341**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENIN CORREA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Fine, Brennan and Kessler, JJ.

¶1 PER CURIAM. Lenin Correa appeals from a judgment of conviction, entered after a jury trial, for five sex crimes involving two young boys. He argues: (1) "the prosecutor abused her discretion by amending the information to include a third count of sexual abuse" prior to trial; (2) the trial court

erroneously exercised its discretion when it granted the State's motion to amend the amended information at the close of trial; and (3) there was insufficient evidence to convict Correa of sexual assault because the boys' testimony was "inherently incredible as a matter of law." (Some uppercasing omitted.) We reject Correa's arguments and affirm the judgment.

BACKGROUND

¶2 Correa and his wife provided child care before and after school for two brothers, David R. and Joshua R., who were ages six and five during most of the time period in question: September 1, 2006, through March 23, 2007. In March of 2007, the boys' mother contacted the police after the boys told her that Correa had inappropriately touched them. The boys were interviewed and a criminal complaint was filed, charging Correa with two counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (2005–06).[1] The complaint alleged that Correa had sexual contact with both boys, which involved having the boys touch Correa's penis and Correa touching the boys' penises while they were all in the basement of Correa's home. Correa, who is blind, denied the allegations and the case proceeded to trial in February, 2009.[2]

¶3 The trial ended in a mistrial and a second trial was scheduled. Shortly thereafter, in March of 2009, the State filed a motion seeking to amend the information to add three additional charges, based in part on testimony David gave

[1] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

[2] Correa's defense was based in part on his blindness. He testified that he was unable to go into the basement by himself.

at the first trial. The motion sought to add one additional count of first-degree sexual assault based on David's testimony that Correa touched David's penis while David was lying on a couch in the living room, plus two counts of child enticement, contrary to WIS. STAT. § 948.07(1) (2005–06), for causing each boy "to go into a building, room or secluded place" with the intent "to have sexual contact" with each boy.[3] *See* ***ibid.*** The motion included a proposed amended information.

¶4 In June of 2009, Correa's retained attorney was allowed to withdraw and an attorney was appointed by the State Public Defender's office. At the final pretrial on September 11, 2009, the trial court asked about the State's motion to amend the information. Trial counsel indicated that he had received notice of the

[3] WISCONSIN STAT. § 948.07 (2005–06) is identical to the 2009–10 version of the statute, so we will reference the current version in this opinion. It provides:

> **Child enticement.** Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:
>
> **(1)** Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.
>
> **(2)** Causing the child to engage in prostitution.
>
> **(3)** Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.
>
> **(4)** Recording the child engaging in sexually explicit conduct.
>
> **(5)** Causing bodily or mental harm to the child.
>
> **(6)** Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

motion and asked for more time to review it. The trial court said that it could conduct the arraignment on the amended information on the day of trial. On the day of trial, the State filed an amended information that was identical to the one it proposed in March, 2009. Trial counsel offered no objection to the amended information. The trial court went through the charges with Correa and then accepted Correa's not guilty pleas to the new charges.

¶5 At trial, both boys testified.[4] Joshua said that he went into the basement with David and Correa to pick up some screws from the floor. He said that while they were in the basement, Correa "put down his pants and his underwear," which exposed Correa's "private part." Joshua testified that "something white" came out of Correa's private part. He said Correa also grabbed David's hand and put it on Correa's private part. Joshua at first testified that he did not touch Correa's penis, but later said that Correa "grabbed my hand and put it on his private part."

¶6 David testified that when he was in the basement with Joshua and Correa, Correa exposed his "private part," and "[s]ome white stuff came out," which Correa referred to as "milk." David said Correa "grabbed [David's] hand and put it on [Correa's] private [part]." David said Correa did the same thing with Joshua's hand. David also testified that on another occasion, Correa touched David's penis while David was on the couch in the living room.

¶7 The jury heard testimony from officers who interviewed the boys, Correa, Correa's wife, and several other witnesses. Correa testified that he had

[4] The boys speak both Spanish and English. A Spanish interpreter was used throughout the trial, although at times, the boys answered in English.

never exposed himself to the boys or had sexual contact with the boys. Correa said that he once went into the basement with the boys, but his wife was with them and nothing inappropriate occurred.

¶8 Before the jury was instructed, the State moved to amend the amended information again, so that the jury would have the option of finding that Correa violated WIS. STAT. § 948.07 by causing each boy "to go into a building, room or secluded place" with the intent either "to have sexual contact" with each boy, *see* § 948.07(1) (as already charged in the amended information), or to expose a sex organ to each boy, *see* § 948.07(3) (as proposed by the State's motion to amend the amended information). The trial court considered whether the information could be amended pursuant to WIS. STAT. § 971.29(2), which provides that a court "may allow amendment" of the information "to conform to the proof where such amendment is not prejudicial to the defendant."[5]

¶9 Trial counsel argued that Correa would be prejudiced because the amendment "comes in so late" and the boys had given inconsistent testimony. The

[5] WISCONSIN STAT. § 971.29 provides:

> **Amending the charge. (1)** A complaint or information may be amended at any time prior to arraignment without leave of the court.
>
> **(2)** At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.
>
> **(3)** Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

trial court rejected this argument, concluding that there was no prejudice to Correa. The trial court observed that "from the Complaint all the way through" the trial, the allegations were that Correa had exposed his penis to the boys and made the boys touch it, so adding the allegation that Correa caused the boys "to go into a building, room or secluded place" with the intent to expose a sex organ, *see* WIS. STAT. § 948.07(3), would not prejudice Correa. The trial court concluded:

> Exposing has always been there. No, it was not charged that way, but it is part and parcel of the fact situation that's always been alleged….
>
> ….
>
> … I don't see any prejudice to the defendant at all. He's been able to prepare a defense.

The trial court granted the State's motion to amend the amended information.

¶10 The jury found Correa guilty of all five charges. Correa filed a motion for a new trial on grounds that the State inappropriately objected six times during trial counsel's closing argument. The motion was denied.[6] The trial court sentenced Correa to ten years of initial confinement and five years of extended supervision on each count, to be served concurrently.

[6] On appeal, Correa has not pursued the issue raised in his postconviction motion.

DISCUSSION

¶11 Correa presents three arguments: (1) "the prosecutor abused her discretion by amending the information to include a third count of sexual abuse" prior to trial; (2) the trial court erroneously exercised its discretion when it granted the State's motion to amend the amended information at the close of trial; and (3) there was insufficient evidence to convict Correa of sexual assault because the boys' testimony was "inherently incredible as a matter of law." (Some uppercasing omitted.) We consider each argument in turn.

I. Amendment of the information prior to trial.

¶12 Correa argues that the State "had the authority to amend the [i]nformation without leave of the Court" and that the State erroneously exercised its discretion when it amended the information, because WIS. STAT. § 971.01(1) prohibits the information from including any charges that were not in the criminal complaint or presented at the preliminary hearing. Correa asks this court to dismiss the sexual assault charge that was added to the information prior to trial.

¶13 In response, the State asserts that while "Correa focuses his argument on [WIS. STAT.] § 971.01, the statute for *filing* an information, the … more relevant provision is [WIS. STAT.] § 971.29, the statute for *amending* an information." We agree. In ***Whitaker v. State***, 83 Wis. 2d 368, 265 N.W.2d 575 (1978), the Wisconsin Supreme Court held that § 971.29(1) "should be read to permit amendment of the information before trial within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not

prejudiced, including the right to notice, speedy trial and the opportunity to defend." *See* ***Whitaker***, 83 Wis. 2d at 374, 265 N.W.2d at 579.[7]

¶14 Here, the State moved to amend the information over eight months before the amendment was permitted. Trial counsel reviewed the motion and did not object to the amended information. Correa therefore forfeited any objection to the amendment of the information. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10–12, 235 Wis. 2d 486, 492–493, 611 N.W.2d 727, 730 (issues must be preserved at the trial court). Moreover, Correa has not asserted that his rights were prejudiced. *See* ***Whitaker***, 83 Wis. 2d at 374, 265 N.W.2d at 579. We reject Correa's argument that we should dismiss the sexual assault charge that was added to the information prior to trial.

II. Amendment of the amended information at trial.

¶15 Correa argues that the trial court erroneously exercised its discretion when it granted the State's request to amend the amended information with respect to the two counts of child enticement. *See* WIS. STAT. §§ 971.29, 948.07. We review the trial court's decision to allow the amendment for an erroneous exercise of discretion. *See* ***State v. Malcom***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 414, 638 N.W.2d 918, 924. "Therefore, we will uphold the trial court's decision to allow an amendment if the record shows that discretion was exercised and a reasonable basis exists for the trial court's ruling. However, the application of constitutional principles to the facts of the case is a question of law which we review *de novo*." ***Ibid.*** (citation omitted; italics added). A trial court misuses its

[7] The language of WIS. STAT. § 971.29 is the same as when the Wisconsin Supreme Court decided ***Whitaker v. State***, 83 Wis. 2d 368, 265 N.W.2d 575 (1978).

discretion when the defendant is prejudiced by the amendment. ***State v. Neudorff***, 170 Wis. 2d 608, 615, 489 N.W.2d 689, 692 (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." ***Ibid.***

¶16 Correa contends that the amendment was "highly prejudicial because it actually changed the crime charged—from having sexual contact to merely exposing his sex organ." He argues that "[i]t also involved a completely different transaction because if there had been no sexual contact with Joshua … then it would have constituted a completely different transaction for him to have merely exposed his sex organ to Joshua." We reject Correa's arguments.

¶17 The amended information charged Correa with two counts of child enticement, contrary to WIS. STAT. § 948.07. The State was required to prove the following elements with respect to each child: (1) Correa caused the child to go into a building, room, or secluded place;[8] (2) Correa did so with intent to do one of seven things, two of which are relevant here: to have sexual contact with the child or to expose a sex organ to the child; and (3) the child was less than eighteen years of age. *See* WIS JI-CRIMINAL 2134. The State's proposed amendment to the amended information simply added a second option to satisfy the second element, such that Correa could be found guilty if his intent in causing the child to go to the basement was to either have sexual contact with the child or to expose his sex organ.

[8] WISCONSIN STAT. § 948.07 provides that this element can also be met if the defendant caused the child to go into a vehicle. That was not alleged in this case so it is omitted above.

¶18 We agree with the trial court that Correa was not prejudiced by the amendment. The original complaint alleged that Correa had exposed himself to the boys, in the course of having them touch his penis, and there was extensive testimony on those facts. We are unconvinced that Correa was denied notice or an opportunity to defend the charge that Correa took the boys into the basement with the intent to expose his sex organ to them. *See* ***Neudorff***, 170 Wis. 2d at 615, 489 N.W.2d at 692.

¶19 Our conclusion is consistent with ***State v. Derango***, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833, an almost identical case. In ***Derango***, the defendant was charged with violating WIS. STAT. § 948.07(1) and at the close of the evidence, the trial court "permitted the State to amend the information to conform to the proof … add[ing] violations of subsections (3) and (4) (intent to expose or cause a child to expose a sex organ, or take a picture of a child engaging in sexually explicit conduct)." ***Derango***, 2000 WI 89, ¶11, 236 Wis. 2d at 731, 613 N.W.2d at 838. The Wisconsin Supreme Court subsequently rejected the defendant's claim that the amendment prejudiced him, stating:

> Here, the prosecution did not charge Derango with an additional crime, nor did it change the crimes originally charged. The amended information merely added several statutorily defined possible mental states which might satisfy the intent element of the original child enticement offense charged in count two, conforming that charge to the proof in the case. The additional intents alleged were closely related to the original (intent to have sexual contact or intercourse, intent to expose a sex organ, and intent to photograph sexually explicit conduct), and derived from facts that were alleged in the original complaint and testified to at the preliminary hearing, and therefore were clearly available to the defendant from the beginning. In short, the amended information did not fundamentally change the legal or factual parameters of the case at all: the charged offenses in the original and amended information remained the same and all resulted from the same transaction. Under these circumstances, Derango cannot

> possibly have been prejudiced, and the circuit court did not err by permitting the amendment.

Id., 2000 WI 89, ¶51, 236 Wis. 2d at 751–752, 613 N.W.2d at 847. The same reasoning applies here.

III. Challenge to the boys' credibility.

¶20 Correa argues that his convictions for sexual assault should be dismissed because the boys' testimony was "completely untrustworthy and inherently incredible as a matter of law."[9] He points out that the boys gave inconsistent testimony. For instance, Joshua at first testified that Correa had not touched his penis, but then later said he had.

¶21 It is well-established that the credibility of witnesses, including child witnesses, and the weight assigned to their testimony are matters for the jury's judgment. *See* ***Shawver v. Roberts Corp.***, 90 Wis. 2d 672, 681, 280 N.W.2d 226, 230 (1979); *see also* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752, 756 (1990) ("'The credibility of the witnesses and the weight of the evidence is for the trier of fact.'") (citation omitted). "Inconsistencies and contradictions in a witness' testimony are for the jury to consider in judging credibility." ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63, 66 (1978). "[E]ven where a single witness is inconsistent and testifies to diametrically opposed facts, [the jury] may choose to believe one assertion and disbelieve the other." ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292, 299 (1978). Unless the testimony is inherently incredible, an appellate court may not substitute its judgment for that of

[9] While Correa states that he is challenging the sufficiency of the evidence, the only argument he presents relates to the boys' testimony. He does not assert that even if the testimony was credible, it does not support the convictions as a matter of law.

the fact-finder. ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546, 550 (Ct. App. 1995).

¶22 Applying these legal standards here, we reject Correa's argument. Although the boys' testimony contained some inconsistencies concerning the details of what happened in the basement, both ultimately testified that Correa touched their penises and had the boys touch his penis. The boys were thoroughly cross-examined. The boys' testimony was not inherently incredible as a matter of law, *see* ***id.***, and it was sufficient to allow the jury to evaluate each boy's credibility, weigh and reconcile the evidence, and find the facts, *see* ***Poellinger***, 153 Wis. 2d at 506–507, 451 N.W.2d at 757.

By the Court.—Judgment affirmed.

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