COURT OF APPEALS
DECISION
DATED AND RELEASED

August 23, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

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

No. 94-2103

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN LEE OSGOOD, SR.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. John Lee Osgood, Sr. appeals pro se from an order denying his motion for postconviction relief from a judgment convicting him of first-degree sexual assault in violation of § 940.225(1)(d), STATS., 1985-86. The conviction was based on evidence that he had sexual contact with his four-year-old daughter, T.S.O., by touching her vagina with his finger. Osgood alleges that his conviction was invalid because sexual contact is a lesser-included offense of sexual intercourse, thus making the inclusion of both offenses in § 940.225(1)(d) an unconstitutional violation of due process and equal protection provisions. He also contends that the trial court erroneously

exercised its discretion at trial by permitting the State to amend the information to allege sexual contact rather than sexual intercourse as originally charged. In addition, he argues that his conviction is invalid because § 940.225(1)(d) conflicts with federal law. We affirm the trial court's order rejecting these arguments.

Osgood relies on ***State v. Nye***, 100 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981), *aff'd,* 105 Wis.2d 63, 312 N.W.2d 826 (1981), to support his argument that sexual contact is a lesser-included offense of sexual intercourse. He contends that in ***Nye***, this court added the term "for the purpose of sexual arousal or gratification" to the elements which must be shown to convict a defendant of sexual assault arising from sexual intercourse. He contends that having added "for the purpose of sexual arousal or gratification" to the definition of sexual intercourse, sexual contact became a lesser-included offense of sexual intercourse based on the "elements only" test for determining lesser-included offenses.

This argument is patently without merit. The ***Nye*** court did not add the term "for the purpose of sexual arousal or gratification" to the definition of sexual intercourse contained in the sexual assault statutes. It merely explained that even though a jury instruction on sexual contact had erroneously reduced the prosecution's burden of proof, the error was harmless because based on the evidence no jury could reasonably conclude that the defendant's conduct was for any purpose other than sexual gratification or arousal. ***Id.*** at 403-04, 302 N.W.2d at 86. Section 940.225(2)(e), STATS., 1977, which was the statute analyzed in ***Nye***, continued to prohibit both sexual contact and sexual intercourse with a person who was over age twelve but under age eighteen, and to treat both contact and intercourse as second-degree sexual assault. ***Nye*** therefore provides no support for Osgood's argument that sexual contact is a lesser-included offense of sexual intercourse, rather than merely a different means of committing the same offense pursuant to § 940.225(1)(d), STATS., 1985-86.

Although confusing, the real gist of Osgood's argument seems to be that the inclusion of sexual contact and sexual intercourse in the same statute violates equal protection and due process provisions because sexual contact is not as serious as sexual intercourse and should not be treated as harshly. This argument is also without merit.

Legislative enactments are presumed constitutional, and this court will sustain a statute against attack if there is any reasonable basis for the exercise of legislative power. ***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). The party bringing the challenge must establish the unconstitutionality of the statute beyond a reasonable doubt. ***Id.*** Every presumption must be indulged to sustain the law if at all possible, and doubts must be resolved in favor of constitutionality. ***Id.*** If this court can conceive of any facts upon which legislation reasonably could be based, it must uphold the legislation. ***Id.***

The police power of the state constitutes the government's inherent power to promote the general welfare and covers all matters having a reasonable relation to the protection of the public health, safety or welfare. ***Id.*** at 130, 447 N.W.2d at 660. When a statute is enacted in the exercise of the state's police power, due process requires that the means chosen by the legislature bear a rational and reasonable relationship to the purpose of the enactment. ***Id.*** Equal protection similarly requires that there exist reasonable grounds for the classification drawn by the legislature. ***Id.*** Where, as here, no suspect classification is involved, the statute must be sustained against an equal protection challenge unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. ***Id.*** at 131, 447 N.W.2d at 660-61.

No due process or equal protection violation has been shown here because the legislature reasonably could conclude that sexual activity by an adult with a child, regardless of whether the conduct involves sexual contact or sexual intercourse, is a social evil which is harmful to the child and should be forbidden. The legislature therefore reasonably could criminalize sexual conduct with a child, regardless of the form the conduct takes, as it elected to do in § 940.225(1)(d), STATS., 1985-86.

Osgood's next argument is that he was prejudiced when the trial court permitted the State to amend the information during the trial to charge him with assault based on sexual contact rather than intercourse, as originally charged. However, Osgood never objected to the amendment of the information, and thus waived his right to challenge the amendment on appeal. *See* ***State v. Gilles,*** 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992).

In any event, amendment of the information was clearly proper. Pursuant to § 971.29(2), STATS., a trial court may amend the complaint or information at trial to conform to the proof, provided the amendment is not prejudicial to the defendant. Whether to allow the amendment is discretionary with the trial court. ***State v. Frey***, 178 Wis.2d 729, 734, 505 N.W.2d 786, 788 (Ct. App. 1993). We will not reverse the trial court's decision absent an erroneous exercise of discretion. ***Id.***

In this case, T.S.O.'s trial testimony indicated that while she was undressed, Osgood touched her vaginal area with his fingers, causing pain to her. A pediatrician also testified that T.S.O. told her that Osgood "puts his finger inside here," referring to her vaginal orifice. The pediatrician testified as to her findings concerning the size of T.S.O.'s vaginal opening and its irregularity, indicating that both findings were unusual for a young female child. A second pediatrician, Dr. Christine Walsh-Kelly, also testified that T.S.O. told her that Osgood had taken off her clothes and touched her vaginal area with his finger. In addition, Walsh-Kelly testified that T.S.O.'s vaginal orifice was open wider than one would expect in a child her age and that she had three areas of scarring on her hymen, which usually would be caused by some kind of force pushing into the vagina and was consistent with finger penetration.

The amendment of the information to allege sexual contact rather than sexual intercourse thus clearly conformed to the proof at trial. Moreover, no basis exists in the record to conclude that Osgood was prejudiced by the amendment. While the complaint charged Osgood with having sexual intercourse with a child in violation of § 940.225(1)(d), STATS., 1985-86, the factual allegations underlying the complaint were that Osgood touched T.S.O.'s vagina with his finger, the same as the testimony at trial. In addition, Osgood's theory of defense at trial was that the allegations were falsely made at the instigation of T.S.O.'s mother to end his involvement in T.S.O.'s life, a defense which was not affected by the amendment of the information.[1] Because the

[1] In his reply brief, Osgood contends that he was prejudiced by the amendment because if he had been put on notice that he was being charged with sexual contact rather than sexual intercourse, he would have argued that Walsh-Kelly's testimony regarding the abnormal size of T.S.O.'s vaginal opening was irrelevant. This argument provides no basis for relief because Walsh-Kelly's testimony corroborated T.S.O's statement that Osgood put his finger inside her vagina. It therefore was relevant to the issue of whether sexual contact occurred.

amendment did not change the factual basis for the sexual assault charge or have any impact on Osgood's theory of defense, the trial court properly permitted the amendment. *See* ***Frey,*** 178 Wis.2d at 736-37, 505 N.W.2d at 789.

Osgood's final argument is that his conviction is invalid because § 940.225(1)(d), STATS., 1985-86, conflicts with federal law. Osgood apparently believes that Wisconsin must conform its laws to the federal criminal statutes. In fact, the task of defining criminal conduct in Wisconsin is entirely within the legislative domain, and, within constitutional limits, the legislature possesses the inherent power to prohibit and punish any act as a crime. ***State v. Wolske***, 143 Wis.2d 175, 187, 420 N.W.2d 60, 64 (Ct. App. 1988), *cert. denied*, 488 U.S. 1010 (1989). While similar conduct might constitute a different crime or be sanctioned differently if it was prosecuted under the federal criminal code, this fact in no way diminishes Wisconsin's ability to enact and execute its own criminal code.

By the Court.—Order affirmed.

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