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February 1, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2014-CR State v. Eric K. Brown (L. C. No. 2014CF2813)

Before Stark, P.J., Hruz and Seidl, JJ.

Eric Brown appeals a judgment, entered upon a jury's verdict, convicting him of repeated sexual assault of the same child, with at least three violations of first-degree or second-degree sexual assault. Brown argues the circuit court erroneously exercised its discretion by granting the State's motion to amend the Information after the State rested its case at trial. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for

summary disposition. We reject Brown's arguments and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

The State filed a criminal complaint alleging Brown committed repeated sexual assault of the same child, fourteen-year-old A.D., between January 1, 2014, and February 28, 2014. At trial, A.D. testified that she rode the bus to and from school, and Brown drove the bus in the afternoon. Although A.D. could not remember exactly when she had inappropriate contact with Brown, she testified that some time in the fall, Brown touched her breasts. A.D. further testified that on two occasions during the winter he put his hand down her pants and touched her vagina. According to A.D., Brown also twice touched her "butt." Because the State was not previously aware of A.D.'s claim that Brown touched her breasts in the fall, the State moved to amend the Information to conform with the evidence. The circuit court permitted the amendment to reflect an alleged time period from October 1, 2013, to February 28, 2014. Brown was found guilty of the crime charged and sentenced to fifteen years' initial confinement and seven years' extended supervision. This appeal follows.

A charging document serves to inform the accused of the acts that he or she allegedly committed in order to enable him or her to understand the charges and prepare a defense. ***State v. Derango***, 2000 WI 89, ¶50, 236 Wis. 2d 721, 613 N.W.2d 833. The circuit court, however, "may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." WIS. STAT. § 971.29(2). An amendment to the charging document does not prejudice a defendant when the amendment "does

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

not change the crime charged, and when the alleged offense is the same and results from the same transaction." ***State v. Gibson***, 2001 WI App 71, ¶15, 242 Wis. 2d 267, 626 N.W.2d 73. Whether to permit an amendment rests within the circuit court's discretion and will not be reversed absent an erroneous exercise of that discretion. ***State v. Malcolm***, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918.

Brown contends he did not receive substantial notice of the time period of the allegations and was deprived of the ability to defend himself. Specifically, Brown asserts the amendment prejudiced his defense by depriving him of the "ability to investigate the allegations in the context of the five month period when all along his investigation was geared towards a two month stretch." Brown further claims the lack of notice "may have affected defense decisions such as whom to call as witness, cross-examination strategies and whether to object to certain evidence." We are not persuaded.

As Brown concedes, the alleged offense—repeated sexual assault of the same child—remained unchanged after the amendment. Factually, A.D.'s allegation of an additional act did not alter the circumstances under which Brown's acts of sexual contact occurred. Each act occurred while Brown drove A.D. home from school on the bus, with Brown touching A.D. as she stood to the right of the driver's seat. To the extent Brown argues he lacked substantial notice of the time period of the allegations, this court has recognized that a more flexible application of notice requirements is required and permitted in cases involving a child victim. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988) (finding that six-month time period adequately informed defendant of charges in child sexual assault case due to "vagaries of a child's memory"). Where, as here, "the date of the commission of the crime is not

a material element of the offense charged, it need not be precisely alleged. … Time is not of the essence in sexual assault cases." ***Id.*** at 250 (citation omitted).

Although Brown asserts the amendment prejudiced him, he does not explain how the amendment altered his theory of defense—namely, that A.D.'s allegations against him were not credible. Brown had the opportunity to cross-examine A.D. on her allegation of the additional act and, regardless of the number of incidents or when they occurred, the jury's decision rested on an assessment of A.D.'s credibility and Brown's challenge to that credibility. It is unclear under the circumstances how Brown's defense or his witness list would have changed had the expanded time period been alleged in the first instance. Brown has failed to demonstrate he was prejudiced by the amendment, and the circuit court did not erroneously exercise its discretion in allowing the amendment to conform to the evidence.

Therefore, upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals