COURT OF APPEALS DECISION DATED AND FILED

August 27, 2015

Diane M. Fremgen
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 No. 2014AP1810-CR | **Cir. Ct. No. 2012CF64**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. DELANEY,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Michael Delaney appeals judgments of conviction for second-degree sexual assault of a child under the age of sixteen, contrary to

WIS. STAT. § 948.02(2) (2013-14)[1] as a repeater, and five counts of child enticement, contrary to WIS. STAT. § 948.07(1).[2] Delaney contends that his convictions should be overturned because sufficient evidence was not presented at trial to prove that the offenses occurred on the dates alleged in the information, or on dates sufficiently close to the dates alleged in the information. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In 2012, the State filed a complaint and an information against Delaney, charging him with sexual assault of a child under the age of sixteen, as a repeater, and five counts of child enticement. The information specified that between January 1, 2008, and December 31, 2008, Delaney committed the sexual assault, and that between March 1, 2008 and October 31, 2008, Delaney committed the child enticements.

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[1] WISCONSIN STAT. § 948.02(2) provides: "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony."

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] WISCONSIN STAT. § 948.07(1) provides in pertinent part:

> 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 a child in violation of s. 948.02 …."

¶3 Delaney was found guilty by a jury of all charges. Delaney appeals. Additional facts are discussed below as necessary.

DISCUSSION

¶4 Delaney contends that his convictions are not supported by sufficient evidence because the evidence at trial failed to establish that the offenses occurred within the dates alleged in the information, or on dates sufficiently close to the dates alleged in the information.

¶5 When reviewing the sufficiency of the evidence to support a conviction, we will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that it can be said as a matter of law "that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762.

¶6 At trial, the victim, who is a relative of Delaney's, testified that in August 2007, when he was between twelve and thirteen years old, he began living with Delaney, who resided in Tomah, Wisconsin. The victim, who was born in August 1994, testified that when he began living with Delaney, Delaney was a truck driver and was away from home Monday thru Friday. The victim testified that he accompanied Delaney on each of Delaney's road trips from the time he moved in with Delaney until October or November 2007.

¶7 The victim testified that a few weeks after he moved in with Delaney, he developed a medical condition and Delaney applied the victim's medication to the victim's genitalia. The victim testified that, after his medical condition resolved, Delaney began asking to inspect the victim's genitalia. The

victim testified that Delaney then began touching the victim's penis, that Delaney had the victim touch Delaney's penis, that Delaney performed oral sex on the victim, and that Delany had the victim perform oral sex on Delaney. The victim testified that all of this sexual contact occurred during the week while he and Delaney were in Delaney's truck, and that the sexual contact "happened just about every time [the victim] went on the road with [Delaney]."

¶8 The victim testified that in October or November 2007, an aunt moved in with him and Delaney in Tomah, and that after that, he stopped accompanying Delaney on the weekly road trips. The victim testified that the day his aunt moved in, he and Delaney slept in the same bedroom at their residence in Tomah and that Delaney had the victim perform oral sex on Delaney. The victim testified that after this incident, no further sexual contact occurred between them.

¶9 The information alleged that Delaney had sexual contact with the victim, contrary to WIS. STAT. § 948.02(2) "on or between January 1, 2008 and December 31, 2008, in the City of Tomah," and that "on or between March 1, 2008 and October 31, 2008," Delaney, with the intent to have sexual contact with the victim in violation of § 948.02, caused the victim to go into a vehicle, contrary to WIS. STAT. § 948.07(1). Delaney argues that because the evidence presented at trial established at most that the acts underlying the charges against him occurred between August 2007 and at latest November 2007, but the information alleged that the acts occurred in 2008, "it is clear that no trier of fact, acting reasonably, could have found [him] guilty beyond a reasonable doubt of the charges as listed in the Information."

¶10 However, as we now explain, the State is required only to produce evidence that substantially corresponds with the date charged, so long as this does

not affect a material right of the defendant, and this occurred here. In 1921, our supreme court held:

> [U]nless some material right of the defendant is affected, as, for example, when such change might bring the alleged offense within some period of statutory limitation, the prosecution is not formally tied to [the date alleged in the information], and may prove the commission of the offense charged on some other day within a reasonable limitation.

Hess v. State, 174 Wis. 96, 99, 181 N.W. 725 (1921). The supreme court reiterated this standard in ***Hawkins v. State***, 205 Wis. 620, 624, 238 N.W. 511 (1931), in which the court stated: "The [S]tate is not formally tied to any date, but may, within reasonable limitations, prove the commission of the offense charged on any other [date] substantially corresponding with the date charged." *See also* ***Thomas v. State***, 92 Wis. 2d 372, 386, 284 N.W.2d 917 (1979) (stating the "failure to prove the specific date of the offense is not fatal to the [S]tate's case against [a] defendant").

¶11 Delaney argues that there is too great a length of time between the dates of the acts alleged in the information and the dates established by the evidence at trial. Delaney asserts that even if the dates of the crimes proven at trial did not need to be precisely alleged in the information, the crimes proven at trial needed to have occurred "within a close date" of the dates specified in the information, but that they do not in this case.

¶12 Delaney supports his assertion by arguing that in ***Blenski v. State***, 73 Wis. 2d 685, 696, 245 N.W.2d 906 (1976), the supreme court "stated [that] the time of commission of a crime 'need not be precisely alleged' immediately after addressing the fact [that] the State could use language 'on or about' rather than needing to specify a specific date." (Quoting ***Blenski,*** 73 Wis. 2d at 696.)

Delaney asserts that in the present case, the "large variation" between the dates charged and the dates proved at trial "clearly deviates from [***Blenski's***] 'on or about' language."

¶13 In ***Blenski***, our supreme court was addressing the sufficiency of a complaint and whether the complaint's allegation as to the time at which the particular offense was committed adequately protected the defendant from the potential for double jeopardy. *See* ***id.*** Delaney does not explain how the supreme court's decision in ***Blenski*** applies in the present case, nor has he directed this court to any legal authority supporting his assertion that the proof at trial in all cases must be sufficient to prove that the charged conduct occurred "on or about" a particular date specified in the charging document.

¶14 In his brief-in-chief, Delaney asserts that the differences between the dates charged in the information and the dates of the offenses proven at trial constitute an overly "large variation." As we have explained, the information alleged that the sexual assault occurred sometime between January 1, 2008 and December 31, 2008, and the evidence at trial established that the sexual assault occurred as late as November 2007. Viewed in the light most favorable to the conviction, as we must on a review of the sufficiency of the evidence, this is a variation of as little as one month (November 30, 2007, to January 1, 2008) between the dates charged and the dates proven at trial. *See* ***Zimmerman***, 266 Wis. 2d 1003, ¶24. As we have further explained, regarding the child enticement offenses, the information alleged that the offenses occurred between March 1, 2008, and October 31, 2008, and the evidence at trial established that the offenses occurred sometime between August 2007 and as late as November 2007. Viewed in the same manner, this is a variation of as little as three months (November 30, 2007, to March 1, 2008) between the dates charged and the dates proven at trial.

¶15 Delaney does not develop an argument explaining why we should not conclude that the charged dates do not substantially correspond with the dates proven, nor does Delaney cite to any legal authority suggesting that variations between the dates charged in the information and the dates proven at trial through the testimony of a minor years after the alleged crimes are not within a "reasonable limitation." *See* ***Hess***, 174 Wis. at 99.

¶16 So far as we can tell, Delaney is also arguing that the difference between the dates specified in the information and the dates proven at trial affected a material right of his, namely his due process right to notice of the charges against him. Delaney asserts that because the information indicates that the offenses occurred in 2008, it "obviously did not give [him] notice and a fair opportunity to defend himself" against alleged acts occurring in middle to late 2007, rather than 2008.[3] We disagree, because as we now explain, Delaney was in possession of evidence well in advance of trial highlighting the timing issues discussed above.

¶17 At the preliminary hearing, the victim testified that he was born in August 1994, that he moved in with Delaney shortly before he turned thirteen, that he traveled with Delaney weekly from the time he moved in with Delaney until his aunt moved in with them "[j]ust before winter" that year, that Delaney had sexual contact with him in Delaney's truck while on their road trips, and that Delaney had sexual contact with him at their home in Tomah shortly after his aunt moved in with them. On cross-examination at the preliminary hearing, the victim again

[3] The State argues that Delaney's argument that he did not have sufficient notice of charges against him is an "attempt[] to shoehorn" forfeited due process notice arguments into a sufficiency of the evidence challenge. We decline to apply forfeiture to this argument.

testified that he moved in with Delaney shortly before he turned thirteen, and that the sexual abuse occurred when he was thirteen. This testimony would appear to establish that the abuse occurred between August and October/November 2007.

¶18 On cross-examination at the preliminary hearing, defense counsel attempted to correlate the timing of the sexual contact to the victim's age and year in school at the time. During this line of questioning, the victim testified that he had moved in with Delaney in the summer of 2008, which was inconsistent with the victim's prior testimony that he moved in with Delaney shortly before he turned thirteen in 2007. The prosecutor objected to defense counsel's line of questioning, stating that "[defense counsel] has put the 2008 date in [the victim's] head ... [defense counsel is] driving [the victim] down this path where [the victim] is miscalculating the dates." Defense counsel argued to the court that he "should be able to ask what year this act allegedly happened," and was permitted to question the victim further as to the time period the victim believed the acts to have occurred:

> [Defense counsel]: Is it possible this occurred after the summer you turned, when you turned 12 in August, that it happened after August 29th, and then you turned 12; is that possible?
>
> [Victim]: No. It happened after I turned 12.
>
> [Defense Counsel]: And it happened after you turned 13?
>
> [Victim]: Yes.
>
> [Defense counsel]: So what year did you turn 13? What year were you born?
>
> [Victim]: 1994.
>
> [Defense counsel]: So in the year 2007, you turned 13?

> [Victim]: Yes.
>
> [Defense counsel]: So is it possible this happened in the summer of 2007?
>
> [Victim]: I suppose.
>
> [Defense counsel]: So you're not sure if it happened in the summer of 2007 or 2008?
>
> [Victim]: I didn't have a calendar in the truck.
>
> [Defense counsel]: So your testimony today is you're not sure, correct?
>
> [Victim]: I'm not sure on the exact date.
>
> [Defense counsel]: Are you sure on the exact year?
>
> [Victim]: … I know that it was the year after I moved from [names place], which was the year of the summer of 7th grade.
>
> [Defense counsel]: So now is it the summer of 7th grade or the summer when you turned 13? Are those the same years?
>
> [Victim]: I'm not exactly sure on the math.

¶19 This record conclusively establishes that prior to trial, Delaney was aware that the dates specified in the information could be off by some months and, more specifically, heard testimony from the victim that the sexual contacts occurred during the weeks around and following when he turned thirteen in August 2007. Accordingly, Delaney's assertion that he did not have notice of and an opportunity to defend against the acts is without merit.

CONCLUSION

¶20 For the reasons discussed above, we affirm.

By the Court.—Judgments affirmed.

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