COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3419-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GEORGE STONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

DYKMAN, P.J. George Stone appeals from a judgment convicting him of two counts of second-degree sexual assault of a child, one count of intimidating a witness, and one count of delivering marijuana, contrary to §§ 948.02(2), 940.45(3) and 961.41(1)(h)1, STATS. Stone argues that the trial court erred by amending the information at the close of the evidence to replace one

count of repeated acts of sexual assault of a child, § 948.025(1), STATS., with two counts of second-degree sexual assault. He also contends there was insufficient evidence to establish that he delivered marijuana in the State of Wisconsin. Finally, he argues that we should grant a new trial in the interests of justice because the real controversy was not fully tried after the trial court barred evidence of prior sexual abuse suffered by the victim. We disagree with each argument and affirm.

I. Background

Stone met James A. as a friend of his family. In 1995, when James was fifteen, Stone would regularly come by his house in Houston, Minnesota, and they would go for a drive. They would often drive across the Wisconsin border to Pettibone Park in La Crosse. Stone would sometimes bring marijuana, and he and James would smoke it on the way to the park. James testified that once they arrived at the park, Stone would talk about sexual acts. On one occasion, Stone rubbed James's penis and had James rub Stone's penis. James said that Stone threatened to hurt his mother if he told anyone what happened and James did not reveal the abuse until 1997, when he told his girlfriend. She then told James's mother. In October 1997, the La Crosse County District Attorney's Office filed a complaint charging Stone with one count of repeated acts of sexual assault of a child, one count of intimidation of a victim, and one count of delivery of marijuana, contrary to §§ 948.025(1), 940.45(3) and 961.41(1)(h), STATS.

A week before his trial on the charges, Stone filed a motion asking to be permitted to introduce evidence covered by the rape shield statute, § 972.11(2), STATS. He sought to introduce evidence regarding allegations of sexual abuse James suffered at the hands of his father earlier in his childhood and

of the resulting five years of therapy James underwent. After a hearing the day before trial, the court granted Stone's motion. However, later that day, the court reversed its decision upon the State's motion to reconsider because Stone had not made a sufficient offer of proof under ***State v. Pulizzano***, 155 Wis.2d 633, 456 N.W.2d 325 (1990), to demonstrate that the evidence should have been admitted despite the rape shield statute. Immediately prior to trial, the court allowed Stone's attorney to make an offer of proof in response to its denial of his motion. Stone's counsel explained that James had been in therapy for five years, that James had been sexually assaulted by his father, and that he assumed it had been a homosexual assault. He hinted that perhaps James's allegations of his father's abuse had been false. He also argued that Stone's relationship with James was, in part, based on James's mother's request that Stone talk with him about this past abuse, and that Stone should be allowed to explain this at trial.

At trial, one issue was whether the acts described in the testimony occurred in Minnesota or Wisconsin. During James's testimony about one incident of abuse, the judge instructed the jury that, "You're not to consider anything that happened in Minnesota vis-a-vis Mr. Stone. He's charged with what happened in Wisconsin and those acts as alleged are the ones that you will ultimately have to find occurred or did not occur beyond a reasonable doubt." The court gave a similar instruction before the closing arguments. In particular, James never clearly stated whether Stone and he smoked the marijuana when they were still driving in Minnesota or while they were in Wisconsin. He first testified that they would smoke in the truck on the way to Pettibone Park and that the joint would be gone by the time they arrived at the beach they always went to. Later in his testimony, describing an incident of abuse at the park, James said, "We were just done smoking the joint and we were down there and he was talking …." At

the close of the State's evidence, Stone moved to have the delivery of marijuana charge dismissed based on insufficient evidence because there was no evidence that he had passed marijuana to James in Wisconsin. The court denied the motion, concluding that there had been testimony that they "were smoking a joint there while they were parked" at Pettibone Park.

At the close of all the evidence, the trial court determined that there was insufficient evidence to support the charge of repeated acts of sexual assault. The charge required three acts of sexual contact, but based on the evidence, only two such acts had occurred in Wisconsin. Despite Stone's objections, the court permitted the state to amend the information to replace the count of repeated acts of sexual assault, § 948.025(1), STATS., with two counts of second-degree sexual assault of a child, § 948.02(2), STATS., corresponding to the two acts of sexual touching James described. The jury convicted Stone of the two counts of second-degree sexual assault, one count of intimidating a victim and one count of delivery of marijuana. Stone appeals.

II. Analysis

A. Amendment of the Information

A trial court has the discretion to allow an amendment to the charging document, and we will not reverse such a decision absent an erroneous exercise of discretion. *See* ***State v. Flakes***, 140 Wis.2d 411, 416, 410 N.W.2d 614, 616 (Ct. App. 1987). Under § 971.29, STATS., the trial court can allow an amendment to the charging document at any time if there is no prejudice to the defendant.[1] *See* ***State v. Tawanna H.***, 223 Wis.2d 572, 577, 590 N.W.2d 276, 278

[1] Section 971.29, STATS., provides, in pertinent part:

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(Ct. App. 1998); ***State v. Wickstrom***, 118 Wis.2d 339, 348, 348 N.W.2d 183, 188 (Ct. App. 1984). The purpose of the charging document is to inform the defendant of the acts he or she is accused of committing and to enable him or her to understand the offense charged so as to prepare a defense. *See* ***Wickstrom***, 118 Wis.2d at 348, 348 N.W.2d at 188. Thus, when an amendment "does not change the crime charged, and when the alleged offense is the same and results from the same transaction, there is no prejudice to the defendant." ***Id.*** The key to determining prejudice is whether a defendant received notice of the nature and cause of the accusations. *See* ***id.*** at 349, 348 N.W.2d at 189.

Stone argues that the two counts of second-degree sexual assault were actually lesser included crimes and that he cannot be convicted of two lesser included crimes. He points out that § 939.66, STATS., provides that an "actor may be convicted of either the crime charged or an included crime," and contends that the use of the word "an" means that he could not be convicted of more than one included crime.[2] He also argues that replacing one count with two counts was in itself prejudicial.

> (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 an 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.

[2] In addition, Stone argues that even if the trial court did amend the charge, the court erred because § 971.29, STATS., does not allow for material changes. He argues that ***State v. Duda***, 60 Wis.2d 431, 210 N.W.2d 763 (1973), holds that § 971.29 can be used only to correct technical variances in the complaint. However, in ***Duda*** the supreme court referred only to amendments made *after the verdict*. ***Id.*** at 440, 210 N.W.2d at 767. The amendment in this case came at the close of the evidence and before the case went to the jury, not after verdict. Therefore, we will consider this argument no further.

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Although, at one point, the trial court described its actions using the term "lesser includeds,"[3] it actually amended the charge under § 971.29, STATS. The court did not submit the charged offense and an included offense to the jury, as would be done with a lesser included offense. As the trial court explained in its jury instructions, it "amended the information" before submitting the charges to the jury, eliminating the count of repeated acts of sexual assault and replacing it with two counts of second-degree sexual assault.

Based on the specific facts of this case, we conclude that the trial court's amendment of the charge was not an erroneous exercise of discretion. In ***Wickstrom***, we explained that the addition of counts by an amendment does not necessarily constitute prejudice, because the key inquiry is whether the defendant had notice of the accusations. ***Wickstrom***, 118 Wis.2d at 348-49, 348 N.W.2d at 188-89. Here, the initial charging document gave Stone sufficient notice of the accusations against him. The amendment did not present Stone with any new elements to defend against because, by definition, the crime of repeated acts of sexual assault of a child, § 948.025(1), STATS., includes the elements of second-

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Stone also argues that ***Whitaker v. State***, 83 Wis.2d 368, 265 N.W.2d 575 (1978) and ***Moore v. State***, 55 Wis.2d 1, 197 N.W.2d 820 (1972), support his position. He states that ***Whitaker*** holds that substantive changes to the charging document must be made before trial, and that ***Moore*** "makes it clear that an elimination of a charge where the charge is amended to a lesser included, is not material under Sec. 971.29(2)." However, ***Whitaker*** merely construes subsection (1) of § 971.29 as allowing an amendment with the court's permission after arraignment, but before trial, as long as the defendant is not prejudiced. ***Whitaker***, 83 Wis.2d at 374, 265 N.W.2d at 579. It does not limit substantive changes to the charging document to the period before trial. ***Moore*** holds only that amending a charge from robbery to theft after the State presented its evidence was not prejudicial because all of the elements of theft were included in the elements of robbery. ***Moore***, 55 Wis.2d at 7-8, 197 N.W.2d at 823. ***Whitaker*** and ***Moore*** do not support Stone's arguments.

[3] At the close of the State's case the trial court stated that it would not submit the charge of repeated acts of sexual assault to the jury. Instead, it said "I'm going to submit both lesser includeds. There is sufficient evidence of two separate acts."

degree sexual assault of a child, § 948.02(2), STATS. Section 948.025(1) provides that "[w]hoever commits 3 or more violations under s. 948.02 (1) or (2) within a specified period of time involving the same child is guilty of a Class B felony." In addition, the alleged offense and the set of events under scrutiny were unchanged in the amended information. Both the original and the amended information point to the sexual interaction between Stone and James in La Crosse in 1995. The original information sufficiently apprised Stone of the charges against him so that he could prepare a defense. Therefore, we affirm.

B. Delivery of Marijuana

Stone contends that there was insufficient evidence to support his conviction for delivery of marijuana, § 961.41(1)(h)1, STATS. He argues that the testimony does not support the conclusion that he passed marijuana to James in Wisconsin. Without evidence of "delivery" in Wisconsin, the state has no jurisdiction to prosecute for that crime. We disagree and affirm.

In reviewing the sufficiency of the evidence to support a conviction, we will not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no [jury], acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). If there is any possibility that the jury could have drawn the appropriate inferences from the evidence to support its verdict, we may not overturn that verdict even if we believe that the jury should not have found guilt based on the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758.

We conclude that the evidence allows for an inference that Stone passed marijuana to James in Wisconsin. In his testimony, James did not clearly

state that Stone and he never smoked marijuana in Wisconsin. At one point, he testified that they smoked on the way to the park and that the marijuana would be gone by the time they reached the beach. At another point, he testified that on one occasion they were "just done smoking the joint" when they were parked at the beach in Pettibone Park. It is possible for a reasonable jury to infer from this testimony that on at least one occasion, they had smoked, and thus Stone had passed marijuana to James, while they were in the park in La Crosse, Wisconsin. It does not matter that the evidence also allows for contrary inferences.

In addition, the jury had notice that they should only consider the acts that occurred in Wisconsin. At one point in James's testimony, and again at the end of trial, the trial court gave them just such an instruction. In his closing argument, Stone's counsel argued that there was no evidence of any delivery of marijuana in La Crosse County. In its rebuttal, the State responded to that argument. The jury was presented with the issue, and we cannot substitute our judgment for that of the jury.

C. Rape Shield Evidence

Stone asserts that we should grant a discretionary reversal under § 752.35, STATS., and remand for a new trial in the interests of justice for the two counts of second-degree sexual assault and the count of intimidating a victim. He argues that the real controversy was not fully tried because the trial court excluded the evidence regarding the sexual abuse by James's father and James's subsequent counseling. Stone argues that this exclusion harmed his defense in a number of ways. The evidence of the prior abuse would have allowed Stone to provide the jury with an explanation for testimony about James's nervous and upset demeanor. Stone also asserts that he could have used the evidence of the five years of counseling to impeach James's testimony that he did not know what "ejaculate" meant. He also argues that he was left unable to impeach the story James told to his girlfriend about Stone assaulting him. One of Stone's theories of defense was that James's mother had planted the idea that Stone had sexually assaulted him in James's head. James wanted to tell his girlfriend that he had been sexually abused, but did not want to implicate his father. Instead, he followed his mother's lead and made up the story about Stone so that he could tell his girlfriend he had been abused without naming his father.

Under § 752.35, STATS., we may grant a discretionary reversal when the real controversy has not been fully tried if, for example, "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case." ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770-71 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990). We should exercise such discretion only in exceptional cases. *See* ***State v. Betterley***, 183 Wis.2d 165, 178, 515 N.W.2d 911, 917 (Ct. App. 1994), *aff'd*, 191 Wis.2d 407, 529 N.W.2d 216 (1995).

In sexual assault cases, Wisconsin's rape shield law provides that "any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence…." Section 972.11(2)(b), STATS. The statute makes exceptions for limited categories of evidence. *See* § 972.11(2)(b)1-3.[4] Otherwise, the statute excludes evidence of prior sexual conduct without regard to the purpose for which the evidence would be used. *See* ***State v. Pulizzano***, 155 Wis.2d 633, 644, 456 N.W.2d 325, 330 (1990).

The Wisconsin Supreme Court has recognized that, in some cases, the rape shield law may infringe on a defendant's constitutional rights to confrontation and compulsory process. *See* ***id.*** at 647-48, 456 N.W.2d at 331. In ***Pulizzano***, the court developed a two-part test to determine whether application of the rape shield law deprives a defendant of his or her constitutional rights. *See* ***State v. Dodson***, 219 Wis.2d 65, 72, 580 N.W.2d 181, 186 (1998). First, the defendant must establish a constitutional right to present the evidence through an offer of proof. *See* ***id.*** The offer of proof must demonstrate: "(1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence

[4] Section 972.11(2)(b), STATS., makes exceptions for:

> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

outweighs its prejudicial effect." ***Id.*** (quoting ***Pulizzano***, 155 Wis.2d at 656, 456 N.W.2d at 335). If the defendant makes a sufficient showing, the trial court must determine whether the defendant's rights to present the evidence are outweighed by the State's compelling interest in excluding it. *See* ***id.*** at 72-73, 580 N.W.2d at 186. Whether the exclusion of evidence under the rape shield law violates a defendant's constitutional rights is a question of constitutional fact that we review de novo. *See* ***id.*** at 69-70, 580 N.W.2d at 185.

We decline to grant a discretionary reversal because Stone's offer of proof was insufficient to demonstrate that the evidence of the prior abuse by James's father should not have been barred by the rape shield law. We acknowledge that an offer of proof need not be completely precise or unnecessarily detailed. *See* ***Michael R.B. v. State***, 175 Wis.2d 713, 736, 499 N.W.2d 641, 651 (1993). However, Stone failed to establish even the first two prongs of the ***Pulizzano*** test. In his offer of proof, he stated that the counselor James saw "could not substantiate that there was any actual abuse" and Stone hinted that perhaps the allegations were untrue. Even assuming the prior abuse had clearly occurred, Stone did not demonstrate that the abuse by James's father closely resembled the abuse alleged in this case. He did not present any similarities, other than that both involved an older man abusing a boy. Without sufficient proof to assess the prior sexual activity in question, we do not need to address the remaining prongs of the ***Pulizzano*** test.

Stone also argues that it is undisputed that James saw a counselor because of the alleged abuse by his father, and that ***Pulizzano*** does not apply to the sexual knowledge one would receive in five years of counseling. However, the legislature has decided that, in sexual assault cases, "any evidence concerning the complaining witness's prior sexual conduct … shall not be admitted … nor shall

any reference to such conduct be made in the presence of the jury." Section 972.11(2)(b), STATS. Prior sexual conduct includes any sexual assault the victim may have suffered. *See* ***Pulizzano***, 155 Wis.2d at 643, 456 N.W.2d at 329. The purpose for which the proponent of the evidence seeks admission has no bearing on its admissibility under the rape shield statute. *See* ***id.*** at 644, 456 N.W.2d at 330. Thus, evidence of James's counseling is barred by the rape shield law, whether used to show a source of sexual knowledge or for any other purpose, because it concerns prior sexual assaults he suffered. We are not convinced that evidence of sexual abuse counseling could be presented without "any reference" to the underlying sexual conduct.

Stone does not contend that James's abuse by his father, or James's related counseling, falls under one of the statutory exceptions to the rape shield law. As a result, Stone cannot present the evidence unless he demonstrates a constitutional right to do so under ***Pulizzano***. Stone is incorrect in asserting that the counseling falls outside the scope of ***Pulizzano***. ***Pulizzano*** merely creates an exception to the rape shield law. By necessity, any evidence covered by the rape shield law can implicate ***Pulizzano***. Since Stone has not demonstrated that the ***Pulizzano*** exception applies here, the trial court was correct in excluding the evidence. Therefore, we affirm.

By the Court.—Judgment affirmed.

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