COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP276-CR **Cir. Ct. No. 2010CF1463**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JADE NICHOLAS-JAMES CLARK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jade Nicholas-James Clark appeals a judgment of conviction for first-degree sexual assault of a child and an order denying his

motion for postconviction relief.[1] Clark argues his trial counsel provided ineffective assistance by failing to object to duplicitous jury instructions. We agree. Because a retrial would subject Clark to double jeopardy, we reverse and remand with directions to dismiss count one with prejudice.

BACKGROUND

¶2 Clark was charged with one count of repeated sexual assault of a child contrary to WIS. STAT. § 948.02(1)(a).[2] The Amended Information alleged generally that Clark had committed "at least three" sexual assaults of Blake J. that were violations of § 948.02(1). Trial was held to a jury.

¶3 The State presented a video-recorded pretrial statement by Blake, together with live testimony from him and other witnesses. Blake was eight years old and had been Clark's neighbor at an apartment complex. In his statement, Blake described three separate incidents during the summer of 2010 in which Clark had engaged in hand-to-penis contact with him. Blake stated the three incidents occurred in the bedroom of Clark's apartment on three consecutive days, although he conceded under cross-examination that there could have been "a couple days after in between" each of the different incidents.

¶4 According to Blake's video statement, the first incident occurred after he went swimming with Clark. The two returned to Clark's apartment,

[1] Clark was also convicted of count two, exposing a child to harmful material, for which he was sentenced to one year of initial confinement and one year of extended supervision. He does not appeal that conviction.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

where Clark showed a pornographic video and touched Blake's penis and caused Blake to touch Clark's penis. After Clark masturbated, Blake returned to his own apartment for supper.

¶5 Blake explained the second incident occurred after he and Clark played a game of "exploring" outdoors. They again returned to Clark's apartment, where Clark showed pornographic videos and they each touched the other's penis. Clark masturbated, and Blake returned home.

¶6 Blake stated the third incident occurred after he and Clark went walking in the woods, and the ensuing conduct in Clark's apartment was "the same thing" as the second incident. Blake's video statement also described all three incidents as the "same routine."

¶7 Clark testified he never engaged in any sexual contact with Blake. After the close of evidence, the court granted the State's request to submit a lesser-included offense of a single count of first-degree sexual assault of a child.

¶8 The court instructed the jury as follows with respect to the offense charged in count one, repeated sexual assault of the same child, and the lesser-included offense:

> The first count of the amended information … reads that, [Clark], on or between January 1st, 2010, and July 31st, 2010, … did commit repeated sexual assault involving the same child, [Blake], where at least three of the assaults were violations of Section 948.02(1) contrary to 940.025(1)(d) [sic] of the Wisconsin Statutes. To this charge the defendant has entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt.
>
> The defendant in this case is charged with repeated acts of sexual assault of a child. Among the issues that are disputed in this case is about how many times the defendant

may have assaulted [Blake]. In considering the verdicts in this case, you must first consider whether the defendant is guilty of the offense charged in the amended information, that is repeated sexual assault of a child. If you are not satisfied that the defendant is guilty of that offense, you will be instructed to consider whether or not the defendant is guilty of sexual assault of a child under thirteen years of age, which is what we call a lesser-included offense of repeated sexual assault of a child.

Section 948.025 of the Criminal Code of Wisconsin is violated by one who, within a specific period of time, commits three or more sexual assaults of the same child. Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following two elements were present.

One, the defendant committed at least three sexual assaults of [Blake]. In this case the defendant is alleged to have committed sexual assault of a child by violating 948.02(1).

Section 948.02(1) requires the State to prove that the defendant had sexual contact with [Blake]. [Blake] was under the age of thirteen at the time of the alleged sexual assault.

Two, at least three sexual assaults took place within a specified period of time. The specified period of time is from January 1st, 2010, through July 31st, 2010. Before you may find the defendant guilty, you must unanimously agree that at least three sexual assaults occurred between January 1st, 2010, and July 31st, 2010, but you need not agree on which acts constituted the required three.

Sexual contact is an intentional touching of the penis of [Blake] by the defendant. The touching may be of the penis directly or it may be through the clothing. The touching may be done by any part or by any object, but it must be an intentional touching.

Sexual contact is a touching by [Blake] of the penis of the defendant if the defendant intentionally caused or allowed [Blake] to do that touching. The touching may be of the penis directly or it may be through clothing. Sexual contact also requires that the defendant acted with intent to become sexually aroused or gratified.

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of Section 948.02(1) within the specified period of time, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty of repeated sexual assault of a child. And you should consider whether the defendant is guilty of sexual assault of a child under the age of thirteen years, which is a lesser-included offense of repeated sexual assault of a child.

You should make every reasonable effort to agree unanimously on your verdict on the charge of repeated sexual assault of a child before considering the lesser-included offense of sexual assault of a child under thirteen years of age. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in a unanimous agreement on the greater charge, you should consider whether the defendant is guilty of the lesser charge.

The difference between repeated sexual assault of a child and sexual assault of a child under thirteen years of age is that repeated sexual assault of a child requires proof of one additional element, that at least three sexual assaults took place within a specified period of time. For the charge of repeated acts of sexual assault of a child, you must unanimously agree that at least three sexual assaults occurred, but you do not need to agree on what acts constitute the required three. If you believe the elements have been met, you should find the defendant guilty of repeated acts of sexual assault of a child.

If you cannot agree that the defendant is guilty of repeated acts of sexual assault of a child, you are instructed to consider the lesser-included crime of sexual assault of a child under the age of thirteen years. Before you may return a verdict of guilty for the lesser-included charge of sexual assault of a child under the age of thirteen years, all twelve jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

If you are satisfied beyond a reasonable doubt that all the elements of repeated sexual assault of a child were present, except for the element requiring that at least three sexual assaults took place within a specified period of time, you should find the defendant guilty of sexual assault of a child under thirteen years of age. …

> In other words, if you are satisfied beyond a reasonable doubt that the defendant had sexual contact with [Blake], and that he was under the age of thirteen years at the time, you should find the defendant guilty of sexual assault of a child under thirteen years of age. If you are not satisfied beyond a reasonable doubt that the defendant committed either one of the offenses, you must find the defendant not guilty.
>
> You are not, in any event, to find the defendant guilty of more than one of the foregoing offenses.

¶9 The court also submitted a written version of the instructions to the jury. Following closing arguments, the court gave the standard jury unanimity instruction, WIS JI—CRIMINAL 515 (2001), which provided, in relevant part: "This is a criminal case, not a civil case. Before the jury may return a verdict which may be legally accepted, the verdict must be reached unanimously. In a criminal case all twelve jurors must agree in order to arrive at a verdict."

¶10 The jury returned a verdict finding Clark not guilty of "Repeated Sexual Assault of a Child, as charged in Count 1 of the Amended Information," but guilty of the lesser-included offense of "Sexual Assault of a Child Under 13 Years of Age."

¶11 Clark moved for postconviction relief seeking an order vacating his conviction of the lesser-included offense, and dismissing count one with prejudice. Clark argued that the jury instructions and the verdict form failed to assure unanimous jury agreement concerning which of the three separate alleged sexual assault incidents formed the basis for his conviction on count one, especially considering his acquittal on the original greater offense, and that his trial counsel had unreasonably failed to so object at the trial. The court denied the motion, and Clark now appeals.

DISCUSSION

¶12 Clarke argues that the jury instructions were duplicitous and failed to assure a unanimous verdict, and that his trial counsel was ineffective for failing to object. A criminal defendant's right to a jury trial includes the right to a unanimous jury verdict as to each offense. WIS. CONST., art. I, § 7; ***State v. Seymour***, 183 Wis. 2d 683, 694, 515 N.W.2d 874 (1994); ***State v. Lomagro***, 113 Wis. 2d 582, 590, 335 N.W.2d 583 (1983). "Duplicity" is the charging of several crimes in a single count. ***Lomagro***, 113 Wis. 2d at 586. Generally, if the jury is presented with evidence of more than one criminal act and each such act might establish a single alleged offense, then the jury must unanimously agree as to which particular act constitutes the offense in order to return a conviction. ***Boldt v. State***, 72 Wis. 7, 16, 38 N.W. 177 (1888); ***Lomagro***, 113 Wis. 2d at 592. However, an exception to this rule occurs when the several criminal acts were conceptually similar in nature; committed during a single, continuous criminal episode; and are charged as a single offense. ***Lomagro***, 113 Wis. 2d at 592-93 (multiple acts of sexual intercourse committed during a two-hour continuing episode); ***State v. Giwosky***, 109 Wis. 2d 446, 456-58, 326 N.W.2d 232 (1982) (multiple acts of battery committed during a two-minute fight).

¶13 Accordingly, subject to the single-continuing-offense exception, if evidence of more than one criminal act is presented with respect to any one charge, then the jury instructions and verdict forms must require the jury to unanimously agree upon which specific criminal act formed the basis for each relevant guilty verdict. ***State v. Marcum***, 166 Wis. 2d 908, 918-19, 480 N.W.2d 545 (Ct. App. 1992). Whether the jury instructions fully and correctly informed the jury of the law that applies to the facts of record is a question of law that is

reviewed de novo. ***State v. Ferguson***, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187.

¶14 To demonstrate ineffective assistance of counsel, a defendant must show both deficient performance and prejudice. ***Marcum***, 166 Wis. 2d at 916-17. An unreasonable failure by counsel to object to duplicitous jury instructions and verdict forms is a deficient professional performance which is prejudicial to the defendant's substantial rights. ***Id.*** at 924-25.

¶15 We agree with Clark that he was deprived of his right to a unanimous guilty verdict on the lesser-included offense. From the jury's verdict of acquittal on the greater offense in count one, it is known that all twelve jurors had a reasonable doubt whether Clark committed at least one of the three separate alleged incidents of sexual contact with Blake that were raised by the evidence.[3]

¶16 From the jury's verdict of guilty on the lesser-included offense, it is known that all twelve jurors agreed that Clark had committed at least one act of sexual assault of a child under the age of thirteen years. However, the verdict form does not tell us whether all twelve jurors agreed Clark committed the same incident. Perhaps they did; but, perhaps the jurors all concluded that Clark committed one of the three offenses, but did not unanimously agree to the same one.

¶17 Consequently, the facts of this case fall squarely within the rule of ***Marcum*** and require Clark's conviction on count one to be vacated and dismissed

[3] We refer to the entire alleged course of sexual contact on each distinct day as a single incident or offense. *See* ***State v. Lomagro***, 113 Wis. 2d 582, 592-93, 335 N.W.2d 583 (1983). There is no dispute as to this issue.

with prejudice, unless the jury instructions sufficiently required unanimous jury agreement. In making this determination, the jury instructions are not to be judged in artificial isolation, but instead are to be viewed as a whole and in context. ***State v. Hubbard***, 2008 WI 92, ¶27, 313 Wis. 2d 1, 752 N.W.2d 839. Further, the instructions must be considered from the standpoint of persons who usually do not possess law degrees. ***Id.***, ¶26.

¶18 The State argues the jury was properly informed as to the unanimity requirement because the court incorporated WIS JI—CRIMINAL 517 (2010), instructing that "[b]efore you may return a verdict of guilty for the lesser-included charge of sexual assault of a child under the age of thirteen years, all twelve jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged." Viewed in isolation, this instruction appears to properly resolve any unanimity concern. However, in context, the jury instructions as a whole perpetuate a unanimity problem for two reasons.[4]

¶19 First, the single sentence of WIS JI—CRIMINAL 517 (2010), was too ambiguous and incomplete, under the particular evidentiary facts of this case, to

[4] The State asserts the instructions here were proper merely because, like in ***State v. Chambers***, 173 Wis. 2d 237, 258, 496 N.W. 2d 191 (Ct. App. 1992), the jury was instructed consistent with WIS JI—CRIMINAL 517 (2010). This assertion, however, fails to address the circumstances of this case or the additional, erroneous jury instructions given here. There is no dispute that, in isolation, instruction 517 properly advises juries regarding unanimity.

Additionally, the State proffers an argument concerning alternative modes of sexual assault during a single, continuous transaction. The argument is irrelevant and nonresponsive to Clark's arguments. Clark does not argue the jury had to agree on the type of assault committed. Further, we agree with Clark that the argument is insufficiently developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed.").

assure that the phrase "the defendant committed the same act" was interpreted to require unanimous agreement about a sexual assault incident in time, as opposed to a *type* of sexually assaultive conduct—namely, whether Clark touched Blake or caused Blake to touch him. This instruction was particularly unhelpful in light of the preceding instruction, stated twice, that the jurors "need not agree on which acts constituted the required three" sexual assaults on the greater offense. Because there were only three assaultive episodes, that language focused the jury on the *type* of conduct.[5] Thus, with respect to the lesser offense, the jurors might have reasonably believed they had to agree only that the same type of act occurred, regardless whether they all agreed it occurred on the same date. Problematically, Blake alleged that the same types of conduct occurred on all three occasions. Moreover, the State fails to respond to this argument by Clark. Accordingly, the argument is deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶20 Second, the instructions that preceded and followed the WIS JI—CRIMINAL 517 (2010), unanimity instruction were erroneous. Prior to that instruction, the jury was told that "[*t*]*he* difference between [the greater and lesser offenses] is that repeated sexual assault of a child requires proof of one additional element, that at least three sexual assaults took place within a specified period of time." (Emphasis added.) Immediately following instruction 517, the jury was instructed:

> If you are satisfied beyond a reasonable doubt that all the elements of repeated sexual assault of a child were present,

[5] Indeed, the instructions further focused the jury on the type of conduct by separately explaining that Clark touching Blake's penis would constitute sexual contact and that Blake touching Clark's penis would constitute sexual contact.

> except for the element requiring that at least three sexual assaults took place within a specified period of time, you should find the defendant guilty of sexual assault of a child under thirteen years of age. …
>
> In other words, if you are satisfied beyond a reasonable doubt that the defendant had sexual contact with [Blake], and that he was under the age of thirteen years at the time, you should find the defendant guilty of sexual assault of a child under thirteen years of age.

¶21 These other portions of the jury instructions omitted any requirement that the jury be unanimous with regard to a single incident. Rather, these instructions told the jurors they were required to find Clark guilty based merely upon a finding that fewer than three incidents of sexual contact had occurred, without regard to timing. The State effectively concedes as much, acknowledging this is a reasonable interpretation, but suggesting no alternative meaning.

¶22 Accordingly, taken as a whole, the jury instructions failed to assure jury unanimity. Clark's trial counsel failed to object to the improper jury instructions, and testified she simply overlooked the issue. Clark therefore received ineffective assistance of counsel. *See* ***Marcum***, 166 Wis. 2d at 924-25. Because it cannot be known which offense(s) formed the basis of the acquittal on the greater offense in count one, the charge must be dismissed with prejudice. *See* ***id.*** at 925.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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