

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2014

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. 2013AP2387-CR

Cir. Ct. No. 2011CF264

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BERNARD C. ADAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge

¶1 PER CURIAM. Bernard Adams appeals a judgment convicting him of first-degree sexual assault of a child and an order denying his motion to withdraw his guilty plea. The complaint charged Adams with two counts of sexual assault of a child and one count of causing a child to view sexual activity,

with all three offenses occurring between October 1, 2005 and December 2007. Adams contends his trial counsel was ineffective for not challenging the charging periods and the sexual assault allegations were multiplicitous. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The complaint alleged two counts of sexual assault of a child when the victim was nine or ten years old, consisting of rubbing his penis on her buttocks and causing her to touch his penis. The complaint also charged Adams with causing the victim to view him masturbating. The police report attached to the complaint indicated Adams confessed to these offenses in a recorded interview with a detective, including an admission of masturbating in front of the child six to eight times when she was nine or ten years old. Adams also admitted to some of the offenses in a recorded telephone conversation he had from the jail with his then wife. After the court denied Adams' motion to suppress his inculpatory statements, Adams agreed to plead guilty to one count of sexual assault of a child under thirteen years of age. The other charges of sexual assault and causing the child to watch him masturbate were dismissed and read in for sentencing purposes. The court imposed a sentence of twenty years' initial confinement and ten years' extended supervision.

¶3 Adams filed a postconviction motion to withdraw his plea, alleging the charging periods in the complaint and information were so long as to make a defense almost impossible. He faulted his trial counsel for failing to file a motion to dismiss the charges or compel the State to narrow the charging period. He also alleged the sexual assault charges were multiplicitous because they charged the same offense over the same time period. Adams' trial counsel, Rand Krueger,

testified he met with Adams and discussed the complaint, “particularly the length of time, the time period that you have concern about.” Krueger concluded that a motion attacking the time periods would likely not be successful and would be detrimental to Adams because it might lead to additional charges. Krueger explained that the victim had made statements alleging Adams sexually touched her when she was as young as four or five years old, and other allegations postdated the time frame alleged in the complaint. The circuit court concluded Adams’ trial counsel made a reasonable strategic decision not to challenge the charging period based on his concern that the State could charge additional counts, and that counsel discussed this strategy with Adams before Adams entered his guilty plea. The court also rejected the argument that the sexual assault charges were multiplicitous.

DISCUSSION

¶4 After sentencing, a guilty plea may be withdrawn if the defendant establishes a manifest injustice such as ineffective assistance of trial counsel. *State v. Balliette*, 2011 WI 79, ¶56, 336 Wis. 2d 358, 805 N.W.2d 334. To establish ineffective assistance, the defendant must show deficient performance and prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel’s strategic choices made with a full understanding of the facts and law are virtually unchallengeable. *Id.* at 690-91. To establish prejudice, the defendant must show a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶5 Adams established neither deficient performance nor prejudice from his counsel’s decision to pursue the plea agreement rather than attempting to force

the State to narrow the charging period. Counsel's choice to pursue the plea agreement based on his fear that raising an issue regarding timing of the offenses could lead to additional charges constitutes a reasonable strategic decision that is virtually unchallengeable. Citing *State v. Nommensen*, 2007 WI App 24, 507 Wis. 2d 695, 741 N.W.2d 481, Adams contends his counsel's fear was unfounded because the State could not charge individual sexual assault offenses during the same time period as a charge of repeated sexual assault of the same child. Nothing in *Nommensen* prohibits the State from charging separate violations that occurred outside of the time period alleged in a charge of repeated sexual assault of the same child. The State could have charged individual offenses for the numerous assaults the victim alleged that occurred in 2000 or 2001. The State could also have separately charged sexual assaults the victim alleged after December 2007.

¶6 Adams also fails to establish that he would have rejected the plea agreement and would have gone to trial on the three charges if his counsel had filed a motion to dismiss or forced the State to narrow the charging period. The circuit court found Krueger's testimony that he discussed the matter with Adams before Adams entered the guilty plea more credible than Adams' denial. The circuit court determines the credibility of witnesses and the weight to be accorded their testimony. *State v. Lukensmeyer*, 140 Wis. 2d 92, 105, 409 N.W.2d 395 (Ct. App. 1987).

¶7 Adams contends the trial court might have granted the motion to dismiss. Dismissal would not have prevented the State from recharging the numerous offenses the victim identified, potentially greatly increasing Adams' prison exposure. Adams contends the charging period was not congruent with the victim's statement. However, it was consistent with Adams' confession, and Adams has not established prejudice from his counsel's attempt to avoid charges

consistent with the victim's statement. In light of the victim's statement and Adams' partial corroboration in his statements to police and his then wife, there is no reason to believe the State would not have refiled the complaint with additional charges.

¶8 Finally, the sexual assault charges were not multiplicitous. Charges are multiplicitous and violate a defendant's double jeopardy right if the charges are the same in law and fact, creating a presumption that the legislature did not intend to authorize multiple punishments. *State v. Davison*, 2003 WI 89, ¶43, 263 Wis. 2d 145, 666 N.W.2d 1. Although the offenses occurred during the same time period, they are not identical in fact because Adams assaulted the victim in two different ways on separate occasions. The charges are not multiplicitous because Adams would not be charged or tried twice for the same offense.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

