**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 7, 2015**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP1824-CR** **Cir. Ct. No. 2012CF93**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES ARNOLD LEWIS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. James Arnold Lewis appeals from a judgment of conviction entered on jury verdicts for one count of first-degree sexual assault of a person under the age of twelve (sexual intercourse), and three counts of first-degree sexual assault of a person under the age of thirteen (sexual contact),

contrary to WIS. STAT. § 948.02(1)(b) and (e) (2011-12).[1] Lewis seeks a discretionary reversal pursuant to WIS. STAT. § 752.35, on grounds "that the controversy was not fully tried in this case because of errors … concerning jury instructions and verdict forms." We affirm.

## BACKGROUND

¶2 This case involves allegations that Lewis sexually assaulted the child of a woman Lewis was dating. Lewis was charged with four counts of first-degree sexual assault of a child, all occurring between August 17, 2011 and December 29, 2011. Three of those counts were alleged to have taken place at the same address in Milwaukee; those counts included: (1) sexual intercourse, penis to mouth, with a child under the age of twelve; (2) sexual contact, penis to vagina, with a child under the age of thirteen; and (3) sexual contact, hand to penis, with a child under the age of thirteen. The fourth count alleged sexual contact, penis to vagina, at a different address in Milwaukee.

¶3 The case proceeded to trial. The jury heard testimony from the child, the child's mother, other members of the child's family, Lewis, police officers, and a health care provider. At the close of the State's case, the State moved to amend the information to change the location of the fourth count from a specific address in Milwaukee to "a motel within the city and county of Milwaukee." The trial court granted that motion.

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

¶4 The State also moved to amend the beginning of the timeframe listed in the information to January 1, 2011, based on testimony from the child's mother about the dates she was living with Lewis. Trial counsel objected on grounds that Lewis would be prejudiced by the amendment, as no defense had been prepared for those earlier months. The trial court denied the State's motion.

¶5 At the close of the defense case, the State renewed its motion to amend the timeframe for the assault, this time asking that the starting date be February 2011. Before the trial court could rule on the motion, the parties stipulated to use August 1, 2011, as the amended starting date. The State filed an amended information that listed the applicable timeframe as August 1, 2011 through December 29, 2011, and also amended the fourth count's location to "at a motel, in the City of Milwaukee." The trial court asked whether the amended information should be read to the jury and the State said it did not believe that was necessary.[2]

¶6 Subsequently, the parties stipulated to the jury instructions and verdict forms. The verdict forms each identified the charged crime, the specific act, and the count referenced in the information. For instance, the guilty version of the verdict form for count one stated: "We the jury find the defendant guilty of First Degree Sexual Assault of a Child (penis to mouth) as charged in Count 1 of the Information."

¶7 When the trial court instructed the jury, it told the jurors that it "had previously read to you the information" and later noted that the time period at

[2] The trial court read the original information to the jury at the beginning of the jury selection process.

issue was "August through December of 2011." The State also told the jury that the "timeframes are the beginning of August through to the end of December." Trial counsel repeated that information, telling the jury that the time period at issue was "[f]rom the first part of August to the end of December."

¶8 As the jury was deliberating, it submitted the following written questions to the trial court: "Is location of importance in the charges, specifically Counts 2 & 4, which are the same type of sexual assault (penis to vagina) but occurred at 2 different places? If so, why is [the] location NOT listed in the description of each count?" Both the State and trial counsel agreed that the jurors should be given the address for each count. Accordingly, the trial court sent back a note to the jurors that listed the locations associated with each count, including the same specific address for counts one, two, and three, and "a motel, City of Milw[aukee]" for the fourth count.

¶9 The jury subsequently informed the trial court that it was deadlocked on the fourth count, and then it asked to review a videotaped interview of the child concerning the alleged assault at the motel. With the parties' agreement, the jury was allowed to watch that portion of the interview again.

¶10 The jury found Lewis guilty of all four counts. He was sentenced to a total of twenty-six years of initial confinement and ten years of extended supervision. This appeal follows.

## DISCUSSION

¶11 Lewis argues that he should receive a new trial because several errors in the verdicts and jury instructions denied him the right to a unanimous verdict. *See* ***State v. Derango***, 2000 WI 89, ¶13, 236 Wis. 2d 721, 613 N.W.2d

833 ("The Wisconsin Constitution's guarantee of a right to trial by jury includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence."). Lewis contends that these errors resulted in duplicity, which is "the joining in a single count of two or more separate offenses." *See* ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983).

¶12 At the outset, we note that because trial counsel stipulated to the verdict forms and jury instructions, Lewis waived any error in the verdicts or instructions. *See* WIS. STAT. § 805.13(3).[3] Nonetheless, as the State points out, alleged errors in the verdicts or instructions can still be reviewed by this court as part of an ineffective-assistance-of-counsel claim or pursuant to a request for discretionary reversal under WIS. STAT. § 752.35.[4] In this case, Lewis has not

[3] WISCONSIN STAT. § 805.13(3) provides:

> INSTRUCTION AND VERDICT CONFERENCE. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.)

[4] WISCONSIN STAT. § 752.35 provides:

(continued)

alleged ineffective assistance of trial counsel and instead argues that errors in the verdicts and jury instructions justify a discretionary reversal because the controversy was not fully tried.

¶13 "We possess a broad power of discretionary reversal pursuant to WIS. STAT. § 752.35 ... which provides authority to achieve justice in individual cases." ***State v. Davis***, 2011 WI App 147, ¶16, 337 Wis. 2d 688, 808 N.W.2d 130. The statute permits this court to order a new trial in the interest of justice on either of two grounds: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). This court will exercise its power of discretionary reversal only in exceptional cases. ***Id.*** at 11.

¶14 "[U]nder the first category, when the real controversy has not been fully tried, an appellate court may exercise its power of discretionary reversal without finding the probability of a different result on retrial." ***Id.*** at 16. There are two primary situations where courts have determined the controversy was not fully tried: where a jury was precluded from hearing evidence bearing on an important issue, and where a jury considered erroneously admitted evidence that clouded a crucial issue. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435

---

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

(1996). However, other situations may also result in the real controversy not being fully tried, including "an error in the jury instructions or verdict questions." ***Vollmer***, 156 Wis. 2d at 20. ***Vollmer*** explained: "In a case where an instruction obfuscates the real issue or arguably caused the real issue not to be tried, reversal would be available in the discretion of the court of appeals under [WIS. STAT. §] 752.35." ***Vollmer***, 156 Wis. 2d at 22.

¶15 With those legal standards in mind, we turn to Lewis's arguments in favor of discretionary reversal. Lewis's first complaint is that the jury verdict forms failed to reference the date and location of each alleged crime. He notes that the amended information was never read to the jurors, so they were not specifically told that the amended information reflected a slightly longer timeframe or that the amended information now identified the location of the fourth count as "a motel, in the City of Milwaukee." We are not convinced that the verdict forms provide a basis for discretionary reversal. With respect to the date, the trial court, the State, and trial counsel all told the jury that the timeframe for the alleged crimes started at the beginning of August. Thus, even though the amended information was not read to the jury, the jurors were informed of the slightly longer timeframe.

¶16 Further, with respect to the location of each count, any alleged deficiencies in the verdict forms were remedied when the jury asked whether the locations were significant. In response to the jury's inquiry, the trial court provided a written list of each count and the corresponding location. Thus, the jury was ultimately given the information that Lewis claims was lacking. There is no basis for discretionary reversal.

¶17 Lewis's second complaint is that the jury was not adequately instructed regarding unanimity.[5] Quoting ***State v. Chambers***, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992), Lewis asserts that the jurors should have been instructed that they "'must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged in the Information.'" *See* ***id.*** at 258.

¶18 In response, the State argues that "where the charges are clearly distinguished by location and conduct, there is absolutely no need for a separate unanimity instruction." The State continues:

> At trial, the prosecution presented evidence of several alternative acts for each of the four counts against Lewis, but every count and its corresponding evidence was properly delineated by location and conduct. The prosecutor carefully detailed each count in her closing argument, and she even reminded the jurors that they had "to be unanimous as to the locations and the types of contact." Then, the four distinct charges were reiterated in

[5] The trial court did instruct the jury consistent with WIS JI—CRIMINAL 515 and WIS JI—CRIMINAL 484, stating:

> This is a criminal case, not a civil case; therefore, before you, the jury, may return a verdict which can legally be received, such verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict.
>
> ….
>
> It is for you to determine whether the defendant is guilty of one or two, three or four or none of the offenses charged.
>
> You must make a finding of guilt or innocence as to each count of the information. Each count charges a separate crime. And you must consider each one separately.

> the verdict forms, which also incorporated the corresponding counts from the information.
>
> From start to finish, the jury in this case knew exactly which acts applied to which counts against Lewis, and nothing in the record demonstrates any of the risks inherent in duplicitous charging.

(Citations, footnotes, and record citations omitted.)

¶19 We agree with the State that the lack of the specific unanimity instruction that Lewis now seeks does not warrant discretionary reversal in this case. The verdict forms identified the specific acts being alleged, and once the trial court answered the jury's questions concerning the location of each alleged act, there was no ambiguity regarding which acts were being alleged in which location. As for Lewis's concern that two crimes alleged penis-to-vagina contact, the location for each alleged act was different, so we are not persuaded that there was a unanimity problem.

¶20 For the foregoing reasons, we are not convinced that the real controversy was not fully tried. *See* ***Vollmer***, 156 Wis. 2d at 22. We conclude that the alleged errors in the jury instructions and verdict forms do not justify a discretionary reversal under WIS. STAT. § 752.35. We affirm the judgment.

*By the Court*.—Judgment affirmed.

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