

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2016

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. 2015AP2569-CR

Cir. Ct. No. 2014CF2996

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND CESAR ORTIZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Raymond Cesar Ortiz appeals the judgment convicting him after a jury trial of two counts of repeated sexual assault of a child

and one count of child enticement. *See* WIS. STAT. §§ 948.025(1)(ar)(2005-06), 948.07(3) (2005-06, 2007-08) & 948.025(1) (2007-08, 2009-10).¹ He also appeals the order denying his motion for postconviction relief. Ortiz claims the State violated WIS. STAT. § 971.29(2) (2013-14) and denied him due process when it added two new charges in an amended information without seeking leave of the trial court to do so. We conclude that Ortiz forfeited this claim by failing to object to the amendment of the information in the trial court. Accordingly, we affirm.

I. BACKGROUND

¶2 In a complaint filed on July 12, 2014, Ortiz was charged with repeated sexual assault of a child and with causing a child to expose her pubic area. Following a preliminary hearing, Ortiz was bound over for trial. The State filed an information containing the original two charges.

¶3 On September 11, 2014, the State filed an amended information charging Ortiz with three counts: count one, repeated sexual assault of a child (same charge as in the original complaint); count two, child enticement (different victim); and count three, repeated sexual assault of a child (involving the same child as in count one but concerning a different time period and at a different location).

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

Ortiz was convicted of crimes committed between June 1, 2006 and August 6, 2010. Specifically, the count one charge of repeated sexual assault of a child took place between June 1, 2006 and June 30, 2008. The count two charge of child enticement took place between June 1, 2006 and June 30, 2008. The count three charge of repeated sexual assault of a child took place between June 1, 2008 and August 6, 2010.

¶4 On September 18, 2014, four days before the trial was to begin, the trial court held a status conference with the parties. At the conference, Ortiz’s trial attorney advised the trial court that he received the amended information by email on September 11th and he received a paper copy of it on September 17th. After the trial court read the charges to him, Ortiz entered not guilty pleas.

¶5 On September 22, 2014, prior to jury selection, the State moved to amend a reference to a statutory subsection in count one of the amended information from WIS. STAT. § 948.025(1)(a) to § 948.025(1)(ar). The State advised that the amendment was necessary to reflect certain statutory changes. In considering whether to grant the amendment, the trial court asked whether doing so would preclude the defense from having “ample opportunity to prepare for trial.” Ortiz’s trial counsel replied, “No, Your Honor.” Accordingly, the trial court allowed the error on the amended information to be corrected.

¶6 At trial, Ortiz denied all allegations of sexual misconduct. A jury found him guilty of the three counts in the amended information. The total bifurcated sentence imposed by the trial court consisted of twelve years of initial confinement and eight years of extended supervision.

¶7 Ortiz subsequently filed a postconviction motion arguing that the trial court erred when it allowed the State to file an amended information without a motion shortly before trial. He further asserted that the amendment prejudiced his right to defend against the new charges. The trial court denied the motion for a

number of reasons, including its determination that Ortiz forfeited his claim by failing to timely object.²

II. DISCUSSION

¶8 The issues on appeal, according to Ortiz, are whether the State violated WIS. STAT. § 971.29(2) and denied him due process when it added two new charges in the amended information without seeking leave of the trial court to do so. We do not, however, get to the merits because we conclude that Ortiz forfeited this claim by failing to object to the amendment of the information in the trial court.

¶9 Here, neither Ortiz nor his attorney objected to the filing of the amended information. As the State points out, we have applied the forfeiture doctrine when defendants waited until after conviction to challenge the State's post-arraignment filing of an amended information. *See State v. Perry*, 215 Wis. 2d 696, 700, 573 N.W.2d 876 (Ct. App. 1997); *see also State v. Webster*, 196 Wis. 2d 308, 315-16, 538 N.W.2d 810 (Ct. App. 1995). The State asserts that we should do so again here.

¶10 The following five sentences are the extent of Ortiz's argument in his opening brief related to forfeiture:

Among other things, in its Decision and Order, denying the Postconviction Motion, the Circuit Court accepted that argument and found that the objection was deemed to have been waived.

² Although the trial court used the term "waiver" in its decision, the appropriate term is "forfeiture." *See State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.

As the defense's Reply noted, however, that was a very strange argument for the [S]tate to make in this case and for the Court to accept. The fact of the matter is that the filing of the Amended Information had already been a completed act by the time counsel had received an email copy of it and the paper copy of it. The only thing that the defense could have done at that point wa[s] to file a formal motion to dismiss the Amended Information on the ground that the [S]tate had not obtained the Court's consent to file it before doing so. The failure to file such a motion does not come within the waiver rule.

(One record citation omitted.)

¶11 Ortiz does not provide any legal support for his assertions, nor does he explain why it is that his particular claims did not have to be preserved below, contrary to the long-established rule that issues must be preserved at the trial court. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (“It is a fundamental principle of appellate review that issues must be preserved at the [trial] court.”). Thus, to the extent Ortiz can be said to have addressed the issue of forfeiture, his argument is undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We may decline to review arguments that are supported only by general statements and that cite no legal authority.).

¶12 Moreover, there is no reply brief refuting the State's position that we should follow *Perry* and *Webster*; consequently, Ortiz concedes the issue. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). By not timely objecting to the filing of an amended information, Ortiz forfeited his right to challenge it on appeal.

By the Court.—Judgment and order affirmed.

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

