STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP558-CR

STATE OF WISCONSIN,
Plaintiff-Appellant-Cross-Respondent-Petitioner,

v.

JOEL M. HURLEY,
Defendant-Respondent-Cross-Appellant.

REVIEW OF A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, REVERSING IN PART AN ORDER OF THE MARINETTE COUNTY CIRCUIT COURT, THE HONORABLE DAVID G. MIRON, PRESIDING, THAT DENIED IN PART AND GRANTED IN PART A MOTION FOR POSTCONVICTION RELIEF, AND REMANDING TO THE CIRCUIT COURT WITH DIRECTIONS TO DISMISS THE CHARGE WITHOUT PREJUDICE

REPLY BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT-PETITIONER

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ARGUMENT

In his response brief, Hurley acknowledges that two considerations not expressly addressed in *Fawcett*'s[1] seven-factor reasonableness test—the impact of the serial nature of the assaults on the victim's ability to recall specifics of individual assaults, and the availability of other defenses—are appropriate in evaluating a notice challenge to a repeated child sexual assault charge under Wis. Stat. § 948.025 (Hurley's Br. at 6-8).

Here, these considerations—which did not receive attention below precisely because they are not an express part of the *Fawcett* multi-factor test—strongly weigh against Hurley's notice claim, and, with other factors, show that the complaint did not violate his right to prepare a defense. Critically, because Hurley lived in the same household with his victim, a more narrow offense period would not have changed his defense. While the State has not argued that this fact is dispositive,[2] it must factor heavily against Hurley's claim.

The State reaffirms the arguments presented in its brief-in-chief, and replies below to arguments made in Hurley's response brief.

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[1] *State v. Fawcett*, 145 Wis.2d 244, 426 N.W.2d 91 (Ct. App. 1988).

[2] It is dispositive in many jurisdictions, however. *See* Brief of Plaintiff-Respondent in *State v. Kempainen*, No. 2013AP1531-CR, at 11 & n.7, filed November 18, 2014.

I. REVIEW WAS APPROPRIATELY GRANTED.

Hurley first argues that this court improvidently granted review (Hurley's Br. at 1-11). Hurley's basic contention is the same one made in his response to the State's petition: that no issue of law needing clarification or development is presented (Hurley's Response to Petition at 1-5; Hurley's Br. at 1).

This court considered and rejected this argument when it decided to grant the State's petition.

Nonetheless, Hurley now asserts that the State's brief shows that this case involves merely error correction (Hurley's Br. at 1-2). Hurley misreads the State's brief, and, regardless, review continues to be warranted for multiple reasons.

First, no published Wisconsin case has addressed a notice challenge to a charge under Wis. Stat. § 948.025 (*See* State's Petition at 4). This statute authorizes the alleging of an offense period limited only by the approximate dates of the first and last assaults regardless the total length of the period, be it five days or fifteen years. *State v. Nommensen*, 2007 WI App 224, 305 Wis.2d 695, ¶ 15, 741 N.W.2d 481. ("The purpose of [§ 948.025] was to facilitate prosecution" of pattern child sexual assault).

Second, *Fawcett* is a twenty-six-year-old court of appeals' decision, and the time is ripe for this court to address the viability and application of *Fawcett*'s reasonableness test—both within the context of a single-act charge (*Kempainen*) and a repeated charge (*Hurley*).

Third, *Fawcett*'s seven-factor test does not expressly account for two important considerations: (1) the repeated nature of the assaults on the victim's ability to recall times and dates of individual acts; and (2) the availability of other defenses. The State has asked this court to direct courts to address these considerations when evaluating notice challenges.

Hurley argues that such guidance is already provided in *Fawcett* (Hurley's Br. at 6-8). Hurley is mistaken.

Although language in *Fawcett* addresses pattern assault cases, (State's Br. at 17, 19), none of the seven factors in *Fawcett* expressly addresses the impact of serial assaults on the ability of the victim to recall dates of specific assaults. *See Fawcett*, 145 Wis.2d at 253-54. And there is nothing in *Fawcett* asking courts to consider the availability of other defenses. The *Fawcett* footnote Hurley references states only that a defendant should not avoid prosecution by claiming that the offense period denied him or her the chance to raise an alibi defense. *Id.* at 254 n.3.

Hurley also asserts that it would be inconsistent with *Fawcett* to direct lower courts to address any particular consideration because courts may ignore individual *Fawcett* factors within their discretion (Hurley's Br. at 10-11).

But this is exactly what this court *must* do if *Fawcett* is to remain viable. Consideration of a charge under this statute must necessarily account for the repeated nature of the assaults on the child's ability to recall the specifics of individual assaults. And failure to consider

whether other defenses are actually available will lead to dismissal of child sexual assault charges when, in fact, there has been no due process violation.

Although he acknowledges that the availability of defenses is a valid consideration, Hurley observes that it may require courts to consider facts outside of the complaint (Hurley's Br. at 16). The State agrees. Accordingly, defendants who seek dismissal of a charge on notice grounds should be encouraged to allege in their motion facts demonstrating the availability of another defense.

Hurley also faults the State for asserting in its petition that *Fawcett/R.A.R.*[3] was inadequate to address notice challenges to repeated child sexual assault charges, then asserting in its brief that *Fawcett* provides a sound framework to address such challenges, provided courts take into account the repeated nature of the criminal acts and the availability of defenses (Hurley's Br. at 1-2).

Hurley appears to suggest that the State must ask this court to replace *Fawcett* altogether for review to continue to be warranted.[4] The demonstrated need for guidance in the application

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[3] *State v. R.A.R.*, 148 Wis. 2d 408, 435 N.W.2d 315 (Ct. App. 1988).

[4] In a similar vein, Hurley appears to argue that the California cases the State cites on the issue of availability of defenses are inapt because the State has not requested that *Fawcett*'s reasonableness test be replaced with California's test (Hurley's Br. at 9). This court may, of course, treat these cases as instructive without adopting California's test wholesale.

of *Fawcett*, along with the other reasons for review discussed above, is sufficient. Moreover, the State's shift in position was the result of *Kempainen* and its timing. A footnote in the State's petition explains that *Kempainen* was issued *one day before* the deadline to request review (*See* State's Petition at 5 n.1). In the body of the State's petition prepared before *Kempainen* was issued, the State objected to *R.A.R.*'s holding precluding courts from considering *Fawcett* factors one through three in many cases (State's Petition at 4, 19). Kempainen resolved this issue. *See State v. Kempainen*, 2014 WI App 53, ¶¶ 13-14, 354 Wis.2d 177, 848 N.W.2d 320. Thus, pre-*Kempainen*, the *Fawcett/R.A.R.* test *was* inadequate; post-*Kempainen*, the *Fawcett* test, sans *R.A.R.*, is essentially sound—again, provided courts also consider the two additional considerations discussed herein.[5]

Finally, this case is unlike *State v. Gajewski*, 2009 WI 22, ¶¶ 5-6, 11, 316 Wis.2d 1, 762 N.W.2d 104, where this court dismissed as improvidently granted an appeal in which the State had asked this court to "put a gloss on" one of the most well-established legal standards in *Strickland*.[6] The legal standard in *Fawcett* has never been considered by this court, and the State has identified a specific need for this court to provide additional guidance in its application. Review was appropriately granted.

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[5] Because the State's petition contained sufficient additional reasons for review (discussed herein), the State elected to stand on its petition when, in response to *Kempainen*, the court of appeals withdrew and reissued its decision in *Hurley* (State's letter filed May 15, 2014). Review was granted on that petition.

[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

II. THE CHARGE DOES NOT VIOLATE HURLEY'S DUE PROCESS RIGHT TO PREPARE A DEFENSE, AND THUS COUNSEL'S DECISION NOT TO SEEK DISMISSAL WAS REASONABLE, AND THERE WAS NO PLAIN ERROR.

A. The Complaint Alleges At Least Twenty-Six Assaults.

Hurley argues that the complaint alleges approximately five assaults, consisting of acts of digital penetration occurring in M.C.N.'s bed. Hurley asserts that the incident of forced touching, and the alleged "weighing incidents," are insufficiently alleged to count as assaults for notice purposes (Hurley's Br. at 11-13).

As argued, the complaint was sufficient to allege at least twenty-six assaults (State's Br. at 22-23). The complaint informed Hurley that he was being charged with repeated child sexual assault under Wis. Stat. § 948.025, consisting of three or more violations of Wis. Stat. § 948.02(1) or (2) (first- and second-degree child sexual assault) (4:2; Pet-Ap. 130).

With the elements of the offense sufficiently alleged through citation to the relevant statutes, *State v. Squires*, 211 Wis.2d 876, 883, 565 N.W.2d 309 (Ct. App. 1997), the State needed only to allege the historical facts of the assaults with sufficient definiteness for a reasonable defendant to know that a particular incident constituted an assault. The incident of forced touching is

sufficiently alleged because the context—where M.C.N. just alleged Hurley committed multiple acts of digital penetration—indicates that Hurley forced M.C.N. to touch *his genitals*: "On these occasions [when Hurley digitally penetrated the child's vagina], [Hurley] would also try to get her to touch him, which MCN stated she did during one of these encounters." (4:2; Pet-Ap. 130).

The facts alleged about the "weighing incidents" are likewise sufficient for a reasonable accused to know that he would have to defend against these incidents as assaults. The complaint alleges Hurley had M.C.N. take off all of her clothes when she got home from school "in excess of 20 times" "and would put her on his shoulders to take her into the bathroom" to be weighed (4:2; Pet-Ap. 130). When Hurley had M.C.N. take off her clothes so that he could carry her naked "on his shoulders," her "intimate parts" under Wis. Stat. §§ 948.01(5)(a)1., and 939.22(19) (buttocks, groin, vagina or pubic mound) would necessarily have been in contact with "any part," *see* § 948.01(5)(a)1., of Hurley, specifically his neck and shoulders.

Moreover, the circumstances are sufficient to draw a reasonable inference that Hurley acted with sexual intent during these incidents. The fact that the complaint alleges that Hurley went "no further" than regularly placing the naked M.C.N. on his shoulders does not mean, as Hurley argues, that he did not act with sexual intent. It only means he did not commit *additional acts* of assault against the naked child at the time.

Accordingly, the historical facts alleged in the complaint were sufficient to provide Hurley with fair notice that he could be asked to defend against at least twenty-six assaults.[7]

B. Application of the *Fawcett* Factors Shows the Complaint Provided Sufficient Notice to Satisfy Due Process.

The State stands on its arguments made in its brief-in-chief at 24-29 concerning application of *Fawcett* to the facts of this case. In the limited space allowed, the State makes two points in response to Hurley's application of *Fawcett*.

First, contrary to Hurley's suggestion, Hurley's work travel of one day to one week at a time (63:277-78), would not have allowed him to change his defense even if an offense period as narrow as *two or three months* could have been alleged. Hurley lived in the same household as the victim, and had on-going access to her. His available defense was the one asserted at trial—a credibility defense.

Second, Hurley's continued resort to *R.A.R.* is unavailing because, as argued, the result in *R.A.R.* was driven largely by that court's decision to limit the analysis to *Fawcett* factors four through seven (State's Br. at 24-25). And Hurley

[7] Even if it were assumed that the complaint sufficiently alleged only five assaults, this court should still conclude that the complaint provided sufficient notice to present a defense under the *Fawcett* reasonableness test.

does not defend *R.A.R.*'s holding that factors one through three do not apply when an accused does not allege that the State could have charged a more definite offense period.

C. Counsel's Performance Was Not Deficient, And There Was No Plain Error.

Hurley agrees with the State that this court should address the notice issue within the context of ineffective assistance and/or plain error (Hurley's Br. at 17-18).[8]

The State reaffirms its arguments as to plain error and deficient performance (State's Br. at 29-30). As argued, any alleged error was not plain, *i.e.*, "so fundamental" as to require a new trial, because "Hurley offered a robust credibility defense, and a more narrow offense period would not have aided this particular defense, or allowed him to pursue a different defense" (State's Br. at 30). Hurley objects that this is a harmless error argument. Even so construed, it still provides grounds for not granting relief. *See State v. Jorgensen*, 2008 WI 60, ¶ 45, 310 Wis.2d 138, 754 N.W.2d 77 (claims of plain error are subject to harmless error review).

Hurley's response to the State's argument that counsel's performance was not deficient because no case law established a duty to seek dismissal of the complaint is particularly lacking

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[8] Hurley briefly suggests that his notice claim was preserved by counsel's assertion at the arraignment that he was "raising all jurisdictional objections and the sufficiency of the information" (Hurley's Br. at 17-18). This perfunctory statement was insufficient to bring Hurley's claim to the court's attention.

(Hurley's Br. at 20-21). Counsel's stated conclusion that he determined upon researching the issue that the charge was not defective was reasonable where no case law plainly establishes when a charge under Wis. Stat. § 948.025 violates notice requirements (66:24; Pet-Ap. 217).

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING OTHER ACTS EVIDENCE.

The circuit court properly exercised its discretion in admitting J.G.'s assault allegations, particularly in light of the greater latitude rule as to like occurrences in child sexual assault cases, for reasons already discussed at length (State's Br. at 34-44).

Hurley argues that the circuit court's decision to admit J.G.'s allegations that Hurley sexually abused her was contrary to controlling precedent, specifically *State v. McGowan*, 2006 WI App 80, 291 Wis.2d 212, 715 N.W.2d 631 (Hurley's Br. at 26-29).[9]

Neither *McGowan* nor any other case is "controlling." Other acts rulings, like all evidentiary determinations, are fact-dependent and committed to the circuit court's discretion.

[9] Hurley also argues that this issue does not meet criteria for review. Respectfully, this matter was decided when this court granted the State's petition without limiting the issues to be heard.

Moreover, *McGowan* is readily distinguishable. McGowan was charged with four single-act counts for assaulting a cousin over a two-and-one-half year period starting when the victim was ten and McGowan was eighteen. *McGowan*, 291 Wis.2d 212, ¶ 2. The assaults included acts of oral, vaginal and anal intercourse. *Id.* ¶¶ 4-8. The other act was an allegation that McGowan assaulted another cousin once when she was five and he was ten. *Id.* ¶ 9. The second victim alleged McGowan "forced her to perform oral sex on him and urinated in her mouth." *Id.*

By contrast, J.G.'s allegations involved a series of assaults over multiple years, as M.C.N.'s allegations did. They were similar in nature to M.C.N.'s allegations because they were repeated; involved digital penetration; concerned an immediate family member; and occurred in the home. Further, J.G.'s allegations did not include an act so revolting (urination in the mouth) that the danger of unfair prejudice was obvious. And while the cases are similar in that both defendants were minors, there are differences here, too. Hurley was fourteen when the alleged assaults of J.G. ended. The age of a high school freshman, Hurley was old enough for the assaults to be sexual in nature. McGowan, however, was only ten (likely in fifth grade) when he allegedly assaulted his victim, significantly younger than Hurley in developmental terms. Thus, the circuit court did not misuse its discretion in distinguishing *McGowan*.

The State's brief-in-chief, *see* pp. 35-44, is responsive to Hurley's arguments about whether J.G.'s testimony was probative of Hurley's mode of operation and motive, and whether it was unfairly

prejudicial (Hurley's Br. at 30-32). The court of appeals' decision should be reversed because the circuit court's ruling was one a reasonable court could make. *See State v. Payano*, 2009 WI 86, ¶ 52, 320 Wis.2d 348, 768 N.W.2d 832.

IV. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PROSECUTOR'S UNOBJECTED-TO REMARKS WERE PLAIN ERROR WARRANTING A NEW TRIAL.

Hurley argues that the circuit court's order of a new trial for the prosecutor's closing argument remarks should be reviewed under a discretionary standard (Hurley's Br. at 32-33).

However, the standard of review in this case is effectively de novo because it involves review of the court's legal conclusion that the prosecutor's unobjected-to remark constituted plain error.[10] *Jorgensen*, 310 Wis.2d 138, ¶ 21. In granting Hurley a new trial, the court acknowledged that counsel made a strategic decision not to object to the remarks, but nonetheless reversed for plain error (66:69-73; Pet-Ap. 262-65).

But regardless the standard of review, the circuit court's order determining that the prosecutor's remark constituted plain error and awarding Hurley a new trial must be overturned because it is based on a misapplication of *State v. Weiss*, 2008 WI App 72, 312 Wis.2d 382, 752 N.W.2d 372.

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[10] The State erred in referencing the discretionary reversal standard in its brief-in-chief. Counsel regrets the error.

Unlike the *Weiss* prosecutor, the prosecutor here did not "ask[] jurors to draw inferences that [he] kn[e]w or should [have] know[n] [were] not true" based on his knowledge of facts outside of the trial record. *See Id.* ¶ 15. Hurley's testimony as elicited on direct examination, was that he did not "recall" assaulting J.G. (63:265, 267; Pet-Ap. 186, 188). The prosecutor held him to that testimony, asserting that Hurley's testimony that he did not recall is "different than it didn't happen." (64:25-26; Pet-Ap. 190-91). The fact that the prosecutor would have known that Hurley had previously denied J.G.'s allegations to J.G. in a private conversation is irrelevant. The prosecutor made no representations about whether Hurley had previously denied the allegations. There was nothing improper about his remark (State's Br. at 44-47).

The circuit court's order determining the prosecutor's remark constituted plain error and ordering a new trial must be reversed.

CONCLUSION

For the reasons set forth herein and in the State's brief-in-chief, the court of appeals' order reversing and remanding for dismissal of the charge, and the circuit court's order granting a new trial, must reversed, and the judgment of conviction reinstated.

Dated this 25th day of November, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,996 words.

Dated this 25th day of November, 2014.

_____
Jacob J. Wittwer
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of November, 2014.

_____
Jacob J. Wittwer
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