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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2021AP174-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

MICHAEL T. DEWEY,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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PETITION FOR REVIEW

The Defendant-Appellant-Petitioner, Michael T. Dewey, by Attorney David R. Karpe, of Madison, Wisconsin, hereby petitions this Court, pursuant to Wis. Stat. §§808.10 and 809.62, to review the April 14,, 2022, decision of the court of appeals in this case.

ISSUES PRESENTED

1. Did the trial court err by denying the defense pretrial motion to dismiss due to vagueness?

The trial court found that there was sufficient notice to the defendant due to the nature of the charges.

The court of appeals upheld the trial court on this point.

The Wisconsin Supreme Court should grant review on this question in order to decide if there are limits on the structure of charging time periods in child sex assault cases.

2. Did trial counsel provide ineffective assistance of counsel by not objecting to the form of jury instructions with three extended non-continuous charging periods in each count?

The trial court found that there was no ineffective assistance of counsel because the law is unsettled on the question.

The court of appeals held that there was no prejudice,

and thus no ineffective assistance of counsel.

The Wisconsin Supreme Court should grant review on this question because there should be a declaration from the Court regarding whether divided charging periods in jury instructions vitiate jury unanimity.

3. Should the Court order a new trial in the interests of justice because the jury instructions contained plain and fundamental error?

The court of appeals held that it was restricted from considering discretionary reversal in these circumstances.

The Wisconsin Supreme Court should grant review on this question because the Court has greater powers of discretionary reversal and should exercise them.

CRITERIA FOR REVIEW

The decision below, *State v. Dewey*, 2021AP174-CR (April 14, 2022), although not recommended for publication, will be citeable as an authored decision, even if it is not ordered published. The Wisconsin Supreme Court should grant review on the first question in order to decide if there are limits on the structure of charging time periods in child sex assault cases, which decision would have statewide application. On the second question, review is warranted because the Court should declare whether divided charging periods in jury instruction vitiate jury unanimity. Finally, on the third question, the Court should accept this case in order to exercise its greater powers of discretionary reversal.

STATEMENT OF THE CASE

This was a direct appeal under Wis. Stat. (Rule) § 809.30 of a sentencing after revocation in a criminal felony matter.

Statement of Facts

The facts as stated in the decision of the court of appeals are essentially correct. *See State v. Dewey*, 2021AP174-CR (April 14, 2022 slip op.), ¶¶3-9.

The court of appeals summed up the case like this:

Dewey was a father figure to two children during his relationship with their mother, from approximately 2002 to 2014. The older child, T., was born in 1999; the younger child, C., was born in 2003. Between 2002 and 2014, Dewey lived with the children and their mother at various times in different residences.

In October 2014, the two children reported allegations of sexual abuse by Dewey. In November 2014, the State filed a criminal complaint, followed by an information, charging Dewey with thirty-six sexual assault-related counts committed against the two children at various locations and times from 2005 through 2013. Counts 1-28 pertained to T., and counts 29-36 pertained to C. We will address the details

of the locations and charging periods for these counts in the discussion below.

Dewey filed a pretrial motion to dismiss most of the counts on the ground that the charging periods for those counts in the information were too long and disjointed to allow Dewey to prepare an adequate defense, in violation of his right to due process. Alternatively, Dewey asked that the circuit court order the State to more narrowly define the charging periods. The court directed the State to do so, and the State filed a first amended information that more specifically defined the charging periods for some of the counts. The court held a hearing and issued an oral ruling denying Dewey's pretrial motion based on the first amended information, for reasons that we will discuss in detail below.

A four-day jury trial was held in April 2016. The State filed the final, third amended information during trial, clarifying certain items that are not at issue on appeal. During the jury instruction conference towards the end of the trial, there was a brief discussion about the charging periods that would be read to the jury. The circuit court relied on the charging periods contained in the third amended information for the jury instructions and the verdict forms, and trial counsel did not object to the jury instructions or the verdict forms. The jury found Dewey guilty of all thirty-six counts, and he was sentenced on those counts of conviction.

In 2018, Dewey filed a motion for postconviction relief seeking dismissal of the six counts of repeated sexual

assault of a child as multiplicitous and violating Dewey's right to be protected from double jeopardy. The State did not object, and the circuit court granted the motion.

In 2020, with this court's permission, Dewey filed a second motion for postconviction relief. Dewey argued that trial counsel was ineffective for not objecting to the jury instructions for counts 32 through 36 (the crimes against C.) on the ground that the three non-continuous time periods charged for each count failed to protect Dewey's right to a unanimous jury. The circuit court held a Machner hearing in October 2020. The court issued an oral ruling, followed by a written order, denying the motion in January 2021.

State v. Dewey, 2021AP174-CR (April 14, 2022 slip op.), ¶¶3-9.

The court of appeals affirmed the convictions, reasoning that “the charging periods in the information, considered together with the allegations in the criminal complaint, are reasonable and therefore provided adequate notice to satisfy Dewey's due process right to plead and prepare a defense,” *id.* at ¶12, and because Dewey “fail[ed] to show either that counsel's failure to object prejudiced his defense or that this is an extraordinary case warranting

discretionary reversal,” *id.* at ¶37.

The court of appeals thus affirmed the circuit court’s order denying postconviction relief. Mr. Dewey seeks review of that decision.

ARGUMENT

I. The Court Should Grant Review as to Whether There Are Any Limits at All Regarding Time Charging Periods in Child Sexual Assault Cases.

Granting review will permit the Court to declare whether the notice requirement is ever violated in child sexual asst cases. The due process protections of notice should not be erased in child sexual assault cases, even if the Court views them through a “more flexible lens.” *State v. Schultz*, 2020 WI 24, ¶62, 390 Wis.2d 570, 939 N.W.2d 519, citing *State v. Hurley*, 2015 WI 35, ¶34, 361 Wis.2d 529, 861 N.W.2d 174. (*Schultz* uses the word “lens.” *Hurley* does not.)

The Court recognized a right to charging imprecision

in sexual assault cases at least as far back as *Gutenkunst v. State*, 218 Wis. 96, 104, 259 N.W. 610 (1935) (one month period). In *State v. Sorenson*, 253, 421 N.W.2d 77 (1988), the Court upheld a *unitary* six week period of time.¹

The justification cited for this leniency is that the “vagaries of a child’s memory more properly go to the credibility of the witness and the weight of the testimony, rather than to the legality of the prosecution in the first instance.” See, e.g., *Hurley*, 361 Wis.2d 529, ¶34, citing *State v. Fawcett*, 145 Wis.2d 244, 254, 426 N.W.2d 91 (Ct. App 1988). In our case, this really is not good justification for the odd time gaps in some of the charges as well as the long time periods of alleged conduct contained in the charge. The most extreme example in our case is in counts 32-36, which, in the words of the court of appeals, is

¹

Hurley had a charging period of five years, but there the offense of conviction was charged under Wis. Stat. § 948.025, Repeated Sexual Assaults of a Child, and specified that the defendant had assaulted the victim 26 times over that five year period. Section 948.025 is unambiguously a “continuing offense” requiring a jury finding of at least three separate assaults during the charged time period.

comprised of “three non-continuous periods of three through six months each.” *Dewey*, 2021AP174-CR, ¶17. To be clear, the charging periods for these counts begin January 1, 2010 and terminate December 31, 2011. That is a *two year period* with interruptions. This is such an extreme example, it should be examined by this Court for whether it should fall outside the exception.

The Court should consider whether the traditional seven-factor “reasonableness test” may not be sufficient in such an odd charging period to permit a finding that the charging period set forth is reasonable and that the defendant was “adequately informed of the charges against him.”²

² The factors of the reasonableness test are:
(1) the age and intelligence of the victim and other witnesses; (2) the surrounding circumstances; (3) the nature of the offense, including whether it is likely to occur at a specific time or is likely to have been discovered immediately; (4) the length of the alleged period of time in relation to the number of individual criminal acts alleged; (5) the passage of time between the alleged period for the

Even where a defendant is charged with a crime of such a horrific nature, s/he still has the right to demand the nature and cause of the accusation against them. It is dubious that counts 32-36 state offenses to which Mr. Dewey was able to plead and prepare a defense, and whether the convictions are a bar to another prosecution for the same offense.

There seems to be a judicial belief supporting the “flexible notice lens” that kids memories are considered so good as to place, but not as to time periods. *See e.g.*, Patricia Bauer *et al.*, “It’s All about Location, Location, Location: Children’s Memory Form the ‘Where’ of

crime and the defendant’s arrest; (6) the duration between the date of the [charging] and the alleged offense; and (7) the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense. *Hurley*, 361 Wis. 2d 529, ¶35. The reviewing court may also “consider any other relevant factors necessary to determine whether a criminal complaint and information provide adequate notice.” *Id.*, ¶36.

Personally Experienced Events,” 111 JOURNAL OF EXPERIMENTAL CHILD PSYCHOLOGY 4,” December 2012 at 510-522. It is noted that the testing done in the Bauer study were children who were four years old and eight years old at the time of the study, not at the time of the past events.

This is not a wholly academic concern in this case, either. Mr. Dewey is currently facing charges in Rock County involving the same alleged victims involving time periods not totally distant from the ones here. *See State v. Dewey*, Rock County Cir. Ct. Case 2015CF437.

II. The Court Should Grant Review to Consider Whether a Jury Instruction Asking the Jury to Consider in a Single Count Three Non-continuous Periods of Three Through Six Months Each During a Two-Year Time Span Violates Constitutional Guarantees Against Double Jeopardy.

The Wisconsin Constitution guarantees the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence. Wis. Const., Art. I, §§ 5 and 7; *Holland v. State*, 91 Wis.2d 134, 138, 280 N.W.2d 288 (1979).

The dates here are not “a set period of time.” The multiple acts are not all part of “one continuous criminal transaction.” *State v. Lomagro*, 113 Wis. 2d 582, 589, 335 N.W.2d 583 (1983)

In order to convict, the jury should have been required to be unanimous at least as to which series of acts Mr. Dewey committed, even if it was not required to be unanimous as to a specific act. With these counts having such an extended and unusually divided allegation regarding dates of commission, the Court cannot be confident that the jury even agreed as to which series of acts was proven beyond a reasonable doubt. Such unanimity would have been essential to a proper jury determination of guilt.

So long as a victim makes an accusation assault by one perpetrator, *over a set period of time*, the law can consider it as one continuous story with various chapters. *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). However, the dates here are not “a set period of time.” The multiple acts are not all part of “one

continuous criminal transaction.” *Lomagro*, 113 Wis. 2d at 589. The court of appeals concluded that such error would be harmless because the trial judge stated that had trial counsel objected to the jury instruction, the circuit court would have amended the charges to exclude gaps. This is speculative, since the objection was not made, but in any case would have created a two-year time period for counts 32-36, which still would have been insufficient to insure jury unanimity.

III. The Court Should Grant Review in Order to Consider Discretionary Reversal Due to the Faulty and Un-objected-to Jury Instruction

The Court should consider exercising its discretionary power of reversal because even if it was not ineffective assistance of counsel to fail to object to the instructions, there is still the glaring probability that the jury verdicts were not unanimous regarding the acts resulting in conviction and what the jury believed was proven. Under

Vollmer v. Luety, 156 Wis.2d 1, 11, 456 N.W.2d 797 (1990), the Supreme Court has powers under Wis. Stat. § 752.35, that the court of appeals lacks to consider the interests of justice in the area of unobjected-to jury instruction. The Court should take a position on whether such divided charging periods pass muster under the Wisconsin Constitution.

CONCLUSION

For the reasons set forth above, Mr. Dewey respectfully requests that this Court grant review.

Respectfully submitted this 16th day of May, 2022.

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CERTIFICATE

I certify that this petition meets the criteria under Rules 809.19(8)(b), and 809.62(4), Stats., for a petition produced with a proportional serif font. The petition is 2727 words long.

David R. Karpe

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this petition which complies with the requirements of s. 809.62(4)(b). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Signed,

David R. Karpe