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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP174-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

MICHAEL T. DEWEY,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This case does not meet any of this Court's criteria for review.

The charging periods in this case were well within what this Court has recognized as permissible in delayed-reporting child sexual assault cases and were based on the dates the children lived in the various residences where they remembered being assaulted. The boys then testified to the types of assaults that took place in each home. Dewey's defense did not depend on the dates of any particular offense, and he was given adequate notice of the charges against him.

Furthermore, there was nothing improper about the jury instructions given in this case, nor is there anything exceptional about it that would warrant discretionary reversal.

In short, none of Dewey's issues raise any important or unsettled questions of law. This Court should deny his petition.

BACKGROUND

In October of 2014, Darren¹ brought his 15-year-old son, Terry, to the Monroe County Sheriff's Office. (R. 4:9.) He told detectives that Terry recently revealed that his mother Delia's former boyfriend, Michael Dewey, had been sexually assaulting him for years, at least 80 times spanning nearly his whole life. (R. 4:9–18.) Terry's half-brother, 11-year-old Corey, also reported being sexually assaulted by Dewey over 70 times, beginning when he was three or four years old. (R. 4:19–23.)

¹ The State uses pseudonyms for the victims and their family members pursuant to Wis. Stat. (Rule) § 809.86.

Based on the boys' disclosures, the events they could remember with specificity, and corroborating information from their mother about various places they had lived and when, the State charged Dewey with 36 crimes. (R. 4:1–9.) Incidents for which the boys could not remember any specific date the State charged alleging generally a one to two year timespan based on how old the boys reported they were during the assaults and where they lived at the time. (R. 4:1–9.)

Dewey moved to dismiss all but five counts on the grounds that the charging periods did not allow him to prepare a defense. (R. 25:4.) The State narrowed some of the date ranges but was unable to do so for others. (R. 37.) After applying the relevant factors stated in *State v. Fawcett*² and *State v. Hurley*,³ the circuit court denied the motion to dismiss. (R. 264:5–14.)

Trial lasted four days. (R. 273; 274; 275; 276.) Terry, Corey, Delia, and Darren testified consistently with what they told police. (R. 81; 273:123–76; 274:36–100.) Dewey testified that the assaults never happened. (R. 275:114–81.) Dewey said he believed he was being set up by the boys' mother and her family because they did not like him, or it was possible the boys made it up on their own. (R. 275:169–71, 177–78.)

The jury found Dewey guilty on all charges. (R. 276:187.) Postconviction, Dewey renewed his claim that the date ranges alleged in the information were impermissibly broad and further contended that trial counsel was ineffective for failing to object to the jury instructions on counts 32 through 36 because they alleged three separate date

² *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

³ *State v. Hurley*, 2015 WI 35, ¶ 33, 361 Wis. 2d 529, 861 N.W.2d 174.

ranges within a year rather than one continuous time frame. (R. 237:1–2.) After a *Machner* hearing, the court denied the motion. The court of appeals affirmed. Dewey seeks review.

ARGUMENT

I. Established case law shows that the charging periods in this child sexual assault case were permissible.

Both this Court and the court of appeals have already addressed and explained, in several cases, that leeway is given to the State in determining date ranges in child sexual assault cases due to the unique characteristics of such cases. *State v. Hurley*, 2015 WI 35, ¶ 33, 361 Wis. 2d 529, 861 N.W.2d 174; *State v. Kempainen*, 2015 WI 32, ¶ 4, 361 Wis. 2d 450, 862 N.W.2d 587; *State v. Fawcett*, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). Dewey's contention that this issue needs further clarification from this Court is thus meritless. (Pet. 10–14.)

A court assessing a challenge that the criminal complaint was too vague as to date range for the defendant to prepare a defense looks to seven factors. These 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 crime and the defendant's arrest; (6) the duration between the date of the indictment 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.

Fawcett, 145 Wis. 2d. at 253. A court may also consider any other relevant factors it finds appropriate. *Kempainen*, 361 Wis. 2d 450, ¶ 4.

The State made a diligent effort to narrow the charging periods after Dewey's motion to dismiss, but the boys had been assaulted so many times over such a long period that they could not identify specific dates for most of the individual assaults and could only remember where they had occurred. (R. 264:5–7.) None of the charging periods was overly long—the longest was between August 1, 2006, and December 1, 2007, or about 15 months. (R. 81:2–3.) The charging periods were based on the dates the children lived at different residences at which they reported being assaulted, which gave Dewey adequate notice to prepare a defense given that he knew when he had lived at each residence with the children, and that he alleged that he had never sexually assaulted them at any time. (R. 266:4–15.) The dates finally alleged were based on the detective's discussions with the victims and were as narrow as the State could discern due to the age of the victims when the assaults occurred, the frequency of the assaults, and the time that had passed since the assaults began. (R. 264:5–6; 266:4–15.)

The circuit court properly applied the *Fawcett* factors and determined that the charging periods were as specific as the children were able to be under the circumstances. In other words, the circuit court applied the correct law and reached the correct conclusion. There is nothing here that would warrant this Court's review.

II. There was nothing problematic about the three discrete date ranges given for counts 32 through 36, but Dewey is judicially estopped from arguing otherwise in any event.

Dewey's claim that this Court should take the case to review whether it was proper for the State to break up the charging periods for counts 32 through 36 into three discrete time spans between January 1, 2010 and December 31, 2011, during which Dewey lived at that particular residence, is likewise unpersuasive, for two reasons: (1) the State initially

charged those counts as one continuous time frame and Dewey objected on the ground that he did not live at the house for certain months over the charging period, meaning he should be judicially estopped from complaining that the narrowed time frame was impermissible now; and (2) any error in this regard was harmless. Corey clearly testified that all of the acts for which Dewey was convicted took place in that residence, and had Dewey successfully objected to the three separate date ranges, the State would have simply amended the information to return to a continuous charging period.

III. Neither the jury instructions nor the verdict forms created any jury unanimity problem in this case.

Finally, there is no reason for this Court to address Dewey's claim regarding the verdict forms or jury instructions given in this case because the controlling case law shows that they are meritless. (Pet. 16–18.) There was no unanimity problem with the jury's instructions or verdicts in this case.

Dewey was charged with and convicted of six crimes against Corey: (1) repeated sexual assault of the same child; (2) first-degree sexual assault of a child under age 12 via sexual intercourse; (3) incest; (4) child enticement; (5) causing a child to expose his genitals; and (6) exposing Dewey's genitals or pubic area to a child, all committed between January 1, 2010 and June 10, 2010, or between November 9, 2010 and February 9, 2010, or between June 16, 2011 and December 31, 2011, in a residence on Hollister Avenue. (R. 81:7–9.) The State introduced evidence showing that Dewey repeatedly committed conduct constituting all five of the individual crimes against Corey multiple times when he was at the Hollister Avenue address; this was a continuous pattern of conduct. The fact that the charging period alleged only the discrete dates that Corey and Dewey lived in the

Hollister Avenue residence and that those dates were not completely continuous, along with the fact that Corey could not testify with specificity as to when any individual assault occurred, is of no moment.

When the State, as it did here, introduces multiple instances of *an identical type of conduct* committed during the charging period—in other words, evidence that the defendant engaged in a continuous course of that conduct—to prove a *single charge*, there is no unanimity issue. *State v. Molitor*, 210 Wis. 2d 415, 565 N.W.2d 248 (Ct. App. 1997); *see also State v. Lomagro*, 113 Wis. 2d 582, 595, 335 N.W.2d 583 (1983). When a single count under a particular statute is charged⁴ and evidence is introduced showing that the defendant committed the conduct described by the charge multiple times over the charging period in a continuing pattern, the jury does not have to agree on which specific act underlies the guilty verdict. Rather, the jury needs only to agree that at least once during the charging period the defendant committed the conduct constituting the crime. *Molitor*, 210 Wis. 2d at 420 (“[W]hen the charged behavior constitutes ‘one continuous course of conduct,’ the requirement of jury unanimity is satisfied regardless of whether there is agreement among the jurors as to ‘which act’ constituted the crime charged.”) (citation omitted).

There is nothing in any of the statutes under which Dewey was found guilty that suggests the Legislature meant to prohibit the State from opting to charge them as a continuing offense, where the evidence warranted. *See* Wis. Stat. §§ 948.02(1)(b); 948.06(1); 948.07(1); 948.10(1); 948.10(1)(a). And the charging period was narrowed to the times Dewey and Corey were specifically in that particular

⁴ Or, for that matter, multiple charges under the same statute that clearly delineate what type of conduct is the basis for the charge.

residence. The multiple assaults committed against the victim in *Lomagro* were committed at different times and in different places, but were still properly considered a continuing sexual assault. There is no reason for a different rule to apply here. And the law already recognizes that children, by nature, are far less capable of remembering specific dates and being able to pinpoint exactly when a particular event in a series of events took place than an adult. See *State v. Sirisun*, 90 Wis. 2d 58, 65–66 n.4, 279 N.W.2d 484 (Ct. App. 1979) (“A person should not be able to escape punishment for such a . . . crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such . . . activity.”) Indeed, that is precisely the reason that specific dates are not required in prosecuting child sexual assaults. *Hurley*, 361 Wis. 2d 529, ¶ 34.

In sum, there is nothing worthy of this Court’s review that is raised by this case. The circuit court and court of appeals resolved Dewey’s case applying long-standing case law that has already been established and refined by this Court. His petition for review should be denied.

CONCLUSION

This Court should deny Dewey's petition for review.

Dated this 24th day of May 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

A handwritten signature in black ink, appearing to read "Lisa E.F. Kumfer", is written over the printed name.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,020 words.

Dated this 24th day of May 2022.



LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

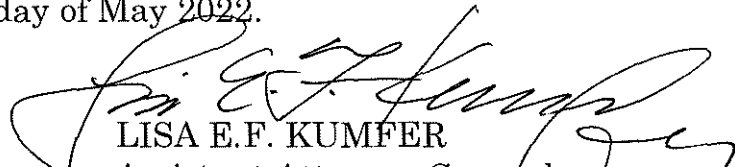
I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 24th day of May 2022.



LISA E.F. KUMFER
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