COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3205-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. KELLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. David L. Kelly appeals from a judgment of conviction of first-degree sexual assault of a child. He argues that his constitutional rights were violated by the exclusion of evidence of the victim's prior sexual contacts and by admission of his 1977 conviction for attempted rape. We conclude there was no error and affirm the conviction.

¶2 Kelly's victim was the five-year-old daughter of a woman he was living with in 1998. The child was left in Kelly's care for a two-week period in April 1998. In June 1998, while in the care of her aunt and her aunt's neighbor, the child revealed that Kelly had put his "thing" in her "pocketbook." "Thing" described Kelly's penis; "pocketbook" referred to the child's vagina. In her initial interview with a female police detective, the child indicated that Kelly had also put his "thing" in her "bootie," or butt. The child named four others who had stuck things in her "bootie."[1] She also said that three of these four had touched her "pocketbook." Finally, she indicated that her female cousin laid on top of her going up and down on her "pocketbook."

¶3 At trial, the child's testimony was confined to the allegation that Kelly had put his penis in her vagina. The police detective's testimony related the child's initial statement describing the hardness and size of Kelly's penis and the appearance of discharge, suggesting that he had ejaculated. A physical examination revealed a small, healed tear on the child's hymenal ring which the examining physician said was consistent with "sexual misuse" of the child. The tear was not indicative of full penile penetration which would have created greater physical trauma. The physician explained a phenomenon known as vulvar coitus, whereby the offender rubs his penis between the child's legs and genital area without full penetration. The physician indicated that because a child's genitalia is sensitive, the child may feel friction and discomfort without actual penetration. The child's aunt testified that the child had been discovered lying on top of

[1] The child indicated that her brother Darryl put his finger in her "bootie;" that a female cousin stuck her finger and Barbie pen in her "bootie;" that a male cousin stuck a toy in her "bootie;" and that the male cousin's brother stuck his "thing" in her "bootie."

another female child. The child had responded that she and the girl were playing house and she was the daddy. When asked where she had learned such behavior, the child made the revelation that Kelly had been doing that to her.

¶4 Kelly sought to admit evidence of the prior assaults to show an alternative source of the child's sexual knowledge and an alternative source of her physical injury. The trial court refused to admit the evidence because those assaults involved anal penetration and the allegation against Kelly involved only vaginal penetration.[2] The court also concluded that an alternative source of knowledge was not a real issue in the case. It found that the evidence served no purpose and would be unduly prejudicial. Kelly argues that the refusal to admit the evidence deprived him of his constitutional rights to confrontation and compulsory process. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990).

¶5 Our standard of review of the trial court's admissibility determination is whether it erroneously exercised its discretion. ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. A decision based on the accepted legal standards and the facts of record, and demonstrating a reasonable basis will not be disturbed on appeal. ***Id.*** However, we may consider questions of constitutional significance, such as a defendant's rights to confrontation and compulsory process, without deference to the trial court. ***Id.***

[2] At the time of its ruling, Kelly was charged with repeated acts of sexual assault by a person responsible for the child's welfare under WIS. STAT. § 948.025(1) and (2m) (1999-2000). A mistrial was declared at the trial of that charge when the jury was unable to reach a verdict. The information was amended to charge first-degree sexual assault by sexual contact with a child. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶6 To gain admission of evidence otherwise inadmissible under the rape shield statute, WIS. STAT. § 972.11, on the ground that the constitutional right to present a defense is denied, a defendant must make an offer of proof establishing that: (1) the prior act clearly occurred; (2) the act closely resembles those at issue in the instant case; (3) the act is relevant to a material issue; (4) the evidence is necessary to his or her case; and (5) the probative value of the evidence outweighs its prejudicial effect. ***Pulizzano***, 155 Wis. 2d at 656. If the defendant makes the requisite showing, the trial court must then determine whether the State's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it. ***Id.*** at 656-57.

¶7 The trial court's ruling was based on Kelly's failure to meet the second ***Pulizzano*** test—that the acts closely resembled the conduct at issue. We agree that the acts were not similar. The evidence sought to be admitted involved only anal penetration. There was no suggestion that any other abuser had penetrated the child's vagina in the manner Kelly had. The act of inserting a penis into a vagina is much more particularized and detailed than the other experiences Kelly sought to put into evidence.[3] Additionally, the mere touching of the child's vaginal area cannot be equated with sexual intercourse. The supreme court has held that touching the private parts of another does not "so closely resemble sexual intercourse as to satisfy the ***Pulizzano*** test." ***Michael R.B. v. State***, 175 Wis. 2d 713, 736, 499 N.W.2d 641 (1993). Thus, it was not error to exclude the evidence.

[3] This is also true with respect to the child's report that her female cousin moved up and down while lying on top of her. Although that conduct could have alternatively explained the child's conduct with the neighbor child, it was markedly different than penile penetration.

¶8 Kelly argues that the police detective's testimony suggesting that the child's behavior was consistent with that of child sexual assault victims opened the door for cross-examination about prior sexual abuse which may have been an alternative reason for such behavior. He cites to ***State v. Dunlap***, 2000 WI App 251, ¶19, 239 Wis. 2d 423, 620 N.W.2d 398, *review granted*, 242 Wis. 2d 543, 629 N.W.2d 783 (Wis. Apr. 5, 2001) (No. 99-2189-CR), where we held that the State opened the door for cross-examination of an expert witness about examples of the victim's pre-offense behavior that were also consistent with child sexual assault victims. Kelly's claim is raised for the first time on appeal and is waived. ***State v. Caban***, 210 Wis. 2d 597, 608, 563 N.W.2d 501 (1997).

¶9 At trial, evidence was presented that in 1977 Kelly was convicted of attempted rape of a five-year-old girl whom Kelly was babysitting. The victim's mother testified that her daughter reported that Kelly had put his penis in her vagina. The mother detailed how she had confronted Kelly about why he had done that to her daughter and Kelly just hung his head and never replied.[4] Kelly argues that the trial court erroneously exercised its discretion in admitting this evidence.

¶10 The trial court's ruling on the admission of other crimes evidence is examined under the erroneous exercise of discretion standard. ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. The trial court must address three inquiries: whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2); whether the other acts evidence is relevant

[4] In his trial testimony, Kelly denied that the assault had occurred. He testified that he had been merely changing the girl's diaper and a diaper rash was mistaken for evidence of sexual assault.

under WIS. STAT. § 904.01; and whether the probative value of the evidence substantially outweighs the danger of unfair prejudice, confusion, or delay under WIS. STAT. § 904.03. ***Davidson***, 2000 WI 91 at ¶35. "[A]longside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***Id.*** at ¶36 (citation omitted).

¶11 Kelly's argument addresses only the third prong of the framework. He contends that the trial court failed to weigh the probative value of the evidence against its prejudicial effect. He claims that the probative value of the prior conviction was weak because it was twenty-one years old, and that prejudice was overwhelmingly strong because this case was dependent only on the victim's credibility matched against his own.

¶12 We do not find this to be an instance where the trial court failed to consider or articulate the balance between probative value and possible prejudice. The trial court expressed concern over the age of the prior conviction. However, it found the similarity between the two cases to be striking, especially that Kelly committed both assaults when placed in the role of caretaker and in the absence of a parental figure. This similarity, coupled with the greater latitude rule, formed the basis for admission of the evidence despite the potential prejudice. The court's decision reflects a reasoned application of the facts of record and rules of law. Admission of the prior conviction was not an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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