

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JANUARY 17, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1618-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**TODD N. TRIEBOLD,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Todd Triebold appeals a judgment convicting him of second-degree sexual assault of a child and an order denying his postconviction motion. He argues that the prosecutor violated § 971.23(7), STATS., and denied him a fair trial by presenting evidence of Triebold's oral statement without prior disclosure. Additionally, Triebold argues that the prosecutor violated his due process rights by failing to correct false testimony by a witness. We conclude that the error in admitting Triebold's statement was harmless and that the witness did not present false testimony when it is considered in context. Therefore, we affirm the judgment of conviction and the order denying postconviction relief.

Triebold was convicted of sexual contact with Rebecca, a weekend guest in his apartment. Triebold hired another thirteen-year-old girl, Amanda, to babysit for his date's child while the couple attended a weekend festival. Amanda asked to have Rebecca accompany her. The girls babysat on Friday night, stayed at Triebold's apartment Saturday night as well, and returned home Sunday afternoon. The sexual assault of Rebecca took place between 1 and 1:30 a.m. on Sunday.

The State presented evidence that throughout the weekend Triebold engaged in inappropriate, suggestive and lewd acts and statements with the girls. The investigating officer described Triebold's conduct as "grooming" the victim in preparation for sexual misconduct. The State presented testimony and other evidence that Triebold rubbed baby oil on Rebecca's legs, requested that the girls give him a back rub for money, made a suggestive comment about a snake Rebecca won at a carnival, suggested that Rebecca change into a swim suit that she thought was too small, offered the girls beer, asked the girls which pair of underwear he should wear, went into the bathroom when one of the girls was showering, adjusted the car mirrors so that he could look at Rebecca in the car, jumped into bed with the girls, and walked up behind Amanda while she was standing and rubbed up against her buttocks. While Triebold denied some of these events and offered an explanation for others, the State presented substantial evidence of inappropriate behavior throughout the weekend.

Against this background, the jury considered Rebecca's testimony that Triebold crawled into the bed Amanda and Rebecca shared and rubbed Rebecca's buttocks and vagina through her clothing. Rebecca attempted to awaken Amanda by hitting her and lightly biting her. Amanda awakened only long enough to tell Rebecca to stop hitting her. Rebecca then got up and went to the bathroom. When she returned, she laid on the floor, telling Triebold that it was too hot in bed. Eventually, he returned to his bedroom.

Rebecca's allegation is partially corroborated by Amanda's testimony that she remembered being awakened and telling Rebecca to stop hitting her. Amanda also testified that she awakened during the night and found Triebold in bed with her.

Triebold acknowledges that he went into the living room where the girls slept on the hide-a-bed at approximately the time Rebecca alleges she was assaulted, but states that he merely sat in a chair and talked to her. Triebold's weekend date, Julie, who was sleeping in Triebold's bedroom, testified that Triebold said that he was going to go check on the girls to see when they got in. When he did not return for some time, she went to the living room and saw him seated in a chair. She asked when he would be returning to bed. He answered that he would return in ten or fifteen minutes. She then went back to bed. Triebold did not return to bed for a long time and Julie fell asleep before he returned. Julie testified that Triebold told her that if anyone asked how long he had been in the living room with the girls, she should answer only ten or fifteen minutes.

Triebold presented an unconvincing defense. He suggested that the motive for the girls to make false accusations was because he did not buy them food at the parade on Sunday or, alternatively, because they believed that the accusation would influence where Amanda would live because the girls wanted to live near each other. The defense provided no evidence that would support the argument that the girls could have believed that making a false accusation of sexual assault would result in their living closer to each other. Triebold's testimony also failed to establish any reasonable explanation for behavior that he admitted. Because the girls performed no babysitting services Saturday night, it is unclear why he did not take them home. His statement that he went to the living room to talk to Rebecca to find out when the girls got home does not answer the questions of why he needed to know that information that night, why it would take ten or fifteen minutes to elicit that information or why it mattered when the girls got home.

Triebold argues that the court should have disallowed Julie's testimony that he told her to lie about how long he was in the living room with the girls because the prosecutor failed to inform the defense about this statement. Julie first informed the prosecutor of this statement on the morning she testified. The State concedes that the statement was inadmissible under § 971.23(7), STATS., because the prosecutor did not disclose to the defense that he would introduce a statement of the defendant discovered during the trial.

We conclude that the error in admitting Triebold's statement was harmless error. An error is harmless if there is no reasonable possibility that the

error contributed to the conviction. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Triebold contends that he was prejudiced by introduction of this evidence because it tends to show a consciousness of guilt. Because the State presented overwhelming evidence of his guilt including other evidence of consciousness of guilt, we are confident that the inadmissible statement had no effect on the outcome.

Triebold's attempts to impeach Rebecca and Amanda's testimony met with limited success. In light of the witnesses' age, maturity and intelligence, the minor inconsistencies in their testimony and the fact that they forgot some details, does not impugn their credibility.

Triebold made other admissible statements that show his guilty state of mind. When the girls refused to ride home with him from the parade on Sunday, he called Amanda's mother to tell her the girls took a ride with someone else. During that conversation, he volunteered that he had never been alone with the girls and that he had previously been charged with sexually assaulting a thirteen-year-old. These statements, along with the girls' testimony and the weak defense, persuade us that the objectionable testimony did not contribute to the verdict.

Triebold also suffered no prejudice from the prosecutor's failure to promptly inform the defense that it would introduce Triebold's statement to Julie. Had the prosecutor complied with § 971.23(7), STATS., by immediately informing the defense when Julie told the prosecutor of that statement, the defense would have had only a few hours of notice before Julie testified. Those hours of preparation for Julie's testimony would not have benefitted the defense. There is no basis for moving to suppress the evidence. Triebold has not identified any question that could have been asked or evidence that could have been presented had the defense had more time to prepare for this witness.

After Julie testified that Triebold told her to say he was only in with the girls for ten or fifteen minutes, the defense cross-examined her as follows:

Q.This statement, you made a statement today, you testified today that Todd told you in the van on Sunday that you should say that how long he was in the--is this--Have you ever told anybody about that statement before?

A.No.

Q.Is this the first time?

A. Yeah.

Q.You never told Investigator Kreuziger about that?

A. No.

Q.And you didn't tell Tim when he talked to you?

A. No.

Triebold argues that Julie had told the prosecutor about this statement and therefore she lied when she testified that she had not told anyone about it before. He argues that the prosecutor violated his right to due process by failing to correct the false testimony.

We agree with the trial court that a fair reading of Julie's testimony is that she meant that she had not told anyone about Triebold's statement prior to the day she testified. From the prosecutor's question that elicited Julie's response, it was obvious to all concerned that the prosecutor knew the answer to his question. A reasonable construction of defense counsel's cross-examination is that he wanted to know whether Julie had previously disclosed this information to police officers or the defense investigator. Because it was apparent from the prosecutor's question that Julie had informed the prosecutor of this statement at some time before she testified, a reasonable construction of defense counsel's question was that he was suggesting recent fabrication or inquiry about prior consistent statements and not about Julie's revelation to the prosecutor earlier on the same day.

*By the Court.* – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.