COURT OF APPEALS
DECISION
DATED AND RELEASED

December 3, 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, 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. 95-3410-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SYED HASAN TURAB,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Syed Hasan Turab appeals from a judgment convicting him of physical abuse of a child (intentional causation of bodily harm) following a jury trial. Turab claims that the trial court erred in several respects. First, he argues a due process violation occurred when the trial court refused his requested addition to the reasonable doubt standard jury instruction that would have required the jury to find "guilt to a moral certainty." Second,

Turab argues that the trial court should have admitted into evidence statements contained in his offer of proof. The evidence he sought to admit consisted of alleged derogatory statements made to him by a Village of Fox Point police officer not present at trial. Finally, Turab argues the trial court should not have permitted the testimony of the mother of the victim because he argues that it was both "incredible" and contrary to the physical facts as she was 129 feet away from the events she witnessed. Because we conclude the trial court properly: (1) instructed the jury using the standard jury instructions; (2) refused to admit the statements contained in the offer of proof because the statements were irrelevant; and finally, (3) admitted the testimony of the victim's mother because it was credible and consistent with the physical facts, we affirm.

I. BACKGROUND.

Turab's legal difficulties began when he drove to a Village of Fox Point school to pick up his children. Upon approaching the school he witnessed some roughhousing between his nine-year-old son and another older boy, later identified as twelve-year-old Jason D. Both boys were pushing and shoving each other on school property. What happened next was hotly disputed at trial. Turab and his children testified that Turab quickly exited his car after he saw his son being pushed into the driveway. He approached the two boys, grabbed Jason D.'s coat and ordered him to drop a piece of ice that he held in his hand. Turab and his children also testified that Jason D. was never struck by Turab or injured in any way. Jason D. and his mother sharply contradicted the testimony given by Turab and his family. Although agreeing that Turab immediately exited his car and rushed over to the boys, Jason D. and his mother testified that, upon reaching the boys, Turab began choking Jason D. and then threw him to the ground, slapping and punching his face several times. As a result, they testified that the boy suffered some minor injuries and his eyeglasses were broken. Jason D.'s mother, who was also driving to the school to pick up her children, witnessed much of the altercation between her son and Turab while stopped at a stoplight some distance away. The last State's witness at trial was a Village of Fox Point police officer who did not see the altercation, but investigated the complaint. In rebuttal, he testified to a statement given by Turab at the police station after Turab was later summoned there by phone.

During the jury trial the trial court denied Turab's attempt at introducing—by way of an offer of proof—what he believed to be derogatory

and insulting statements made to him by a Village of Fox Point police officer absent from the trial. Turab contends that the trial court made four errors in refusing to permit the statements' introduction through Turab's testimony. First, Turab claims the trial court erred by finding the police were not agents of the state as contemplated in the hearsay exception codified in RULE 908.01(4)(b)4, STATS., thus ruling that the defense was required to subpoena police witnesses needed for their case. Next, Turab contends the trial court erred in its conclusion that the statements of the officer contained in the offer of proof were irrelevant and consisted of inadmissible hearsay. Last, he contests the trial court's conclusion that the defense was not allowed to introduce the statements on the defense theory that the State had opened the door to the subject matter by admitting Turab's police station declarations.

Turab also challenges the decision of the trial court to allow Jason D.'s mother to testify. Turab contends her testimony should not have been admitted because she claimed she saw the incident from a distance of 129 feet; a distance, according to Turab, too far away to actually see the events unfold, thereby rendering her testimony contrary to the physical facts.

Finally, Turab argues that the trial court committed an error requiring a new trial when it refused to give his proposed jury instruction that would have required the jury to be convinced of guilt to a moral certainty when contemplating the concept of reasonable doubt. The jury found Turab guilty and, after unsuccessfully seeking a new trial in a “Motion After Verdict,” Turab brought this appeal.

II. ANALYSIS.

Turab's first argument deals with the trial court's refusal to give his special jury instruction. Turab had proposed a jury instruction which sought to add the words, "the jury must be convinced to a moral certainty of guilt in order to find him guilty" to the standard Wis J I—Criminal 140. Turab claims the failure to add this clause is a due process violation requiring a new trial. He cites, however, no cases in support of his position that a new trial is mandated when the phrase "convinced to a moral certainty" is omitted. In fact, other than claiming a due process argument, he fails to satisfactorily explain why the standard instruction was erroneous. He does cite a 1899 Wisconsin Supreme Court case, ***Emery v. State***, 101 Wis. 627, 78 N.W. 145 (1899), in which the court used the words "moral certainty" in defining reasonable doubt, *see* ***id***. at 651, 78 N.W. at 152, but this case does not require Turab's proposed language in the jury instructions. He also cites to a United States Supreme Court case, ***Victor v. Nebraska***, 511 U.S. 1, 127 L.Ed.2d 583 (1994), in which the appellant argued that it was reversible error for the trial court to give an instruction using the language "to a moral certainty" in defining reasonable doubt. The Supreme Court concluded that the challenged instruction using the phrase "to a moral certainty" in defining reasonable doubt was not a due process violation, but only because it was saved by other surrounding language found in the instruction. ***Id***. at ___, 127 L.Ed.2d at 596. Thus, these cases lend no support to Turab's argument that failing to give his proposed jury instruction is error.

The current standard instruction, Wis J I—Criminal 140, has been in use for many years. The comments following the "reasonable doubt" instruction note that this version was first published in 1962 and was revised in 1983. For thirteen years this instruction has successfully withstood appellate court scrutiny in defining the concept of reasonable doubt. "A trial court has broad discretion when instructing a jury, and if the trial court's instructions accurately cover the law, [the Court of Appeals] will not find error in the refusal to give an instruction proposed by one of the parties, even where the proposed instruction is not erroneous." *See* ***Plautz v. Time Ins. Co.***, 189 Wis.2d 136, 151, 525 N.W.2d 342, 349 (Ct. App. 1994). Turab has supplied no solid authority or arguments to establish why the standard jury instruction was insufficient. We conclude the trial court properly exercised its discretion by refusing Turab's modified instruction.

Turab next argues that the trial court erroneously exercised its discretion in excluding evidence contained in an offer of proof that consisted of Turab's recollections of what a Fox Point police officer who was not present at trial allegedly stated to Turab at the time of his interview at the police station. Turab wished to introduce the absent officer's alleged pejorative statements through several different legal vehicles. First, Turab believed he was not obligated to subpoena the officer because, he contended, the officer was an agent of the State and his statement was an exception to the hearsay rule pursuant to RULE 908.01(4)(b)1, STATS. In addition to concluding that, under RULE 908.01(4)(b)4, the missing police officer's unrecorded statements to the defendant did not qualify for admission, the trial court ruled that the content of the offer of proof was irrelevant and contained impermissible hearsay.

With respect to Turab's assertion that he was entitled to admit the offer of proof because the police are agents of the State for purposes of the hearsay exception found in RULE 908.01(4)(b)4, the trial court correctly determined that generally in criminal cases this exception is not available against the state. *See* 2 MCCORMICK ON EVIDENCE, § 259 at 168 (John W. Strong ed., 4th ed. 1992). We note, however, that the trial court did not have to reach this issue, as the statements in question were not hearsay. RULE 908.01(3), STATS., defines "hearsay" as "a statement ... being offered in evidence to prove the truth of the matter asserted." In this instance, the police officer's alleged statements were not being admitted to prove they were true, but rather, to explore the bias and prejudice of the police. The trial court concluded similarly, "[I]f I understand the defense's argument correctly, it's [the offer of proof] a statement that would implicate the motivation in the bringing of this suit." Thus, Turab's requested offer of proof, had it survived the relevancy challenge, would have been admissible because it was not hearsay.

Having determined the statements were not hearsay, we turn to the other objections argued by the State. Turab asserts, as the trial court correctly deduced, that Turab wanted the alleged statements of the missing police officer admitted because he wished to explore the bias and prejudice of the police. Although Turab has, as he has argued, the absolute right to explore the bias of a witness, he failed to lay a foundation showing a nexus between the testifying officer and the purported bias of the missing officer. The fact that one officer may have made comments to Turab which he found insulting does not render them automatically admissible. Turab has not shown that the officer making the alleged offending statements played any relevant role in the

investigation, nor has he shown that this alleged bias or prejudice permeated the entire department. Without such a foundation, Turab did not show how the police officer's statements, if true, were relevant to the jury's determination of his guilt. While an officer's alleged discourteous and insulting statements might warrant further investigation by the police and fire commission or other supervisory body, Turab's alleged complaints were of little value to the jury under these facts and circumstances. Thus, the trial court correctly determined that this evidence was irrelevant and would not assist the jury in reaching its determination. RULE 904.01, STATS., defines relevant evidence as: "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Turab's offer of proof fails this test. The evidence sought by Turab was irrelevant.

Turab maintains the failure to allow the jury to hear his conversation with the absent police officer is of constitutional proportions because he lost his right to a fair trial. While Turab is entitled to a fair trial, he has cited no cases which make the failure to introduce irrelevant evidence a violation of a constitutional right; nor can he, because there is no constitutional right to introduce irrelevant evidence. *See, e.g.*, ***State v. Morgan***, 195 Wis.2d 388, 432, 536 N.W.2d 425, 441-42 (Ct. App. 1995); *see also* RULE 904.02, STATS. (irrelevant evidence is not admissible).

Further, we review discretionary acts such as the exclusion evidence, "`only to determine whether the trial court examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion.'" ***State v. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79-80 (citation omitted), *cert. denied*, 510 U.S. 845 (1993). The trial court, although incorrectly determining that the statements were inadmissible hearsay, correctly concluded that the statements sought by Turab were irrelevant. As such, the trial court properly exercised its discretion.

Finally, Turab claims the trial court should not have permitted the mother of the victim to testify, because her testimony was contrary to the physical facts. Turab does not elaborate on exactly what part of her testimony he considers "contrary to the physical facts." What can be deduced from a reading of the briefs and the record is that there is some question as to whether Jason D.'s mother could have seen the events at a distance of 129 feet. This

question goes to the credibility of the testimony, not the admissibility of the testimony. As such, the jury is the ultimate arbiter of conflicting evidence. Further, if Turab is challenging the sufficiency of the evidence on this point, he presents nothing that undermines the sufficiency of the evidence supporting the jury's verdict. *See* ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). Ample evidence exists in this case to support the jury's finding. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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