NO. 96-2587-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL W. EDWARDS,

DEFENDANT-APPELLANT.

ERRATA SHEET

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PLEASE TAKE NOTICE that the attached per curiam is to be substituted for the per curiam in the above-captioned matter which was released on December 9, 1997.

Dated this 12th day of December, 1997.

COURT OF APPEALS DECISION DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL W. EDWARDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID HANSHER, Judge. *Affirmed.*

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

PER CURIAM. Randall Edwards appeals from the judgment of conviction, following a jury trial, for two counts of first-degree sexual assault of a child. He claims that the trial court erred: (1) in admitting expert testimony concerning child behavior and delayed disclosure; (2) in admitting other acts evidence; (3) in admitting the victim's out-of-court statement to her teacher and a

City of Milwaukee police officer as an excited-utterance exception to hearsay; and (4) in permitting the State to impeach him with convictions which were more than ten years old. He also claims that the jury's verdict was not supported by the evidence. We reject his claims and affirm.

I. BACKGROUND

On September 27, 1995, the State charged Edwards with two counts of first-degree sexual assault of a child for the sexual abuse of his stepdaughter. At trial, she testified that on September 8, 1995, Edwards forced her to masturbate him. She also testified that he had touched her indecently on several occasions prior to that date. The jury also heard testimony from the child's teacher and from a City of Milwaukee police officer. The teacher testified, over hearsay objection, that on September 11, 1995, the child had told her about her stepfather's abuse. The police officer, also testifying over hearsay objection, stated that the child also reported to her that Edwards had abused her. The State's expert witness, Raeline Freitag, a social worker with the Child Protection Center of Children's Hospital, explained that children do not always report sexual abuse and are often reluctant to tell persons who are very close to them about the incidents. Lastly, Edwards testified that he was never alone with the child and that he never had sexual contact with her.

II. ANALYSIS

Edwards first claims that the trial court erred in admitting Freitag's expert testimony on child behavior and delayed disclosure. He argues that the State failed to show that such information was beyond the general knowledge and experience of an average juror and, therefore, that the trial court erred, as a matter

of law, when it determined that the expert testimony was necessary. Edwards's argument is without merit.

"Expert testimony is admissible only if it is relevant." ***State v. Pittman***, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79-80 (1993). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence." RULE 904.01, STATS. In addition, to be admissible, the expert testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. *See* RULE 907.02, STATS. The decision to admit or exclude expert testimony is a matter of trial court discretion. *See* ***State v. Friedrich***, 135 Wis.2d 1, 15, 398 N.W.2d 763, 769 (1987). Our review of the trial court's evidentiary decisions is limited to determining whether the trial court erroneously exercised discretion. *See* ***Pittman***, 174 Wis.2d at 268, 496 N.W.2d at 79-80. We will not find an erroneous exercise of discretion if the trial court examined the relevant facts, applied a proper legal standard, and used a rational process to reach a reasonable decision. *See* ***id***.

Here, the trial court concluded that expert testimony was necessary to assist the jury in its understanding of the evidence. As the trial court explained:

> I have three children … and when I say to my friends in discussion, well, you know how children are, their answer's no. They don't have the experience.
>
> And children[,] as set forth in the State's brief, retain, perceive and relate information differently than adults …. [A]nd this case involves a delayed report of a sexual assault … and it's a common phenomenon in child sexual abuse cases ….
>
> …
>
> Therefore, … the Court will allow the State to present testimony from an expert witness to educate the jury about issues outside of what I believe …. [is] their common

> knowledge and experience and I believe this clearly would help them evaluate the evidence.

We agree with the trial court and, therefore, conclude that the trial court did not erroneously exercise discretion.

Edwards next argues that the trial court erred in admitting testimony regarding his uncharged sexual contact with the victim. We disagree. RULE 904.04(2), STATS., prohibits the use of other acts evidence "to prove the character of a person in order to show that he [or she] acted in conformity therewith." RULE 904.04(2). However, the rule does allow admission of other acts evidence if used for a permissible purpose. *See* RULE 904.04(2).

To determine whether the other act evidence is admissible, the trial court must engage in a two-step test. *See* ***State v. Bustamante***, 201 Wis.2d 562, 569, 549 N.W.2d 746, 749 (Ct. App. 1996). First, the trial court must determine if the proffered evidence fits within one of the exceptions of RULE 904.04(2), STATS.,[1] and, if so, the trial court must then decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *See* ***Bustamante***, 201 Wis.2d at 569, 549 N.W.2d at 749; § 904.03, STATS.[2] This court's review of RULE 904.04(2) evidentiary issues is deferential.

[1] RULE 904.04(2), STATS., provides in relevant part:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[2] RULE 904.03, STATS., provides:

(continued)

See ***Bustamante***, 201 Wis.2d at 569, 549 N.W.2d at 749. "The trial court's determination will be upheld if discretion was exercised according to accepted legal standards and in accordance with the facts of record." ***State v. Mink***, 146 Wis.2d 1, 13, 429 N.W.2d 99, 104 (Ct. App. 1988).

In the instant case, the trial court concluded that the evidence of Edwards's prior abuse of the child was admissible to "show the context of the crime." The court added that it thought the evidence was also necessary for "a full presentation of the case and [because] it shows [the defendant's] common plan or scheme and intent."

The trial court was correct. The evidence of Edwards's prior uncharged sexual abuse of Jessica was relevant and admissible to prove that Edwards intended to sexually assault her, and to show that he did so for the purpose of sexual arousal or gratification. *See* § 948.02(1), STATS. Thus, the other acts evidence was probative of Edwards's specific intent and motivation. *See* ***Mink***, 146 Wis.2d at 12-17, 429 N.W.2d at 103-105 (evidence of other acts of sexual misconduct committed against a child admissible to prove that the defendant's motive to commit the charged crime was to become sexually aroused or gratified).

Edwards next argues that the trial court erred in admitting the child's out-of-court statements to the police officer and to her teacher. He is incorrect.

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The child's statements were admissible as out-of-court statements under the excited utterance exception, *see* RULE 908.03(2). STATS., and the rule of completeness. *See* ***State v. Sharp***, 180 Wis.2d 640, 511 N.W.2d 316 (Ct. App. 1983).

In determining whether to apply the excited utterance exception in a child sexual assault case, a court must consider a number of factors, "including the age of the child and the contemporaneity and spontaneity of the alleged assertions in relation to the alleged assault." ***State v. Dwyer***, 143 Wis.2d 448, 459, 422 N.W.2d 121, 124 (Ct. App.1988). It must also be shown that the statement was made under psychological distress. *See* ***id.*** Our supreme court has expansively applied RULE 908.03(2), STATS., in child sexual assault cases. *See* ***State v. Sorenson***, 143 Wis.2d 226, 244-45, 421 N.W.2d 77, 84 (1988); *see also* ***State v. Moats***, 156 Wis.2d 74, 97, 457 N.W.2d 299, 309 (1990). Extrajudicial statements made by young sexual assault victims may be admissible even though the statements were not made immediately following the incident. *See* ***Sorenson***, 143 Wis.2d at 244-45, 421 N.W.2d at 84.

In reaching its determination, the trial court took into account the child's young age, the circumstances under which the statements were made, and the length of time that had elapsed between the assault and the statement. The trial court noted that Edwards sexually assaulted the child for the last time on September 8, 1995. It also noted that her out-of-court statement to the officer and the teacher were made on September 11, 1995, just three days after the assault. The uncontroverted evidence established that when she made her out-of-court statements to her teacher, she was crying and appeared very shaken. Her disclosure was spontaneous and unexpected, coming when the students were all working at their seats and her teacher was working at her desk. The court also

found that the child's disclosure to the officer was made under duress. The officer testified that when the child told her about the incident she was very upset, crying, and appeared "very sad, almost afraid." Under these circumstances, the trial court reasonably concluded that the child's statements were made while still under the stress and excitement of the assault and, thus were admissible under the excited utterance exception.

The child's statements were also admissible under the rule of completeness. *See* ***State v. Sharp***, 180 Wis.2d at 648-57, 511 N.W.2d at 320-24. Because Edwards contended that these incidents never happened and because defense counsel cross-examined the child about her motives to testify falsely and implied that the adults who questioned her "told [her] what to say," her out-of-court statements were necessary "to address the implications of [the defendant's] cross-examination." ***Id.*** at 653, 511 N.W.2d at 322.

In ***Sharp***, the trial court admitted out-of-court statements made by a child sexual assault victim to various adults—a family friend, a Child Protective Services worker, a police officer, and an emergency room physician. On review, we concluded that the out-of-court statements were admissible because "the statements, together with the child's testimony, provided the jury the opportunity to evaluate whether incompleteness or inconsistency within and among the interviews indicated improper influence on the child's testimony." *See* ***id.*** at 657, 511 N.W.2d at 323. Similarly, in this case, we conclude that the out-of-court statements to the teacher and the officer were admissible under the rule of completeness to address the defense implication that the teacher and officer both of whom questioned the child about the incidents, somehow influenced her testimony.

Edwards next claims that the trial court erroneously exercised discretion by permitting the prosecutor to impeach him with felony convictions, that were more than ten years old. He argues that the trial court should have considered itself bound by the ten-year rule of FED. R. EVID. 609. In addition, he contends that the trial court erred because it failed to consider the possibility of unfair prejudice. We reject his arguments.

Whether to permit impeachment through prior convictions is addressed to the discretion of the trial court. *See* ***State v. Kruzycki***, 192 Wis.2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). We will not reverse absent an erroneous exercise of discretion. *See* ***id.*** at 525, 531 N.W.2d at 435. A prior conviction is relevant to the witness's credibility. *See* ***id.*** at 524, 531 N.W.2d at 435. "Our law presumes that a person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted. The fact and number of such convictions are therefore relevant evidence." ***Id***. at 524-25, 531 N.W.2d at 435 (citations omitted).

In deciding whether to admit evidence of prior convictions for impeachment purposes, a trial court should:

> consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement in the crime ..., the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice.

State v. Kuntz, 160 Wis.2d 722, 752, 467 N.W.2d 531, 543 (1991) (quoted source omitted).

With respect to Edwards's claim that the trial court should have considered itself bound by the ten-year watershed mark of FED. R. EVID. 609, the

State argues that because Wisconsin law does not contain the ten-year limit, and allows only the fact and number of convictions, as opposed to the details, Wisconsin courts need not follow the ten-year rule in determining the admissibility of this evidence. We agree. RULE 609(B) of the FEDERAL RULES OF EVIDENCE generally bars admission of a prior conviction for impeachment purposes if more than ten years have elapsed since the latter of the date of the conviction or release from the confinement imposed for that conviction. By contrast, RULE 906.09(1), STATS., has no time limit for the admissibility of prior convictions and, therefore, the trial court had no obligation to follow Edwards's request to limit his impeachment to the most recent of his three prior convictions.

Edwards next argues that the trial court failed to consider the prejudicial impact of these convictions. He is incorrect. Before the trial court admitted the convictions for impeachment purposes, it considered not only that the convictions had occurred in 1984 but also that Edwards had failed to be rehabilitated. The court reasoned that while a reformed defendant's past convictions may not be probative of his or her credibility, and admitting such convictions could be unfairly prejudicial, the admission of Edwards's past convictions posed no such danger. Because the court employed a rational analysis of the relationship between the ages of past convictions, the periods he was confined, and his lack of reform, we conclude that it properly exercised discretion.

Finally, Edwards claims that the evidence was insufficient to support his conviction. We disagree.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a

> reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible – that kind of evidence which conflicts with the law of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

Edwards does not argue that the evidence was insufficient as to any specific element of the charged crimes. Instead, he urges this court to substitute his view of the evidence for that of the jury's. This we cannot do. *See* ***State v. Davidson***, 44 Wis.2d 177, 200-01, 170 N.W.2d 755, 760 (1969). In this case, the evidence was such that a reasonable jury could find Edwards guilty of first-degree sexual assault beyond a reasonable doubt. Edwards's conclusory assertion that the child's allegations "were made in a vacuum and without any corroborating support" does not render her trial testimony patently or inherently incredible as a matter of law. Thus, we cannot reverse. *See* ***State v. Daniels***, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415-16 (Ct. App. 1983).

By the Court.—Judgment affirmed.

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