COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2350-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KELCEY X. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and JACQUELINE D. SCHELLINGER, Judges. *Affirmed.*

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

¶1 PER CURIAM. Kelcey X. Nelson appeals from the judgment of conviction, following a jury trial, for first-degree sexual assault of a child and repeated sexual assault of the same child, and from the order denying his motion

for postconviction relief. He argues that: (1) the trial court erroneously exercised discretion "when it prohibited evidence of [a] prior inconsistent statement [of the alleged victim, E.T.,] that Jeffrey … Turner sexually assaulted her"; (2) the trial court erroneously exercised discretion by prohibiting him from cross-examining E.T. "regarding her prior untruthful allegation of sexual assault involving … Turner"; (3) his "due process rights were violated when the State inadvertently failed to disclose" a police telephone log book entry which he characterizes as "favorable evidence that could have been used to impeach [E.T.]"; (4) the trial court erroneously exercised discretion by denying him a new trial on the basis of the newly discovered evidence of the log book entry; and (5) a new trial, in the interest of justice, is required so that a jury may have "the opportunity to hear and evaluate the information concerning [E.T.]'s untruthful and inconsistent statements regarding Turner's alleged sexual assault of her." We affirm.

BACKGROUND

¶2 On February 5, 1998, City of Milwaukee police were dispatched to Nelson's home to investigate an allegation that he sexually assaulted E.T., his eleven-year-old stepdaughter. The police detained Nelson and interviewed his wife, Linda, E.T.'s mother.

¶3 Linda told police that she married Nelson on January 9, 1998, but that he had been living with her and her children since she met him in February 1995. Linda reported that, beginning in the summer of 1997, she noticed Nelson treating E.T. differently than he was treating the other children. She stated that late one night in November or December of 1997, Nelson got out of their bed and, contrary to his usual behavior, closed the bedroom door as he left the room. Several minutes later, Linda also left their bedroom and observed Nelson exiting

E.T.'s bedroom; she said Nelson claimed that he had been adjusting the heat in E.T.'s room, but that she was suspicious because the heat could not be adjusted without some type of tool and she had observed no tool in his hand. On February 4, 1998, while arguing with Nelson, Linda told him that she did not like him lying next to E.T. or having E.T. sit on his lap, and that he was to have no more of that type of contact with E.T. On February 5, 1998, E.T. told her mother that Nelson had licked her vaginal area and had rubbed his penis against her; Linda then called the police to report Nelson's behavior.

¶4 E.T. told the police that Nelson began touching her breasts sometime after her half sister was born in April 1997. She also reported that Nelson had her "sit on his face" and that he had licked her vaginal area, inserted his fingers into her vagina, touched her buttocks, rubbed his penis against her buttocks, and tried to insert his penis into her vagina. She said that the last time Nelson touched her was the day before he married her mother.

¶5 Based upon the information obtained from E.T. and her mother, the police arrested Nelson and the State charged him with one count of first-degree sexual assault of a child under age thirteen, and one count of repeated acts of sexual assault of the same child. At a pretrial hearing, defense counsel revealed his intention to introduce evidence of E.T.'s alleged prior sexual assault by Jeffrey Turner, to show an alternative source of E.T.'s knowledge of sexual matters; the State objected to introduction of such evidence. After hearing arguments of counsel, the trial court decided to allow limited questioning of E.T.'s mother. Following Linda's testimony, the trial court questioned E.T. in chambers.

¶6 When questioned regarding the alleged sexual assault by Turner, E.T. first testified that she could not remember him ever doing anything to her, but

then she recalled that he had burned her brother, slapped both of them with extension cords, and hit their mother. She also testified that her mother had filed a police complaint regarding him. When proceedings resumed in open court, the trial court denied defense counsel's request to introduce any evidence regarding alleged sexual contact between E.T. and Turner.

¶7 The jury found Nelson guilty of both charges, and the trial court sentenced him to a total of sixty years in prison. Nelson moved for postconviction relief, requesting the court to authorize his counsel's inspection of all law enforcement officers' records regarding E.T.'s alleged sexual assault by Turner, and requesting a new trial. The postconviction court ordered the police department to produce "a copy of all reports and/or records regarding any reported sexual assault of [E.T.]" by anyone other than Nelson. The department produced a copy of its telephone log book entry for the call made by E.T.'s mother regarding E.T.'s alleged sexual assault by Turner. The entry stated:

> Order in Thursday 3-30-95 9 AM—Schuster to TCO
> [E.T.]'s mother called stating [E.T.] just told her that she, [E.T.], was SA'd in 1992 by mother's x-boyfriend. [Jeffrey T. Turner] made [E.T.] rub his penis and "did her up"

Following its review of additional briefs, the postconviction court denied Nelson's motion for a new trial.

DISCUSSION

¶8 Nelson employs five separate theories essentially aimed at the premise that evidence of E.T.'s alleged sexual assault by Turner would have: (1) established an alternative basis for E.T.'s sexual knowledge; and (2) formed the basis for E.T.'s impeachment because of the inconsistency between her allegation of assault by Turner and her claim, at trial, that she did not remember such an incident.

¶9 Nelson first contends that the trial court erroneously exercised discretion "when it prohibited evidence of [E.T.]'s prior inconsistent statement that … Turner sexually assaulted her." He argues:

> Despite several references to the [***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990),] analysis of the trial court, the postconviction court failed to perform a ***Pullizano*** [sic] analysis in light of the police log entry. Significantly, the postconviction court failed to provide any reasoning for its decision finding that [E.T.]'s testimony was not a prior inconsistent statement. Rather, the court relies on the reasoning of the trial court. No prior inconsistent statement analysis is actually undertaken by the reviewing court.

(Record references omitted.) Nelson specifically argues that "no determination as to inconsistency and admissibility could have been made by the trial court in the absence of information contained in the police reports," that the log book entry "could have been admitted into evidence for the limited purpose of establishing that [E.T.] obtained her sexual knowledge elsewhere," and that "evidence of [E.T.]'s prior inconsistent statement, in the form of the [log book entry], should have been admitted for the purpose of impeaching [E.T.]'s testimony." We disagree.

¶10 Evidence of prior untruthful allegations of sexual assault made by E.T. could not have been admitted into evidence, or referred to in the presence of the jury, during the course of the proceedings against Nelson unless the trial court had determined that it was both "material to a fact at issue in the case" and "of sufficient probative value to outweigh its inflammatory and prejudicial nature." *See* WIS. STAT. §§ 972.11(2)(b)3, 971.31(11) (1997-98).[1]

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶11 In ***Pulizzano***, the supreme court concluded:

> [T]o establish a constitutional right to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, prior to trial the defendant must make an offer of proof showing: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. If the defendant makes that showing, the circuit 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. In making that determination, the state's interests are to be closely examined and weighed against the force of the defendant's right to present the evidence ….

Pulizzano, 155 Wis. 2d at 656-57.

¶12 Following E.T.'s chambers examination, the trial court stated, in open court:

> The Court did question [E.T.] about the circumstances surrounding the [Turner] incident …. She has no recollection of that incident, cannot recall anything that he may have done, other than he burned her brother.
>
> And, further, she does not recall what she told her mother. She has never repeated anything that may have been said. She was aware that her mother filed a complaint and that nothing happened, but she cannot recall any circumstance with [Turner], other than he disciplined both she [sic] and her brother by hitting both of them with extension cords. There was no hint—there was no recollection of any sexual contact in any manner.
>
> ….
>
> All right. Considering the factors that are set forth in ***State v. Pulizzano***, … the defendant must make an offer of proof showing, one, that the prior acts clearly occurred.
>
> The Court finds that there is not evidence that the prior acts clearly occurred. [E.T.] first made a comment to her mother three years after the alleged incident. Her mother doesn't clearly recall the circumstances, and the

Court finds that that factor has not been proven by the defense.

Second, that the acts closely resembled those of the present case.

In this particular case, it is alleged that the defendant brought [E.T.] into a bedroom, that he brought her under the covers, that he would pull her pants down and rub his exposed penis against her buttocks, that he attempted to put his penis into her vagina, and that he would require her to sit on his face and he would lick her private area and put his tongue into her vagina; that he would also rub on her breasts with his hands and that he also touched her vaginal area with his fingers and would insert his fingers into her vagina.

The alleged incident with [Turner] that occurred when she was approximately five years old, the statement at best is that [Turner] had her play with his thing, which she then understood—the mother understood to mean his penis. Those acts don't even closely resemble the facts of the present case. The prior act is not relevant to any material issue in this case.

The alleged circumstance or relevance is the prior alternative source of sexual knowledge. The fact of the difference between the conduct of [Turner] allegedly requesting that [E.T.] touch his penis is far different from the allegations in this case where it is alleged that the defendant did all the touching and that he was the one who was rubbing his penis against her private parts and he was touching her. There is no similarity in facts or from the prior conduct, alleged conduct that that conduct gave her a source of sexual knowledge in relation to this particular circumstance. The fact of, for example, sitting on his face and his licking her clearly has no relation to the alleged prior conduct.

The evidence is not necessary to the defendant's case and that evidence has very little probative value and clearly is outweighed by any prejudicial effect to the State and also to the victim.

For all of those reasons then, the Court will deny the defense's request to introduce any evidence regarding any alleged sexual contact between the victim and Jeffrey Turner ….

….

Moreover, the Court doesn't find that it was an inconsistent statement. This is a statement by a five-year-old, maybe a seven or eight-year-old at the time she may

> have made the statement to her mother …. There's no clear evidence that it's a false statement when it was made, and she merely cannot remember, which is certainly consistent with children in general regarding an act that occurred prior to her starting kindergarten.…
>
> And also under [WIS. STAT. §] 906.08, evidence of the character and conduct of a witness, subsection 2, specific instances of conduct cannot be examined into by extrinsic evidence, which the question regarding any cross-examination of the mother on the incident would be prohibited.
>
> And then under the circumstances, the subject may be gone into, subject to [WIS. STAT. §] 972.11(2), which precludes it, as I've already ruled, if probative of truthfulness or untruthfulness and not remote in time. Clearly, this is remote in time … and does not bear upon the child's … truthfulness under the totality of the circumstances.

¶13 In denying Nelson's motion for a new trial, the postconviction court stated:

> For the same reasons set forth by [the trial court], this court does not find [E.T.]'s testimony to constitute a "prior inconsistent statement" or evidence of a "prior untruthful allegation." It also finds that the defendant was not prejudiced by the inability of the State at the time of trial to locate the written police entry pertaining to [E.T.'s mother]'s complaint in 1995. Had the written police entry been submitted [on the first day of the trial], there is not a reasonable probability it would have altered the trial court's conclusion with regard to the admissibility of the evidence. In accordance with the ***Pulizzano*** analysis the court performed, the police entry does not establish that the victim's testimony was either inconsistent or untruthful.
>
> Finally, under the newly discovered evidence standard, there is not a reasonable probability that confidence in the trial outcome would have been undermined had the written police entry been produced at the time because it would not have rendered the prior sexual assault admissible as evidence. Hence, the jury would not have been presented with evidence of a prior inconsistent statement or a prior untruthful allegation.

(Record reference and footnote omitted.)

¶14 We will uphold a trial court's discretionary decision to exclude evidence if it has a reasonable basis, was made by applying a proper standard of law, and is supported by the record. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). The party seeking admission of evidence bears the burden of showing why it is admissible. *See* ***id.*** at 188. Nelson has not met this burden. The trial court's rationale for excluding the evidence was correct in every respect.

¶15 Nelson next contends that the trial court erroneously exercised discretion by prohibiting him from cross-examining E.T. "regarding her prior untruthful allegation of sexual assault involving … Turner." He argues that "the act of registering a complaint with the Sensitive Crimes Unit by telephone and later failing to appear in person to verify that complaint is evidence of a prior untruthful allegation of sexual assault," and that such conduct amounts to a recantation of the allegation. Failing to cite any legal authority in support of this argument, Nelson goes on to assert that "[t]his conclusion is supported by the fact that the Milwaukee Police Department chose not to charge Turner with sexual assault." Nelson is wrong.

¶16 In the first place, the complaint against Turner was registered not by E.T., but by her mother. E.T.'s inability, years later at the time of Nelson's trial, to remember having been sexually assaulted by Turner is not proof that the assault did not occur.

¶17 In the second place, even assuming, for the sake of argument, that E.T. falsely accused Turner, Nelson's argument still fails. Nelson could not have cross-examined E.T. regarding her alleged sexual assault by Turner unless the allegation was "probative of truthfulness or untruthfulness and not remote in

time." *See* WIS. STAT. § 906.08(2). Turner's alleged sexual assault of E.T. in 1992 was reported to the police in 1995. The allegation was remote in time, especially since E.T. was only twelve years old at the time of Nelson's trial in 1998. Accordingly, the trial court appropriately barred defense counsel from cross-examining her with respect to that subject.

¶18 Nelson further contends that the State violated his due process rights when it "inadvertently failed to disclose" the police telephone log book entry. He argues that he was convicted primarily on the basis of E.T.'s testimony, and that the log book entry was "favorable evidence that could have been used to impeach [her]."

¶19 Nelson points out that, during pretrial proceedings, he requested the State to turn over any police reports regarding E.T.'s alleged sexual assault by Turner. At the pretrial motion hearing on the morning of the first day of trial, the State claimed that the police department cross-references such reports by the names of both victim and defendant and that a search for such records under E.T.'s name revealed no report. As previously noted, however, during postconviction proceedings, the police department produced a copy of the log book entry related to E.T.'s alleged assault by Turner.

¶20 Relying on ***Brady v. Maryland***, 373 U.S. 83 (1963), Nelson argues that "[d]ue process requires the prosecution to disclose evidence that is favorable to the defendant upon request when that evidence is material to guilt or punishment." Next, he acknowledges that Wisconsin has adopted the materiality standard set out in ***U.S. v. Bagley***, 473 U.S. 667 (1985): "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable

probability' is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 682. Relying on ***Bagley***, Nelson contends that the log book entry is favorable to him because it could have been used to impeach E.T.

¶21 As we have already discussed, however, Nelson offered no proof that E.T. untruthfully alleged that Turner sexually assaulted her; he therefore would have been unable to use the log book entry to impeach her. Additionally, Nelson has failed to show a reasonable probability that if the State had disclosed the log book entry to him prior to trial, the result of the trial would have been different. As the State correctly notes, "Nelson had knowledge of the relevant information in the log[]book entry at the time of trial and elicited the same information from [E.T.]'s mother at the pretrial hearing."

¶22 Nelson also contends that the trial court erroneously exercised discretion by denying him a new trial on the basis of the newly discovered log book entry he characterizes as "suggesting that [E.T.] obtained her sexual knowledge elsewhere." As this court recently explained:

> A new trial will be granted on [the basis of newly discovered evidence] only if the defendant establishes by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial. The motion is addressed to the trial court's sound discretion and we will affirm the circuit court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record.

State v. Carnemolla, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999) (citations omitted), *review denied*, 2000 WI 2, ___ Wis. 2d ___, 607 N.W.2d 291. Clearly, for the several reasons we have explained, this evidence was not material

to an issue in the case. Thus, we affirm the trial court's decision to deny Nelson a new trial on the basis of newly discovered evidence.

¶23 Finally, Nelson contends that we should grant him a new trial, in the interest of justice, so that a jury may have "the opportunity to hear and evaluate the information concerning [E.T.]'s untruthful and inconsistent statements regarding Turner's alleged sexual assault of her." The State responds:

> [I]t would not be in the interests of justice to subject [E.T.] to the humiliation and embarrassment of a second trial on the basis of three sentences entered in a police log[]book. This is true especially when those three sentences are merely cumulative of information previously in Nelson's possession and those three sentences and any information derived from those three sentences are inadmissible under the rape shield law.

Nelson offers no reply. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

By the Court.—Judgment and order affirmed.

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