

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2556-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY ZYLKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Bradley Zylka appeals from a judgment convicting him of four counts of first-degree sexual assault of a child under thirteen years old

and one count of attempted first-degree sexual assault of the same child¹ and from an order denying his postconviction motion for a new trial. We affirm.

¶2 Zylka was charged with having sexual contact on several occasions with the eleven-year-old sister of his son's girlfriend. The four acts of sexual contact occurred when Zylka touched the victim's vagina. The attempted sexual assault occurred when Zylka tugged on the victim's hand after he unzipped his pants. Zylka denied the sexual contact and theorized that the victim was an unhappy child who falsely accused him in order to get attention. The jury convicted Zylka.

¶3 In his postconviction motion seeking a new trial, Zylka claimed that during deliberations, the jurors made oral requests of the bailiff relating to the length and outcome of deliberations and that the bailiff responded. Zylka claimed that these incidents affected the deliberations. The foreperson did not appear at the postconviction hearing. After the court declared the foreperson unavailable to testify, Zylka offered the testimony of his investigator. The investigator testified that the foreperson told him that the jury had orally inquired of the bailiff what would happen if the jury could only agree on three of the five counts. The bailiff left the jury room. Upon his return, the bailiff stated that the judge wanted the jury to do the best it could. According to the foreperson, the jury also asked the bailiff if deliberations could resume in the morning. The bailiff stated the jury had to stay the night.

¹ The judgment of conviction does not make clear that Zylka's conviction for count five of the information is a conviction for attempted first-degree sexual assault. Upon remittitur, the judgment shall be amended to reflect that the conviction for count five is a conviction for attempted first-degree sexual assault as charged in the information. Appellate counsel shall do whatever is necessary to have the judgment amended.

¶4 The bailiff testified that he did not recall any juror approaching him with a question other than the written questions relating to jury room supplies and exhibits. The bailiff understood that all inquiries from the jury had to be in writing. The bailiff did not recall any juror inquiring about what would happen if the jurors could only agree on certain counts. The bailiff did not recall any question about whether the jury could retire for the night. The bailiff did not recall making a statement that the jurors were stuck with him. The bailiff reiterated on cross-examination that oral questions are not transmitted to the court and that the jurors are instructed to reduce their questions to writing. The bailiff discounted the possibility that he responded to any inquiry regarding suspending deliberations for the night because the court would have to make that determination. The bailiff did not recall if the jury told him that it was having difficulty agreeing on verdicts.

¶5 The court found that two jurors who testified at the postconviction motion hearing understood that questions had to be in writing and neither juror testified that oral questions were asked. The court noted that the bailiff denied that oral questions were posed to or answered by him. The court found that the foreperson's allegation of oral questions was not borne out by the other evidence presented at the postconviction motion hearing. The court found that the jury did not pose any questions other than the written questions, and that the record did not support Zylka's claim to the contrary.

¶6 On appeal, Zylka argues that the court impermissibly inferred that the foreperson was not credible because he failed to appear at the postconviction motion hearing despite having been subpoenaed. We disagree with Zylka's characterization of the court's findings. The court did not link the foreperson's lack of credibility with his failure to appear. Rather, the court weighed the foreperson's contentions (as expressed by Zylka's investigator) against the

testimony of the two jurors and the bailiff who appeared at the postconviction motion hearing. This credibility determination was within the province of the circuit court. *See State v. Owens*, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). Rather than discounting the statements of the foreperson, the circuit court accepted the statements but found them less credible than the other evidence before it.

¶7 Zylka seeks a new trial in the interest of justice because the real controversy was not fully and fairly tried. A court may exercise its discretionary power to grant a new trial without finding the probability of a different result on retrial if it concludes that the real controversy was not fully tried. *See State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Zylka alleges that the real controversy in this case was the victim's credibility and that it was not properly tested because: (1) defense counsel did not obtain a transcript of the preliminary examination which could have been used to cross-examine the victim about inconsistencies in her various statements; (2) the jury was not able to fairly evaluate the victim's credibility because a detective was permitted to testify that the victim's written statement and her trial testimony were consistent in certain respects; and (3) the circuit court used an improper procedure in responding to written inquiries from the jury about exhibits during deliberations.

¶8 Zylka argues that if defense counsel had obtained a transcript of the preliminary examination, counsel could have located inconsistencies between the victim's testimony on that occasion and at trial. However, this error was not raised in the postconviction proceedings, and Zylka did not procure defense counsel's testimony on this issue. We do not address issues raised for the first

time on appeal. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).²

¶9 Zylka next argues that the jury was not able to fairly evaluate the victim's credibility because a detective was permitted to testify that the victim's written statement to police and her trial testimony were consistent in certain respects. Zylka complains that the detective's testimony was actually an impermissible expression of the detective's opinion of the victim's credibility which usurped the jury's function to determine witness credibility. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶10 The record reveals consistencies and inconsistencies between the victim's testimony at trial and her written statement to police regarding the manner in which she was assaulted, notably whether Zylka placed his finger in her vagina on any of the four occasions of sexual contact. The inconsistencies were highlighted for the jury when the victim and the detective testified. On redirect, the State asked the detective to identify the consistencies and inconsistencies between the victim's written statement and her testimony. Zylka objected and the court overruled the objection. The detective testified that the victim had been consistent in her description of where the assaults happened, who was involved,

² Even though we do not address this issue, we note that defense counsel viewed the preliminary examination on videotape, so he was not deprived of a record of the victim's testimony at that hearing. Zylka focuses on inconsistencies relating to whether the victim was digitally penetrated. We note that the victim was never asked at the preliminary examination about digital penetration of her vagina, testimony which Zylka claims was later given at trial and is inconsistent with the preliminary examination testimony. The victim testified at the preliminary examination that on one occasion Zylka put his hand inside her underwear, and touched her vagina, rubbing his finger back and forth. The examination did not clarify whether Zylka penetrated the victim.

who assaulted her, and the manner in which she was touched. The inconsistencies were discussed again on recross-examination.

¶11 On postconviction motion, the circuit court found that the detective's testimony was not inappropriate commentary on the victim's credibility. We agree. Our review of the record indicates that the detective was not expressing an opinion about the victim's credibility. Rather, the detective was being asked to compare the victim's written statement and her testimony to pinpoint the consistencies and inconsistencies. It remained for the jury to assess the victim's credibility in light of this comparison.

¶12 Zylka argues that the danger that the jury would rely on the detective's testimony was greatly enhanced because the jury was not able to peruse exhibit 8A, the report of the victim's statement to police, during deliberations. Zylka contends that there was a misunderstanding between the court and the parties which denied the jury access to exhibit 8A during deliberations.³

¶13 The circuit court found that the jury did not ask for exhibit 8A. Had the jury been dissatisfied with the response to a request for exhibits or needed additional exhibits, the jury was free to clarify or request other exhibits. The jury was instructed that the evidence consisted, in part, of exhibits. The jury was informed that "[a]n exhibit received is evidence whether or not it goes to the jury

³ The court found at the postconviction hearing that the attorneys and the court had agreed that only those exhibits requested by the jury would be sent to the jury room. Zylka argues that the court is mistaken and that the attorneys and the clerk understood that if the jury requested any exhibit, all the exhibits would be provided. We need not address this dispute because we hold that Zylka has not shown that he was prejudiced by the jury's failure to have exhibit 8A in the jury room.

room.” The jury obviously understood that exhibits could be requested because it made a written request for “the written testimony of Brad Zylka” and photographs of the laundry room of Zylka’s home where some of the alleged assaults took place. The court’s finding that the jury did not ask for exhibit 8A is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98).⁴

¶14 We do not agree that having exhibit 8A in the jury room was necessary to give the jury an opportunity to assess the victim’s credibility. The consistencies and inconsistencies in the victim’s statements and testimony were fully aired at trial. The record does not demonstrate that the jury was hampered in its consideration of the victim’s credibility, regardless of the dispute regarding the procedure for responding to requests for exhibits.

¶15 We conclude that the victim’s credibility was fully tried. Therefore, we decline to grant a new trial.

By the Court.—Judgment and order affirmed.

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

⁴ All references to the Wisconsin Statutes are to the 1997-98 version.

