COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-3202-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE J. GASTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Lawrence J. Gaston appeals from a judgment of conviction and from an order denying his postconviction motion.[1] Gaston seeks a new trial in the interest of justice pursuant to WIS. STAT. § 752.35 (1997-98)[2] because a police officer commented that she believed the victim's description of the assault. We conclude that the police officer's comments did not violate the proscription that no witness may comment on the credibility of another witness. We affirm the judgment and the order.

¶2 Gaston was convicted of sexually assaulting a twelve-year-old girl. As in most sexual assault cases, the victim's credibility was challenged. Only a brief summary of the trial testimony is necessary to illustrate this point.

¶3 The assault occurred in a bathroom of the victim's home. The victim testified that during the assault, Gaston displayed a knife and unbuckled the straps to the bib overalls he was wearing. Two other witnesses present in the home when the assault occurred testified that the bathroom door was partially open and they saw nothing wrong the times they walked past the bathroom or entered it. One of these witnesses also contradicted the victim's testimony about whether she reported being assaulted after Gaston left. Witnesses agreed that Gaston was wearing bib overalls that evening, but they said he wore them with the straps down. When questioned by police officer Ann Gollner, Gaston could not remember anything about what occurred in the bathroom since he had been

[1] Gaston was convicted of first-degree sexual assault of a child, child enticement and false imprisonment. The penalties were enhanced because Gaston was a habitual offender. The trial court granted Gaston's postconviction motion in part by vacating his conviction of intimidation of a victim and ordering a new trial on that count.

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

drinking and had taken something called a "tripball." Gollner testified that Gaston cried several times during the interview and asked to be taken to jail because he had done something bad and wrong. At trial, Gaston denied assaulting the victim and having a knife.

¶4 During the cross-examination of Gollner, the following exchange occurred:

> Q. Did she ever describe to you or have you formed any opinion as to the position that they were in when this was taking place?
>
> A. She described it to me.
>
> Q. And what is that?
>
> A. That he was sitting on the bathtub and she was walking forward.
>
> Q. And you don't actually know what took place in that bathroom?
>
> *A. I believe what she told me*.
>
> Q. And if someone had walked by that bathroom, you do not know if that would be important or not at this point in time?
>
> A. It would depending on when it was or how – I can't answer that, I guess.
>
> Q. But based upon your observations of this case, there is no DNA testing?
>
> A. No.
>
> Q. The physician's report shows no lacerations, no abrasions, no bruising and no infection; is that correct?
>
> A. I don't know about the infection.
>
> Q. You have no DNA on any pants?
>
> A. No.
>
> Q. You're relying solely on the statement of [the victim]?
>
> A. *Yes – and I believe that statement*. (Emphasis added.)

¶5 It is well settled that a witness, expert or otherwise, may not testify that another physically and mentally competent witness is telling the truth. *See* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988); ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992); ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). This is often referred to as the ***Haseltine*** rule. Gaston's postconviction motion requested a new trial on the ground that the officer's testimony that she believed the victim's statement violated the ***Haseltine*** rule. The trial court denied the motion upon concluding that the testimony did not violate the rule and that, even if error occurred, it was harmless error.

¶6 We review a trial court's order denying a postconviction motion for a new trial in the interest of justice for an erroneous exercise of discretion. *See* ***State v. Harp***, 150 Wis. 2d 861, 873, 443 N.W.2d 38 (Ct. App. 1989) (***Harp I***), *overruled on other grounds by* ***State v. Camacho***, 176 Wis. 2d 860, 501 N.W.2d (1993). Here, however, Gaston asks this court to independently exercise its discretion under WIS. STAT. § 752.35. We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). A new trial may be ordered where the jury had before it evidence improperly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). The authority to grant a new trial in the interest of justice extends to situations where the right to review is waived by failing to make a proper objection. *See* ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991) (***Harp II***). We need not find a substantial likelihood of a different result on retrial when considering whether a new trial should be granted because the real controversy was not fully tried. *See* ***id.*** at 775.

¶7 Whether the officer's testimony constituted improper comment on the credibility of another witness is a question of law. *See* ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996). In making that determination, we examine the purpose for which the testimony was submitted and its effect. *See* ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999). When the purpose of the testimony is to bolster the credibility of a witness and its effect is to interfere with the jury's role as the arbiter of credibility, the testimony is improper. *See* ***State v. Pittman***, 174 Wis. 2d 255, 270-72, 496 N.W.2d 74 (1993); ***Romero***, 147 Wis. 2d at 278.

¶8 We first note that the officer's testimony was not offered by the prosecution in a direct attempt to bolster's the victim's credibility. When examining the effect of the testimony, we review it in the context of the cross-examination. During cross-examination, the defense challenged the officer's investigation in a manner suggesting that the officer had no reason to continue the investigation. The officer's response explained why she proceeded as she did. Moreover, the comments about believing the victim's version of the assault were isolated and did not pervade the officer's testimony or the trial.[3] This was not opinion testimony which, as in ***Tutlewski***, 231 Wis. 2d at 389-90, usurped the jury's ability to make the credibility assessment.

¶9 The officer's testimony did not violate the ***Haseltine*** rule. No ground exists for granting a new trial.

[3] Officer Gollner's testimony was not exploited in closing argument. While the prosecutor reflected that Gollner said the victim was "remarkably consistent," this comment did not suggest to the jury that Gollner believed the victim. It did not serve to remind the jury of Gollner's testimony that she had believed the victim.

By the Court.—Judgment and order affirmed.

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