COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1615 **Cir. Ct. No. 01JV001825**

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

IN THE INTEREST OF ELVIN L.P., JR., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ELVIN L.P., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Elvin L.P., Jr. appeals from an order finding him delinquent after the trial court found Elvin guilty of first-degree sexual assault

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

of a child, contrary to WIS. STAT. § 948.02(1) (2001-02).[2] Elvin asks this court to exercise its authority for discretionary reversal under WIS. STAT. § 752.35 because the trial court allowed into evidence testimony which he alleges bolstered the credibility of the victim. Because this court declines to exercise its discretionary authority, the order is affirmed.

I. BACKGROUND

¶2 In May 2001, Sarah C. asked a cousin, Candito, to baby-sit her four-year-old son, Nicholas C. Sarah was pregnant and expected to be in labor shortly; thus, she needed a baby-sitter for Nicholas. Candito asked if another cousin, Elvin, could come along to help. Elvin, who was thirteen years old at the time, was Sarah C.'s husband's nephew. The two teenagers came to baby-sit Nicholas.

¶3 A few weeks afterward, Nicholas blurted out to his mother that Elvin had "sucked on his peter and touched him on the butt." Nicholas told his mother he had not reported this immediately because Elvin had threatened him. After the disclosure, Sarah noticed marked behavioral changes, including nightmares, clinginess and bed-wetting. Within three months of the alleged assault, Nicholas participated in a videotaped forensic interview at the Child Protection Center of Children's Hospital. Forensic interviewer, Margaret Flood, conducted the interview on August 3, 2001. During the interview, Nicholas repeated the allegation regarding Elvin.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 A delinquency petition was filed, charging Elvin with first-degree sexual assault of a child. The case was tried to the court. During the trial, the court watched the videotape and admitted it into evidence. Flood also testified. At one point, she testified that Nicholas's allegations "appeared very credible." Defense counsel objected to this statement. The trial court sustained the objection and struck the testimony.

¶5 Later, Flood testified regarding the evaluation process used by the Child Protection Center in assigning "level of suspicion" ratings to cases. The most "suspicious" cases, diagnostic of abuse, are rated a "level five." She testified, over objection, that this case was rated a "level four." Nicholas also testified at trial. He was now five years old. He stated that Elvin pulled down Nicholas's pants and looked at his "privates." Nicholas indicated he did not know whether Elvin did anything else. Nicholas was never directly asked whether Elvin sucked on his "privates" or "peter."

¶6 At the close of the case, the trial court noted that the credibility of Nicholas was the key to the case. If Nicholas's original allegation and the evidence from the videotape were accurate, then the State satisfied its burden of proof. If not, then Elvin could not be found delinquent. The trial court found Nicholas credible and ruled that there was no reasonable doubt that Elvin committed the offense. As a result, the trial court placed Elvin on one year of supervision. The delinquency order was entered. Elvin now appeals.

II. DISCUSSION

¶7 Elvin asks this court to reverse the order and grant him a new trial on the basis of WIS. STAT. § 752.35. He argues that the testimony of Flood regarding this case being rated a "level four" on the suspicion scale improperly bolstered the

credibility of the victim. Elvin contends that the admission of this testimony prevented the real controversy from being tried because the evidence clouded the credibility issue. This court is not persuaded.

¶8 Under WIS. STAT. § 752.35, this court may grant a new trial in the interest of justice if it "appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried …." ***Id.*** Elvin contends that "improper matters" crucial to the credibility issue so clouded the trial court that it may be fairly said that the real controversy was not fully tried. ***State v. Ambuehl***, 145 Wis. 2d 343, 366-67, 425 N.W.2d 649 (Ct. App. 1998).

¶9 The alleged "improper matters" included the trial court's reference to its own respect for the court's cousins and the court's mother, and Flood's testimony regarding the level of suspicion rating assigned to the instant case. The record demonstrates that neither matter clouded the trial court's determinations on the credibility issue.

¶10 The trial court referred to its relationship with its older cousins growing up and the respect the court had for them. The trial court mentioned this only in addressing the issue of Nicholas's disclosure of the assault. The trial court did not indicate that it relied on this information in rendering its ultimate decision. Accordingly, this court sees no reason to reverse the trial court because of its reference to personal experience. In fact, as the State points out, a fact-finder is instructed that: "In weighing the evidence, you may take into account matters of your common knowledge and your observations and experience in the affairs of life." WIS JI—CRIMINAL 195. Thus, this court cannot find error in the trial court's statements regarding its personal relationship with its cousins.

¶11 Elvin also challenges the admission of Flood's testimony that the instant case was rated a "level four" on the suspicion scale. Elvin claims this testimony unfairly bolstered the credibility of the victim. This court cannot agree with Elvin's claim.

¶12 As noted, the trial court struck Flood's testimony that Nicholas's allegations "appeared to be credible" as violative of the rule set forth in ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Flood went on to testify how the Child Protection Center evaluates alleged abuse cases. She indicated that the center evaluates the entire case, including medical evidence and the forensic interview. The case is rated on a suspicion scale of one to five, with one being "little or no evidence to believe that the abuse occurred," and five being "diagnostic" of child abuse. Flood then testified that the instant case was rated a "four." Elvin objected that this testimony violated the rule set forth in ***Haseltine*** as well. The trial court disagreed and allowed the evidence.

¶13 On appeal, Elvin argues that this testimony improperly bolstered the credibility of the victim, that there is no difference between the testimony that was struck and the testimony that was admitted, and that the trial court would have been unable to fairly decide the case. As a result, Elvin contends the real controversy was not tried. This court cannot agree.

¶14 The record demonstrates that the trial court fairly assessed the case. There is no indication that its decision relied on either the excluded or admitted challenged testimony. Rather, the trial court relied on the videotape, Nicholas's live testimony, and addressed the credibility of both Nicholas and the defense witness who testified this assault could not have happened. There is nothing in the record to show that the trial court's credibility assessment was improperly clouded

or biased. The trial court's decision was based on proper evidence. Consequently, there is no reason for this court to exercise its discretionary authority.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.