

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2006AP2337-CR

Cir. Ct. No. 2005CF10

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. HOMZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brian Homz appeals from a judgment convicting him of first-degree sexual assault of the child of his former companion and from an order denying his postconviction motion challenging his conviction. On appeal, Homz challenges the circuit court's refusal to suppress evidence, the

admission into evidence of the victim's statement via the testimony of a detective and the victim's day care teacher, the sufficiency of the evidence at trial, and the circuit court's exercise of sentencing discretion. We do not reach the challenge to the sentence because Homz died during the pendency of this appeal, and review of the sentence is now moot. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989) (review of the sentence "cannot have a practical effect on an existing controversy").¹ As to the other issues, we reject Homz's challenges and affirm the judgment and order.

¶2 In July 2004, the five-year-old victim told her day care teacher that her grandfather had sexually assaulted her. Later that day, the child described the assault to a detective. At the time of the victim's allegation, the victim's mother was engaged in a sexual relationship with Homz. DNA testing of the victim's underwear and of swabs taken from the victim revealed semen, but the DNA results excluded the grandfather as the source of the semen.

¶3 After Homz's sexual relationship with the victim's mother ended in December 2004, the victim's mother gave police a bed sheet Homz had left in her home and upon which she and Homz had had sex. Testing revealed semen on the sheet; the semen's DNA profile matched the semen found on the victim's swabs and underwear. Pursuant to a search warrant, police obtained a swab of Homz's saliva. DNA testing of Homz's swab yielded a match between Homz's DNA and the DNA on the victim's swabs and underwear. Thereafter, Homz was charged with first-degree sexual assault of a child, and a jury convicted him of that charge.

¹ The appeal continues, however. *State v. McDonald*, 144 Wis. 2d 531, 536, 424 N.W.2d 411 (1988) (right to appeal continues despite defendant's death).

¶4 Homz argues that the circuit court should have suppressed the DNA evidence retrieved from swabs of the victim's body. We re-cast Homz's argument as a challenge to the admissibility of the DNA evidence obtained from the victim, not as a request to suppress that evidence. Suppression is the remedy for a violation of the Fourth Amendment right against unreasonable search and seizure. *State v. Griffin*, 126 Wis. 2d 183, 187, 376 N.W.2d 62 (Ct. App. 1985), *aff'd*, 131 Wis. 2d 41, 388 N.W.2d 535 (1986), *aff'd sub nom. Griffin v. Wisconsin*, 483 U.S. 868 (1987). Homz does not make a Fourth Amendment claim in relation to the DNA evidence found on the victim. Therefore, we review the circuit court's discretionary decision to admit this evidence. *State v. St. George*, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777.

¶5 Homz argues that the DNA evidence should have been excluded because the nurse examiner did not employ a proper technique when she swabbed the victim for evidence. Homz cross-examined the nurse examiner and challenged the manner in which she collected the DNA evidence from the victim.

¶6 Essentially, Homz challenges the credibility and reliability of the nurse examiner and the evidence her examination generated. The admission of scientific evidence is not conditioned upon its reliability. *State v. Peters*, 192 Wis. 2d 674, 687, 534 N.W.2d 867 (Ct. App. 1995). Rather, such evidence is admissible if the expert witness is qualified, and the evidence is relevant and will assist the trier of fact. *Id.* at 687-88. Cross-examination is the means to challenge such evidence, and Homz did so. *Id.* at 690. The weight and credibility of the evidence is for the trier of fact. *Id.* The court properly admitted this evidence.

¶7 Homz next argues that DNA evidence from the victim's underwear should have been excluded because there was a break in the chain of custody

relating to the evidence. Homz argues that after the child alleged she had been sexually assaulted, her mother drove her to the hospital for a sexual assault examination while a police officer followed in another vehicle. Homz speculates that this took the underwear out of police custody and rendered the underwear unreliable evidence.

¶8 This argument lacks merit. We assume without deciding that the law of chain of custody applies to these circumstances. The law with respect to chain of custody requires proof sufficient “to render it improbable that the original item has been exchanged, contaminated or tampered with.” *B.A.C. v. T.L.G.*, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). WISCONSIN STAT. § 909.01 (2005-06)² provides: “The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Alleged gaps in a chain of custody normally “go to the weight of the evidence rather than its admissibility.” *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988).

¶9 Homz does not offer any evidence indicating that the victim’s underwear was tampered with, contaminated or exchanged. He simply speculates that this occurred because the child traveled to the hospital with her mother. This speculation “is insufficient to overcome the presumption of regularity” in the handling of the underwear. *State v. McCoy*, 2007 WI App 15, ¶19, 298 Wis. 2d 523, 728 N.W.2d 54.

² All references to the Wisconsin statutes are to the 2005-06 version unless otherwise noted.

¶10 Homz next argues that the bed sheet containing his semen and DNA was illegally seized by the police in contravention of his expectation of privacy. Therefore, the DNA evidence obtained from the sheet should have been suppressed. The circuit court declined to suppress evidence obtained from the sheet because the police did not illegally obtain the bed sheet. The court found that Homz abandoned the sheet, the sheet was in the mother's possession, and she found the sheet at the back of a closet in her home after Homz removed many of his personal effects.³ The mother voluntarily turned the sheet over to the police for testing, and she was not acting as an agent of the police. These findings are not clearly erroneous. See *State v. Knight*, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. The court left it for the jury to consider the mother's motivation and bias, if any, relating to her decision to give the sheet to the police.

¶11 “The Fourth Amendment applies only to actions of government agents, not to private individuals or actions.” *State v. Rogers*, 148 Wis. 2d 243, 246, 435 N.W.2d 275 (Ct. App. 1988). The mother was not the State's agent such that her conduct could be deemed the conduct of the State for purposes of the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Even if the Fourth Amendment applied to these circumstances, “a warrantless seizure of property whose owner has abandoned it does not violate the Fourth Amendment.” *State v. Hart*, 2001 WI App 283, ¶22, 249 Wis. 2d 329, 639 N.W.2d 213.

³ Although the circuit court did not make a finding as to who owned the sheet, the parties do not dispute that Homz owned the sheet.

¶12 Homz also did not have a reasonable expectation of privacy in the sheet or the semen deposited on the sheet. A reasonable expectation of privacy in property depends, in part, on whether the person exercised dominion over the property. *See State v. Whitrock*, 161 Wis. 2d 960, 989, 468 N.W.2d 696 (1991). Here, Homz abandoned the sheet and the semen deposited on the sheet. The rest of Homz’s argument about the legality of the evidence derived from the sheet is not supported by citation to legal authority. We will not consider it further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶13 Homz challenges the evidence obtained pursuant to a search warrant authorizing a swab of his mouth for DNA testing purposes. Homz premises this challenge on an assertion that the semen and DNA on the sheet was discovered in a warrantless search. We have upheld the legality of the means by which Homz’s semen and DNA were found on the sheet produced by the victim’s mother. The match between the DNA found on the sheet and the DNA found on the victim was the basis for a search warrant to obtain DNA from Homz directly. Homz’s DNA was lawfully gathered.

¶14 Homz next challenges the sufficiency of the evidence to convict him of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1) (2003-04). In order to be convicted of this crime, the State had to prove that Homz had sexual contact with a child who was under the age of thirteen. “Sexual contact” includes “[i]ntentional penile ejaculation of ejaculate ... by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation ... is ... for the purpose of sexually arousing or gratifying the defendant.” WIS. STAT. § 948.01(5)(b) (2003-04).

¶15 We will not reverse a conviction “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The credibility of the witnesses was for the trier of fact. *Id.* at 503. It was for the trier of fact to draw reasonable inferences from the evidence. *Id.* at 504 (citation omitted).

¶16 Viewed most favorably to the State, the evidence shows that the victim first claimed that her grandfather sexually assaulted her. The night of the assault, which occurred at her grandparents’ house, the mother bathed the five-year-old victim and put clean underwear on her before putting her to bed. The assault occurred during the night while the victim slept on a couch. The perpetrator turned the victim onto her stomach to assault her. The next morning, the victim did not put on the clean underwear set out for her. At day care, the victim told her teacher that her grandfather had assaulted her with his penis. Although semen was found on the victim and her underwear, the semen’s DNA profile did not match the victim’s grandfather. After the grandfather was cleared, the victim’s mother gave a bed sheet to the police which contained semen whose DNA matched the DNA found on the victim and her underwear. A DNA sample obtained from Homz matched the DNA on the sheet and the victim, making Homz the likely assailant. At trial, the victim testified that she did not remember the assault. The State then introduced a videotape of the victim describing the details of the assault while she still believed that her grandfather had assaulted her.

¶17 Homz makes much of the fact that the victim accused her grandfather, not him, and that there was no evidence placing him in the grandparents’ house on the night of the assault. Homz overlooks the most

significant piece of evidence in the case: his DNA was found on the intimate areas and underwear of the five-year-old victim. From this evidence, the jury reasonably inferred that Homz sexually assaulted the victim. Moreover, it was for the jury to evaluate the credibility of the witnesses and weigh the evidence presented. Homz's contention that his DNA made its way onto the victim other than by having sexual contact with her was rejected by the jury in its role as the trier of fact. This was the jury's prerogative.

¶18 Homz next argues that there was no evidence that he had the requisite intent to sexually arouse or gratify himself as required by WIS. STAT. § 948.01(5)(b) (2003-04). We disagree. Based upon the victim's description of the assault to the detective,⁴ the jury could reasonably infer that Homz assaulted the victim for purposes of sexual arousal and gratification. "Intent to become sexually aroused or gratified ... may be inferred from the defendant's conduct and from the general circumstances of the case...." *State v. Drusch*, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987); *State v. Shanks*, 2002 WI App 93, ¶26, 253 Wis. 2d 600, 644 N.W.2d 275 ("Intent to become sexually aroused or gratified can be inferred when a man places his finger in the vagina of a two-year-old girl.").

¶19 Homz next contends that the admission into evidence of the victim's statements about the sexual assault to her day care teacher and a detective violated his Sixth Amendment confrontation right. Homz further contends that he could

⁴ The victim gave the following description of the assault to the detective: the perpetrator put his penis on her buttocks, he was shaking, and she was wet afterward. The victim thought the perpetrator had urinated on her.

not effectively cross-examine the victim because of her young age and the fact that she testified that she forgot about “the gross thing” that happened on the couch.

¶20 At trial, the victim identified herself and her family, her grade in school, and stated that she lives with her sister and mother at her grandparents’ house, and that she occasionally falls asleep on the couch in the living room. Although the victim stated that she remembered the night when she fell asleep on the couch and “something gross happened,” she testified that she forgot what happened and she forgot if she told anyone about the incident. She testified that she was afraid to talk about what happened on the couch, and she did not want to talk about it.

¶21 Homz’s counsel cross-examined the victim and cited her preliminary examination testimony that no one had put “his wiener on her butt.” On redirect, the victim stated that she was scared when she talked about the incident.

¶22 Thereafter, the victim’s day care teacher testified that the victim told him that “grandpa stuck his wiener in my crotch last night.” A detective testified about the details the victim shared about the sexual assault.

¶23 We reject Homz’s confrontation claim. The first issue is whether the victim’s prior statements are admissible under the rules of evidence. *State v. Manuel*, 2005 WI 75, ¶23, 281 Wis. 2d 554, 697 N.W.2d 811. The victim testified at trial that she did not remember the sexual assault, but she previously told the detective and her day care teacher that her grandfather put his wiener on her butt. The victim’s prior inconsistent statements to her day care teacher and the detective were not hearsay because the victim testified at trial and the prior statements were inconsistent with the trial testimony. WIS. STAT. § 908.01(4)(a)1. Therefore, the victim’s prior statements were admissible at trial.

¶24 We turn to whether admitting the victim's prior statements violated Homz's right to confrontation. "[T]he key inquiry for Confrontation Clause purposes is whether the declarant is present at trial for cross-examination, takes the oath to testify truthfully and answers questions asked of him or her by defense counsel.... [T]he Confrontation Clause does not guarantee that the declarant's answers to those questions will not be tainted by claimed memory loss, real or feigned." *State v. Rockette*, 2006 WI App 103, ¶24, 294 Wis. 2d 611, 718 N.W.2d 269, review denied, 2006 WI 113, 296 Wis. 2d 62, 721 N.W.2d 484 (No. 2004AP2732-CR). Here, the victim testified at trial and was subject to cross-examination, the crux of a defendant's right to confrontation. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). As the court in *Rockette* held:

[W]e hold that a witness's claimed inability to remember earlier statements or the events surrounding those statements does not implicate the requirements of the Confrontation Clause under *Crawford*, so long as the witness is present at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination.

Rockette, 294 Wis. 2d 611, ¶26. Admitting the victim's prior statements to her day care teacher and a detective about the assault did not violate Homz's confrontation right.

By the Court.—Judgment and order affirmed.

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

