COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP432-CR **Cir. Ct. No. 2005CF5105**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. MENDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Edward J. Mendez appeals from a judgment of conviction entered after a jury found him guilty of first-degree sexual assault of a child. He contends that the circuit court improperly barred him from offering

evidence tending to show that the victim was of untruthful character and had a motive to make a false accusation. We reject his contentions and affirm.

BACKGROUND

¶2 In 2005, the State charged Mendez with sexually assaulting a ten-year-old girl, Myriah D. in 2004. Mendez is the father of Myriah's half-siblings, but his relationship with Myriah's mother, Rose D., ended in 2000 or 2001. Myriah alleged that Mendez assaulted her while she was accompanying her half-siblings on an overnight visit with Mendez. Mendez denied the accusation, and the matter proceeded to a jury trial.

¶3 In this appeal, Mendez claims that the circuit court improperly barred him from entering into evidence Myriah's prior untruthful statements pursuant to WIS. STAT. §§ 906.08 and 904.04(2) (2005-06).[1] The statements, however, are not included in the record. Our understanding of their content is derived from the circuit court's oral summaries of the proposed evidence during pretrial and trial proceedings.

¶4 Myriah made the first set of statements after Rose D. was charged with physically abusing Myriah. The charges against Mendez and Rose D. were not related, and the State moved *in limine* to exclude from Mendez's trial any evidence related to Rose D.'s prosecution. Mendez opposed the motion. He sought to admit testimony that Myriah gave at Rose D.'s preliminary examination as evidence of Myriah's untruthful character. It appears that Myriah

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

acknowledged fewer instances of abuse during the preliminary examination than she originally reported to the police. Further, Myriah apparently testified that, after she reported being abused, she falsely assured Rose D. that no report had been made. The circuit court determined that Mendez could not present these matters to the jury.

¶5 During trial, Mendez attempted to introduce evidence of another event that he contended was relevant to show Myriah's untruthful character. Mendez began his cross-examination of Myriah by asking her if she had "told an untrue story before about your mother's boyfriend in order to cause problems between the two of them." The State objected, and Mendez explained that he wanted to elicit testimony regarding an incident reflected in a police report concerning Rose D.'s former boyfriend, "Corey."[2] It appears that Myriah told police that she had hidden Rose D.'s video camera in the hope that Rose D. would blame Corey for a theft; Myriah thereby intended to cause "a rift" in the relationship between Rose D. and Corey.

¶6 During argument outside of the jury's presence, the parties disputed the exact nature of the information in the police report. Mendez characterized the police report as showing that Myriah had lied. The State asserted that the incident "didn't involve lying." The circuit court pressed Mendez to point out where the police report reflected that Myriah lied, but Mendez evidently was unable to do so. The circuit court determined that the police report contained "no indication of a

[2] The record reflects neither the nature of the investigation in which the police report was generated nor Corey's surname.

lie," and barred Mendez from cross-examining Myriah in regard to the police report.

¶7 The jury ultimately returned a guilty verdict. The circuit court imposed a forty-year term of imprisonment, bifurcated as twenty-eight years of initial confinement and twelve years of extended supervision. Mendez appeals.

DISCUSSION

¶8 We review evidentiary rulings with deference. We will uphold a circuit court's decision to admit or exclude evidence if the court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115.

¶9 Mendez first contends that the circuit court improperly limited his direct examination of Rose D. Mendez elicited Rose D.'s opinion that Myriah was not always truthful, but the circuit court did not permit Mendez to ask Rose D. about specific instances of Myriah's conduct underlying that opinion. Mendez contends that the court erred. In support, he cites ***State v. Cuyler***, 110 Wis. 2d 133, 327 N.W.2d 662 (1983). We agree with the State that ***Cuyler*** is inapposite.

¶10 In ***Cuyler***, the circuit court barred the defendant from calling witnesses to testify to their opinions of the defendant's character for truthfulness. ***Id.*** at 140-41. The defendant appealed, and the supreme court held that the opinion evidence should have been admitted pursuant to WIS. STAT. § 906.08(1)

(1979-80).[3] ***Cuyler***, 110 Wis. 2d at 141. Section 906.08(1) provides, in pertinent part, that "the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but … (a) [t]he evidence may refer only to character for truthfulness or untruthfulness." ***Id.*** ***Cuyler*** clarifies that § 906.08(1) authorizes introduction of both reputation and opinion evidence for purposes of attacking or supporting the credibility of a witness. ***Cuyler***, 110 Wis. 2d at 138.

¶11 Pursuant to ***Cuyler*** and WIS. STAT. § 906.08(1), the circuit court properly permitted Mendez to call Rose D. to testify about her opinion of Myriah's character for truthfulness. On direct examination, however, a defendant cannot ask about the specific instances of conduct upon which a witness bases his or her opinion that another witness is untruthful. ***State v. Spraggin***, 77 Wis. 2d 89, 102 n.12, 252 N.W.2d 94 (1977). Thus, the circuit court did not err in barring Rose D. from describing the conduct on which she based her opinion of Myriah's untruthful character.

¶12 Mendez next contends that the circuit court erroneously barred him from cross-examining Myriah about the substance of her prior statements. Mendez asserts that the cross-examination should have been permitted pursuant to WIS. STAT. § 906.08(2).

¶13 WISCONSIN STAT. § 906.08(2) provides, in pertinent part:

> **(2)** SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence. They may, however … if probative of truthfulness or untruthfulness and not remote

[3] The current version of WIS. STAT. § 906.08(1) is virtually identical to the version considered in ***State v. Cuyler***, 110 Wis. 2d 133, 327 N.W.2d 662 (1983).

> in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Id. The scope and extent of cross-examination permitted under § 906.08(2) lie within the circuit court's discretion. *See* ***Rogers v. State***, 93 Wis. 2d 682, 689-90, 287 N.W.2d 774 (1980).

¶14 WISCONSIN STAT. § 906.08(2) permits parties to cross-examine witnesses about extrinsic matters that are probative of truthfulness or untruthfulness. ***State v. Rodriguez***, 2006 WI App 163, ¶35, 295 Wis. 2d 801, 722 N.W.2d 136. The statute does not, however, require the circuit court to permit parties to explore a witness's every prior untruth. "[The statute] contemplates impeachment by specific conduct that proves not just that the witness lied on one or more occasions, but that he or she is an 'untruthful character' who would also lie under oath." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 608.2 at 483-84 (3d ed. 2008).

¶15 Moreover, when applying WIS. STAT. § 906.08(2), the circuit court must also conduct the balancing test set forth in WIS. STAT. § 904.03. ***McClelland v. State***, 84 Wis. 2d 145, 156-57, 267 N.W.2d 843 (1978). Section 904.03 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ***Id.***

¶16 Here, the circuit court considered the substance of the testimony Myriah gave at Rose D.'s preliminary examination and indicated that neither Myriah's uncertainty as to the precise number of times she was physically abused nor her false assurances to Rose D. that the abuse remained a secret constituted the

kind of "lies" addressed by WIS. STAT. § 906.08. We cannot say that the circuit court's assessment was unreasonable, particularly because we lack the transcript showing Myriah's precise prior testimony. *See* ***State v. Benton***, 2001 WI App 81, ¶10, 243 Wis. 2d 54, 625 N.W.2d 923 (when record is incomplete, we assume that the missing material supports every fact essential to sustain the circuit court's ruling).

¶17 The circuit court further determined that any probative value of Myriah's preliminary examination testimony was substantially outweighed by its prejudicial effect. *See* ***McClelland***, 84 Wis. 2d at 156-57. The court noted that the cases against Mendez and Rose D. were not connected, and that they involved different people and different allegations in regard to different activity. The court found that admitting the testimony from Rose D.'s preliminary examination would require the jury to sort through matters that were not germane and that the evidence would confuse the jury.

¶18 The circuit court reached similar conclusions in considering Mendez's efforts to impeach Myriah with the police report reflecting that she once hid Rose D.'s video camera. The court found that "there's no indication in [the police report] that [Myriah] lied" and reiterated twice more that "I don't see that there is a lying going on." The court indicated that any possible probative value of the evidence was substantially outweighed by its potential to confuse the issues because the incident was not related to the sexual assault charge and therefore would only "mudd[y] the water." Because the report is not in the record, we again assume that the missing material supports the circuit court's decision. *See* ***Benton***, 243 Wis. 2d 54, ¶10. Thus, we assume that nothing in the report shows that Myriah lied or bears significantly on her character for truthfulness.

¶19 The circuit court's analysis reflects reasonable bases for barring Mendez from cross-examining Myriah about her preliminary examination testimony and the police report. The court determined that the matters were not probative of Myriah's character for truthfulness, and that they arose in contexts so far outside of the sexual assault charge that any marginal relevance they might have was substantially outweighed by their prejudicial effect. We conclude that the circuit court properly exercised its discretion in applying WIS. STAT. §§ 906.08(2) and 904.03.[4]

¶20 We turn to Mendez's alternative argument that the preliminary examination testimony and the incident involving Rose D.'s video camera were admissible pursuant to WIS. STAT. § 904.04(2). That statute provides, in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Id. While § 904.04(2) bars evidence offered to show a person's propensity to act in conformity with a negative character trait, it permits prior acts evidence for other purposes, including proof of motive. ***State v. Sullivan***, 216 Wis. 2d 768,

[4] The circuit court *sua sponte* considered and rejected a theory that Myriah's prior statements might be admissible pursuant to WIS. STAT. §§ 904.04(1)(b) and 904.05. Both statutes set out grounds for admitting character evidence, but the circuit court determined that neither statute permitted the extrinsic evidence that Mendez proffered. On appeal, Mendez does not brief any challenge to the circuit court's application of these statutes. We deem the issue abandoned. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (noting that issues not briefed or argued are deemed abandoned).

783, 576 N.W.2d 30 (1998). Mendez asserts that the proffered evidence was admissible pursuant to § 904.04(2) because it shows Myriah's "motive to lie about an adult with whom she is displeased" and because it shows "a pattern of untruthful statements about the responsible adults in [Myriah's] life." We disagree.

¶21 A prior act may be admissible to prove motive if the prior act "provided a reason" for the fact of consequence or there is some link between the two acts. *See* ***State v. Cofield***, 2000 WI App 196, ¶12, 238 Wis. 2d 467, 618 N.W.2d 214. Here, Mendez simply fails to show that the other acts provided a reason for Myriah to make a false accusation of sexual assault. As the State points out, Myriah testified that she loved Mendez and continued to view him as a father figure. Moreover, the record fails to show any relationship between the sexual assault and the other acts.

¶22 As to the claim that the prior acts evidence shows "a pattern of untruthful statements," we are unable to distinguish this argument from a claim that Myriah has a propensity to lie. If evidence shows nothing more than propensity to act in a certain way, then the evidence is not admissible pursuant to WIS. STAT. § 904.04(2). ***State v. Barreau***, 2002 WI App 198, ¶40, 257 Wis. 2d 203, 651 N.W.2d 12. Accordingly, the circuit court did not err in barring the evidence.

By the Court.—Judgment affirmed.

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