COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1595-CR **Cir. Ct. No. 2007CF342**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY H. JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: JEROME L. FOX, Judge. *Reversed and remanded with directions*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 SNYDER, J. Ricky H. Jones appeals from an order denying his motion to admit two video recordings of police interviews with the alleged victims. Jones is charged with two counts of first-degree sexual assault of a child

under the age of thirteen. Each of the two counts involve a different child. The video recordings show each of the girls being interviewed about unrelated charges they made against other men. Jones believes the videos are admissible to show that each victim has made prior untruthful allegations of sexual assault or, in the alternative, that he has a constitutional right to present this evidence to the jury. We reject Jones' argument that he has a constitutional right to present the video evidence to the jury. However, we agree with Jones that the evidence may be admissible as a prior untruthful allegation under WIS. STAT. § 972.11(2)(b)3 (2007-08).[1] That determination requires further analysis by the circuit court. Accordingly, we reverse and remand the matter with directions.

BACKGROUND

¶2 Jones is charged with two counts of sexual assault, both involving children under the age of thirteen. He is alleged to have had sexual contact with six-year-old C.B. and to have engaged in sexual conduct with seven-year-old M.W. Both alleged assaults took place in 2006.

¶3 Prior to trial, Jones moved the court to admit two video recordings (DVDs) in which C.B. and M.W. describe how other men had assaulted them. In the first DVD, C.B. describes inappropriate touching by Robert S. during summer 2006. Robert had been in a relationship with C.B.'s mother. In his trial brief, Jones argued that C.B. makes false allegations against real or perceived suitors of her mother. No charges were brought against Robert as a result of C.B.'s allegations.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 In the second DVD, M.W. describes sexual conduct initiated by David G., who was M.W.'s babysitter. The investigation revealed that M.W. had lied about visiting a pond while David was watching her, and David reported it to her parents. M.W. subsequently made the allegations of assault against David. In the child protective service report, the investigator notes that M.W.'s "[p]arents report [M.W.] has a history of lying about 'important things.'" David was never charged.

¶5 Jones sought permission to present the DVDs as evidence, arguing that they demonstrated the girls' prior false accusations and showed "motive, plan, and opportunity" to falsely accuse him of sexual assault. The circuit court held a hearing on June 13, 2008, where it concluded that the evidence should be excluded. In its rationale, the court stated:

> [I]t's acknowledged that neither of these two incidents, the one relating to [Robert], nor the one relating to [David], were charged as crimes by—either the district attorney's office or any other agency.
>
> From that, the defense concludes that [C.B's and M.W.'s] allegations must have been untruthful. I think the defense … also points to the fact that [M.W.'s] mother says that she tells lies on big things or something similar to that.
>
> The Court in reviewing this record can't come to the conclusion that these young women lied. What the Court has concluded is that their version of an incident was unsubstantiated, which I find to be very much different than an untruthful allegation, and the unsubstantiated allegation, as those who practice in the area … of alleged sex offenses know, occurs not from time to time but very often ….
>
> And in this case … based on my watching the interviews … [and] reading what I could find in the record either from the Department of Human Services or the police department, my reading is that nobody concluded that [the girls] were lying. There simply wasn't enough, based on what they were able to transmit by way of an allegation, to charge these persons with crimes.

> [T]he Court, therefore, doesn't believe that these allegations can fairly be said to be untruthful allegations.

¶6 The court then went on to analyze whether, regardless of the rape shield law exclusion, Jones had a constitutional right to present the evidence in his defense. Applying the rationale in ***State v. Pulizzano***, 155 Wis. 2d 633, 651-52, 456 N.W.2d 325 (1990), the court held that the evidence would be excluded. Jones appeals.

DISCUSSION

¶7 Jones' sole issue on appeal is whether the circuit court improperly excluded the two DVD interviews, one of C.B. and one of M.W., each making allegations of sexual assault by other men. He presents three arguments to establish his right to use the DVDs in his defense. He asserts the DVDs are (1) admissible other acts evidence, (2) admissible demonstrations of prior untruthful allegations of sexual assault, and (3) admissible components of his constitutional right to present a defense. Evidentiary rulings are discretionary, and therefore we review them under an erroneous exercise of discretion standard. ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. Those evidentiary rulings that implicate a defendant's constitutional rights, however, we review without deference to the circuit court. ***Id.***

¶8 We begin with Wisconsin's rape shield law, because it provides the most specific evidentiary rule.[2] WISCONSIN STAT. § 972.11(2) precludes admission of other acts evidence involving the complainant in a sexual assault case. Jones seeks to pierce the rape shield and argues that, under § 972.11(2)(b)3., evidence of prior untruthful allegations of sexual assault made by the two complainants are admissible. Jones' primary theory of defense is that the two girls have made untruthful allegations of sexual assault before under similar circumstances and are doing it against him now.

¶9 To be deemed admissible under WIS. STAT. § 972.11(2)(b)3., evidence must meet three criteria: (1) it must fit within the language of the statute, (2) it must be material to a fact at issue in the case, and (3) it must be of sufficient probative value to outweigh its inflammatory and prejudicial nature. ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990). The first factor requires a determination by the court as to whether "the defendant has established a sufficient factual basis for allowing the jury to hear the evidence that the complainant has made prior allegations of sexual assault that are untruthful." ***Id.*** at 786. The State exhorts us to affirm the circuit court and directs us to ***State v. Moats***, 156 Wis. 2d 74, 110, 457 N.W.2d 299 (1990), for the proposition that prior

[2] When two statutes addressing the same subject matter conflict, the specific controls the general unless it appears the legislature indicated that the general statute should prevail. ***State v. Galvan***, 2007 WI App 173, ¶7, 304 Wis. 2d 466, 736 N.W.2d 890, *review denied*, 2007 WI 134, 305 Wis. 2d 129, 742 N.W.2d 527 (No. 2006AP2052-CR). WISCONSIN STAT. § 904.04(2) prohibits the introduction of evidence of other crimes, wrongs or acts to prove a person's character in order to show conduct in conformity therewith unless it is offered for an acceptable purpose, is relevant, and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time or needless presentation of cumulative evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Because § 904.04(2) is the more general statute, we address admissibility under WIS. STAT. § 972.11(2)(b)3.

allegations do not meet the § 972.11(2)(b)3. exception unless the complainant recants or the defendant proves the allegations to be false. In ***Moats***, 156 Wis. 2d at 110, the parties had stipulated that prior sexual assaults of the child victim had occurred. The court noted that the perpetrators admitted to prior sexual contact with the child victim and it easily concluded that the child's prior allegations were not untruthful. ***Id.*** at 110-11.

¶10 The ***Moats*** court did indeed state that the defendant must "prove" the prior allegations to be false, but it explained that the burden of proof is met when a defendant demonstrates "that a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault." ***Id.*** at 110 (citing ***DeSantis***, 155 Wis. 2d at 788). Here, the circuit court reviewed the proffered DVDs and investigative files, including the decision by the district attorney not to charge Robert or David with sexual assault. The court stated that, after reviewing the materials, it "[could not] come to the conclusion that these young women lied."

¶11 However, it is for the fact finder to determine credibility; the circuit court's inquiry should have been limited to whether *a reasonable jury could reasonably infer* that the girls had been untruthful. In its rationale, the circuit court commented that it "may be" that the police and social workers who investigated the prior allegations "didn't think crimes had been committed" or possibly "they thought they were committed but that the evidence simply didn't rise to the level that would have merited a charge." The court's comment suggests that competing but reasonable inferences may be drawn from the evidence. By ruling on the ultimate issue of credibility, the court usurped the role of the jury. *See* ***State v. Norman***, 2003 WI 72, ¶68, 262 Wis. 2d 506, 664 N.W.2d 97 ("The jury is the ultimate arbiter of a witness's credibility.").

¶12 When a circuit court applies the incorrect legal standard, it erroneously exercises its discretion. ***State v. Carlson***, 2003 WI 40, ¶24, 261 Wis. 2d 97, 661 N.W.2d 51. Accordingly, we reverse the order and remand for further proceedings. Specifically, we direct the circuit court to determine whether a reasonable person could reasonably infer that C.B. or M.W. was untruthful when making the prior allegations. If so, the circuit court must then move to the second and third ***DeSantis*** factors to ascertain whether either of the DVDs is admissible under WIS. STAT. § 972.11(2)(b)3.

¶13 If, on remand, the circuit court concludes that the DVDs are not admissible under WIS. STAT. § 972.11(2)(b)3., the question of Jones' constitutional right to present the evidence will remain. For that reason, in the interest of judicial efficiency, we address the issue here.

¶14 There is a natural tension between the state's interest in the integrity of its evidentiary rules and a defendant's constitutional right to present evidence.[3] In ***Pulizzano***, 155 Wis. 2d at 651-52, the supreme court held that, under certain circumstances, evidence may be admitted over the rape shield law to protect the defendant's constitutional right to present a defense. The court determined that a defendant must put forth a sufficient offer of proof to establish a constitutional right to present otherwise excluded evidence. ***Id.*** at 656. A sufficient offer of proof includes five elements: (1) the prior acts clearly occurred, (2) the acts closely resembled those in the present case, (3) the prior acts are relevant to a material issue, (4) the evidence is necessary to the defense, and (5) the probative

[3] ***State v. Pulizzano***, 155 Wis. 2d 633, 643-48, 653-55, 456 N.W.2d 325 (1990), provides an overview of the conflict between the state's interests in its evidentiary rules and the defendant's constitutional right to present evidence in his or her defense.

value outweighs the prejudicial effect. ***Id.*** If the defendant makes a sufficient showing, the trial court must determine whether the defendant's rights to present the evidence are outweighed by the State's compelling interest in excluding it. *See* ***id.*** at 656-57.

¶15 The State argues that Jones has not made any of the five required showings. The circuit court agreed, holding that the first element was not met because it did not believe that prior untruthful allegations clearly occurred. Without the first element, Jones failed to demonstrate a constitutional right under ***Pulizzano*** to present the DVD evidence to the jury. The first factor under ***Pulizzano*** sets a different standard than that in ***DeSantis***. Jones' burden under ***Pulizzano*** is to demonstrate that prior untruthful allegations "clearly occurred"; however, under ***DeSantis***, Jones is required only to raise a reasonable inference. *See* ***Pulizzano***, 155 Wis. 2d at 656; ***DeSantis***, 155 Wis. 2d at 788. We agree with the State and the circuit court that Jones' offer of proof does not satisfy ***Pulizzano*** and, therefore, he has not demonstrated that the suppression of the DVD evidence violates his constitutional right to present evidence in his defense.

CONCLUSION

¶16 We reverse and remand to the circuit court to determine whether a reasonable person could reasonably infer that C.B. or M.W. was untruthful when making the prior allegations. We direct the circuit court to measure the offer of proof against the ***DeSantis*** factors to ascertain whether the DVDs are admissible under WIS. STAT. § 972.11(2)(b)3.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.