COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2721-CR **Cir. Ct. No. 2006CF2370**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. DAMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. David Damon appeals from a judgment convicting him of first-degree sexual assault of a child. He argues that the trial court erred in admitting a videotaped statement by the child and that the evidence was insufficient to support the verdict. We affirm for the reasons discussed below.

BACKGROUND

¶2 According to the testimony presented at trial, Damon and five-year-old Kyana S. were both guests at the house of Aaron and Vicki Bronson, who were having a cookout. Shortly after Kyana had laid down to sleep on the couch with the lights turned down, Vicki Bronson, her daughter Angie Bronson, and her nephew Shane Bronson all observed Damon sitting on the couch with Kyana in his lap under a blanket and pillow and thought something didn't look right. Shane Bronson saw Damon moving his arm under the blanket, and when Shane pulled off the blanket, he saw that Damon had his hand under Kyana's skirt in her vaginal area. Shane took the child off Damon's lap and handed her to Vicki, then confronted Damon, pushing him down, asking him how he could touch a child, and yelling at him to admit it. Damon responded that he wouldn't deny it. Meanwhile, Angie went to get her father and called the police.

¶3 The police took Kyana's clothing, and testing revealed trace male DNA on her underwear of an insufficient quantity for further testing. A forensic interviewer questioned Kyana at the Safe Harbor Child Advocacy Center. The State introduced a videotape of that interview at trial, over the objection of the defense. Kyana also testified in court that Damon had touched her in a bad way on more than one occasion.

¶4 The jury found Damon guilty, and the court sentenced him to two years of initial incarceration and ten years of extended supervision. Damon now appeals, challenging the admission of the videotape and the sufficiency of the evidence.

DISCUSSION

A. Sufficiency of the Evidence

¶5 We first consider the sufficiency of the evidence, since our review includes even that evidence which was erroneously admitted and double jeopardy precludes retrial if there was insufficient evidence to support the verdict. ***Lockhart v. Nelson***, 488 U.S. 33, 41 (1988); ***State v. Wulff***, 207 Wis. 2d 143, 153-54, 557 N.W.2d 813 (1997). When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762; ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990); *see also* WIS. STAT. § 805.14(1) (2007-08).[1] Thus, we will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of the witnesses and drawing of inferences to the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

¶6 In order to obtain a conviction for first-degree sexual assault of a child, the State needed to establish that Damon had sexual contact with a person under thirteen years old. WIS. STAT. § 948.02(1)(e). As the trial court advised the jury, sexual contact in this case meant that Damon had intentionally touched

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

Kyana's vagina, either directly or through clothing, with the intent to become sexually aroused or gratified. WIS. STAT. § 948.01(5)(a).

¶7 Damon argues that the evidence was insufficient to establish that any touching that occurred was done for the purpose of becoming sexually aroused or gratified. We disagree. An intent to become sexually aroused or gratified may be inferred from a defendant's conduct and the circumstances of the case. Here, Damon approached a child who was on a couch alone in a room with darkened lights, put her on his lap and covered her and himself with a blanket and pillow, moved his hand around in her vaginal area long enough for three people to observe the conduct and become concerned, and when confronted, expressly refused to deny that he had been touching a child. A jury could properly draw the inference beyond a reasonable doubt that the touching was purposeful rather than accidental, and was motivated by a desire for sexual gratification.

B. Admissibility of Videotape

¶8 Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We will only set aside such discretionary determinations if the trial court has failed to apply a relevant statute or consider legally relevant factors, or has acted based upon mistaken facts or an erroneous view of the law. ***Id.***; ***Duffy v. Duffy***, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). We will, however, independently determine whether a trial court has properly interpreted the law. ***James***, 285 Wis. 2d 783, ¶8. That includes determining whether a videotaped statement of a child meets the statutory criteria for admissibility. ***State v. Jimmie R.R.***, 2000 WI App 5, ¶¶38-39, 232 Wis. 2d 138, 606 N.W.2d 196.

¶9 In order to introduce the videotaped statement of a child, the proponent must show that: (1) the child was under 12 when the trial or hearing took place (or under 16, if the interests of justice so require); (2) the videotape accurately records the interview and is free from alteration or distortion; (3) the statement was made under oath or affirmation, or "upon the child's understanding that false statements are punishable and of the importance of telling the truth"; (4) the time, content and circumstances of the statement provide indicia of its trustworthiness; and (5) admission of the statement will not unduly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement. WIS. STAT. § 908.08(3). A child's understanding of the consequences for failing to tell the truth must be demonstrated by the words actually used by the child in the interview, but the exact words of the statute need not be expressed and it is not necessary to individually address both the importance of truth and punishment for false statements. ***Jimmie R.R.***, 232 Wis. 2d 138, ¶¶41-42. Rather, "a reasonable child would associate a warning about the importance of telling the truth with the related concept of untruthfulness and the consequences that might flow from such deceit… [and] [t]he same would be true in the converse situation." ***Id.***, ¶42 and n.7.

¶10 Damon contends the third requirement was not met here, arguing that Kyana was not adequately advised about the consequences of lying and did not show that she understood she could be punished for doing so. It is true that Kyana was initially unable to define what a lie was or to provide an answer as to what would happen if she told a lie. However, she did say that a lie was a bad thing, and throughout the interview she was able to give both affirmative and negative answers, as well as saying when she didn't know something or was unable to give an answer. We agree with the trial court that the child's statement

that a lie is a bad thing in conjunction with the way she answered questions during the interview itself demonstrates that the child understood that it was important to tell the truth. Contrary to Damon's contention, we are not persuaded that it was necessary for either the interviewer or Kyana to specifically mention punishment; it was inherent in the concept that lying is bad and Kyana needed to tell the truth.

¶11 In any event, even if the videotape had been erroneously admitted, we conclude the error would be harmless here because the essential information conveyed in the videotape—namely that Damon had touched Kyana's vagina—could already be inferred from the other witness testimony presented in court.

By the Court.—Judgment affirmed.

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