COURT OF APPEALS DECISION DATED AND FILED

July 1, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP1826-CR **Cir. Ct. No. 2007CF232**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAUN HODGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Shaun Hodge appeals from a judgment convicting him of two counts of second-degree sexual assault of a child and from an order denying his postconviction motion for a new trial. He claims that: (1) the court erred in admitting testimony that the victim had told her mother that she was raped

more than once by Hodge; (2) Hodge was denied his rights to counsel and to be present during all stages of the prosecution when the court communicated ex parte with the jury during deliberations; and (3) he is entitled to a new trial in the interest of justice based upon those errors in addition to the fact that the court erroneously cited the repeater statute number to the jury in its instructions and on the verdict form. We conclude that none of the alleged errors warrant a new trial.

¶2 First, we will assume for the sake of argument that the trial court erroneously permitted the victim's mother to give hearsay testimony about a phone conversation in which the victim stated that she had been raped more than once by Hodge. We conclude, however, that this was harmless error. *See generally* ***State v. Harris***, 2008 WI 15, ¶43, 307 Wis. 2d 555, 745 N.W.2d 397 (An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.). The real controversy for the jury to decide in this case was whether various inconsistencies in the victim's account of the assaults, and evidence that she wanted her sister to break up with Hodge and get back together with another man, showed that she had fabricated the incidents with the help of that other man, who claimed to have witnessed part of one of the assaults. Because there were no specific details about any of the assaults in the victim's telephone conversation with her mother, the admission of that statement would not have been particularly probative on the question of whether the victim's allegations were truthful. In other words, the statement did not significantly bolster the victim's credibility, notwithstanding the State's claim to the trial court that it did. Rather, it was unremarkable that the victim would have told a family member about the assaults shortly before going to the police, regardless whether the allegations were true or not. Therefore, we are

not persuaded that Hodge was prejudiced by the admission of the statement the victim made to her mother.

¶3 Second, we agree that it was a constitutional violation for the trial court to have orally answered a question from the jury outside the presence of Hodge and his attorney. *See* ***State v. Anderson***, 2006 WI 77, ¶44, 291 Wis. 2d 673, 717 N.W.2d 74. Again, however, we are satisfied the error was harmless. Hodge and his attorney were informed that the jury asked whether a third charge of sexual assault by use of force could be reduced to sexual assault only, and agreed that the court could inform them "they have to just act on the verdict alone, that there has been no lesser included [offense] that has been added, and thus, there is no other option." Hodge complains that, since neither he nor counsel were present when the judge went into the jury room, he cannot know whether the judge actually instructed the jury in accordance with the agreement. We note that it does not appear that Hodge made any effort to ask the court to place the instruction on the record. In any event, since the jury returned a not-guilty verdict on the count that was the subject of its question, Hodge could not have been prejudiced with respect to that count even if the court did deviate in some manner from the agreed-upon instruction. Nor do we see how Hodge could have been prejudiced with respect to the other two counts, since the jury's inquiry into reducing the charge shows that it already believed that at least some level of inappropriate sexual conduct had occurred.

¶4 Although we have concluded that it was harmless error to communicate orally with the jury outside the presence of Hodge and his attorney, we emphasize that in the future the court should avoid this problem by either communicating to the jury orally in the presence of the defendant and counsel, or presenting a written answer to the jury that has been discussed and prepared in the

presence of the defendant and counsel. We also advise that both options be done on the record.

¶5 Finally, we decline to exercise our discretionary power of reversal on the ground that the real controversy was not tried. We have already explained why the mother's testimony and the court's communication were harmless error. As for citations to the repeater statute, aside from the fact that Hodge approved the verdict forms to which he now objects, we see no reason to believe that erroneously including references to a statute number somehow prevented the real controversy from being tried. No one told the jury that the cited statute, provided in a string of other applicable statutes, referred to repeater allegations or made any improper mention of prior convictions during the course of the trial.

By the Court.—Judgment and order affirmed.

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