COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1338-CR **Cir. Ct. No. 2008CF357**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. SCHEMENAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Timothy Schemenauer appeals a judgment convicting him of two counts of sexual assault of a child. He contends the victim falsely accused him as part of her aunt's vendetta against him for terminating an affair. On appeal, he argues that the court improperly exercised its discretion and

denied his constitutional right to present a defense by disallowing a photograph of Schemenauer that depicts injuries the aunt inflicted on him and by disallowing three witnesses' testimony that would have contradicted the aunt's account of the incident leading to the injuries. He also argues that the court should have suppressed an incriminating statement Schemenauer made to police after he requested a cigarette break. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The victim accused Schemenauer of sexually assaulting her on three occasions. The jury convicted him of two of the counts. The victim first reported the assaults during a phone conversation on August 11, 2008, with her aunt, Amy Lunderville. The victim asked Lunderville why she no longer associated with Schemenauer and Lunderville responded it was because of some unspecified lies he told. Lunderville asked the victim whether Schemenauer had ever touched her and the victim began to cry. Eventually the victim told Lunderville about the sexual assaults and asked her not to tell anybody. Lunderville ultimately told the victim's mother who called the police. The victim indicated that before trial she and Lunderville discussed the assaults a number of times but denied planning with anyone what she would say to law enforcement or at the trial.

¶3 Lunderville's account of the initial phone conversation was similar to the victim's. She denied asking the victim to come up with a story to tell the police. Lunderville also testified about an incident that occurred on July 3, 2008 at a gathering at Schemenauer's home. Lunderville testified that she was not intoxicated but had a few beers. After Schemenauer grabbed her arm where she had surgery six months earlier, she struck Schemenauer breaking his glasses and cutting his face. She denied that his voice remained calm during the incident, and

denied threatening him. After the July 3 incident, Lunderville filed complaints accusing Schemenauer of sexual harassment in the workplace.

¶4 Schemenauer was interrogated by police regarding the sexual assault allegations. In a written statement, he conceded that in the summer of 2006, he felt the victim's breast and they went out in the grass where he fell on top of her, pulled out his penis and put it in her vaginal area. He also stated that on another occasion, when she was in bed, he got in and put his hand on her. On a third occasion, he admitted to touching her breasts. Parts of Schemenauer's written statement are illegible. However, the deputy testified that Schemenauer admitted touching the victim's buttocks and breasts on three occasions and admitted to once falling on top of her.

¶5 Schemenauer testified that he did not sexually assault the victim. Regarding the July 3 incident, he stated Lunderville hit him with her keys and threatened: "I'll teach you for messing with me and my family, and we'll take you down and it ain't going to be pretty, something to that extent."[1] The court did not allow Schemenauer to introduce into evidence a photo of his face taken after the July 3 incident depicting his injuries. The court also refused to allow Schemenauer to call three witnesses who attended the July 3 gathering. According to the offer of proof, they would have testified that Lunderville was intoxicated, Schemenauer's voice remained calm, Schemenauer's son saw her strike his father with keys in her hand, Schemenauer was not holding or twisting her arm at the time, and Lunderville threatened "words to the effect of if you mess with me and my family, I will bring you down and it won't be pretty."

[1] In a statement to police, Schemenauer described the threat as "I'll hang your ass."

DISCUSSION

¶6 The court properly refused to allow Schemenauer to introduce the photograph depicting his injuries and to call the witnesses to contradict Lunderville's account of the July 3 incident. The court disallowed the evidence to prevent the July 3 incident from becoming a "sideshow." Under WIS. STAT. § 904.03, the court has discretion to exclude testimony that is cumulative or that would mislead the jury into an improper focus on questions about a witness's motive. *See* ***State v. Rhodes***, 2011 WI 73, ¶¶60-62, 799 N.W.2d 850.

¶7 Schemenauer's right to present a defense includes a right to present relevant and material evidence that is vital to the defense. *See* ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 867 (1982). Impeaching Lunderville's testimony regarding the July 3 incident was not vital to the defense. She was called as a State's witness merely because she was the first person to whom the victim reported the assaults. She did not claim any personal knowledge of the assaults. Evidence that she was intoxicated, struck Schemenauer with her keys, that his voice remained calm and that she threatened to "bring him down" would impeach her testimony regarding the incident, but would not impeach the victim's testimony. In effect, the defense would have to ask the jury to doubt the victim's testimony because her aunt misrepresented an altercation that occurred five weeks before the victim first reported the assaults. The court properly excluded extrinsic evidence designed to impeach a nonessential witness on collateral points.

¶8 Defense counsel's closing argument painted a picture of Lunderville as a scorned woman trying to gain revenge by prompting her niece to accuse him of sexual assault after her attempts to cause trouble for him in the workplace had failed. Lunderville's animosity toward Schemenauer was apparent. The

prosecutor never attempted to discredit Schemenauer's testimony that Lunderville threatened to "take him down." Providing extensive detail about the July 3 incident was not necessary for Schemenauer's defense.

¶9 The court also correctly determined that Schemenauer's statements to the police were voluntary under the totality of the circumstances. Statements are voluntary "if they are a product of free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the state exceed the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person conducting the interrogation. ***Id.***, ¶37. If a defendant establishes coercive conduct, the court must undertake a balancing analysis, weighing the personal characteristics of the defendant against the coercive police conduct, to determine whether the statement was voluntary. ***State v. Owen***, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996). When the balancing test comes into play, the court examines the totality of the circumstances. ***State v. Knapp***, 2003 WI 121, ¶102, 265 Wis. 2d 278, 666 N.W.2d 881.

¶10 Schemenauer's primary contention is that his statement was coerced by the police ignoring his request for cigarettes and soda. Schemenauer requested a cigarette approximately one hour and twenty minutes into the interview. The deputy responded that he first wanted to read Schemenauer his ***Miranda***[2] rights.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Once the rights were read and Schemenauer signed the written waiver, questioning continued and Schemenauer did not renew his request for a cigarette. Schemenauer was made to wait approximately forty minutes after he requested a cigarette to actually have an opportunity to smoke. Making Schemenauer wait forty minutes for a cigarette after he made only one request does not constitute improper coercion.

¶11 Schemenauer was also made to wait eight minutes for a soda. His request for something to drink was prompted by the deputy's question as to whether he would agree to give a DNA swab of his mouth. Schemenauer indicated that he was thirsty and this prompted the deputy to ask if he wanted a soda. The deputy told Schemenauer that he could have a soda when another deputy returned. Making a suspect wait eight minutes for a soda cannot be deemed coercive.

¶12 Schemenauer argues that the deputy threatened to charge him with obstruction if he continued to lie, prompting Schemenauer to make incriminating statements. Schemenauer cites no authority to support his assertion that a threat of being charged with obstruction for lying to police renders a confession impermissibly coercive.

¶13 Even if any of the police tactics were considered coercive, triggering the balancing test, the totality of the circumstances show that the police pressure was not sufficient to overcome Schemenauer's will to resist. He was forty-eight years old, high school educated, gainfully employed and was not suffering from mental illness or sleep deprivation. The interrogation did not include any raised voices or threatening gestures. The deputy told Schemenauer at the beginning of the interview that he was not under arrest and was free to leave. Except for a brief

period when the tape ran out, the entire interrogation was recorded and reviewed by the circuit court. The record supports the finding that the incriminating statement was voluntary.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).