COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1532-CR **Cir. Ct. No. 2007CF405**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD M. ARNOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Richard M. Arnold appeals from a judgment convicting him of repeated sexual assault of the same child and from an order

denying his postconviction motion. Arnold contends that the trial court erroneously exercised its discretion by not either releasing to him any of the records it reviewed in camera or granting a new trial on grounds of newly discovered evidence. Alternatively, he claims a new trial should be ordered in the interest of justice. His arguments are unpersuasive. We affirm.

¶2 After a four-day trial, a jury found Arnold guilty of repeated sexual assault of the same child, his son, Michael, over a fifteen-month period when Michael was thirteen and fourteen. As a persistent repeater, Arnold was sentenced to life without parole. *See* WIS. STAT. § 939.62(2m)(b)2., (2m)(c) (2009-10).[1] The court denied his motion for judgment notwithstanding the verdict.[2]

¶3 Michael already was under the supervision of the Fond du Lac county juvenile court for his own adjudications for sexually assaulting children. Postconviction, he authorized the Fond du Lac County Department of Social Services (FCDSS) to release to Arnold certain records in its possession comprising his KIT (Kids in Treatment) progress reports. Based on this information, Arnold filed a postconviction motion for a new trial based either on newly discovered evidence—that the progress reports contained evidence inconsistent with Michael's claims of assault and additional information with which to impeach his credibility—or in the interest of justice. Arnold also asked the trial court to conduct an in camera inspection of all KIT reports regarding Michael to determine whether the reports contained exculpatory evidence.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] Arnold does not challenge the denial of the motion on appeal. We thus need not address whether a motion for judgment notwithstanding the verdict has a place in a criminal proceeding. *See* ***State v. Escobedo***, 44 Wis. 2d 85, 90, 170 N.W.2d 709 (1969).

¶4 The court granted Arnold's request, and ordered FCDSS to provide a copy of all of Michael's records in its possession. Michael gave his consent. *See* ***State v. Solberg***, 211 Wis. 2d 372, 386-87, 564 N.W.2d 775 (1997). The trial court concluded that the FCDSS records were "consistent" with information known and available to Arnold and that nothing in them would have "made any difference whatsoever" in the trial's outcome. It denied Arnold's motion, and he appeals. More facts will be supplied as needed to develop the appellate issues.

¶5 The first issue is whether the trial court should have released to Arnold the records it reviewed in camera. The postconviction discovery of confidential records is governed by ***State v. Robertson***, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105. The parties do not dispute that Arnold made the preliminary ***Shiffra/Green***[3] showing based upon the first four of the well-known five-factor newly discovered evidence test. *See* ***Robertson***, 263 Wis. 2d 349, ¶22. The records need be disclosed to Arnold, however, only if the evidence satisfies the fifth factor—that it is reasonably probable that a different result would be reached on a new trial. *See* ***id.***, ¶16. Said another way, the court reviewing the evidence must determine if the evidence is "consequential." ***Id.***, ¶22

¶6 Evidence is consequential only if a reasonable probability exists that, had it been disclosed to the defense, the result of the proceeding would have been different. ***State v. O'Brien***, 223 Wis. 2d 303, 320, 588 N.W.2d 8 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). That presents a

[3] *See* ***State v. Shiffra***, 175 Wis. 2d 600, 608-610, 499 N.W.2d 719 (Ct. App. 1993), as further clarified in ***State v. Green***, 2002 WI 68, ¶¶28-34, 253 Wis. 2d 356, 646 N.W.2d 298.

question of law that we review de novo. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

¶7 Michael's consent allowing the trial court access also cloaks this court with the authority to inspect the records. *See* ***Solberg***, 211 Wis. 2d at 383. We have done so. We wholly agree that the remaining records contain no additional material which, to a reasonable probability, would result in a different outcome at a new trial. A mere possibility that undisclosed information might help the defense is not enough. *See* ***O'Brien***, 223 Wis. 2d at 321.

¶8 Arnold next contends that the trial court erroneously exercised its discretion by not granting a new trial due to newly discovered evidence in the form of prior inconsistent statements and a habit of untruthfulness. A defendant advancing a newly discovered evidence argument must satisfy each of the five criteria by clear and convincing evidence to warrant a new trial. ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). We review a court's conclusion of whether newly discovered evidence warrants a new trial for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590.

¶9 The jury heard testimony that Arnold engaged Michael in mutual masturbation between May 2004 and August 2005 and that Michael first revealed the assaults to his counselor in February 2006. Arnold contends that staff notations in Michael's KIT reports showed that Michael made statements at odds with his trial testimony. A February 13, 2006 notation stated: "Mike reveal[ed] in group that he wasn't sure of his dad sexually assaulting him or not." On an undated self-report, Michael answered a question asking who had touched him "in a sexual way that felt scary or unsafe," "No one that I can remember."

¶10 We will assume without deciding that Michael's statements constitute prior inconsistent statements. A witness' prior inconsistent statements can impeach the witness' testimony and serve as substantive evidence if the declarant is available for cross-examination. ***State v. Horenberger***, 119 Wis. 2d 237, 247, 349 N.W.2d 692 (1984); *see* WIS. STAT. § 908.01(4)(a)1.

¶11 These "inconsistencies" simply are too ambiguous, however, to make it reasonably probable that a different result would be reached on a new trial. Michael's statement that he "wasn't sure" if his father had sexually assaulted him could be interpreted as a reflection of the boy's understanding of the word "assault." He may have thought "assault" required force, penetration or pain, and he testified that the masturbation was physically pleasurable. Further, Arnold has not established when Michael made the statement relative to telling his counselor of the assaults. Perhaps Michael had not yet confided in her because he truly "wasn't sure" if the activity constituted sexual assault. If Michael already had told her, a jury reasonably could accept that he still might hedge in a group setting, given his testimony that he feared being labeled "gay" or treated differently.

¶12 Similarly, the undated self-report does not necessarily discredit Michael's trial testimony. Michael was involved at FCDSS before the assaults began. Even if he already had accused Arnold, Michael might have interpreted the question to be asking about assaults by someone besides his father. Arnold simply has not shown that these newly discovered "inconsistencies" would have changed the course of the trial.

¶13 Arnold also contends some of the newly discovered evidence would have more impressively impeached Michael's credibility than was done at trial. Arnold points to KIT notes indicating that Michael was "having problems with

lying" and was "working on [an] assignment … regarding lying." On another date, a staff member noted: "Not always sure if Mike is honest … Mike getting caught in lies, likes to get other kids going."

¶14 Character trait evidence is admissible only if the character trait is an essential element of the defense. *See* ***State v. Evans***, 187 Wis. 2d 66, 80-82, 522 N.W.2d 554 (Ct. App. 1994). Michael's alleged penchant for lying may be relevant to Arnold's defense, but in terms of disproving the sexual assaults, it at best allows a circumstantial inference. Arnold thus would not be able to introduce these specific instances of Michael's untruthfulness. *See* WIS. STAT. § 904.05(2).

¶15 Arnold proposes, however, that he could have developed opinion evidence about Michael's veracity from his social workers and therapists. Arnold made no offer of proof in the postconviction proceedings that professionals working with Michael had an opinion about his general character for truthfulness or, if they did, that any one of them would give character evidence at trial about a program client. In any event, evidence that merely impeaches the credibility of a witness does not warrant a new trial on this ground alone. ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968).

¶16 Furthermore, Michael's testimony already was impeached in various ways. A friend of Arnold's testified that Michael told him that he had fabricated the events because he was angry at his dad; Michael conceded that he enjoyed spending time with his father throughout this time period; and, although Michael testified he could recall nothing unusual about Arnold's genitalia, the defense introduced photographs showing several prominent piercings. We conclude that the trial court properly exercised its discretion when it denied Arnold's motion on

the basis that the new evidence was merely cumulative to that introduced at trial. *See* ***State v. Sarinske***, 91 Wis.2d 14, 37, 280 N.W.2d 725, 735-36 (1979).

¶17 Lastly, Arnold requests that we grant a new trial in the interest of justice under WIS. STAT. § 752.35 because the real controversy was not fully tried. The real controversy has not been fully tried if the jury was denied the opportunity to hear and examine evidence bearing on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial. ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436. As discussed above, we are persuaded that new evidence regarding Michael's possibly inconsistent statements and his credibility adds little to the evidence already before the jury. We therefore conclude that the real controversy was fully tried and decline to grant Arnold a new trial.

By the Court.—Judgment and order affirmed.

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