COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP857-CR **Cir. Ct. No. 2009CF539**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER WALTER HURNS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Christopher Walter Hurns appeals his conviction for second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2)

(2009-10),[1] on two grounds. First, Hurns argues that the trial court erroneously exercised its discretion by denying his motion to present evidence at trial of the complaining witness's prior false allegation of sexual conduct under WIS. STAT. § 972.11(2)(b)3. Second, Hurns contends that the trial court erred by denying his motion for a mistrial after a detective testified that Hurns was on probation. We conclude that the trial court properly exercised its discretion in both instances and affirm.

BACKGROUND

¶2 In January 2009, S.J., who was thirteen years old, was staying with her aunt and Hurns, her aunt's boyfriend, when S.J. reported to her aunt that Hurns tried to have forcible sexual contact with her. Hurns denied that the sexual assault occurred. He was charged with second-degree sexual assault, contrary to WIS. STAT. § 948.02(2).[2]

¶3 Prior to trial, Hurns filed a motion to admit evidence of prior, allegedly untruthful, allegations of sexual assault made by the complaining witness under WIS. STAT. § 972.11(2)(b)3. At a pretrial hearing on his motion, Hurns presented testimony from S.J. and S.J.'s mother, aunt and grandmother,

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

[2] Hurns was also charged with exposing a child to harmful material, contrary to WIS. STAT. § 948.11(2)(a), and second-degree sexual assault with use of force, contrary to WIS. STAT. § 940.225(2)(a), but was acquitted of these two charges after a jury trial. Neither charge has any bearing on the issues raised on appeal.

regarding two statements S.J. allegedly made to each of them at some uncertain times in the past. Hurns claimed that S.J. told her mother, aunt and grandmother, first that she had been raped by a man named Kevin, and then later, that she had not been raped, but had willingly had sex with Kevin.

¶4 At the pretrial hearing, Hurns first called S.J., who denied ever telling her mother, aunt or grandmother that she had been raped by Kevin. S.J. testified that she told her mother, aunt and older sister that she willingly had sex with Kevin when she was twelve or thirteen. She testified that she told her mother about the sexual encounter approximately two days after the incident. S.J. testified that her aunt asked her about the encounter when she was approximately fourteen, and she told her aunt that she wanted to have sex with Kevin.

¶5 S.J.'s mother testified that S.J. did not tell her that Kevin raped her, but that S.J. told her that she "gave it up willingly." S.J.'s mother testified that because S.J.'s grandmother told her that S.J. had been raped, she asked S.J. if she had told her grandmother she had been raped, and S.J. said "yes." But then, when S.J.'s mother asked S.J. why she did not come to her after she was raped, S.J. told her mother, "I didn't get raped, I gave it up willingly so." S.J.'s mother testified that she did not know Kevin, but she had been told that he was twenty-one years old. S.J.'s mother was not certain when S.J. had allegedly had sex with Kevin, but S.J. told her about it when she was thirteen, in early 2009.

¶6 S.J.'s grandmother testified that in 2008 S.J. told her that Kevin raped her, but then changed her story after S.J.'s mother said they should press charges. S.J.'s grandmother testified that S.J. was twelve when the sexual encounter allegedly happened.

¶7 S.J.'s aunt testified that she heard from S.J.'s older sister that S.J. was raped by Kevin and she told S.J.'s grandmother. S.J.'s aunt testified that she asked S.J. in October 2008 if she had been raped, and S.J. said "yes," but a couple of months later, S.J. told her aunt that she willingly had sex with Kevin.

¶8 The trial court excluded the evidence, concluding that the defense had failed to demonstrate that the evidence was material or that the probative value of the evidence substantially outweighed its prejudicial nature under ***State v. DeSantis***, 155 Wis. 2d 774, 456 N.W.2d 600 (1990).

¶9 At the jury trial, during cross-examination by trial defense counsel, Milwaukee Police Detective Steve Wells stated that Hurns was on probation. Defense counsel objected and moved to strike. The trial court granted the motion and instructed the jury to disregard the detective's response. When the jury was out of the room, trial defense counsel moved for a mistrial. The trial court denied the motion.

¶10 The jury found Hurns guilty of one count of second-degree sexual assault and the trial court sentenced him to nine years and six months of initial confinement followed by five years and six months of extended supervision. Hurns appeals the pretrial order denying admission of the prior-reported testimony and the denial of his motion for mistrial.

DISCUSSION

I. S.J.'s prior statement of sexual assault was not admissible under WIS. STAT. § 972.11(2)(b)3., and thus, the trial court did not erroneously exercise its discretion in excluding it.

¶11 Hurns first argues that the complaining witness, S.J., previously falsely reported being sexually assaulted and that the trial court erred in not

permitting him to present witnesses to S.J.'s prior false report under WIS. STAT. § 972.11(2)(b)3. Hurns claims that although S.J. disputes saying that she was raped, her grandmother's and aunt's testimonies are admissible to show that S.J. did falsely report a sexual assault and is generally untruthful.

¶12 The decision to admit evidence is subject to the trial court's discretion. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). We will not disturb a trial court's discretionary decision excluding evidence unless the record shows that the trial court "applied the wrong legal standard in the exercise of its discretion or that the facts of record fail to support the [trial] court's decision." ***DeSantis***, 155 Wis. 2d at 777 n.1. Whether the evidence fits within a statutory exception to an evidentiary rule is a legal issue that we review independently. ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290.

¶13 Wisconsin's rape shield law, WIS. STAT. § 972.11, generally prohibits evidence of the complainant's prior sexual conduct. ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. "The rape shield law was enacted to counteract outdated beliefs that a complainant's sexual past could shed light on the truthfulness of the sexual assault allegations." ***Id.*** (internal quotation marks and citations omitted). The statute "expresses the legislature's determination that evidence of a complainant's prior sexual conduct has low probative value and a highly prejudicial effect." ***DeSantis***, 155 Wis. 2d at 784-85.

¶14 However, WIS. STAT. § 972.11(2)(b)3. permits admission of some evidence of the complainant's prior sexual conduct to show "prior untruthful

allegations of sexual assault," but "'only after close judicial scrutiny.'" ***Ringer***, 326 Wis. 2d 351, ¶26 (citations omitted).

¶15 As relevant here, WIS. STAT. § 972.11(2)(b) provides:

> If the defendant is accused of a crime under s. … 948.02 …, if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
>
> ….
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

¶16 The Wisconsin Supreme Court set forth the framework for analyzing the admissibility of evidence of a prior-false-sexual-assault report under WIS. STAT. § 972.11(2)(b)3. in ***DeSantis***, requiring the trial court to make three findings before evidence of a prior untruthful report of sexual assault is admissible under § 972.11(2)(b)3. and WIS. STAT. § 971.31(11)[3]: "(1) whether the proffered

[3] WISCONSIN STAT. § 971.31(11) states, in relevant part:

> In actions under s. … 948.02 …, if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

evidence fits within sec. 972.11(2)(b)3[.]; (2) whether the evidence is material to a fact at issue in the case; and (3) whether the evidence is of sufficient probative value to outweigh its inflammatory and prejudicial nature." ***DeSantis***, 155 Wis. 2d at 785. We address each prong in turn.

*1. The First **DeSantis** Prong: Whether the report was untruthful under WIS. STAT. § 972.11(2)(b)3.*

¶17 "[I]n order to admit evidence of untruthful prior allegations of sexual assault, a [trial] court must be able to conclude from the proffered evidence that a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault." ***DeSantis***, 155 Wis. 2d at 788. Thus, the first prong of the ***DeSantis*** analysis addresses whether the defendant has established a sufficient factual basis for allowing the jury to hear the evidence of the complainant's prior report, *see* WIS. STAT. § 972.11(2)(b)3., that is, could a jury reasonably find that the complainant made a report and that the report was untruthful?

¶18 Here, the trial court found this first prong in Hurns's favor—that a reasonable jury could find that S.J.'s prior report of sexual assault was untruthful.[4] The State argues that in so finding the trial court wrongfully construed WIS. STAT.

[4] The parties agree that S.J. reported a sexual encounter. Therefore, the only issue is whether that report was untruthful under WIS. STAT. § 972.11(2)(b)3.

§ 972.11(2)(b)3. and disregarded the jurisprudence of ***DeSantis***, ***Ringer*** and ***State v. Moats***, 156 Wis. 2d 74, 457 N.W.2d 299 (1990).[5]

¶19 We need not resolve whether the trial court erred in concluding that a reasonable jury could find S.J.'s prior report untruthful under WIS. STAT. § 972.11(2)(b)3. and ***DeSantis***, ***Ringer*** and ***Moats***, because we conclude that Hurns fails to produce evidence sufficient to meet the second and third prongs of the ***DeSantis*** admissibility analysis, i.e., that the evidence is material and that its probative value substantially outweighs its prejudicial nature. *See* ***Barber v. Weber***, 2006 WI App 88, ¶19, 292 Wis. 2d 426, 715 N.W.2d 683 (When the resolution of one or more issues resolves the appeal, we need not address additional issues presented.).

[5] Although we need not resolve this issue, we note that the State makes a compelling argument that S.J.'s prior report is not untruthful under WIS. STAT. § 972.11(2)(b)3.; ***State v. DeSantis***, 155 Wis. 2d 774, 456 N.W.2d 600 (1990); ***State v. Ringer***, 2010 WI 69, 326 Wis. 2d 351, 785 N.W.2d 448; and ***State v. Moats***, 156 Wis. 2d 74, 457 N.W.2d 299 (1990). The State argues, relying on ***Ringer*** and ***Moats***, that whether the prior report is admissible turns on whether the prior statement truthfully reports the general occurrence of a sexual assault and that, even if there is evidence of a discrepancy or recantation as to the degree or type of sexual assault, that does not make the prior report untruthful within § 972.11(2)(b)3. *See* ***Ringer***, 326 Wis. 2d 351, ¶¶34-36. Relying on ***Moats***, the court in ***Ringer*** concluded that whether the evidence of a prior report is admissible must be reviewed in terms of whether "'the general occurrence of a sexual assault is later recanted by the complainant or proved to be false by the defendant.'" ***Id.***, 326 Wis. 2d 351, ¶39 (citing ***Moats***, 156 Wis. 2d at 110). Noting that the complainant in ***Ringer*** never recanted her prior accusation against her father and that the father never proved the sexual-touching report false, the court concluded that the discrepancy between the two versions alone was not enough to show that the complainant's prior report was untruthful. ***Ringer***, 326 Wis. 2d 351, ¶39. This is similar to the court's materiality analysis in ***DeSantis***. *See* ***id.***, 155 Wis. 2d at 789-94.

The State argues that even if a reasonable jury could find that S.J. recanted that she was raped, implying sex forced against her will, it could not find that S.J. was not sexually assaulted by Kevin. It is undisputed on this record that S.J., as a twelve- or thirteen-year-old girl, had sex with Kevin, a twenty-one-year-old male, which is a first-degree or second-degree sexual assault under WIS. STAT. § 948.02(1)(e) and (2). Thus, the general occurrence of a sexual assault was never recanted or proven false, and the evidence is inadmissible under WIS. STAT. § 972.11(2)(b)3. *See* ***Ringer***, 326 Wis. 2d 351, ¶39.

*2. The Second **DeSantis** Prong: Whether the evidence is material to a fact at issue in the case.*

¶20 In rejecting Hurns's motion to admit evidence of a prior untruthful allegation, the trial court found that the evidence was not material to a fact at issue in the case. Similarly, in ***DeSantis***, the Wisconsin Supreme Court concluded that the evidence of a prior allegation of sexual assault lacked sufficient materiality to outweigh the prejudice that the rape shield law was designed to protect against. *See* ***id.***, 155 Wis. 2d at 789-94.

¶21 In ***DeSantis***, the court concluded that the materiality of evidence of a prior allegedly untruthful report of sexual assault was "minimal," ***id.*** at 791, because: (1) the evidence was "sketchy, vague, remote, disputed, and cumulative," ***id.*** at 792; (2) the complainant's prior report could "be accepted as a truthful assertion of a nonconsensual touching," ***id.***; and (3) the circumstances between the two incidents were too different, ***id.*** at 791. We conclude that all three of those reasons apply here as well.

¶22 In facts very similar to those here, DeSantis claimed that in 1985 the complainant told her neighbor that she was raped, then later in 1986 told her neighbor "that 'it didn't happen exactly the way she [the complainant] had said that it did.'" *See* ***id.*** at 779 (brackets in ***DeSantis***). The neighbor understood the complainant's comment to mean that she was now denying that she had been raped. ***Id.*** The complainant testified that she never told the neighbor that she was raped. ***Id.*** at 781. DeSantis, like Hurns, sought to use the prior report to generally attack the complainant's credibility at trial. *See* ***id.*** 778.

¶23 The ***DeSantis*** court held that the alleged prior report of sexual assault was of limited value in generally discrediting the complainant's truthfulness because under either version of the evidence, the complainant's prior report was a truthful report of nonconsensual touching. ***Id.*** at 791. "Both [the neighbor] and the complainant testified that the occurrence in autumn 1985 involved a nonconsensual touching." ***Id.*** at 790. Thus, "[n]o matter who is believed, the complainant's 1985-86 statements can be interpreted as truthful allegations of a nonconsensual assault." ***Id.*** at 791.

¶24 So too here, the evidence of S.J.'s prior report is of minimal materiality because: (1) it is vague, remote and disputed; (2) no matter which witness is believed, the report consists of an undisputed assertion of a sexual assault; and (3) the prior report is substantially different from the charged crime.

¶25 First, like in ***DeSantis***, the quality of the evidence of S.J.'s prior report was poor. None of the witnesses to the prior report could establish with any certainty when S.J. had sex with Kevin or when each statement by S.J. had allegedly been made. S.J. disputed ever telling her grandmother anything about her sexual encounter with Kevin and disputed telling anyone that she had been raped. There was no resolution of the dispute because there was no report to police, subsequent investigation or trial.

¶26 Second, and most significantly, no matter who is believed, the testimony undisputedly establishes that S.J. was sexually assaulted by Kevin. Sex between a twelve- or thirteen-year-old girl and a twenty-one-year-old male is a sexual assault under Wisconsin law. *See* WIS. STAT. § 948.02(1)(e) and (2). So, even if a reasonable jury believed that S.J. first said she was raped, and later said she had sex with Kevin willingly, there was no dispute that she was sexually

assaulted. Therefore, her report was not untruthful, and there is no basis to attack her credibility.

¶27 Finally, a key difference exists between the circumstances surrounding the sex-with-Kevin incident and the second-degree sexual assault charge against Hurns. Hurns is not claiming a consent defense at trial. Thus, the materiality of the prior incident with Kevin is very minimal because the allegedly recanted part was the element of consent. As a result, the prior report is only material to generally attack S.J.'s credibility. And, as set forth above, such an attack fails because it is undisputed that S.J. was sexually assaulted, and therefore her credibility is not appropriately impeached. Hurns's prior-report evidence is also remote in time, and thereby, lacking in materiality. S.J.'s prior report about Kevin was made approximately two years prior to the charges against Hurns. As the court noted in ***DeSantis***, "[t]he fact that the prior incident was remote in time and dissimilar in circumstances further diminishes the value of comparing the two incidents and drawing conclusions regarding the complainant's credibility or her consent." ***Id.***, 155 Wis. 2d at 791.

*3. The Third **DeSantis** Prong: Whether the evidence is of sufficient probative value to substantially outweigh its prejudicial nature.*

¶28 "Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case upon an improper basis." ***Id.*** at 791-92. Given the lack of materiality of S.J.'s prior report as discussed above, its admission would have exposed S.J. to "the humiliation and degradation associated with unfounded allegations regarding sexual history" that the law was designed to prevent. *See* ***id.*** at 793. Admission would have led to a trial within a trial over what S.J. and her

relatives had each said and meant, and "might [have] misle[]d the jury or overemphasize[d] the complainant's behavior in a previous assault situation that had minimal relevance to the facts and defenses asserted at trial, potentially influencing the jury to decide the case on an improper basis." *See* ***id.***

¶29 We conclude that the trial court correctly determined that evidence of the prior report was not of sufficient probative value to substantially outweigh its inflammatory and prejudicial nature.

II. The Trial Court Properly Denied Hurns's Motion For Mistrial.

¶30 "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The trial court must decide whether the basis for the mistrial request "was sufficiently prejudicial to warrant a new trial." ***Id.*** On review, we give deference to the trial court's ruling on mistrial requests because "[i]n exercising discretion on whether to grant a mistrial, the [trial] court is in a particularly good 'on-the-spot' position to evaluate factors such as a statement's 'likely impact or effect upon the jury.'" ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 657, 511 N.W.2d 879 (1994) (citations omitted). When a trial court gives a proper cautionary instruction, appellate courts presume on review that the jury followed it. ***State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475.

¶31 At trial, Hurns's lawyer asked Detective Wells on cross-examination:

> Q … He [Hurns] explained to you, or said to you, that he doesn't live with Tom at that address, that he lives with his mother, correct?

> A Yes.
>
> Q But that he stays at Tom's house on 36th Street, correct?
>
> A Yes.
>
> Q And --
>
> A Later on, he told me that the reason why he is saying that, is because he is on probation and his P.O. knows him to live at his mother's address.

Hurns's lawyer objected and moved to strike. The trial court ordered the answer stricken and instructed the jury to disregard it. After the jury was excused, Hurns's lawyer moved for mistrial because the reference to Hurns being on probation was so prejudicial that it required a mistrial. The trial court denied the motion, finding that: (1) the witness did not engage in intentional misconduct when making the reference; (2) the reference was immediately stricken from the record; and (3) given the volume of testimony, the brief reference to probation would not stand out to the jury.

¶32 Hurns argues on appeal that he was unfairly prejudiced by the jury knowing that he was on probation and that the detective's answer suggested that he was hiding from his probation officer, which "was akin to prior bad act evidence that would tend to prompt the jury to conclude Hurns was a bad person and therefore guilty of the offense charged." Although he cites to ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), in support of his prior-bad-act argument, he fails to develop the argument further. *See* ***Grube v. Daun***, 173 Wis. 2d 30, 64, 496 N.W.2d 106 (Ct. App. 1992) (Even though raised and argued in some fashion, arguments inadequately briefed need not be addressed on appeal.).

¶33 We conclude that the record supports the trial court's decision denying the motion for mistrial and affirm. Any prejudice was slight and quickly corrected by the trial court's instruction to disregard the statement, which we presume the jury followed. We note that the trial court's finding that there was no intentional misconduct by the witness is supported by the fact that it was Hurns's lawyer's questioning that elicited the reference to probation.[6] We defer to the trial court's assessment of the impact of the reference *vis a vis* the volume of trial testimony and affirm its decision. *See* ***Schultz***, 181 Wis. 2d at 657. Accordingly, we affirm the trial court's denial of the motion for mistrial.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[6] Additionally, we note that, as the State points out, Hurns himself testified that he had two prior juvenile adjudications and three prior adult convictions. Hurns did not argue on appeal that his decision to testify was forced by the witness's reference to his being on probation.