COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2773-CR **Cir. Ct. No. 2012CF5274**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVIS KEVIN LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Reserve Judge.[1] *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

[1] The Honorable Michael J. Skwierawski, Reserve Judge, presided over the trial and entered the judgment of conviction. The Honorable David L. Borowski presided over the sentencing hearing. Lewis filed a motion for postconviction relief seeking eighteen days of sentence credit on November 7, 2014, which the Honorable Daniel L. Konkol granted on November 11, 2014. The sentencing credit is reflected in an amended judgment of conviction filed on November 14, 2014. Lewis's postconviction motion is not at issue in this appeal.

¶1 CURLEY, P.J. Davis Kevin Lewis[2] appeals the judgment convicting him of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2013-14).[3] Lewis contends that: (1) there was insufficient evidence to convict him; (2) the trial court erroneously exercised its discretion in determining a defense witness could not testify; and (3) the trial court erroneously exercised its discretion when it permitted the jury to watch the victim's videotaped forensic interview a second time.

¶2 After reviewing the record, we are satisfied that there is sufficient evidence to convict Lewis of third-degree sexual assault, and we conclude the trial court properly exercised its discretion when it both prohibited a defense witness from testifying and when it granted the jury's request for a second viewing of the victim's videotaped interview. Consequently, we affirm.

BACKGROUND

¶3 Lewis, who was K.W.'s personal care worker, was charged with third-degree sexual assault and pled not guilty. Shortly before the jury trial began, the trial court learned that the defense had named Julie Bradley, Lewis's supervisor, as a witness. An offer of proof was made. Lewis's trial attorney stated that if this witness was called to testify, she would say she observed the interactions between Lewis and K.W. and they were all positive. The State advised the court that if this witness testified, the State was going to ask her if she

[2] In his appellate brief, Lewis contends that his first name is "David." The judgment of conviction lists "David K. Lewis" as an alias. As the criminal complaint and the judgment of conviction use the name "Davis," we will continue to do so here.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

checked Lewis's criminal record before hiring him, as Lewis was a convicted sex offender and was on the sex offender registry. The State believed that this fact, and the implications for the company, would affect the witness's credibility with the jury. The trial court determined that the State's proposed questions on cross-examination were proper, but ruled Bradley could not testify because the cross-examination would elicit very prejudicial evidence against Lewis.

¶4 According to the testimony at the jury trial, the police were called to the victim, K.W.'s, house on October 16, 2012. A police officer spoke to K.W. and took his complaint. Because K.W. was physically and cognitively disabled, the police decided to conduct a forensic interview with K.W. According to one of the testifying detectives, a "forensic interview is where we place the interviewee in a situation where they're telling us, they're recounting the incident in their own words." He noted that generally this method is used with young children, but it is also used with adults who have some cognitive delays or intellectual limitations. The forensic interview of K.W. was recorded and was shown to the jury during the course of the trial.

¶5 During the forensic interview, K.W. told the police officer that "Uncle David did something to me that I did not like." He identified "Uncle David" as Lewis, his personal care worker. When asked what it was that K.W. did not like, K.W. replied that Lewis "put his lips on my penis and started sucking on it." K.W. recounted that this incident took place in his bedroom where Lewis was getting him ready for school. K.W. recalled that the morning when this happened, Lewis was watching a pornographic movie while sitting in a chair. When K.W. got out of the shower and was standing nude in front of Lewis, Lewis put lotion on K.W.'s penis and then sucked K.W.'s penis. The incident ended

when K.W.'s sister opened the door but could not enter because the chair that Lewis was sitting in partially blocked the door.

¶6 K.W. also testified at the trial. His testimony was consistent with some of the facts he related to the police officer in the forensic interview, although at trial he referred to his penis as his "ding-a-ling." However, K.W.'s answers to several questions concerning what he said in the police interview and what else Lewis said to him during the incident were "I don't know" or "I don't remember." In several instances K.W. gave inconsistent answers to questions asked of him. However, K.W. correctly identified the penis on an exhibit that portrayed a naked male body as his "ding-a-ling" and ultimately testified that Lewis put K.W.'s "ding-a-ling" in his mouth.

¶7 K.W.'s sister testified that on the day in question, which was established as being October 9, 2012, she opened her brother's bedroom door and saw her brother standing naked in front of Lewis. The chair that Lewis was sitting on blocked the door from opening wider. She thought that K.W. was getting dressed and did not see the assault. Several days later, when she was with K.W., he told her that on the day when she burst into his room, Lewis put his mouth on K.W.'s penis. Her boyfriend went and got K.W.'s mother to come into the room and K.W. repeated what happened to him to his mother.

¶8 K.W.'s mother also testified. She explained that her son has sickle cell anemia, which caused his epilepsy, and that he also has borderline cognitive delays. She said she has known Lewis for many years. After hearing about the incident from K.W., she called the police the next day.

¶9 Lewis also testified. He denied sexually assaulting K.W. He gave several reasons why K.W. made up this story. First, he said that K.W. was mad at him because he (Lewis) hurt his back while at a golf tournament and could not assist K.W. when he went to homecoming. Also, Lewis had recently disciplined K.W. for talking back to his mother by telling him that he was grounded for the weekend. In addition, he had reprimanded K.W. for not telling him that he had failed to wipe himself after having a bowel movement on the night prior to the incident. When asked if he had told the police the possible reasons that K.W. would make up the story of the sexual assault, Lewis testified that he could not remember because he was in shock when speaking to the first detective at the police station.

¶10 The final witness called in rebuttal was the detective who spoke to Lewis at the police station. He confirmed that Lewis never offered the various reasons that Lewis told the jury why K.W. would make up this story. The detective also said Lewis did not appear to be in shock at the time of the interview.

¶11 After the jury began their deliberations, the jury sent out a note requesting to see K.W.'s videotaped forensic interview again. The State wanted it played and the defense objected. The trial court decided to permit it as K.W. was very soft-spoken, the microphone was some distance away from K.W. when he was speaking, making it hard to hear, and parts of the interview were garbled. The trial court felt it was a very important piece of evidence and the jurors may not have been able to hear it all the first time. The trial court repositioned the monitor to give the jurors better sight lines to the video. After further deliberation, the jury found Lewis guilty.

ANALYSIS

(1) Sufficient evidence was produced at trial to convict Lewis of third-degree sexual assault.

¶12 Lewis first argues that there was insufficient evidence to support the jury's verdict finding him guilty of the crime. When reviewing the sufficiency of the evidence, we look at whether "'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 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). "'If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, [we] may not overturn a verdict.'" ***Id.*** (quoting ***Poellinger***, 153 Wis. 2d at 507). It is the jury's duty, not this court's, to sift and winnow the evidence and determine the credibility of the witnesses. ***State v. Block***, 222 Wis. 2d 586, 596, 587 N.W.2d 914 (Ct. App. 1998).

¶13 During the taped forensic interview, K.W. told the police that "Uncle David" did something to him that he did not like. When asked what Lewis did, K.W. said that Lewis sucked on his penis. K.W. stated that this occurred when Lewis, who was his personal care worker, came into his bedroom and put on a pornographic movie. When K.W. came out of the shower, K.W. was standing in front of Lewis, who was sitting in a chair. Lewis put lotion on K.W. and afterwards put K.W.'s penis in his mouth. K.W. related that he was trying to get away from Lewis but that Lewis kept holding on to him. It was only when K.W.'s sister opened the bedroom door that Lewis stopped.

¶14 At the jury trial, which was held fifteen months after the incident, K.W.'s memory of the events was not good, but he was able to recall that Lewis was "feeling on me" and he went on to describe how Lewis's hands were on his "ding-a-ling," which he later identified as his penis. He told the jury that Lewis put lotion on him every day, but only that one time did he put lotion on his penis. To be sure, K.W. was sometimes confused during his testimony. At one point he could not remember telling the police that Lewis put his penis in his mouth. However, he later testified that Lewis did put K.W.'s penis in his mouth. K.W. never wavered from his testimony that Lewis put K.W.'s penis in his mouth shortly after K.W. got out of the shower.[4] Moreover, K.W.'s version of the events was corroborated by his sister, who, on the morning in question, pushed open K.W.'s bedroom door and saw a naked K.W. standing in front of Lewis, who was sitting in a chair. Also, K.W.'s mother retrieved a pornographic movie from the top of the TV in K.W.'s bedroom, which was consistent with K.W.'s statement that Lewis was watching a pornographic movie in his bedroom that morning. As noted earlier, it was up to the jury to decide who to believe. The jury believed K.W. There was sufficient evidence to convict Lewis of third-degree sexual assault.

[4] Lewis points out in his brief that at trial, K.W. testified both that Lewis had and had not put K.W.'s penis in his mouth. While K.W. did answer the question, "Did his mouth ever go anywhere onto your body? A[nswer] No," he later answered the question, "What do you think about a mouth going on a ding-a-ling? A[nswer] I don't like it." And he answered the next question, "You don't like it. Did anybody ever do that to you? A[nswer] My uncle," and when asked "which uncle did that,?" he responded, "Uncle David." For further clarification, he was asked, "And when that happened to you, was it the same day that he was feeling on your ding-a-ling? A[nswer] Yes, ma'am."

(2) The trial court properly exercised its discretion when excluding a defense witness from testifying.

¶15 Lewis argues that the trial court erroneously exercised its discretion when it refused to allow Julie Bradley to testify at trial. Lewis's trial attorney listed Bradley on her witness list. Bradley was Lewis's supervisor and, according to Lewis's attorney, Bradley was going to testify that she had, on several occasions, observed Lewis in his role as personal care worker for K.W. and that her evaluation of Lewis's job performance was positive. Prior to Bradley testifying, the State advised the trial court that the State planned on exploring with Bradley why her company would hire a convicted sex offender for a position working with vulnerable people. The State surmised that because of this fact, the witness's credibility would be called into question and she might shade her testimony in order to shield the company from liability.

¶16 The trial court said: "Okay. Well, this is an extremely difficult question. I think the State is, if she testifies, probably entitled to ask those questions, but I think allowing that to happen would result in a mistrial in this case." The trial court explained:

> I think this evidence is so – has limited probative value in this case – it's probably relevant but it[']s very limited probative value – it opens the door to extremely prejudicial potential cross-examination which is also relevant that I think the best course here is to simply exclude the witness because I don't think under [§] 904.03 her testimony should be allowed as a witness.

The trial court was referring to WIS. STAT. § 904.03, which reads:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of

> undue delay, waste of time, or needless presentation of cumulative evidence.

¶17 Lewis argues that Bradley's testimony was probative because she would have been able to tell the jury of her observations of Lewis working with K.W. and to explain to the jury what a personal care worker does and how it is not unusual for a personal care worker to see a client's naked body when providing assistance. Citing ***Chapin v. State***, 78 Wis. 2d 346, 254 N.W.2d 286 (1977), Lewis submits that the trial court could have limited the State's cross-examination of Bradley to remove the highly prejudicial answers concerning Lewis's criminal record and the fact he was hired despite being on the sex offender registry. In support of this solution Lewis wrote:

> [The trial court] should have simply forbidden [t]he State to inquire about Mr. Lewis' past, as the Court is permitted to do under ***Chapin***. The State would have an opportunity to impeach Mr. Lewis with prior criminal convictions upon his taking the stand in his own defense, which would then allow the jury to hear that Mr. Lewis had been previously convicted of a crime while omitting the highly prejudicial information regarding the type [of] conviction.

(Internal citation to ***Chapin*** omitted.)

¶18 We disagree for several reasons. First, "[t]rial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial; [the appellate court] will upset their decisions only where they have erroneously exercised that discretion." ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. Under WIS. STAT. § 904.03, when excluding relevant evidence when its probative value is substantially outweighed by danger of unfair prejudice, "[p]rejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the

outcome of the case by improper means.'" ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399 (citations and one set of quotations omitted).

¶19 Under the test for unfair prejudice, there can be no question that the jury would view Lewis's listing on the sex offender registry as a strong indicator of guilt in this case. In other words, the jury would have been influenced by improper means because ordinarily a jury would only be told the number of times an accused was convicted of a crime, not the actual crime. Further, to permit Bradley to testify and limit her cross-examination, as suggested by Lewis, would leave a false impression with the jury, which would not know that the company hired Lewis for this sensitive position despite his being on the sex offender registry. Thus, without allowing the State to cross-examine why the company hired Lewis, a convicted sex offender, would unduly enhance Bradley's credibility.

¶20 Secondly, Lewis misunderstands the State's argument. The State was not going to impeach Lewis with his criminal past had the State cross-examined Bradley, but rather, it was the State's intent to impeach Bradley, who was involved in hiring a man listed on the sex offender registry. As noted, the consequences would have been disastrous for Lewis and in all likelihood would have resulted in a mistrial. In refusing to allow the witness to testify, the trial court properly exercised its discretion.

(3) The trial court properly exercised its discretion when it granted the jury's request to view K.W.'s taped interview a second time.

¶21 Lewis submits that the trial court should not have allowed the jury to view K.W.'s videotaped interview a second time.[5] Lewis argued that it was prejudicial to hear the victim's incriminating testimony twice, but the accused's version only once. Also, Lewis claims that the jury may have felt sympathy for K.W., and seeing him in the videotape would remind them of his limitations. Again, we disagree.

¶22 In permitting the second showing of the videotape, the trial court said it was taking into consideration that K.W. was clearly "cognitively limited," that as a result of his disability his testimony at trial was very difficult at times to understand because of his "speech mannerisms and issues," and the videotape was at times very difficult to understand because "[t]he microphone wasn't placed close enough to the witness, … his statements sometimes were garbled and sometimes were away from the microphone." The trial court commented that "[t]he jurors were cranking their necks to hear."

¶23 Finally, the trial court summed up by saying, "I think this was so difficult to really hear and understand that another viewing of it or hearing of it is essential for them to at least understand exactly what it is."

¶24 As noted, a trial court has broad discretion in evidentiary decisions. *See* ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. How a trial court responds to a jury's inquiry is committed to that court's discretion.

[5] According to the judgment roll, the jury sent a question to the trial judge the first day the jury deliberated. The trial court did not take up the issue until the following morning when it heard argument on whether the jury request to view the tape a second time should be granted.

Kohlhoff v. State, 85 Wis. 2d 148, 159, 270 N.W.2d 63 (1978). In exercising its discretion to determine whether the jury should be permitted to view evidence during deliberations, a court should consider whether the evidence "will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the [evidence]," and whether the evidence could be misused. *See* ***State v. Jensen***, 147 Wis. 2d 240, 260, 432 N.W.2d 913 (1988). We affirm discretionary decisions if the court examined the relevant facts, applied the correct legal standard, and used a rational process to reach a reasonable result. ***State v. Edmunds***, 229 Wis. 2d 67, 74, 598 N.W.2d 290 (Ct. App. 1999).

¶25 K.W.'s cognitive limitations and his manner of speech, coupled with his physical issues, posed significant problems for the jurors. The trial court observed that the jurors were having difficulty understanding him. As a result, the trial court was concerned that the jurors might not have heard his version of the events. The trial court was mindful of the dangers of viewing a videotape a second time, but the trial court felt this was an extraordinary case. The final consideration that the trial court took into account was that he wanted the jury to have another opportunity to "really understand what is said."

¶26 Here, the trial court was schooled on the relevant law and aware of the risks of permitting a second viewing of the videotape. The trial court stated that the benefits of having the jurors actually understand K.W.'s testimony outweighed the risks. Given the trial court's concerns, the risk of prejudice to Lewis was low. In making its decision, the trial court employed a reasoned, rational process to conclude that the jury's request should be granted.

¶27 The trial court properly exercised its discretion. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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