COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 14, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-1175-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TODD N. JAHNKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kewaunee County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Todd Jahnke appeals a judgment convicting him of two counts of sexually assaulting his niece and sentencing him to consecutive terms totaling fifteen years. He also appeals an order denying his postconviction motions. Jahnke argues that the victim's testimony was incredible as a matter of law, that the court improperly exercised its discretion when it allowed testimony regarding other sexual assaults, allowed the State to

amend the information during the trial and based its sentencing decision on Jahnke's denial of guilt. We reject these arguments and affirm the judgment and order.

The victim reported a series of sexual assaults from the time she was fourteen until she was seventeen. The initial criminal complaint charged five counts of sexual assault and one count of exposing a child to harmful material. The State presented no evidence on several of these charges at the preliminary hearing and those charges were dismissed. The information charged two counts of sexual assault, the first and the last assaults alleged by the victim.

Jahnke argues that the victim's testimony was so inconsistent and contradictory that no reasonable jury could have found guilt beyond a reasonable doubt. This court must review the evidence in the light most favorable to the verdict and will overturn the jury's verdict only if the evidence is inherently or patently incredible, or so lacking in probative force that no jury could have found guilt beyond a reasonable doubt. ***State v. Alles***, 106 Wis.2d 368, 377, 316 N.W.2d 378, 382 (1982). Evidence is incredible as a matter of law when it is in conflict with the uniform course of nature or with fully established or conceded facts. ***State v. King***, 187 Wis.2d 548, 562, 523 N.W.2d 159, 163 (1994). Jahnke argues that the victim's testimony conflicted with fully established facts because it conflicted with her testimony at the preliminary hearing. The victim's testimony at the preliminary hearing does not constitute "fully established facts." Were we to accept this argument, no witness could correct a testimonial error made at a preliminary hearing. Any inconsistency between the testimony at a preliminary hearing and at trial would render the trial testimony incredible as a matter of law. We will not institute such an ill-conceived rule of law.

Jahnke next argues that no jury could have found guilt beyond a reasonable doubt because of inconsistencies in the victim's testimony. This argument is based on the proposition that the victim reported five, and only five, sexual assaults. The victim's descriptions of where, when and how the assaults occurred are not inconsistent if she was describing different events at trial than she described at the preliminary hearing. Construing the evidence most favorably to the verdict, most of the alleged inconsistencies reflect separate incidents of sexual assault rather than confusion or contradiction by the witness.

In addition, some confusion by the witness is understandable under the circumstances and does not render her testimony incredible as a matter of law. The sexual assaults began when she was fourteen years old. After numerous incidents of sexual assault, the victim could reasonably confuse the details of some of the assaults with other assaults. The victim's inability to specify the date of an assault does not render her testimony incredible. The inability to focus on the date of a traumatic event is a matter for the jury to consider in deciding the witness's credibility, but does not render her testimony incredible as a matter of law.

The court properly exercised its discretion when it allowed the victim to testify regarding uncharged sexual assaults. Jahnke contends that the State's failure to establish probable cause that these events occurred at the preliminary hearing precludes use of these incidents at trial. At the preliminary hearing, the court did not dismiss the charges because it doubted the plausibility of the victim's testimony. Rather, the court dismissed the charges because the State presented no evidence to support them. A finding that the State presented no evidence is not the equivalent of finding that the testimony of the victim was implausible.

Jahnke also argues that evidence of other sexual assaults should not have been received because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. We disagree. Evidence of other sexual assaults may be admitted to furnish a context to the crime and to explain why the victim may be confused or inconsistent regarding the details of the two crimes charged. *See* ***State v. CVC***, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989); ***State v. Shillcut***, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983). Jahnke was not unfairly prejudiced by introduction of this evidence. The trial court gave an appropriate cautionary instruction. *See* ***State v. Pharr***, 115 Wis.2d 334, 349, 340 N.W.2d 498, 504 (1983). The trial court properly exercised its discretion when it determined that the substantial probative value of this evidence exceeded the danger of unfair prejudice.

The trial court properly exercised its discretion when it allowed the State to amend the information to conform with the victim's trial testimony regarding the date of the final sexual assault. The information charged that this offense occurred in August 1994. At trial, when the victim was reminded that

her parents became aware of the assaults in July 1994 and she had no additional contact with Jahnke, she testified that the assault in fact occurred in August 1993.

A defendant is prejudiced by an amendment to the information only if it deprives him of his right to notice, speedy trial and the opportunity to defend against the charge. The trial court's decision to allow an amendment of the information is discretionary. ***State v. Frey***, 178 Wis.2d 729, 734, 505 N.W.2d 786, 788 (Ct. App. 1993). Jahnke argues that he was prejudiced by the amendment because he was unable to prepare a defense to the amended charge. He was prepared to prove that he could not have committed the assaults in August 1994.

The trial court properly concluded that Jahnke was not unfairly prejudiced by the amendment. Nothing in the record suggests that Jahnke had an alibi or other defense that could have been raised if he had earlier notice of the date in question. The substance of the charges was not altered. Jahnke's defense, a complete denial, was not altered. Jahnke complains that he was left with no "coherent theory of defense." There is no reason to believe that he had a defense to the charge other than to attack the victim's credibility. Denying Jahnke the opportunity to defend against an August 1994 incident that the victim agrees did not occur does not constitute unfair prejudice.

Finally, the trial court properly exercised its sentencing discretion. The court considered defense counsel's arguments regarding rehabilitation, and noted that rehabilitation programs do not work unless the individual admits his problem. The court also expressed doubt that rehabilitation programs in the prison would rehabilitate an inmate who denies all culpability. In making these statements, the trial court did not indicate that Jahnke would receive a greater sentence because he exercised his right to a trial. Rather, the court properly considered Jahnke's lack of remorse and the poor prospects for rehabilitation. *See* ***State v. Thompson***, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732 (Ct. App. 1992). The trial court reviewed positive as well as negative factors. It expressed serious concerns regarding the gravity of the offense and the need to protect the public. In the context of explaining why rehabilitation programs were unlikely to work, the court reasonably considered Jahnke's lack of remorse.

By the Court.—Judgment and order affirmed.

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