COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2308-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MORGAN LARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DECHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Morgan Larson appeals from a judgment convicting him on four counts of second-degree sexual assault of a child. He contends that the trial court made erroneous evidentiary rulings and that three of the counts against him charged the same offense in violation of his double-jeopardy protection. We reject these contentions and affirm.

Larson was formerly the full-time, salaried executive director of an all female drum and bugle corp. In 1995, a fifteen-year-old member of the corps, R.S., accused him of sexually assaulting her on several occasions. The State subsequently charged him with six counts of second-degree sexual assault, and the case went to trial.

Larson's defense was that R.S. fabricated the charges. The evidence of fabrication included her admission that she made a false report of sexual assault in 1992, when she was twelve. On direct examination, she admitted the false report and stated that she had lied about it to her principal, a teacher, her parents and to police officers. Counsel for Larson cross-examined her on the issue as follows:

> ATTORNEY: Remember in 1992 that you made up a story about being sexually assaulted?
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> WITNESS: Yes.
>
> …
>
> ATTORNEY: Well, do you remember you—you said that you lied to your parents?
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> WITNESS: Yes.
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> ATTORNEY: You lied to your teacher?
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> WITNESS: Yes.
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> ATTORNEY: You lied to your counselor?
>
> WITNESS: Yes.
>
> ATTORNEY: You lied to a number of police officers?
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> WITNESS: Yes.
>
> ATTORNEY: Now, at that time with that false allegation of sexual assault, you also told the police officer about some notes that had been written to you by the

person who supposedly wanted to sexually assault you, right?

WITNESS: Correct.

ATTORNEY: That was a complete lie, wasn't it?

WITNESS: Yes.

ATTORNEY: And you told the officer at that time that the notes had been destroyed, right?

WITNESS: I do not remember.

ATTORNEY: But then you found a note, didn't you?

WITNESS: Yes.

ATTORNEY: And you said you found that note in the vent of your locker, right?

WITNESS: Correct.

ATTORNEY: But that wasn't a note from the person who had sexually assaulted you, was it?

WITNESS: No, it wasn't.

ATTORNEY: It was a note that you made up?

WITNESS: Yes.

ATTORNEY: It was in your handwriting?

WITNESS: Yes, it was.

ATTORNEY: And when you were first confronted with that lie by the detective who interviewed you, you didn't admit that you had made up that note, did you?

WITNESS: I did not admit it.

ATTORNEY: And then only after some questioning by the detective did you finally admit that you had made up the note?

WITNESS: Correct.

ATTORNEY: And that was one of the times when you still lied to him about that there was a sexual assault

> and then you finally admitted to your parents that the whole thing was made up, right?
>
> WITNESS: Correct.
>
> ATTORNEY: And your parents were concerned about your lying, weren't they?
>
> WITNESS: Yes, they were.

However, over Larson's objection, the trial court allowed no further cross-examination on the details of the 1992 incident that included R.S.'s elaborate description of the assault and of a fictional attacker.

The State's case also included testimony from an eighteen-year-old member of the corps, who admitted to a consensual sexual relationship with Larson several months before the assaults against R.S. began. A thirty-five-year-old corps instructor also testified that Larson had attempted to touch her breasts on occasion and, at other times, had propositioned her and made sexual comments about corps members. In each instance, the trial court allowed the other acts evidence over Larson's objection.

The jury found Larson guilty on four counts, and acquitted him on one, with the trial court dismissing the remaining count. Of the four findings of guilty, three involved acts taking place on the same date, at the same place. They involved several minutes of hand to breast contact, immediately followed by simultaneous hand to vagina and hand to penis contact.

On appeal, Larson contends that he was denied his constitutional right to present a defense and to confront R.S. when the trial court refused to allow further cross-examination on the 1992 incident, that the court erred by admitting the other acts evidence described above, and that the three sexual assault charges based on the one brief encounter were multiplicitous, in violation of the protection

against double-jeopardy. Alternatively, he requests a new trial in the interest of justice based on the trial court's alleged evidentiary errors.

The trial court properly limited cross-examination of R.S. regarding her prior false accusation. Without dispute, evidence of that fabrication was admissible, under § 972.11(2)(b), STATS., as evidence of a prior untruthful allegation of sexual assault. Also without dispute, Larson was limited to cross-examination regarding the fabrication, and could not introduce extrinsic evidence concerning it. ***State v. Rognrud***, 156 Wis.2d 783, 787, 457 N.W.2d 573, 575 (Ct. App. 1990). That being true, Larson contends that the trial court violated his constitutional right to confront witnesses and to present his defense by limiting the cross-examination on the subject.

However, the trial court may place reasonable limits on inquiries into a prosecution witness's credibility, based on such concerns as harassment, prejudice, confusion, repetitiveness or marginal relevance. ***State v. Olson***, 179 Wis.2d 715, 724, 508 N.W.2d 616, 620 (Ct. App. 1993). "This is particularly true where the attack on credibility is based on prior alleged false allegations as opposed to a more particular attack on credibility aimed toward revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." ***Id***. at 725, 508 N.W.2d at 620. Here, the details of the fabrication were marginally relevant. Larson fully established his point that R.S. previously lied about a sexual assault and then went to great lengths to defend her fabrication. Additionally, Larson was able to present extensive testimony from other witnesses regarding R.S.'s lack of credibility, both at specific times and in general. In these circumstances, the trial court reasonably limited cross-examination on the 1992 incident, without infringing on Larson's right to cross-examination or to present his defense.

The court properly allowed other acts evidence concerning Larson's conduct with adult members of the corps. Relevant evidence of other acts is not admissible to prove bad character or acts in conformity with a bad character, but is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident. Section 904.04(2), STATS. Before allowing the evidence, the trial court must also determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Section 904.03, STATS. The decision to admit such evidence is discretionary and we reverse only for an erroneous exercise of that discretion. ***State v. Fishnick***, 127 Wis.2d 247, 257, 378 N.W.2d 272, 278 (1985). Here, the evidence was relevant and admissible because it helped prove that Larson exploited his opportunities as executive director of the corps, to satisfy his sexual desires. It also tended to show that he had a plan to do so. Additionally, although the evidence was not particularly strong on these points, the unfair prejudice to Larson did not substantially outweigh its probative value. One witness testified to a consensual sexual relationship between adults. The other testified to inappropriate comments and acts, that she made clear did not particularly disturb her. Larson cannot reasonably contend that the testimony of either witness unfairly influenced the jury to convict him.

Larson was properly convicted on all four counts. He contends that three of the counts charged a single offense because they involved the same contact, that is touching, and occurred within five minutes. As he notes, a defendant should not be convicted for offenses that are substantially alike when they are part of the same general transaction or episode. ***State v. Eisch***, 96 Wis.2d 25, 34, 291 N.W.2d 800, 805 (1980). However, the touchings of two separate body parts belonging to R.S. and the forced touchings of Larson's body part are

sufficiently distinct in nature not to deem them merged into one offense, notwithstanding the fact that two occurred simultaneously, immediately after the first contact.

Finally, Larson requests a new trial in the interest of justice due to the evidentiary rulings discussed in this decision. Because we conclude that those rulings were not erroneous, justice does not require a new trial.

By the Court.—Judgment affirmed.

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