COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3171-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAYFIELD PENNINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER and JEFFREY A. WAGNER, Judges. *Reversed and cause remanded.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Mayfield Pennington appeals from the judgment of conviction entered following a jury trial for one count of facilitating sexual

intercourse with a child, contrary to WIS. STAT. § 948.02(3).[1] Pennington also appeals from the trial court's order denying his postconviction motion. Pennington argues that the trial court erred in permitting the prosecutor's cross-examination of him in which she implied that he was under a duty to inform the State of a phone call he received from his son, L.P., prior to trial, in which L.P. recanted the story about the sexual encounter. Pennington contends that the prosecutor's cross-examination, as well as statements the prosecutor made during closing argument, claiming that Pennington "ambushed" the State and L.P., constitute reversible error because they: violated his right to counsel, his right to remain silent and his right to due process; were irrelevant and prejudicial; and amounted to prosecutorial misconduct. Pennington also argues that trial counsel was ineffective because counsel failed to adequately object to the prosecutor's cross-examination. Because we conclude the trial court erred in permitting the prosecutor's cross-examination concerning Pennington's actions following L.P.'s recantation, and because we cannot conclude that the error was harmless, we reverse.

I. BACKGROUND.

¶2 Pennington was charged with one count of facilitating sexual intercourse with a child. The facts leading to the charge began when L.P., Pennington's thirteen-year-old son, visited Pennington for the weekend. Pennington and L.P.'s mother were separated. L.P. lived with his mother, but he visited Pennington periodically. Shortly after a weekend visit with his father in May of 1998, one of L.P.'s teachers overheard him tell a classmate that he had lost

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

his virginity. The teacher contacted L.P.'s mother and told her of L.P.'s statements. L.P.'s mother confronted him and L.P. told her that he lost his virginity during the May visit at Pennington's apartment. L.P. asserted that Pennington brought a woman to the apartment for the express purpose of having sexual intercourse with L.P. and he had, in fact, engaged in sexual activities with her. Following the conversation, L.P.'s mother contacted the police.

¶3 L.P. originally told the police that, prior to the May visit, he complained to his father that he felt left out at school when his classmates were talking about sex. L.P. related that, in response, Pennington told him that he and his classmates were too young for sex, but that he should make up a story about his sexual exploits because his classmates would never know he was not telling the truth. However, despite this advice, L.P. asserted that during his May visit, Pennington arranged for him to have sex with a woman. According to L.P., Pennington let the woman into his apartment, gave L.P. a condom and directed him to the bedroom. L.P. claimed that he and the woman engaged in various forms of sexual intercourse for fifteen to twenty minutes, until he grew tired, at which point the woman left. Based on L.P.'s allegations, Pennington was arrested and charged with facilitating sexual intercourse with a child.

¶4 It is undisputed that, shortly before trial, L.P. called Pennington and recanted his allegations. L.P. told his father that he made up the story because he was angry with Pennington for refusing to buy him a new pair of shoes. L.P. repeated his recantation to Pennington's attorney. However, the State did not become aware of L.P.'s recantation until trial.

¶5 L.P. testified at trial. On direct-examination, he testified consistent with his first version of the events leading up to, and including, the sexual

encounter with the woman at Pennington's apartment. On cross-examination, he then admitted calling Pennington one week before the trial, apologizing for his behavior and repudiating his story. However, at trial, L.P. claimed that he was now telling the truth, that the encounter with the woman really had occurred and that his disavowal had been a lie. When asked why he had recanted, L.P. stated that he did not want to anger Pennington and he wanted to be "on his side."

¶6 Pennington then testified on his own behalf. On direct-examination, he related the conversation he had had with L.P. regarding what the kids at school were saying about sex. Pennington testified that he told L.P. that the other kids were lying and that he should just make up a story of his own. He denied the allegations that he arranged a sexual encounter for L.P. during L.P.'s May visit. Pennington also testified about L.P.'s phone call in which L.P. admitted to lying about the sexual encounter. On cross-examination, the following dialogue concerning L.P.'s recantation occurred:

> [PROSECUTOR]: So you really were taken completely aback when you learned that [L.P.] was mad about you not getting him the Jordan shoes?
>
> [PENNINGTON]: Yes.
>
> [PROSECUTOR]: And the first that you heard about that was this last Sunday, November 8th. Is that right?
>
> [PENNINGTON]: That was the first.
>
> [PROSECUTOR]: Now, Mr. Pennington, it was your decision not to tell the State – not to tell me or not to tell Detective Stawicki about that phone call. Wasn't it?
>
> [PENNINGTON'S COUNSEL]: I'm going to object because that was not his decision. That was his lawyer's decision, your Honor.
>
> [THE COURT]: We'll let him answer the question, okay. You can answer the question.
>
> …

[PENNINGTON]: I didn't think about it.

[PROSECUTOR]: You didn't think about it.

[PENNINGTON]: I didn't think about it.

[PROSECUTOR]: You were certainly aware of what your son was saying to you in that phone call. Correct?

[PENNINGTON]: Yes.

[PROSECUTOR]: And you're maintaining that what he said to you in that phone call was that he was sorry?

[PENNINGTON]: That he was sorry.

[PROSECUTOR]: And that he just made this up. Correct?

[PENNINGTON]: That he made this up.

[PROSECUTOR]: And you did not think that that was an important thing that the State should know about?

[PENNINGTON]: Right, he called – okay. He called Saturday and my lawyer already made an appointment, and I told him.

[PROSECUTOR]: And you did not think that that would be important for the State to know. Is that what you're saying?

[PENNINGTON]: I told my lawyer. This is the first time I've ever been in the system. I've never been in jail before. I've never done nothing. I don't know the situation.

[PROSECUTOR]: And you would agree that it was a good idea to spring this for the first time in court. Is that right?

[PENNINGTON'S COUNSEL]: Again, I'm going to object, your Honor.

[THE COURT]: Overruled.

…

[PENNINGTON]: Yeah. See, I – what you're saying is that – that it shocked me when [L.P.] had told me that he was mad at me about the Jordans, and I told my lawyer, and that's all I thought about. I didn't think about going, telling the State or nothing. I told my lawyer.

…

[PROSECUTOR]: And wouldn't you think if your son was suddenly saying that, gosh, this is a big lie that I made up, that that might be something important for the State to know?

[PENNINGTON]: Yes. What I'm saying is –

> [PENNINGTON'S COUNSEL]: I'm going to object.
>
> [PENNINGTON]: Me telling my lawyer, isn't that the same thing[?]
>
> …

Then, in her closing argument, the prosecutor asserted: "Think how difficult it must have been for [L.P.] to be ambushed on the witness stand by this information that his father had about this story about the Air Jordans and how it felt to be him to have to say, yeah, I did say those things."

¶7 Following the trial, the jury found Pennington guilty of the charged offense. Pennington filed a motion for postconviction relief, which was denied without a hearing. Pennington appeals.

II. ANALYSIS.

¶8 On appeal, Pennington argues that the trial court erred in permitting the prosecutor's line of questioning implying that he was under a duty to notify the State of L.P.'s recantation. He asserts that the prosecutor's cross-examination of him, and her closing argument, resulted in reversible error. Pennington maintains that this case turned on his credibility and that of L.P. Pennington argues that the prosecutor's cross-examination improperly besmirched his credibility by suggesting that he had violated some obligation he had to notify the State of L.P's recantation and also that he had "ambushed" L.P. Pennington asserts that because he was not obligated to inform the State of L.P.'s pretrial recantation, and because

his credibility was essential to his defense, the prosecutor's cross-examination and closing argument constituted reversible error. We agree.[2]

¶9 "The scope of cross-examination allowed for impeachment purposes is within the trial court's discretion." ***State v. Echols***, 175 Wis. 2d 653, 677, 499 N.W.2d 631 (1993). Moreover, the control of the content of courtroom argument is also within the discretion of the trial court. ***State v. Stawicki***, 93 Wis. 2d 63, 77, 286 N.W.2d 612 (Ct. App. 1979). We will only reverse the trial court's decision upon a showing of a prejudicial erroneous exercise of discretion. *See* ***State v. Lindh***, 161 Wis. 2d 324, 348-49, 468 N.W.2d 168 (1991). The trial court should set forth the basis of its exercise of discretion as evidence for the appellate court that discretion was, in fact, exercised. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). However, where, as in this case, "the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***Id.*** at 343.

¶10 Our review of the record establishes that the prosecutor's questions and comments were not only improper, but also were of such force that they were likely to have affected the jury's verdict. Therefore, the trial court erred in allowing them to stand over counsel's objection. *See* ***Stawicki***, 93 Wis. 2d at 77 (reversal of the trial court's discretionary decision will only be granted where there

[2] Specifically, Pennington argues that the cross-examination violated his right to counsel, his right to remain silent, and his right to due process. Pennington also asserts that the prosecutor had no good faith basis for her allegations, and that the questions were irrelevant and prejudicial. Because we conclude that the questions were improperly prejudicial, we decline to address Pennington's other arguments. ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) ("[W]e should decide cases on the narrowest possible grounds and should not reach the constitutional issues if we can dispose of the appeal on other grounds.").

was an erroneous exercise of discretion that was likely to have affected the jury's verdict); *see also* WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.…").

¶11 Pennington correctly asserts that the clear implication of the prosecutor's cross-examination, and her closing argument, was that he violated some obligation he had to notify the State of L.P.'s recantation because he "personally sought to hide his son's admission from the [S]tate." In its brief to this court, the State acknowledges that Pennington was not under a legal obligation to inform the prosecutor of the recantation; however, the State asserts: "[A] reasonable person in his position might have attempted to do so. After all, the recantation, if believed, exonerated him." Further, the State remarks that "the prosecutor never stated that Pennington had a legal obligation to inform the State of the victim's recantation." Although it is true that the prosecutor never explicitly claimed that Pennington was obligated to notify the State of L.P.'s recantation, we are satisfied that such a suggestion is clearly implicit in the prosecutor's line of questioning, and that the jury could not help but infer that Pennington had engaged in improper tactics.

¶12 Further, we conclude, contrary to the State's assertions, that it is clear from the prosecutor's questions and comments that she was not merely seeking to establish the State's ignorance of L.P.'s pretrial recantation. Prosecutors are allowed considerable latitude in argument, but they are limited by facts introduced in evidence, and the fair and reasonable conclusions to be drawn from those facts. ***State v. Nemoir***, 62 Wis. 2d 206, 213 & n.9, 214 N.W.2d 297 (1974). While the prosecutor may have had the right to explore the nature of L.P.'s recantation, her extensive cross-examination went well beyond determining

the factual underpinnings surrounding the recantation. Here, the prosecutor's questions, and the unavoidable inference drawn from them, attacked Pennington by suggesting he had done something improper when he had not. This was error.[3]

¶13 Finally, we cannot conclude that the prosecutor's improper questioning and comments amounted to harmless error. An error is harmless if there is no reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Here, the State bears the burden of demonstrating that the error did not contribute to the conviction. ***Id.*** We are satisfied that the State has not satisfied its burden in this case for several reasons.

¶14 Contrary to the State's assertion, the prosecutor's questions regarding L.P.'s recantation were not "brief and isolated." Nor do we agree that "[t]he State abandoned further questioning on those issues once Pennington had explained that he had not told the State about the recantation, because he had told his lawyer and thought his lawyer would handle the matter." The record demonstrates that the prosecutor persisted in her improper cross-examination by asking no less than seven questions intimating that Pennington intended to surprise the State at trial with L.P.'s recantation. At least six of her questions were asked following Pennington's counsel's objection in which he asserted it was his decision, not Pennington's, not to notify the State. The final two questions were asked after Pennington himself explained that he had informed his lawyer and

[3] We note that the State also argues that the prosecutor's questioning was proper because Pennington "opened the door" on direct examination. While Pennington may have opened the door, allowing the prosecutor to explore the nature and circumstances of L.P.'s alleged recantation, the prosecutor was not justified in impeaching Pennington's credibility by improperly implying that Pennington sought to "spring this one" on the State.

thought that was all he needed to do. Moreover, the prosecutor returned to the theme in closing argument that Pennington had acted improperly by claiming L.P. was ambushed on the stand by the recantation testimony. Thus, we are satisfied that the prosecutor's questions were not "brief and isolated," and we reject the State's argument that the prosecutor abandoned this line of questioning.

¶15 Because this case turned on the credibility of the witnesses, L.P.'s and Pennington's in particular, we cannot conclude that the improper cross-examination and closing argument did not contribute to the conviction. Rather, we agree with Pennington that it is reasonable to conclude that "the improper cross-examination seriously tainted the jury's perception of [his] credibility, leaving it to infer that [he] somehow did something unfair and improper and that his supposed concealment of his son's admission to lying evidenced bad character or consciousness of guilt." Pennington also correctly argues that "[t]he trial court's failure to sustain counsel's objections to the improper examination further enhanced the resulting prejudice." *See* ***Williams v. United States***, 168 U.S. 382, 397-98 (1897) (counsel's objections to prosecutor's improper remarks within hearing of the jury should have been sustained and, therefore, tended to prejudice the defendant's right to a fair and impartial trial).

¶16 Therefore, we conclude that the prosecutor's cross-examination and closing argument constituted error, and that the State has not demonstrated that such error was harmless. Consequently, we reverse.[4]

[4] We need not address Pennington's remaining arguments. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

By the Court.—Judgment and order reversed and cause remanded.

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