COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP107 **Cir. Ct. No. 2010CF1065**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABRIEL DIAZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Gabriel Diaz appeals an order denying his postconviction motion for a new trial on a charge that he sexually assaulted his girlfriend's son, J.A.N. He argues: (1) the circuit court improperly allowed the victim to testify that Diaz similarly assaulted him ten to fifty times, even though

the victim could only remember details regarding two of the incidents; (2) Diaz's right to be present during voir dire was violated because no interpreter was present during part of the voir dire; and (3) he is entitled to a new trial because DNA evidence used against him was destroyed during testing by the State. We reject these arguments and affirm the order.

¶2 Assuming without so holding that the victim's testimony regarding ten to fifty prior sexual assaults should not have been admitted into evidence, the error is harmless because there is other overwhelming evidence of Diaz's guilt. An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. J.A.N. testified Diaz pulled down the back of J.A.N.'s pants and put his penis into J.A.N.'s anus. He testified "it felt wet inside [his] butt" after the assault. He said Diaz also pulled down the front of his pants and touched J.A.N.'s penis with his hand, and tried to kiss it.

¶3 J.A.N.'s brother testified he was upstairs while his mother and aunt were out buying food. When he went downstairs to use the bathroom, he saw Diaz using his hand to touch J.A.N.'s "private spot" on the outside of J.A.N.'s pants, and heard J.A.N. asking Diaz to stop.

¶4 J.A.N.'s mother testified J.A.N. reported the assault to her and was "crying," "shaking," and "scared." He told her when Diaz put his penis into J.A.N.'s anus "it felt like [Diaz] was peeing." J.A.N.'s mother then asked her sister to look at J.A.N.'s butt. J.A.N.'s aunt testified his butt looked red and irritated.

¶5 J.A.N. was then examined by a Sexual Assault Nurse Examiner. She saw a one-inch abrasion in J.A.N.'s rectal area, consistent with a penis being placed into that area. She also swabbed J.A.N.'s penis for evidence.

¶6 The swabs were sent to the state crime laboratory for DNA testing. The sample showed a mixture of DNA from two males. The forensic scientist testified it was ninety million times more likely that the sample consisted of J.A.N.'s and Diaz's DNA than the DNA of J.A.N. and a random person in the population. In light of this evidence, no rational jury would have acquitted Diaz, regardless of whether the victim testified that a large number of similar assaults had taken place in the past.

¶7 Diaz's argument that his rights were violated because there was no interpreter present during part of the voir dire fails for lack of factual support in the record. Part of the voir dire took place in chambers because of the sensitive nature of the questions being asked of potential jurors. Diaz contends neither of the two interpreters being used for the trial was present during that portion of the voir dire. However, the circuit court found an interpreter was present. Its finding of fact is not clearly erroneous. *See* ***State v. David J.K.***, 190 Wis. 2d 726, 738, 528 N.W.2d 434 (Ct. App. 1994). The circuit court's finding is supported by the transcript which shows Diaz, through an interpreter, said he wished to use a restroom near the end of the individual voir dire. Diaz fails to develop any argument challenging the circuit court's factual finding, and he fails to point to any prejudice that resulted from the alleged absence of the translators.

¶8 Finally, Diaz has not established any due process violation from the destruction of the DNA evidence. A defendant's due process rights are violated if the State (1) fails to preserve evidence that is apparently exculpatory or (2) acts in

bad faith by failing to preserve evidence that is potentially exculpatory. ***State v. Luedtke***, 2015 WI 42, ¶53, 362 Wis. 2d 1, 863 N.W.2d 592. The crime lab analyst used the entire sample when conducting the DNA tests because there was a very small amount of DNA to test. The DNA was not apparently exculpatory. To the contrary, it was inculpatory.

¶9 At most, the DNA evidence was potentially exculpatory. Diaz has not established bad faith from the analyst's destruction of the DNA during testing. Bad faith occurs only if the State's agents were aware of the potentially exculpatory value or usefulness of the evidence and acted with "official animus or made a conscious effort to suppress exculpatory evidence." ***Id.***, ¶46. Diaz makes no effort to show the State was aware of any potentially exculpatory value and has not alleged the crime lab analyst acted with animus or made a conscious effort to suppress exculpatory evidence. As the circuit court found, "The State took all steps possible to preserve the evidence for independent testing, but was unable to do so based on the nature of the evidence." Diaz does not allege, much less establish, that the crime lab unnecessarily used the entire DNA sample, that it did not perform the tests in accord with normal practice, or that it could have preserved some of the sample for defense testing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).