

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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Appeal No. 2004AP1536-CR

Cir. Ct. No. 2001CF5750

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONNIE L. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN,¹ Judge. *Affirmed.*

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

¹ The Honorable Jeffrey A. Conen presided over the jury trial. Various other trial judges presided over the preliminary hearing and pretrial proceedings.

¶1 CURLEY, J. Lonnie L. Jackson appeals the judgment convicting him of four counts of first-degree sexual assault, contrary to WIS. STAT. § 948.02(1) (2001-02).² Jackson contends that the trial court had no authority to hold a second preliminary hearing after learning that the first preliminary hearing was defective. He also argues that because the time limit set out in WIS. STAT. § 970.03(2) was violated when the second preliminary hearing was held, his convictions must be reversed as the trial court lost personal jurisdiction over him. Finally, Jackson claims that insufficient evidence was introduced at trial to support the jury's guilty verdicts. Because Jackson waived the § 970.03(2) time limit before his first preliminary hearing was held, he cannot challenge the timing of the second preliminary hearing; after a trial, case law prohibits challenges to an improper preliminary hearing unless it is shown that the preliminary hearing resulted in the trial being either unfair or error-ridden, and neither is alleged here; and overwhelming evidence of Jackson's guilt was presented at trial, we affirm.

I. BACKGROUND.

¶2 Jackson's convictions stem from multiple sexual assaults upon Brittany S., the then-nine-year-old daughter of his live-in girlfriend, Linda S. Brittany S. told the police that on various occasions, including October 25, 2001, Jackson touched her vagina, attempted to insert his penis into her vagina, and placed his mouth on her vagina. Brittany S. also said Jackson sometimes videotaped these assaults.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 On October 26, 2001, Linda S. found a videotape which, among other things, depicted a man fondling a prepubescent girl's vagina and showed a man's penis. Linda S. recognized the girl on the tape as her daughter, Brittany S.; she also recognized Jackson, from his hand and penis, as Brittany S.'s assailant. Linda S. immediately went to the police station. After viewing the tape, the police spoke with Brittany S., who confirmed that Jackson had made the tape the night before. Her sister, Desiree B., also claimed to have been sexually assaulted by Jackson.

¶4 Jackson was arrested and charged with two counts of sexual assault, one for assaulting Brittany S., and the other for assaulting Desiree B. According to trial testimony, after Jackson's arrest, Jackson made repeated phone calls to Linda S.'s home in which he convinced her to lie about the sexual assaults. As a result, Linda S. faxed both a letter she had written and a letter allegedly written by Brittany S. to the Bureau of Milwaukee Child Welfare, recanting the allegations. Linda S.'s letter stated that Jackson was innocent and that she had lied, while Brittany S.'s alleged letter stated that she loved Jackson and that Jackson had never assaulted her. However, both Linda S. and Brittany S. later renounced their letters. Linda S. admitted that she had lied and convinced Brittany S. to lie because she was in denial over Jackson's sexual assaults.

¶5 On January 22, 2002, a preliminary hearing was held. After making a determination that videotapes of statements made by Brittany S. and Desiree S. during interviews with a social worker were admissible, the trial court viewed the tapes "in camera." Jackson and the State then stipulated, for preliminary hearing purposes only, that the address where the assaults occurred was in Milwaukee County, and to Jackson's identity. Based upon the videotapes and the stipulation, the trial court found that there was probable cause to believe that Jackson had

committed a felony and bound him over for trial. Jackson was never permitted to view the videotapes.

¶6 The trial court scheduled Jackson's trial for May 27, 2002, but the date was postponed when Jackson requested that his attorney be removed. A new trial date was set for August 26, 2002. Subsequently, Jackson indicated that he intended to plead guilty, but at the plea hearing, Jackson requested that his second attorney be dismissed and indicated that he no longer wished to plead guilty. Jackson explained that he did not believe that the videotapes should have been admitted into evidence at the preliminary hearing and that both of his attorneys had failed to satisfactorily dispute his bindover. The trial judge expressed concern over the fact that Jackson did not view the videotapes at any time before or during the preliminary hearing. Consequently, the trial judge determined that the proper solution was to "redo the preliminary hearing and all sit and watch the tapes all together so that the Court can make another determination as to probable cause and Mr. Jackson can be present...." Prior to conducting such a hearing, the case was transferred to another court.

¶7 The new judge conducted a second preliminary hearing after rejecting Jackson's motions to dismiss, in which he had argued that there was no basis for the trial court to order another preliminary hearing. The trial court found that the earlier judge's failure to make a record of the evidence he relied on was a fatal problem because Jackson was unable to review the preliminary hearing. Therefore, the trial court ordered a new preliminary hearing because he believed that "the validity of [the] preliminary proceeding [could not] be upheld." Based upon the evidence, including the testimony of police officers and the videotaped interviews, the trial court found probable cause to believe a felony had been committed by Jackson and again bound him over for trial.

¶8 The State then filed an amended information in which it added three additional charges of first-degree sexual assault of Brittany S., contrary to WIS. STAT. § 948.02(1). At the jury trial, the State presented ten witnesses, including Brittany S. and Desiree B.; police officers; social workers; a sexual assault nurse examiner, who examined Brittany S.; and an expert witness, who explained that recanting of testimony occurs fairly often in intra-family sexual assaults.

¶9 Brittany S. testified that on the night of October 25, 2001, after she had walked in on Jackson watching “nasty movies,” Jackson videotaped her while she lay naked on her back with her legs spread apart. Brittany S. further testified that Jackson touched her on “[her] private part,” and that Jackson “tried to put his private in [her private]” “more than one time.” Brittany S. also testified that Jackson had told her after his arrest: “He told me to lie. He’ll give me anything in the world if I lie.” The social workers and police who interviewed Brittany S. stated her allegations against Jackson were consistent.

¶10 Desiree B. also testified. She told the jury that Jackson touched her inappropriately only once, when she was in her mother’s bed with her mother and Jackson. She could not explain why she claimed in the videotaped statement that it occurred elsewhere. She also contradicted some other facts, including the date this alleged assault occurred. In addition to the aforementioned testimony, the jury viewed other evidence that indicated Jackson had sexually assaulted Brittany S., including the videotape Jackson made of him fondling Brittany S., and Brittany S. and Desiree B.’s videotaped interviews at Child Protection Services outlining how Jackson assaulted them.

¶11 In his defense, Jackson presented only two witnesses. Jackson’s mother, Dorothy Jackson, testified that Jackson was very close to Brittany S. and

bought her things, and that Linda S. had once threatened that if Jackson ever left her, she would have her children accuse him of sexual assault. Jackson's sixteen-year-old sister, Cheyanne Rainer, testified that in the time she had lived with Jackson and Linda S. she had never seen Jackson touch Brittany S. in a sexual manner. The jury convicted Jackson of the four counts involving Brittany S. and acquitted him of the count involving Desiree B.

II. ANALYSIS.

A. Jackson waived his right to have a preliminary hearing set within ten days of his initial appearance and the trial court's decision to hold a second preliminary hearing did not result in an unfair or error-ridden trial.

¶12 Jackson first claims that the trial court had no authority to hold a second preliminary hearing, and instead, he submits the trial court should have dismissed the case, requiring the State to reissue the charges. Second, he contends that because the second preliminary hearing was held in violation of WIS. STAT. § 970.03(2)'s time limit, the State lost personal jurisdiction over him. As a result, he contends the appropriate remedy is to reverse his convictions.

¶13 We address Jackson's second argument first. WISCONSIN STAT. § 970.03(1) directs that a person charged with a felony is entitled to a preliminary hearing. The purpose of the hearing is to determine "if there is probable cause to believe a felony has been committed by the defendant." *Id.* If the court finds that such probable cause exists it must bind the defendant over for trial. Sec. 970.03(7). Section 970.03(2) requires a preliminary hearing to be held within ten days after the initial appearance "if the defendant is in custody and bail has been fixed in excess of \$500." Jackson was in custody with bail in excess of \$500.

¶14 As noted, the first preliminary hearing was held by the trial court after Jackson waived his right to have a preliminary hearing within the time limit set out in WIS. STAT. § 970.03(2). At the first preliminary hearing, the trial court failed to show Jackson the videotapes the court viewed “in camera” to reach its determination that the State had presented sufficient evidence to support a probable cause finding that Jackson committed a felony. As a result, a second preliminary hearing was ordered. Jackson contends that the holding of a second preliminary hearing resulted in a loss of personal jurisdiction over him because the second preliminary hearing was not held within the time limit set forth in § 970.03(2). We disagree.

¶15 Jackson has no standing to raise this issue because he waived his right to have a preliminary hearing within the ten-day limit before his first preliminary hearing was conducted. In fact, he waived his right to a timely preliminary hearing twice – on November 8, 2001, and on December 10, 2001. *See* WIS. STAT. § 970.03(2). Consequently, he cannot now complain that the second preliminary hearing violated the time limits set out in § 970.03(2). Once waived, a party cannot later attempt to resurrect a right. “Waiver” is defined in BLACK’S LAW DICTIONARY as:

The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something[,] the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it. The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity, or wrong. A doctrine resting upon an equitable principle, which courts of law will recognize.

BLACK'S LAW DICTIONARY 1417 (5th ed. 1979) (citation omitted). Jackson surrendered his right to a timely hearing; thus, he cannot complain that the second preliminary hearing was in violation of the statutory time limit.

¶16 Although we have found Jackson waived his rights to enforce the time limit of WIS. STAT. § 970.03(2), we address Jackson's claim that the trial court lost personal jurisdiction over him when the preliminary hearing was held outside the statutory time limit.³ Jackson cites *State v. Horton*, 151 Wis. 2d 250, 445 N.W.2d 46 (Ct. App. 1989), for support. *Horton*, however, implicitly supports our conclusion that the holding of a second preliminary hearing outside the time limit did not result in a loss of personal jurisdiction. *See id.* at 256. In *Horton*, the preliminary hearing was not held because this court stayed the proceedings to hear Horton's appeal of his juvenile waiver determination. *Id.* at 253. After the stay was lifted, Horton argued that the court lost jurisdiction over him because no preliminary hearing was held within the time limitation found in WIS. STAT. § 970.03(2). *Horton*, 151 Wis. 2d at 254. This court disagreed:

Because the right to a preliminary hearing is solely a statutory right, the statutory scheme or statutory declarations must govern.

... [I]f a defendant undertakes an interlocutory appeal while he is in custody, he subverts one of the primary purposes of sec. 970.03(2), Stats.: providing an *expeditious* means for the discharge of an accused if it does not appear probable that he has committed the crime or crimes for which he is being held. It therefore appears to us that the reason for the ten-day provision—expeditious determination—disappears when an interlocutory appeal is successfully commenced prior to the preliminary hearing.

³ Jackson properly raised the preliminary hearing issue before trial by filing a request for an interlocutory appeal, which was denied. Thus, he preserved the issue for appeal. *See State v. Wolverton*, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995).

We conclude that the appeal process is not contemplated by sec. 970.03(2). If proceedings are stayed by an appellate court before the preliminary hearing is held, sec. 970.03(2) sets no mandatory date upon which the preliminary hearing must be held.

Id. at 256 (emphasis in original; citation omitted).

¶17 Here, it is also significant that Jackson’s first preliminary hearing resulted in both a probable cause finding and a bindover, as contemplated by WIS. STAT. § 970.03(7). The reason an additional preliminary hearing was required was that no record of the preliminary hearing existed and Horton had not been permitted to view the videotape relied on by the judge in binding him over for trial. This is not a situation where Jackson remained incarcerated without a probable cause determination having been made. Moreover, Jackson had already waived his right to a preliminary hearing within ten days, so the reason behind the statute’s time limit—an expeditious determination—had already been abandoned by Jackson. *See Horton*, 151 Wis. 2d at 256.

¶18 Next, we address Jackson’s claim that the trial court had no authority to order a second preliminary hearing. We choose to assume, without deciding, that this contention is correct. Nevertheless, a reversal of the convictions is not warranted because the supreme court in *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991), found that in order to challenge the propriety of the preliminary hearing after a trial, the alleged preliminary hearing error must have resulted in a trial that was not fair and errorless. In *Webb*, the defendant claimed that the trial court improperly closed the preliminary hearing when it prohibited the defendant’s mother and niece from attending the hearing, but permitted the victim’s mother and a “rape-crisis unit” member to remain. *Id.* at 626. The supreme court refused to address the issue because Webb had not sought appellate

review before trial and proclaimed: “We do not decide the question of whether there was error at the preliminary hearing in this case, because we hold that a conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing.” *Id.* at 628.

¶19 Jackson has not complained that the preliminary hearing interfered with or created a trial that was unfair or error-ridden. *See id.* at 628. His only argument is that insufficient evidence was presented to convict him. Consequently, the holding of a second preliminary hearing, while possibly in error, did not affect his trial and, therefore, he is not entitled to the relief he seeks.

B. Sufficient credible evidence was introduced at trial to support the jury’s verdicts.

¶20 Jackson maintains that insufficient evidence was introduced at trial to support the jury’s verdicts. Jackson notes that the jury acquitted him on the one charge involving Desiree B. He argues that “if the evidence was insufficient to support a finding of guilt as to count (5), the evidence likewise was insufficient to support a finding is [sic] of guilt as to counts one (1) through four (4).” Jackson contends, citing *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990), that the evidence was so “inherently or patently incredible such as to conflict with the laws of nature or with the fully established or conce[ded] facts.” Additionally, he argues that the testimony of the child, Brittany S., was not worthy of belief because she “recanted her story on three different occasions” and changed her story on numerous key elements of the charges. As to the videotape which depicted an assault of a child, he submits that the “only testimony that the person in the videotape was [him] came from his estranged ex-girlfriend and mother of the children.” He also claims that his ex-girlfriend’s testimony should not have been believed because she “was shown to be a person who had an axe to

grind,” and had also “recanted her statements to the authorities.” Further, he alleges that his ex-girlfriend told his mother that should Jackson ever leave her, she would use the children to get even with him. Jackson also questions why, if he was truly guilty, his ex-girlfriend would have left Brittany S. alone with him when she went to the police station to report his conduct. Finally, Jackson submits that the jury verdicts should be rejected because the time frames were vague, making it difficult to mount a defense, and the videotape’s sound track contains a loud noise in the backyard of the depicted home, but his dog that normally barks does not bark. We are not persuaded.

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless 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. 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, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶21 It is for the jury, not the appellate court, to determine the credibility of witnesses and to weigh the evidence: “Where there are inconsistencies within a witness’s testimony or between witnesses’ testimonies, the jury determines the credibility of each witness and the weight of the evidence.” *State v. Sharp*, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993) (citation omitted).

¶22 At trial, Brittany S. testified that Jackson sexually assaulted her on October 25, 2001, and on previous occasions. Indeed, Jackson videotaped one of

the assaults. As noted, she also testified that, after his arrest, Jackson pleaded with her to deny the assaults, and telephone records supported the testimony of Brittany S. and her mother that Jackson frequently called the family and urged them to recant. Several police officers and a social worker testified to taking statements from Brittany S. in which she described the assaults. These statements were all consistent with one another. Additionally, a sexual assault expert testified that it is fairly common for witnesses and victims to recant their statements about the assaults, especially when the offender is a family member.

¶23 Contrary to Jackson's claim that the only identification of Jackson as the assaulter was Linda S., Brittany S. also identified Jackson as the assaulter and confirmed that she was the child depicted in the video. Jackson's assertion that it might have been some other man sexually assaulting another child strains credulity. The video, discovered in the family home, exactly replicated the victim's allegations of what occurred, and the victim confirmed that she was the girl in the video. While Brittany S.'s mother may have been vengeful and could have possibly fabricated her daughters' sexual assaults, given this powerful evidence, the jury was free to disregard this defense.

¶24 With regard to the assault charge for which Jackson was acquitted, the facts of that charge were quite different from those related to Brittany S. Desiree B. contradicted her earlier statements and appeared confused about where and when the assault took place. The other discrepancies Jackson noted are minor. Our review of the record reveals more than ample evidence to convict Jackson of the charge. For the reasons stated, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

