COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2602-CR **Cir. Ct. No. 2003CF509**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK GULLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 CURLEY, J. Frederick Gulley appeals from a judgment entered after a jury convicted him of two counts of sexual assault of a child, contrary to

WIS. STAT. § 948.025(1) (2001-02).[1] He also appeals from an order denying his postconviction motion. Gulley argues that the trial court should have severed the two counts to assure a fair trial; the trial court should have granted a mistrial sua sponte when a witness testified about a victim's prior sexual/medical history; it was error for the trial court to allow hearsay evidence; the trial court erred when it summarized and read back testimony to the jury; the defendant's prior criminal record was erroneously allowed into the record; and the interest of justice requires a new trial. Because we conclude that the trial court properly exercised its discretion in refusing to sever the charges; the witness's testimony about the sexual/medical history of a victim was not grounds for mistrial because any prejudice was adequately addressed by a curative instruction to which the defense agreed; the alleged hearsay evidence was not hearsay; it was within the discretion of the trial court to both summarize and read back testimony to the jury; evidence of the defendant's prior criminal record was not wrongfully admitted because the parties had stipulated to it; and a new trial is not needed in the interest of justice, we affirm.

I. BACKGROUND.

¶2 Gulley's convictions stem from the sexual assaults of Jazmine B., his thirteen-year-old daughter, and Unique W., the fifteen-year-old daughter of his former girlfriend, Reva W. On January 24, 2003, Joyce B., Gulley's former girlfriend and mother of Jazmine, found a letter in which Jazmine had written: "I got a secret even my mama don't know about." Joyce confronted her daughter

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

about what she meant by a secret, and Jazmine told her that her father had been sexually assaulting her. Jazmine then revealed to her mother that her friend, Unique, had earlier confided to her that Gulley had assaulted her as well. As a result, Joyce called Reva, and told her that her daughter may also have been assaulted. Reva asked Unique whether it was true that Gulley had sexually assaulted her and Unique admitted that it was.

¶3 The same day the police were contacted. Jazmine told the police that on several occasions, starting about one year before the day her mother found the letter, her father had touched her on her breasts and her vagina, both over and under her clothes. Unique told police that starting when she was approximately eleven years old, Gulley began touching her on her private areas, and later, on multiple occasions, forced her to have sexual intercourse with him. Based on the investigation, Gulley was charged with two counts of sexual assault of a child: one for Jazmine, alleged to have occurred between January 1, 2002 and November 30, 2002; and one for Unique, alleged to have occurred between May 1, 1999 and December 31, 1999.[2]

¶4 On April 24, 2003, Gulley filed a motion to sever the two charges. The trial court denied the motion and the case proceeded to a jury trial on both counts.

¶5 At trial, Jazmine testified that she lives with her mother but frequently sees her father, and that about a year ago, when she was twelve years old, her father started acting inappropriately toward her. She testified that the first

[2] Initially, Gulley was also charged with one count of incest with respect to Jazmine. The incest charge was later dropped because the State believed it to be duplicative.

incident occurred at her father's apartment and involved him touching her breasts, and that all other incidents took place at her grandmother's, Gulley's mother's, house where Gulley had subsequently moved. She described one occasion on which Gulley touched her breasts and vagina under her clothes for about an hour, and another on which she woke up to find him fondling her. When asked how he touched her vagina, she said he "stuck his finger in and started rubbing it." She also testified that Gulley once attempted to have sexual intercourse with her, but did not succeed because she told him to stop and locked herself in a bathroom. She also said her father told her not to tell anyone. When asked how many times her father touched her sexually, Jazmine answered about twenty, about five or six of which involved touching her vagina.

¶6 Jazmine also testified that about two years ago she had a conversation with Unique in which Unique had told her that Gulley had been touching Unique's private parts and had had sex with her. Jazmine promised Unique not to tell anyone.

¶7 Joyce testified that she and Gulley have a daughter, Jazmine, together, and that even though she no longer has contact with Gulley, her daughter still does. She then testified that she had come across a letter that her daughter had written, containing the sentence "I got a secret even my mama don't know about," and that this prompted her to confront her daughter about what she meant by a secret of which her mother was unaware. She said Jazmine reluctantly told her that the secret referred to in the letter was "that her father had been messing with her." She continued by stating that Jazmine then revealed to her that Unique had told her that she had also been sexually assaulted by Gulley and that she then called Reva and informed her of what Jazmine had just told her regarding Gulley and Unique. Immediately thereafter, Joyce said:

> Jazmine had told me a secret that a year ago, about, Unique had got pregnant. It was the[ir] family secret, but she had brought this conversation forward the day when she told me her father messed with her. She said he could have been the father of her child that got aborted.

Following this statement, defense counsel objected on the grounds of hearsay, but the objection was overruled after the prosecutor explained that the testimony was not intended for the truth of the statement, but rather to explain to the jury how the case developed and ended up in court.

¶8 Shortly thereafter, defense counsel clarified to the judge in camera that he and the prosecutor both agreed that the rape shield law should have prevented the abortion and pregnancy reference from being introduced, and now that it had been mentioned, it was "powerfully prejudicial" and could be used by the jury to think that Gulley was the father of the aborted fetus. The defense then moved for either a mistrial or a curative instruction. The judge granted a curative instruction.

¶9 Unique testified that Gulley is her mother's former boyfriend who used to live with her, her mother and her sister Grace J., and that while Gulley was living with her family, when she was twelve years old, he began touching her inappropriately, which included touching her breasts and wrestling with her. She stated that when she was fourteen and was starting eighth grade her family and Gulley moved, and not long thereafter, Gulley forced her to have sexual intercourse with him. She said it appeared as though Gulley planned the sexual encounters because they occurred while her mother and sister were gone, that he promised to give her money, to buy her new shoes, and that he would not tell her mother if she brought boys over. She also testified that after each incident Gulley acted as though nothing had happened and went back to being her mother's

boyfriend and a father-figure for her and her sister. Gulley eventually moved out, and Unique testified to having sexual intercourse with Gulley at his new residence on three different occasions. She said she agreed to go to Gulley's residence and engage in sexual intercourse with him because of various things. He threatened to tell her mother if she did not. She stated that during the summer after eighth grade she ultimately ceased having intercourse with Gulley because he moved in with his mother.

¶10 Unique also testified that initially she told no one about the assaults, but that one night after Gulley had forced her to have intercourse with him, she told her sister and Jazmine. She also testified that Jazmine had not told her that Gulley had been sexually assaulting her and that she did not find out about Jazmine's assaults until the day Joyce called Reva.

¶11 Following Unique's testimony, the State moved to amend the alleged time frame from between May 1, 1999 and December 30, 1999, to between September of 2000 and June of 2001, to reflect her testimony that all incidents of sexual intercourse occurred while she was in eighth grade. The court granted the motion.

¶12 Reva testified that she had been in a relationship with Gulley and that he used to live with her and her two daughters. She said Gulley tried to buy Unique expensive gifts, and that Unique sometimes had money for unexplainable reasons. She said she did not know about the assaults until she received a phone call from Joyce who told her that Jazmine had told her that Gulley had been assaulting Unique. She said she asked Unique whether the information was true and that Unique admitted that it was.

¶13 At trial, Gulley denied that there was any truth to any of the allegations. He said he recalled only one shopping trip that could have caused Jazmine to feel hostility toward him because he refused to buy her a pair of shoes. When questioned by the State about a statement he had made to police about play wrestling with Unique where she would "grind" on him, Gulley admitted that he recalled one such occasion, and that because he was unsure whether the "grinding" was sexual in nature, he stopped. He also admitted that during the play wrestling he might have "possibly," unintentionally touched Unique's private areas. On cross-examination, Gulley was asked whether he has ever been convicted of a crime and Gulley answered that he had. When asked how many times, Gulley said twice. On re-direct, defense counsel attempted to ask Gulley of which two crimes he had been convicted, but the State objected and the court sustained the objection.

¶14 The trial court instructed the jury to consider the charges separately. The trial judge also offered to give a more detailed cautionary instruction to the jury, but Gulley and his counsel declined.

¶15 During deliberations, the jury sent the court a note asking whether Jazmine had told Unique that she had in fact been assaulted. The court responded by summarizing Jazmine's testimony back to the jury. Not long thereafter, the jury informed the court that it had reached a verdict on one of the counts, but that "the firm minority vote could reconsider based on the reading of the transcript of Jazmine's entire testimony." The court complied with the jury's request and had Jazmine's entire testimony read back.

¶16 The jury convicted Gulley of both counts and he received a sentence of twelve years and six months of initial confinement, followed by twelve years and six months of extended supervision, to be served concurrently. Gulley's new

counsel filed a postconviction motion for sentence modification. The motion was denied. In its postconviction decision, the trial court held that it did not err in refusing to sever the charges because initial joinder was proper and no prejudice existed since the evidence could have been admitted as other acts evidence had there been separate trials; a mistrial was unnecessary because the curative instruction, which the defense agreed to, cured any prejudice; the mothers' testimonies were not hearsay because they were not offered for the truth, and even if their admission was erroneous, the error was harmless because the evidence was corroborative; it did not erroneously exercise its discretion when Jazmine's testimony was both summarized and read to the jury; refusing to admit evidence of the actual reasons for the previous convictions was not error because it was a proper exercise of discretion; and a new trial is not warranted in the interest of justice. Gulley now appeals.

II. ANALYSIS.

A. The trial court did not err in refusing to sever the charges.

¶17 Gulley argues that the trial court erred when it failed to sever the charges and that he was prejudiced by a combined trial on both counts.

¶18 To determine whether a trial court's refusal to sever charges was proper an appellate court must engage in a two-step analysis. First, we must establish whether the charges were properly joined under WIS. STAT. § 971.12(1); and second, even if the initial joinder was proper, a court may still order separate trials if it appears that the defendant is prejudiced by the joinder under WIS. STAT. § 971.12(3). ***State v. Locke***, 177 Wis. 2d 590, 596-97, 502 N.W.2d 891 (Ct. App. 1993). Whether the two charges were properly joined is a question of law that is reviewed *de novo* and the statute that allows for joinder is to be construed broadly

in favor of initial joinder. ***Id.*** at 596. WISCONSIN STAT. § 971.12(1)[3] allows two or more crimes to be joined and charged under the same complaint if the crimes are "of the same or similar character …." Case law clarifies the meaning of "same or similar character" and provides that it requires that: (1) the crimes must be the same types of offenses; (2) the offenses must occur over a relatively short period of time; and (3) the evidence as to each must overlap. ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988).

¶19 If a court finds that initial joinder of the charges was proper, the court may nonetheless order separate trials if it appears that the defendant is prejudiced by a joint trial. WIS. STAT. § 971.12(3);[4] ***Locke***, 177 Wis. 2d at 597. The court must weigh the prejudice that would result from a joint trial against the

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[3] WISCONSIN STAT. § 971.12(1) provides:

> JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

[4] WISCONSIN STAT. § 971.12(3) provides:

> RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

public interest in conducting a trial on multiple counts. ***Locke***, 177 Wis. 2d at 597. The question of whether joinder is likely to result in prejudice to the defendant is left to the discretion of the trial court, and this court will find an erroneous exercise of discretion only if the defendant can establish that failure to sever the counts caused "substantial prejudice." ***Id.*** (citation omitted). In evaluating the likelihood of prejudice, "courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." ***Id.*** As a result, the joinder analysis leads to an analysis of other acts evidence under WIS. STAT. § 904.04(2).[5] *See* ***Locke***, 177 Wis. 2d at 597.

¶20 To determine whether, if tried separately, evidence from one trial would be admissible as other acts evidence in the other, the court must apply the following three-part test: (1) whether the other acts evidence is "offered for an acceptable purpose" under WIS. STAT. § 904.04(2) such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) whether the other acts evidence is relevant, under WIS. STAT. § 904.01, and probative; and (3) whether the probative value of the other acts evidence is "substantially outweighed by the danger of unfair prejudice" under

[5] WISCONSIN STAT. § 904.04(2) provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

WIS. STAT. § 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (citations omitted).

¶21 In sexual assault cases, the admissibility of other acts evidence is given greater latitude than in other cases. ***State v. Hunt***, 2003 WI 81, ¶86, 263 Wis. 2d 1, 666 N.W.2d 771. This greater latitude is especially applicable to sexual assault cases in which the victims are children. ***State v. Hammer***, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613 N.W.2d 629.

¶22 We begin by assessing whether the initial joinder was proper. First, we must determine whether the two offenses were the same type. *See* ***Hamm***, 146 Wis. 2d at 138. Gulley asserts that they were not, and argues that the counts involve two different types of behavior because one alleged sexual intercourse while the other alleged only a touching.[6] We disagree.

¶23 For two offenses to be the same type it is not sufficient for the offenses to involve merely the same criminal charge under a given statute. ***Hamm***, 146 Wis. 2d at 138. Even though the same criminal charge is not automatically enough, this court has, for instance, deemed multiple sexual assaults involving different acts to be the same type. *See* ***id.*** at 136-38 (two charges involved touching, one charge involved a struggle and one charge involved attempted intercourse).

[6] As the trial court pointed out, there are indeed situations in which the distinction between sexual intercourse and sexual contact might be of significance. *See, e.g.*, ***State v. Pulizzano***, 155 Wis. 2d 633, 638-39, 654, 456 N.W.2d 325 (1990) (holding that in sexual assault cases when a state evidentiary rule conflicts with the defendant's constitutional rights, the State must demonstrate a compelling interest to overcome that right and thus that the admission of evidence of the previous sexual conduct of a victim is not precluded by rape shield laws). The question of whether two cases were properly joined, however, is not such a situation.

¶24 The trial court concluded that the offenses were of the same type because "Mr. Gulley's crimes of sexual assault and sexual contact [were] perpetrated in similar circumstances against victims with whom defendant had a similar relationship…." Although one offense involved intercourse and the other involved touching, both gave rise to the same charge, and while the same charge alone is not enough, *see* ***id.*** at 138, we are convinced that the marked similarities listed by the trial court show that they are indeed the same type. In addition, Jazmine testified that Gulley did, in fact, albeit unsuccessfully, attempt to have sexual intercourse with her as well. We are therefore convinced that Gulley's differentiation between intercourse and touching does not make the two counts different in type.

¶25 Second, we must decide whether the period of time between the two incidents was relatively short. *See* ***id.*** at 138. Gulley argues that the time between the incidents was not sufficiently short and claims there was a three-year separation between the assaults of the two victims. We disagree.

¶26 In ***Hamm***, this court explained that the meaning of "relatively short period of time" as follows:

> is to be determined on a case-by-case approach; there is no per se rule on when the time period between similar offenses is so great that they may not be joined. Indeed, that is why we have referred to a '*relatively* short period of time' between the two offenses. The time period is relative to the similarity of the offenses, and the possible overlapping of evidence.

Id. at 140 (citation omitted; emphasis in original). In ***Hamm***, we concluded that two years was short enough. ***Id.*** at 136, 140.

¶27 The record contradicts Gulley's contention that there was a three-year separation between the incidents.[7] Trial testimony by Unique showed that the assaults against her took place between September 2000 and June 2001, while testimony by Jazmine showed that the assaults against her took place between January 2002 and November 2002, making the time between the assaults approximately six months and the time during which all of the assaults occurred just over two years. Thus, we are satisfied that six months is well within what ***Hamm*** described as a "relatively short period of time." ***Id.*** at 138.

¶28 Third, we must determine whether evidence as to each offense overlaps. *See* ***id.*** Gulley maintains that it does not and disagrees with the trial court, which found that:

> A key factor for the jury to consider in a child sexual assault case without corroborating physical evidence is how soon and in what circumstances the victim reports the crime. In this case, Unique … reported the assault to Jazmine …, who reported that assault, along with her own assault, to her mother. Jazmine['s] … mother, in turn, discussed the assault with Unique['s] … mother, who, in turn, confronted Unique ….

¶29 We disagree with Gulley and see nothing wrong with the trial court's statement. The trial court correctly explained how a jury ought to consider the way child sexual assaults are reported, and it accurately described how the conversation between Unique and Jazmine came to light when Joyce confronted

[7] According to the original complaint, the time separating the incidents could have been as long as three years. However, during the trial, the State amended the information to reflect Unique's testimony, which resulted in the time between the assaults of Unique and Jazmine being approximately six months. We agree with the trial court that in light of the new information, it is unnecessary for us to decide whether the trial court's initial decision not to sever the charges, while under the impression that the separation might have been as long as three years, was correct.

Jazmine, and how Joyce then contacted Reva to inform her of what she had found out about Unique. We believe this chain of events clearly shows that the two charges are inter-related and what led to charges being brought in the first place, and agree with the trial court that the evidence overlaps. We are thus satisfied that all three requirements of WIS. STAT. § 971.12(1) are met.

¶30 Having concluded that initial joinder was proper, we must now determine whether the trial court nonetheless should have severed the charges under WIS. STAT. § 971.12(3) due to prejudice, and whether the evidence could have been admitted as other acts evidence in separate trials under WIS. STAT. § 904.04(2). Gulley argues that even if the charges were properly joined, failure to sever the charges resulted in prejudice and that it was error not to sever them. We disagree.

¶31 First, we must ascertain whether the purpose for which the evidence is offered is acceptable. *See* WIS. STAT. § 904.04(2); ***Sullivan***, 216 Wis. 2d at 772. The trial court found that admitting the evidence would serve one or more proper purposes, including intent, plan or purpose, motive, and lack of mistake or accident. It found numerous similarities between Gulley's assaults of the two girls, including that he was a father-figure to both girls, he fondled both girls, he threatened both girls to keep them from reporting his actions, and both girls were approximately the same age. We agree with the trial court that all of these similarities lend support to the inference that Gulley's assaults of both Jazmine and Unique were intentional, and that Gulley had a consistent plan for carrying out the assaults. We believe the evidence related to the sexual assaults of Jazmine

strongly disproves Gulley's claim that the touching of Unique's private parts while play wrestling was unintentional.[8]

¶32 Second, we must address whether the evidence in question was relevant and probative. *See* WIS. STAT. § 904.01; ***Sullivan***, 216 Wis. 2d at 772. Concluding that the evidence was both relevant and probative, the trial court found:

> [t]he evidence of Mr. Gulley's assaults on one of the victims related quite directly to the issues raised by the assaults on the other: the allegations and Mr. Gulley's denial of them put in issue his opportunity to commit the crimes, his motive and means for doing so and, at least with regard to Unique … the absence of mistake.

We agree with the trial court's assessment that the evidence was both relevant and probative.

¶33 Third, we must examine whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03; ***Sullivan***, 216 Wis. 2d at 772-73. Gulley vehemently argues that the risk of prejudice associated with trying both counts in a single trial is great, claiming that the testimonies of Jazmine and Unique were not "strong or credible" on their own, but when presented together, "the jurors could not help but use the information from both girls for an improper purpose namely that of enhancing the girls' credibility and finding the defendant to be a 'bad person.'" Again, we disagree.

[8] In reference to the play wrestling with Unique, Gulley now argues he had an affirmative defense as to one charge of sexual contact, claiming if it did happen, it was accidental. As the State correctly points out, no such affirmative defense exists because Gulley never put forth such a defense at trial, but based his entire defense on the assertion that none of what was alleged ever happened.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90 (citation omitted).

¶34 The trial court instructed the jury to consider the two charges separately, and in its postconviction decision, it noted that it was "an instruction which we know the jury took to heart because it reported having difficulty with one of the charges after having reached an agreement on the other." The trial judge also offered to give the jury a more detailed cautionary instruction, but Gulley and his counsel declined. The trial court observed that in his postconviction motion, Gulley did not attempt to show that the evidence of the assaults should not be admissible as other acts evidence under ***Locke***, but argued only that the evidence was prejudicial. *See* 177 Wis. 2d at 597. On appeal, Gulley makes the same argument he did in his postconviction motion.

¶35 We do not think a joint trial influenced the outcome by improper means or that it appealed to the jury's sympathies, aroused its sense of horror, provoked its instinct to punish, or otherwise caused it to decide based on something improper. *See* ***Sullivan***, 216 Wis. 2d at 789-90. Rather, the jury instruction to consider the charges separately adequately addressed any issue of prejudice. Hence, we believe the trial court correctly concluded that the probative value of the evidence of one count was not outweighed by the danger of prejudice. *See* ***id.*** at 772-73.

¶36 Having established that all three factors of the ***Sullivan*** test are met, we conclude that had the two counts been tried separately, evidence from one trial

would have been admissible as other acts evidence in the other trial, and vice versa. *See* ***id.*** Particularly in light of the fact that sexual assault cases that involve children are given greater latitude in the admissibility of other acts evidence, *see* ***Hunt***, 263 Wis. 2d 1, ¶86; ***Hammer***, 236 Wis. 2d 686, ¶23, we are satisfied that the evidence of one trial could have been admitted in the other.

¶37 Accordingly, we are convinced that the charges were properly joined and that refusing to sever the charges was not error. *See* ***Locke***, 177 Wis. 2d at 596.

B. Pregnancy and abortion testimony were not grounds for a mistrial because any prejudice was adequately addressed by a curative instruction, which the defense agreed to.

¶38 Gulley submits that the trial court should have granted a mistrial sua sponte, after Joyce testified that Unique was pregnant and had an abortion, and that Gulley might have been the father,[9] arguing that the curative instruction was insufficient to appropriately remedy the prejudice the testimony caused him. We disagree.

¶39 The decision to grant or deny a mistrial is within the sound discretion of the trial court. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529

[9] The parties do not dispute the fact that the testimony about pregnancy and abortion was covered by the so-called rape shield law detailed in WIS. STAT. § 972.11(2)(b), and should not have been admitted. WIS. STAT. § 972.11(2)(b) provides:

> If the defendant is accused of a crime under s. … 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, …

N.W.2d 923 (Ct. App. 1995). Taking into account the entire proceeding, the trial court must determine whether the basis for the motion for a mistrial is sufficiently prejudicial to warrant a new trial. *See* ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). This court will reverse an order denying a mistrial only upon a clear showing of an erroneous exercise of discretion by the trial court. ***Bunch***, 191 Wis. 2d at 507. A mistrial may be granted only if there is a "manifest necessity" for termination of the trial. *See* ***Arizona v. Washington***, 434 U.S. 497, 505 (1978). "'[T]he law prefers less drastic alternatives, if available and practical.'" ***Adams***, 221 Wis. 2d at 17 (citation omitted). A curative instruction by a trial court gives rise to a presumption that any potential prejudice is erased, *see* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998), and when the trial court gives a curative instruction, "appellate courts presume that the jury followed that instruction …," ***State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475.

¶40 Following Joyce's testimony about Unique's pregnancy and abortion, Gulley's trial counsel informed the court in camera that he wished to "either move for a mistrial or ask the Court to direct the jurors to disregard that statement and that some sort of curative instruction be given." In making the motion, counsel even conceded that he "appreciate[ed] that it came in kind of quickly, perhaps in [sic] innocuous sense," and that he "d[id not] fault the prosecutor."

¶41 In deciding how to rule on the motion, the trial judge explained that he considered both the impact the evidence might have on the fairness of Gulley's trial and the context in which the evidence arose, and made the following finding:

> [Joyce] said it so quickly and she said it in such a background way that I don't think she'd conveyed to the jury anything more than the possibility that this might be true. When taken into context along with [the prosecutor's] assertion to the jury that [the prosecutor] at any time didn't believe it was true and that this was just a deviation from the effort to try to explain to the jury how this all came to light, I don't really believe that the jury would accept this as true.

The trial judge denied the motion for a mistrial and granted the motion for a curative instruction.[10] In its decision the trial court reiterated that it felt the curative instruction had been an effective remedy for any prejudice that Joyce's statement might have caused because it came directly after Joyce's testimony and was on point. For this reason, the trial court also found that it was "fair to presume that the jury followed [the] instruction and ignored the possibility that Mr. Gulley was responsible for impregnating Unique …."

¶42 We believe the curative instruction was preferable to the drastic remedy of a mistrial because it was both available and practical and that this case did not present a "manifest necessity" for terminating the trial. *See* ***Adams***, 221 Wis. 2d at 17. As a result, we agree with the trial court and believe Gulley has failed to explain why this single, admittedly innocuous, reference to an abortion and a pregnancy was so prejudicial that it was not adequately addressed by a

[10] The trial judge read to the jury the following curative instruction:

> You'll recall that Ms. [Joyce] had referred to Ms. [Unique] and to an incident that she's testified about but had no knowledge about. I want to instruct you that that witness had no knowledge about any previous incident involving Ms. [Unique] and had no basis of being able to know whether that incident happened or not. Therefore, you should disregard what Ms. [Joyce] said about Ms. [Unique] and about the pregnancy and about abortion. Those issues are not before you. They're not to influence your verdict in any way in this case.

curative instruction and would have required that the court sua sponte declare a mistrial. Particularly since the defense moved for and agreed to the instruction in the first place, we conclude that the trial court did not erroneously exercise its discretion in not granting a mistrial sua sponte. *See* ***Bunch***, 191 Wis. 2d at 511.

C. The trial court did not err in admitting the victims' mothers' testimonies because the evidence was not admitted for the truth and therefore was not hearsay.

¶43 Gulley contends that it was error for the trial court to permit Joyce and Reva to testify because he insists that their testimonies were inadmissible hearsay evidence under WIS. STAT. § 908.01(3).[11] We disagree.

¶44 The trial court has broad discretion in making evidentiary rulings. ***State v. Martindale***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. This court will review the rulings under an erroneous exercise of discretion standard and will "uphold a decision to admit or exclude evidence if the [trial] court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.*** Accordingly, it is within the discretion of the trial court to determine whether evidence that is introduced is hearsay under WIS. STAT. § 908.01(3). However, if a party fails to object to the admissibility of evidence the objection is considered waived. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537.

[11] WISCONSIN STAT. § 908.01(3) defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

¶45 Joyce gave the following testimony about Unique's pregnancy and abortion: "It was the[ir] family secret, but she had brought the conversation forward the day when she told me her father messed with her. She said he could have been the father of her child that got aborted." Immediately following this statement the following exchange took place.

> [DEFENSE COUNSEL]: Wait, Your Honor. There is-- I have a motion to make outside the presence of the jury.
>
> THE COURT: No. I think it's fair to say-- [Prosecutor], you're not asking the jury what's being said here as truth, right?
>
> [PROSECUTOR]: No. I will stipulate that this witness was not there for any of the sexual assaults. I'm just trying to show how this case came here and how we went from an allegation and got here.
>
> THE COURT: The objection's overruled …

¶46 As the above exchange explicates, Gulley's trial counsel never actually stated that he was objecting to the testimony on the grounds of hearsay. The trial court nevertheless appears to have perceived trial counsel's statement as a hearsay objection and as such overruled it. As the prosecutor's answer to the trial court's question makes plain, the State was not introducing the evidence for the truth of the statements, but rather to explain the circumstances under which the allegations arose. Because the statements were not introduced for their truth, we hold that it was not hearsay, and that it was not error for the trial court to admit it. *See* WIS. STAT. § 908.01(3).

¶47 The above objection is the only hearsay objection Gulley's defense counsel made against any of the testimonies by Joyce and Reva. Because Gulley did not object to the remainder of Joyce and Reva's testimonies, he waived any objection he might have had and cannot now argue that the evidence was hearsay

and should not have been admitted. *See* ***Edwards***, 251 Wis. 2d 651, ¶9. Consequently, the trial court did not err in admitting the evidence. *See* ***Martindale***, 246 Wis. 2d 67, ¶28.

D. The trial court did not err in both summarizing and reading back testimony to the jury because the decision to do so was within its discretion.

¶48 Gulley next asserts that the trial court erred when it first summarized the testimony of Jazmine and then had the same testimony read back to the jury, claiming that it prejudiced him because it reinforced the testimony of a particular witness over other testimony. We disagree.

¶49 When, during deliberations, a jury poses a question concerning testimony that has been presented, the jury has the right to have the testimony read to it, or alternatively, the judge may choose to summarize the testimony for the jury. ***Kohloff v. State***, 85 Wis. 2d 148, 159, 270 N.W.2d 63 (1978). The preferable practice is to have the testimony read back to a jury, but the decision whether to read back testimony or to summarize it is within the discretion of the trial court. ***Id.*** at 159-60. Error will be found only if the trial court erroneously exercised its discretion. *See* ***id.*** at 159. An erroneous exercise of discretion will be found only if the trial court did not examine the relevant facts, apply a proper standard of law, and use a demonstrative rational process to reach a conclusion that a reasonable judge could reach. ***Sullivan***, 216 Wis. 2d at 780-81.

¶50 This issue arose after the jury first asked the court whether Jazmine had indeed testified that she actually told Unique that she, too, had been assaulted; a question the court and counsel attempted to answer from their collective memories. Only after the jury informed the court that it had reached a verdict on one of the counts, but was split as to the other, and that "the firm minority vote

could reconsider based on the reading of the transcript of Jazmine's entire testimony," did the court allow the entire testimony of Jazmine to be read back.

¶51 We conclude that the trial court was entirely within its discretion when it first summarized the testimony and later decided that it was necessary to have the same testimony read back to the jury, and we decline to find error. *See* ***Kohloff***, 85 Wis. 2d at 159.

E. The trial court did not err in admitting testimony about Gulley's prior criminal record because the parties had stipulated to it.

¶52 Gulley also maintains that his prior criminal record was erroneously allowed into the record. We disagree.

¶53 It is within the trial court's discretion to decide whether to admit evidence of prior convictions for the purpose of impeachment under WIS. STAT. § 906.09. ***Gary M.B.***, 270 Wis. 2d 62, ¶19. "Under § 906.09, any prior conviction is relevant to a witness' character for truthfulness …" ***Id.***, ¶21.

¶54 When the prosecutor asked Gulley whether he had ever been convicted of a crime, Gulley responded in the affirmative, after which the prosecutor continued by asking how many times, to which Gulley responded twice. Defense counsel did not object to either of the two questions. When on re-direct defense counsel asked Gulley to elaborate on the two offenses, the State objected, and after a conversation at sidebar that was off the record, the court sustained the objection.

¶55 The trial court later made a record of the sidebar conversation in which the court stated that defense counsel told the court he wished to introduce this evidence because Gulley's previous convictions were not for sexual assault

offenses. The court expressed concern that going into detail about the previous offenses—misdemeanor disorderly conduct and misdemeanor battery—would distract the jury and lead to the presumption that Gulley committed the offenses for which he was now being tried. The court also noted that the State's objection had been that the parties had stipulated to the number of offenses and that this stipulation bars the defense from exploring the offenses further. Defense counsel did not disagree with the court's statement. The trial court subsequently noted in its decision that "[w]hile the record is not precisely clear on this point, the record supports my recollection that the parties stipulated that these convictions could be used for impeachment purposes."

¶56 We believe the trial court was within its discretion to admit the evidence that Gulley had two prior criminal convictions and to exclude further details about those convictions. *See* ***id.***, 270 Wis. 2d 62, ¶19. Moreover, because the parties stipulated to the admissibility of the number of convictions, Gulley cannot now complain that it was error to admit the evidence. We find no error.

F. The interest of justice does not warrant a new trial because the real controversy was adequately tried.

¶57 Gulley's final claim is that a new trial is warranted in the interest of justice because the real controversy was not tried. Under WIS. STAT. § 752.35, this court has the authority to order a new trial in the interest of justice. We reject, however, Gulley's claim because he has failed to convince us to exercise this discretionary power. Nothing in the record convinces us that justice was not served.

¶58 For the reasons stated, the trial court's judgment of conviction and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.