

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0917-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMELL V. GLENN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Demell V. Glenn appeals a judgment convicting him of intentionally causing bodily harm to a child. The issues are: (1) whether Glenn's Fifth Amendment rights were violated when a police detective testified at trial about her attempts to contact Glenn; and (2) whether testimony from the child

victim's grandmother, Karen Kvalo-Lutz, should have been excluded. We resolve these issues against Glenn and affirm.

BACKGROUND

¶2 When Kaela Kvalo, a two-year old, returned to her father's home after a weekend visit with her mother and her mother's boyfriend, Demell Glenn, she had a bruised and swollen face and bruises on other parts of her body. Glenn was charged with intentionally causing bodily harm to Kaela. At trial, Kaela's mother, Jessica Whelan, testified that she went to work on Friday, leaving Kaela and her twin sister Samantha with Glenn, his little brother Fredrick Holifield, and Glenn's niece and nephew. Holifield testified that Samantha threw a comb that day that struck Kaela under the eye. Whelan testified that when she got home from work, Kaela's cheek was red and Kaela told her that Samantha was naughty and hit her in the face with a comb. Whelan reported that later that day, as they were going to the store, Kaela fell on the porch steps. Whelan noticed a four-inch red mark on Kaela's leg after she fell.

¶3 A family friend, Stacie Gaustad, picked Kaela and Samantha up on Tuesday to return them to their father's home. Gaustad testified that during the drive Kaela allegedly remarked "Demell's mean" and "Demell hit me." On the other hand, Gaustad also testified that when she asked Kaela what happened to her face, Kaela responded that Samantha had hit her. When Gaustad asked what happened to her leg, Kaela said "Demell." Gaustad passed this information along to the girls' father.

¶4 The girls' father took Kaela to the emergency room after Gaustad brought them home. Dr. Kathryn Richmond testified that when she asked Kaela what happened she responded "Mommy and Demell spanked me." Dr. Richmond

further testified that the bruising was consistent with an adult handprint and that it was unlikely that the injury could have resulted from Samantha throwing a comb. The doctor also testified that she doubted that the bruising on the child's thigh would have been caused by a fall on some steps. After a two-day trial and testimony from fourteen witnesses, the jury convicted Glenn of intentionally causing bodily harm to Kaela.

ANALYSIS

Pre-Arrest Silence

¶5 Glenn first argues that the government violated his right against self-incrimination when it elicited testimony from Detective Maureen Wall concerning his failure to respond to her attempts to speak with him. It is well established that it is improper to comment upon a defendant's choice to remain silent at or before trial. *State v. Fencel*, 109 Wis. 2d 224, 236, 325 N.W.2d 703 (1982). "The protection from reference to silence arises from the Fifth Amendment guarantee against self-incrimination." *Id.* "[A] person is entitled to the protection of the Fifth Amendment even prior to arrest or a custodial interrogation." *Id.* at 237.

¶6 Detective Wall answered about ten questions posed by the prosecutor about her attempt to retrieve from Glenn the comb that Samantha allegedly threw at Kaela, causing the facial bruising. Although Wall testified that Glenn did not reach her, she also testified that he did return her calls twice, leaving messages, and that he never *refused* to talk to her. We see no reason to extend *Fencel* to encompass an officer's accounting of investigative efforts where the officer testifies that the defendant did not contact her, but that he attempted to do so.

Karen Kvalo-Lutz's Testimony

¶7 Glenn next argues that Karen Kvalo-Lutz's testimony should have been excluded because: (1) it was inadmissible hearsay; (2) it violated his right to confrontation; and (3) its probative value was substantially outweighed by the danger of unfair prejudice, WIS. STAT. § 904.03 (1999-2000).¹

¶8 Kaela was called as the first witness at the trial and approached the witness stand with her grandmother, Kvalo-Lutz. The trial court had previously decided that Kaela could sit on her grandmother's lap while testifying. As they were approaching the witness stand, Kaela first remarked "Demell" as she passed by Glenn. She then said, "Grandma, I'm scared" and, a moment later, repeated "I'm scared." After making these comments, Kaela refused to respond to most of the questions posed by the prosecutor and defense even though she was sitting on her grandmother's lap. Because Kaela would not answer, the prosecutor also asked Kaela's grandmother a few questions.

Mr. Kaiser: When you came into the courtroom just this morning, just a few minutes ago.

Ms. Kvalo-Lutz: Yes.

Mr. Kaiser: Were you carrying Kaela at that time?

Ms. Kvalo-Lutz: No.

Mr. Kaiser: Where in the courtroom did you get to before you picked her up?

Ms. Kvalo-Lutz: Up front.

Mr. Kaiser: Next to the Court?

Ms. Kvalo-Lutz: Yes.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Mr. Kaiser: Before you were sworn?

Ms. Kvalo-Lutz: Before I was sworn in.

Mr. Kaiser: So Kaela was walking and holding your hand up to that point; is that correct?

Ms. Kvalo-Lutz: Yes.

Mr. Kaiser: Would it be fair to say that that point where you were standing in front of the clerk is –

Kaela Kvalo: Grandma. Grandma.

Ms. Kvalo-Lutz: What?

Mr. Kaiser: -- is very close to where the person is sitting at the end of the table down here?

Ms. Kvalo-Lutz: Yes.

Mr. Kaiser: Let the record reflect that at that point I was pointing to the defendant.

The Court: So noted.

Kaela Kvalo: I want to go down, grandma.

Ms. Kvalo-Lutz: In a minute, honey. We just have to finish.

Mr. Kaiser: Ms. Kvalo, before Kaela told you she was afraid and asked you to pick her up, did you see whether or not she saw this person sitting at the end of the table?

A I can't –

Mr. Peterson: Objection.

The Court: I'll let the answer stand. The witness indicates she didn't observe.

Mr. Kaiser: At the time that she told you she was afraid and you picked her up, did she say what she was afraid of or who, if anyone, she had seen?

Ms. Kvalo-Lutz: I don't recall.

¶9 Glenn contends that Kvalo-Lutz's testimony describing Kaela's conduct and comments constituted hearsay and should not have been admitted.

“Hearsay is 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.” WIS. STAT. § 908.01(3) (emphasis added; quotation omitted). We agree with the State that Kaela’s exclamations and conduct were not hearsay because they were made by Kaela, the declarant, at trial in front of the jury.²

¶10 Glenn also contends that Kvalo-Lutz’s testimony violated his right to confrontation because he was not able to effectively cross-examine Kaela. This argument is puzzling. Glenn *was* able to cross-examine Kvalo-Lutz, so *her* testimony did not violate his right to confrontation. To the extent Glenn is attempting to argue that Kaela’s testimony violated his right to confrontation because she would not answer questions on cross-examination, we have explained that “the confrontation clause guarantees *an opportunity* for effective cross-examination, not cross-examination that is effective to whatever extent the defense may wish.” *State v. Lomprey*, 173 Wis. 2d 209, 216, 496 N.W.2d 172 (Ct. App. 1992) (emphasis added). We reject Glenn’s argument because he had an opportunity to question Kaela and did so, though his efforts were unsuccessful.

¶11 Glenn next argues that the jury should have been instructed to disregard Kaela’s conduct and exclamations and the corresponding testimony of Kvalo-Lutz because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.³ WIS. STAT. § 904.03. Again, we disagree. Kaela’s conduct and comments had probative value because they tended

² For hearsay purposes, a statement includes “nonverbal conduct of a person, if it is intended by the person as an assertion.” WIS. STAT. § 908.01(1)(b).

³ It is unclear whether Glenn’s counsel objected to the admission of the testimony of Kaela or her grandmother because several bench conferences were held off the record. We assume for purposes of this argument that the objections were made.

to show her fear of Glenn. Of course, he was free to argue that Kaela was afraid for other reasons, such as being in a room full of strangers. Because several reasonable inferences could be drawn, including inferences not unfavorable to Glenn, we believe that there was little danger of unfair prejudice. Therefore, we reject the argument.

¶12 Glenn finally argues that he should be granted a new trial in the interest of justice. WIS. STAT. § 752.35. We have concluded that there was no error. We see no reason to exercise our discretionary power to reverse.

By the Court.—Judgment and order affirmed.

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

