COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1244-CR **Cir. Ct. No. 2004CF118**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. LAING-MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Christopher J. Laing-Martinez appeals from a judgment of conviction of first-degree sexual assault of a child under thirteen years of age, and from an order denying his postconviction motion for a new trial. He challenges the sufficiency of the evidence and argues that instructional error

occurred at trial. We conclude that the evidence supports the conviction and that there was no prejudicial error in the jury instruction. We affirm the judgment and order.

¶2 Appellate review of a challenge to the sufficiency of the evidence is very narrow. ***State v. Hayes***, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. We accord great deference to the trier of fact. ***Id.*** We "view the facts in the light most favorable to sustain the verdict and where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury." ***State v. Forster***, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. We accept the inference the jury drew unless the evidence upon which it is based in incredible as a matter of law. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). We may not overturn the verdict if there exists any possibility that the jury could have drawn the inferences appropriate to a finding of guilt. ***Id.*** at 507.

¶3 Laing-Martinez was accused of touching five-year-old Stephanie B. below her underwear on occasions in June 2003 when he was providing child care for Stephanie and her two older brothers. Because Laing-Martinez was a long-time family friend, he was referred to by Stephanie as "Uncle Chris." The jury heard the following testimony.

¶4 Haley Besaw indicated that in March 2004 Stephanie was over at her home as her daughter's playmate. The two girls were having a conversation about the school playground when Besaw's daughter stated that a certain boy had put his hand down her shirt. Stephanie stated that, "My uncle sticks his hands down my pants." Upon overhearing this, Besaw asked Stephanie who her uncle is and what happened. Stephanie explained that Chris is her uncle and godfather and that "he

put his hands down my pants and touched me." Besaw reported the conversation to Stephanie's mom, Susan B., when Susan came to pick up Stephanie.

¶5 Susan testified that at the end of June 2003, she was traveling to Boston and needed assistance with the children. She arranged for Laing-Martinez and his wife to care for the children for a couple of days. Upon getting home from Besaw's house that day in March 2004, Susan asked Stephanie to tell her more about what she had said at the Besaws. Stephanie said, "Uncle Chris put his hand in my pants and tickled me." She indicated it happened every time Laing-Martinez came over when her mother was in Boston. About three weeks after first revealing the touching, Stephanie asked her mother if they could discuss it again. Stephanie told her mother that if she got a doll, Stephanie would show what Laing-Martinez did. Stephanie pulled up the doll's skirt and stuck her hand in the doll's underwear and wiggled her fingers there. Susan described the area touched by Stephanie as the "vaginal area." Stephanie repeated the demonstration for her father that same night. Susan indicated that Stephanie references the vaginal area as her private parts or "pee-pee." Susan explained that the vaginal area includes any area covered by underwear in the front.

¶6 Stephanie, age six and one-half at the time of the trial, testified that while her mother was in Boston, there was a bad touch with Chris. She said he touched her in "this one certain place … on my private." Stephanie identified the area below the tummy and in-between the legs and the area where one goes to the bathroom as private. She indicated that Laing-Martinez tickled her under her underwear in her "below private." The touch was not on the area where she would go to the bathroom but a bit up from there. During an interview with a police

detective, Stephanie colored in a picture of a girl that her mother had drawn and circled the area that Laing-Martinez touched her.[1] The circle went from hip to hip and encompassed the girl's crotch. Stephanie demonstrated on a stuffed bunny she brought to court that the touch occurred below the underwear line.

¶7 When first interviewed by detectives, Laing-Martinez wrote a statement indicating that "[d]uring the course of horseplay or tickling I made the mistake of inappropriately touching Stephanie, although I do not recall the specific incident as described by her." A second statement explained Laing-Martinez's understanding that inappropriate touching refers to touching the genital area. Laing-Martinez testified that he never touched Stephanie inside her underpants or in the groin or vaginal area. He testified he tickled her on her stomach.

¶8 Laing-Martinez was charged with having sexual contact with a child by the intentional touching of the child's intimate parts. WIS. STAT. §§ 948.02(1) and 948.01(5) (2003-04).[2] The definition of intimate parts is "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." WIS. STAT. § 939.22(19). Laing-Martinez argues that the evidence was not sufficient that he touched Stephanie's groin, vagina or pubic mound. He contends the evidence only shows that he touched an area somewhere above those body parts. He points to Stephanie's denial that Laing-Martinez touched her where she goes to the bathroom and her understanding that private part included the broad area

[1] Susan B. drew the outline of a girl and Stephanie B. colored it in.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

covered by underwear in the front, not necessarily the groin, vagina or pubic mound.

¶9 We conclude that the evidence permits a reasonable inference that Laing-Martinez touched Stephanie's groin, vagina or pubic mound. The term groin means "the crease or hollow at the junction of the inner part of each thigh with the trunk, together with the adjacent region and often including the external genitals." ***State v. Brunette***, 220 Wis. 2d 431, 453, 583 N.W.2d 174 (Ct. App. 1998) (quoted source omitted). The meaning of pubic mound is the "eminence at the lower part of the abdomen, just above the reproductive or sex organs." ***Id.*** (quoted source omitted).

¶10 Stephanie first indicated that Laing-Martinez stuck his hands down her pants. She testified that he touched her on her private. By attaching a singular reference to the area touched, Stephanie narrowed the scope. Stephanie, who had received lessons about good touch and bad touch, characterized Laing-Martinez's touch as a bad touch. Her mother indicated that her private was understood to be her vaginal area, which could include the groin, vagina and pubic mound. Stephanie demonstrated on a doll and a stuffed animal that the touch occurred in the area of her crotch. On the picture with the circled area from hip to hip there is a smaller marking directly in the crotch and it appears the word "here" was written on the picture. Laing-Martinez himself admitted to having touched Stephanie in her genital area, even though he later distanced himself from that admission.

¶11 We deem the testimony and her demonstrations sufficient to permit the jury to conclude that Stephanie was touched on her groin, vagina or pubic mound. Although at some points Stephanie identified areas beyond the definition of intimate parts, the jury was free to accept some parts of her testimony and reject

others. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752; ***Brunette***, 220 Wis. 2d at 454. Even accepting Stephanie's testimony that the touch was not where she goes to the bathroom, the jury could still draw a reasonable inference that the touch was to her groin or pubic mound. *See* ***id.*** The evidence supports the conviction.

¶12 The jury was instructed that sexual contact "is an intentional touching by the defendant of the groin, vagina, or pubic mound *area* of" Stephanie B. and that the touching may be of the "groin, vagina or pubic mound *area*," directly or through clothing. (Emphasis added.) Laing-Martinez argues that the instruction expanded the definition of intimate part by including not just the pubic mound but also the pubic mound *area*. He claims the error in the instruction denied him due process and was an error of such magnitude so as to require a new trial in the interests of justice. *See* WIS. STAT. § 752.35. Laing-Martinez did not object to the instruction at trial so he also alleges that he was denied the effective assistance of trial counsel by the failure to object. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992) (the failure to object to an instruction is a waiver of the right to challenge the instruction on appeal although review may be made under a claim of ineffective assistance of counsel).

¶13 In ***State v. Morse***, 126 Wis. 2d 1, 4, 374 N.W.2d 388 (Ct. App. 1985), the court rejected a claim that instructional error occurred when sexual contact was defined to include touching the "vaginal area" instead of just the vagina. The court concluded that the term vagina was not limited to its literal medical definition because to do so would permit a defendant to touch almost the entire female external genitalia without legal consequence. ***Id.*** at 4-5. The court held that the instruction did not expand the scope of the area of prohibited touching. ***Id.*** at 6. Notably the court found its conclusion consistent with ***State v.***

Gustafson, 119 Wis. 2d 676, 696, 350 N.W.2d 653 (1984), *modified on other grounds*, 121 Wis. 2d 459, 359 N.W.2d 920 (1985), where touching the victim's pubic area was equated to touching an intimate part. ***Morse***, 126 Wis. 2d at 6.

¶14 Use of the word "area" did not impermissibly expand the scope of the crime. Even if the instruction was error, it was harmless error. An instructional 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. Ziebart***, 2003 WI App 258, ¶26, 268 Wis. 2d 468, 673 N.W.2d 369 (quoted source omitted). "In determining whether an error is harmless, we weigh the effect of the trial court's error against the totality of the credible evidence supporting the verdict." ***Id.***

¶15 We have reviewed the evidence which supports the jury's conclusion that Laing-Martinez touched an intimate part of the victim. The jury was not mislead by the instruction. The alleged error in the instruction did not contribute to the conviction. It follows that Laing-Martinez was not denied the effective assistance of counsel because he was not prejudiced by counsel's failure to object to the instruction.

By the Court.—Judgment and order affirmed.

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