

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2005AP2857-CR

Cir. Ct. No. 2001CF675

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Christopher L. appeals an order denying his motion for postconviction relief as well as his underlying judgment of conviction for repeated sexual assault of a child, contrary to WIS. STAT. § 948.025(1) (1999-2000). Christopher claims he is entitled to a new trial because he has a due

process right to an interpreter, certain evidence was erroneously admitted, and the real controversy was not fully tried. We reject his arguments and affirm the judgment and order.

Background

¶2 Christopher was charged with repeated sexual assault of his adopted daughter Victorea.¹ At the preliminary hearing, he had some difficulty hearing the proceedings. He pled not guilty at his arraignment on February 21, 2001. At the next hearing on April 3, he appeared pro se. He again had difficulty hearing and requested an Exact English Sign Language interpreter but also advised the court, “if you use a microphone, I can hear just fine” The court advised Christopher that if the case proceeded to trial, there would be a microphone but also acknowledged the possibility of arranging an interpreter, if necessary.

¶3 At the June 22, 2001 status conference, Christopher appeared with appointed counsel. He again requested an interpreter for trial. The court asked if he had tried the assisted listening device (ALD) in one of the other courtrooms. The court advised Christopher to go to one of those rooms and try the device. The court said, “If we could do that, I’d prefer it because it’s a lot less expensive than the sign language interpreter, but if we can’t and you can’t hear, then, certainly, you have a right to that.” The case proceeded to trial with Christopher using the ALD; there was no interpreter.

¹ Christopher was initially charged in Eau Claire County case No. 2000CF623. On November 5, 2001, that case was dismissed without prejudice at the State’s request. The State then recharged Christopher with the same offense in case No. 2001CF675.

¶4 At the start of the jury trial, Christopher had some difficulty hearing, but adjusting the volume on the headphones of the ALD appeared to resolve the problem. During his testimony, Christopher asked the attorneys to repeat questions on a few occasions, but never complained to the trial court about any inconvenience.

¶5 Christopher had also filed a motion in limine to exclude evidence of physical abuse or corporal punishment unless connected with the alleged sexual assault. The court ultimately decided to allow such evidence to the extent it could be used to explain Victorea's delayed reporting of the sexual assault. Victorea subsequently testified about getting "smacked with a belt" and other witnesses testified about Victorea's statements to them about Christopher beating her with a belt. Ultimately, the jury convicted Christopher of the alleged sexual assault.

¶6 Christopher filed a motion for postconviction relief in the interests of justice, arguing he was denied an interpreter and certain evidence was improperly excluded from trial. The court denied the motion without a hearing. This court reversed and remanded for a hearing on the complaint Christopher was denied an interpreter.²

¶7 Multiple witnesses testified on remand. The attorney who represented Christopher in a CHIPS proceeding testified he had been observing the criminal case and recalled a number of times Christopher's behavior led him to believe Christopher had difficulty hearing. The attorney testified he did not use an interpreter when meeting with Christopher. He also testified that at a hearing in

² See *State v. Christopher L.*, No. 2004AP135, unpublished slip op. (WI App Dec. 28, 2004): there is no mention of the evidentiary complaint.

the CHIPS case, when Christopher was using the ALD, he had stopped the proceeding to tell the trial court when he could not hear.

¶8 Christopher's attorney in the criminal action could not recall the courtroom experiment with the ALD. He testified that, had Christopher told him the headphones were not working, he would have notified the trial court.

¶9 Audiologist Ryan Hummel testified about the nature of Christopher's "significant" hearing impairment. While Hummel did not test Christopher's hearing while using the ALD, he testified that Christopher should have been able to hear if the system was at its maximum capacity.

¶10 Per Forsberg, the owner of the company that installed the listening devices in the courthouse, testified about how the system works. He also testified that the system is meant to be used for "moderate" hearing loss and without a hearing aid.

¶11 Christopher testified on his own behalf. He explained that when he tried on the ALD, only he, his attorney, and a court employee were in the room. He was not instructed on the device's proper use and was not advised to turn off his hearing aids. He had tried on the headphones while standing at the counsel tables, but not on the witness stand, where he claims he had the most difficulty hearing. He says he told his attorney after the experiment that he was still going to have trouble hearing. He testified that he subsequently had difficulty hearing on the witness stand because the microphones picked up extraneous noise like paper shuffling.

¶12 The court rejected Christopher's claims, finding him not credible. The court remarked that Christopher had affirmed his experimentation with the

ALD and that although he claimed he expected he would still have difficulty hearing, his attorney recalled no such discussion and none of Christopher's concerns were conveyed to the court. The court recalled that Christopher had been previously asked to use the device if it worked, but that Christopher was also aware he had the right to an interpreter if it did not.

¶13 The court observed that Christopher had no recollection of telling defense or CHIPS counsel that he could not hear. It rejected his assertion on remand that he was embarrassed by his impairment, and therefore did not want to bring it to the court's attention, because there were multiple occasions when he had no reservations about speaking up when having hearing trouble. Moreover, the court had pointed out to the jury at the beginning of the trial that Christopher was wearing headphones to better facilitate his hearing. In other words, it was already known to the trial participants that Christopher had a hearing impairment.

¶14 Ultimately, the court wrote:

The Court did have notice of [Christopher's] hearing difficulty, but no notice of any language problem. After the defendant represented that he could hear with the assisted hearing device, the court did not find it necessary to appoint an interpreter. As no interpreter was deemed necessary, there was no need for a colloquy with the defendant, nor an express waiver of the right to an interpreter. He didn't need one and made no further request for one. Therefore, there was no "waiver."

... [T]he defendant failed to make known his need for an interpreter, assuming he could not adequately hear at the trial. In order for the Court to know that an interpreter is necessary, the defendant has to make the need known.

Discussion

Whether an Interpreter was Necessary

¶15 WISCONSIN STAT. § 885.37(1)(b)³ states, in relevant part:

If a court has notice that a person who fits any of the criteria under par. (a)[⁴] has ... a hearing impairment ... the court shall make a factual determination of whether the ... [hearing] impairment is sufficient to prevent the individual from communicating with his or her attorney, reasonably understanding the English testimony or reasonably being understood in English. If the court determines that an interpreter is necessary, the court shall advise the person that he or she has a right to a qualified interpreter....

Christopher asserts that he had a due process right to an interpreter and that he never waived the right.

¶16 When a court has notice of a hearing impairment, the court must determine if that impairment will impede the individual from communicating with counsel or from understanding and being understood in English. WIS. STAT. § 885.37(1)(b). At that point, the court must make a factual determination whether an interpreter is necessary. *State v. Yang*, 201 Wis. 2d 725, 734, 549 N.W.2d 769 (Ct. App. 1996). This inquiry is not subject to a condition precedent of the defendant's request. *Id.* at 735. Rather, the court must make such an inquiry regardless how it comes to be aware of the defendant's impairment. *Id.* at 734-35. Thus, it was incorrect for the trial court to suggest Christopher was required to be

³ All references to WIS. STAT. § 885.37 are to the 1999-2000 version. All remaining references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

⁴ The four criteria of WIS. STAT. § 885.37(1)(a) are that the person: is charged with a crime, is a child or parent subject to WIS. STAT. chs. 48 or 938, is subject to WIS. STAT. chs. 51 or 55, or is a witness in an action or proceeding under the first three criteria.

more vocal in his request for an interpreter. This error is not fatal, however, because the record nonetheless supports the conclusion that no interpreter was necessary.

¶17 As mentioned, the necessity of an interpreter presents a factual question. *See id.* at 734. We do not disturb the court's factual findings unless clearly erroneous. WIS. STAT. § 805.17(2). Christopher asserts the trial court failed to make any finding under WIS. STAT. § 885.37. However, the record reveals the court implicitly concluded, prior to trial, that no interpreter was necessary. The court had asked Christopher to experiment with the ALD and advised him that if it would not suffice, he had a right to an interpreter. In other words, the court considered an interpreter unnecessary if the ALD worked.

¶18 Even if this were insufficient, the record supports the postconviction holding that no interpreter was necessary.⁵ Christopher made no complaint about the effectiveness of the ALD after experimenting with it. Indeed, prior to voir dire, the court questioned Christopher in chambers, asking:

THE COURT: ... [A]re you able to hear? Did you check in the courtroom? Did you use the earphones?

[CHRISTOPHER]: Yes, I did.

THE COURT: Okay. So that will work fine?

[CHRISTOPHER]: Correct.

⁵ Christopher contends that if the trial court has failed to make the appropriate factual findings under WIS. STAT. § 885.37, the burden shifts to the State to prove that an interpreter was unnecessary. We decline to reach this issue because we conclude the court followed the appropriate statutory procedure, albeit implicitly.

¶19 The first time he had difficulty hearing at trial, the court suggested he adjust the volume on the headphones, asking “Is that helping? Are you able to hear now?” Christopher responded, “Yeah.” Additionally, when he took the stand to testify, his attorney asked him, “Can you hear okay?” Christopher answered, “Yes, I can.” Moreover, neither Christopher’s defense attorney nor his CHIPS attorney recalled being told he was having difficulty hearing in the courtroom, and neither testified to any difficulty communicating with Christopher outside of court.

¶20 Although Christopher makes much of Hummel’s and Forsberg’s testimony, neither of those witnesses undercut the ruling that an interpreter was unneeded. Hummel only established the fact of Christopher’s hearing loss. Indeed, he testified Christopher should have been able to hear with the device. Forsberg only established that the device was designed to be used in a different manner than Christopher used it, not that an interpreter was needed.

¶21 We discern no error in the trial court’s rulings. Accordingly, we do not reach the due process question. There is no due process right to an interpreter—there is only a right to a *necessary* interpreter. See WIS. STAT. § 885.37(1)(b). In addition, we need not discuss “waiver” of an interpreter because there is no right to be waived unless the court considers the interpreter necessary.⁶

⁶ Christopher asserts that primary consideration should have been given to his request for an interpreter. See 28 C.F.R. § 35.160(b)(2) (2000); see also *State v. Piddington*, 2001 WI 24, ¶46, 241 Wis. 2d 754, 623 N.W.2d 528. Assuming that section applies, it requires only primary consideration of a defendant’s request, not exclusive consideration. Moreover, the comments to the section reveal that the court “shall honor the choice unless it can demonstrate that another effective means of communication exists” *Nondiscrimination on the Basis of Disability in State & Local Government Services*, 55 Fed. Reg. 35,694, 35,711-12 (July 26, 1991). The assisted listening device is another effective means of communication.

Whether Evidence was Properly Admitted

¶22 Christopher asserts that it was improper for the trial court to admit evidence of his alleged physical abuse of Victorea. He contends it was highly inflammatory, irrelevant other acts evidence not offered for an acceptable purpose under WIS. STAT. § 904.04(2).

¶23 The decision to admit or exclude evidence, including other acts evidence, is a discretionary determination. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Our review is highly deferential. *State v. Shomberg*, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370. We will sustain a discretionary determination if the trial court examined the relevant facts, applied a proper legal standard, and, using a demonstrative, rational process, reached a conclusion a reasonable judge could reach. *Sullivan*, 216 Wis. 2d at 780-81. If the trial court fails to explain its reasoning, it is an erroneous exercise of discretion, but we will review the record to determine whether it nonetheless supports the discretionary act. *Id.* at 781.

¶24 The admissibility of other acts evidence is governed by a three-pronged analytical framework: (1) whether the other acts evidence is offered for a permissible purpose in accord with WIS. STAT. § 904.04(2); (2) whether the other acts evidence is relevant, considering WIS. STAT. § 904.01; and (3) whether the probative value of the evidence is outweighed by any of the concerns in WIS. STAT. § 904.03. *Sullivan*, 216 Wis. 2d at 772-73.

¶25 As to the first prong, WIS. STAT. § 904.04(2) states:

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.

Christopher asserts evidence of corporal punishment was not offered for a permitted purpose. However, it was not offered to show that Christopher's sexual assault of Victorea was in conformity with a pattern of behavior. Rather, the court admitted the evidence for, and limited it to, the sole purpose of explaining Victorea's delay in reporting the sexual abuse. Christopher has not demonstrated this is an inappropriate purpose. To the extent this purpose is not explicitly listed in WIS. STAT. § 904.04(2), that list is exemplary, not exhaustive. *J.W. v. B.B.*, 2005 WI App 125, ¶22, 284 Wis. 2d 493, 700 N.W.2d 277; *Sullivan*, 216 Wis. 2d at 783.

¶26 The second prong is relevance. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Evidence explaining why a victim would delay reporting is relevant insofar as it bears on the victim's credibility, which goes to the jury's responsibility to determine the ultimate factual question of a defendant's guilt or innocence.

¶27 The final prong is whether the evidence runs afoul of WIS. STAT. § 904.03, which allows otherwise relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Christopher complains evidence of physical abuse is unfairly prejudicial. However, the court emphasized to the jury that physical abuse was not the subject

of the trial except to the extent that it explained Victorea's reluctance and delay in reporting the sexual abuse. Moreover, a complaint of inflaming the jury's passions rings hollow; it is difficult to consider how evidence of the physical assault was more shocking than evidence regarding the sexual assault. The trial court did not err by admitting limited testimony regarding Victorea's references to corporal punishment.

Whether a New Trial is Warranted

¶28 Finally, Christopher seeks a new trial in the interests of justice. He contends the suppression of certain evidence and the absence of a formerly-named State witness prevented the real controversy from being fully tried.

¶29 We have the discretionary power to reverse a judgment if it is clear the real controversy has not been fully tried, regardless whether we can say there would be a new result on remand. WIS. STAT. § 752.35. This is, however, a power to be used sparingly. *State v. Tainter*, 2002 WI App 296, ¶23, 259 Wis. 2d 387, 655 N.W.2d 538. A multitude of circumstances can lead us to conclude the real controversy was not fully tried. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19-21, 456 N.W.2d 797 (1990). Christopher's challenge, distilled to its essence, is that he was unable to put on enough evidence to impeach Victorea's testimony and this means the "crucial issue" of her credibility was clouded. *See State v. Ambuehl*, 145 Wis. 2d 343, 366, 425 N.W.2d 649 (Ct. App. 1988).

¶30 Christopher wanted a letter from an attorney to Victorea's mother, Patricia, admitted at trial. According to Christopher, this letter contained information telling Patricia, whose parental rights to Victorea had already been terminated, that she might have her rights reinstated if Christopher were sexually abusing the child. He also wanted to cross-examine Patricia, who was on the

State's witness list but never called, ostensibly because the State could not locate her.⁷ On appeal, Christopher asserts this evidence would go to Victorea's credibility, supporting the idea Victorea was fabricating her allegations as part of a plan to be reunited with her mother.

¶31 Defense counsel had specifically disavowed the notion that they would be pursuing this conspiracy idea as Christopher's defense. Moreover, Victorea's credibility appears to have already been a central issue before the jury. It is the very reason the State sought to explain her delayed reporting of the sexual assault.

¶32 Ultimately, however, the real controversy was not whether Victorea wanted to be reunited with her mother, not Patricia's state of mind, and not the contents of an attorney's letter. The real controversy was whether Christopher sexually abused Victorea. That controversy was fully tried.

By the Court.—Judgment and order affirmed.

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

⁷ The inability to locate Patricia was evidently part of the reason the first case, No. 2000CF623, was dismissed. In his briefs, Christopher hints at duplicity by the State in declining to call Patricia in the second case, but neither the circumstances of the first dismissal, nor of the State's decision not to call Patricia, are directly before us on appeal. We will not speculate on the State's motivations.

