COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP598-CR **Cir. Ct. No. 2001CF46**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAS S.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Chas S. appeals a judgment convicting him of sexually assaulting his six-year-old daughter. He also appeals an order denying postconviction motions in which he requested a new trial or resentencing. He argues that: (1) the trial court denied him his right to present a defense when it

disallowed testimony regarding attempts to relieve the victim's constipation, which Chas contends provides an alternative explanation for the child's damaged hymen; (2) the trial court violated Chas's due process rights by bolstering the child's testimony by asking questions after the attorneys completed their questioning and by granting the jury's request to have the victim's testimony read to them during deliberations; (3) an expert's testimony that victims underreport abuse was irrelevant and amounted to expressing an opinion that the victim was telling the truth; (4) the court improperly allowed hearsay testimony from a nurse that the victim told her that "dad had put his privates—his wiener" in her vagina; (5) the court relied on inaccurate information when sentencing Chas; and (6) new factors justify modification of the sentence.[1] We reject these arguments and affirm the judgment and order.

¶2 The victim testified to the effect that her father put his penis in her vagina. The defense attempted to impeach her testimony by the fact that she twice recanted her allegations and she gave inconsistent statements regarding several details regarding timing and location. The child first reported the sexual assault more than one year after it occurred. The defense suggested that the child was induced by her mother to report sexual assault to counter Chas's threat to attempt to gain custody of the children.

[1] Chas also argues that these alleged errors justify a new trial in the interest of justice. Because we reject the arguments as to each of the alleged errors, we need not separately address the arguments that the real controversy was not fully tried or that justice miscarried. Chas also argues ineffective assistance of trial counsel for failing to preserve some of these issues by contemporaneous objection. Because we reached the merits of these issues, we need not address the ineffective assistance of counsel argument.

¶3 Other State witnesses included Lori Holmes, a social worker, who testified that it was not unusual for a child to delay reporting sexual abuse, to be unable to remember dates, to change details of allegations or to recant allegations. She also stated that children are much more likely to underreport abuse than exaggerate or make up such claims.

¶4 Julie Kennedy-Oehlert, a sexual assault nurse examiner, testified that the victim's hymen was damaged due to the insertion of something into her vagina. Chas sought to present evidence of a possible alternative cause of the damaged hymen. Through the testimony of his ex-wife and later through his own testimony, he sought to show that the child once suffered from constipation that required medial treatment. At the postconviction hearing, Chas testified that he witnessed the child's mother and grandmother attempt to extract a stool "by pressing on the vaginal and rectal areas, like they tried to pop a pimple." He did not witness anyone putting anything in the child's vagina, and he produced no medical records that showed any damage to her hymen at that time. The trial court disallowed any testimony at trial regarding the efforts to relieve the child's constipation because, in the absence of expert testimony, Chas failed to lay a proper foundation to establish that the treatment he described could have resulted in a torn hymen.

¶5 The trial court properly required expert testimony to establish that the actions of the victim's mother and grandmother could have resulted in the damage to her hymen. Even at the postconviction hearing, Chas did not present any expert testimony to establish a link between their actions and the torn hymen. The trial court properly concluded that expert testimony was required because making a causal link between the alleged treatment and the torn hymen is not within the realm of ordinary experience and common sense. *See* ***State v. Doerr***,

229 Wis. 2d 616, 623, 599 N.W.2d 897 (Ct. App. 1999). The testimony of the examining nurse did not provide an adequate foundation for the testimony. She testified that nothing other than insertion of something into the vagina could cause that type of injury. Chas focuses on her testimony that "unless there is some pressure put directly on that tissue or near that tissue it generally stays intact." That single sentence does not provide an adequate foundation for Chas's alternate theory. The nurse was not asked whether placing thumbs on the exterior of the vagina could result in the damage she found in her examination. The nurse's single reference to damage "near that tissue" would not sufficiently enlighten the jury to allow it to accept Chas's alternate theory.

¶6 Because Chas did not lay a proper foundation for his alternate theory and presenting that theory would have encouraged jury speculation, the proffered evidence was irrelevant. A defendant's constitutional right to present evidence only extends to relevant evidence. *See* ***State v. St. George***, 2002 WI 50, ¶¶14-15, 252 Wis. 2d 499, 643 N.W.2d 777.

¶7 The trial court did not violate Chas's due process rights when it questioned the victim after the attorneys completed their questioning. The court asked the victim whether she remembered the difference between a truth and a lie and whether her testimony was the truth. The witness nodded affirmatively to each question. This questioning did not reveal the trial court's view of the matters and did not turn the court into a "partisan." *See* ***State v. Nutley***, 24 Wis. 2d 527, 562, 129 N.W.2d 155 (1964). The questions did not express any opinion whether the court believed the victim was telling the truth. From the non-leading questions, it was just as likely that the court was expressing doubt about her truthfulness. The court's questions did not deny Chas a fair trial.

¶8 The trial court properly exercised its discretion when it granted the jury's request to have the victim's testimony read to it. The jury's note asked for a "copy of [the victim's] court statement." The court reasonably construed the "court statement" as the child's testimony. The jury has a right to have the testimony read to it by the court reporter. *See* ***State v. Cooper***, 4 Wis. 2d 251, 255-56, 89 N.W.2d 816 (1958). The trial court is vested with discretion as to how much of the testimony should be read. ***Id.*** The trial court reasonably chose to have the victim's testimony read back in its entirety. The court noted that the testimony was broken up by emotional responses and long pauses, and it was reasonable for the jury to want to hear the child's words without those interruptions. The jury had the right to focus on the content of the child's testimony without the distractions caused by her emotional responses.

¶9 The court properly admitted Lori Holmes's testimony that children are much more likely to underreport the number of times that sexual abuse happens than they are to exaggerate the number or make it up. The testimony was relevant as part of a larger discussion of the dynamics of sexual assault abuse and why children often do not report the crime immediately and why they may attempt to minimize or change the number of incidents. Expert testimony regarding the behaviors of sexual assault victims is relevant because it may disabuse the jury of widely held misconceptions. *See* ***State v. Robinson***, 146 Wis. 2d 315, 335, 431 N.W.2d 165 (1988). Because the victim had recanted on two occasions, made varying statements about the number of times Chas abused her, could not pinpoint when the abuse occurred and substantially delayed reporting the abuse, Holmes's testimony was relevant to disabuse the jury of misconceptions that these defects would be uncommon for an incest victim. The testimony does not violate

State v. Haseltine, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984) which prohibits expert testimony that a victim is telling the truth. Holmes only testified regarding the behaviors common to child sexual assault victims. She did not refer specifically to the victim in this case and, in fact, testified that she had never met the victim. In response to a specific question, Holmes testified that she was "talking about child sexual abuse in general." Her testimony cannot be reasonably construed as a comment on the victim's credibility in this case.

¶10 Chas next argues that Kennedy-Oehlert's testimony that the victim told her that her father put his "wiener" in her vagina was hearsay. At the postconviction hearing, the trial court acknowledged that the statement was not admissible as a prior consistent statement because the statement was made after allegations of improper motive and influence had arisen. The State argues that the evidence is nonetheless admissible under the residual hearsay exception. We need not determine whether the evidence was admissible because we agree with the trial court that the error, if any, was harmless. In the context of the entire trial, one more instance of the child reporting the sexual abuse would have no impact on the verdict. Other similar statements were never challenged. Kennedy-Oehlert's brief mention of the statement is unlikely to have affected the verdict in any manner.

¶11 Chas next argued that his sentence was based on the trial court's erroneous generalizations about the likelihood that he would re-offend. At sentencing, the court stated:

> Based on my experience, individuals who undertake this type of behavior typically do it more than once with more than one victim …. If it happened once, it's very likely going to happen again. Or at least the temptation to do it again is going to be there. So I see a very, very high need to protect the public.

At the postconviction hearing, Chas presented evidence that the likelihood of re-offending is much lower for perpetrators of incest than for perpetrators of other sexual assaults. He requested resentencing because he has the right to be sentenced on the basis of accurate information and because he characterizes the studies he presented as a "new factor" justifying sentence reduction. The trial court denied the motion for resentencing, stating that it based the sentence not on generalized information about the likelihood of child abusers re-offending, but on the facts and circumstances of this case. The record shows that Chas continued to deny his guilt. The court also received information that Chas had sexual contact with an unrelated thirteen-year-old. The fact that perpetrators of incest may have a lower rate of recidivism than other sexual abusers does not establish that he presents a low risk to his children or others.

¶12 Finally, Chas argues that he was raped in prison, resulting in more punishment than the trial court anticipated, and therefore constituting a new factor to justify sentence reduction. A new factor is one that frustrates the purpose of the original sentence. *See* ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). Chas was sentenced for rehabilitation, deterrence and to incapacitate him as much as for punishment. The sentencing court expressed no thoughts about the degree of punishment Chas would experience in prison. Therefore, the additional punishment inflicted on him by circumstances beyond the court's control was not a substantial factor in determining the length of the sentence and does not frustrate the purpose of the original sentence. *See* ***State v. Klubertanz***, 2006 WI App 71, ¶¶41-43, __ Wis. 2d __, 713 N.W.2d 116.

By the Court.—Judgment and order affirmed.

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