COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP252-CR **Cir. Ct. No. 2005CF194**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN SCOTT KERN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Kevin Kern was convicted, following a jury trial, of one count each of attempted first-degree sexual assault with use of a dangerous weapon, second-degree recklessly endangering safety, false imprisonment, misdemeanor battery, and kidnapping. Kern argues that the circuit court erred by

permitting the State to present evidence that Kern sexually assaulted a different woman in a similar setting years earlier. Although we question the admission of this other acts evidence, we conclude that if admission was error, it was harmless error. Accordingly, we affirm the judgment of conviction.

Background

¶2 Kern met Diane S. at Job Services in Wisconsin Dells. He used his van to drive her around for a few hours while she engaged in job hunting and other errands. Eventually Kern drove Diane to a secluded location where, according to Diane, Kern threatened her with a knife in an attempt to engage in sexual intercourse or oral sex. The case proceeded to trial, at which the prosecutor was permitted to present the testimony of Ann A., a woman Kern sexually assaulted about sixteen years earlier. We recount additional details as necessary in the remainder of this opinion.

Discussion

A. Admission Of Other Acts Evidence

¶3 Although we need not discuss the admissibility of the other acts evidence, we comment on the arguments of the parties on this topic.

¶4 For the most part, the parties' admissibility arguments follow a familiar pattern. The defendant argues with a fair amount of specificity why the other acts evidence was not relevant or was not sufficiently relevant under various recognized purposes. The State responds with less precise arguments. This is, perhaps, understandable in light of similarly imprecise discussions in published cases discussing other acts evidence, *see*, *e.g.*, ***State v. Hunt***, 2003 WI 81, ¶¶58-61, 65-67, 263 Wis. 2d 1, 666 N.W.2d 771, and ***State v. Davidson***, 2000 WI 91,

¶¶56-62, 66-68, 72, 236 Wis. 2d 537, 613 N.W.2d 606, and in light of the State's belief that the greater latitude rule applies to all sexual assault cases. We need not address these admissibility arguments on the merits, however, because we conclude that admission of the other acts evidence here, if error, was harmless. Nonetheless, we single out three topics for comment.

¶5 First, Kern points out that the circuit court did not explain how a sexual assault committed sixteen years earlier was probative of Kern's plan in this case. Kern argues that, for other acts evidence to constitute plan evidence, it must show more than a propensity to engage in the conduct charged and instead must provide some evidence of a defendant's plan in the current case. To support this proposition, Kern quotes pertinent language from ***State v. Cofield***, 2000 WI App 196, ¶13, 238 Wis. 2d 467, 618 N.W.2d 214. In ***Cofield***, we wrote:

> The State argues that the similarities between the old and new [sexual assault] offenses demonstrated a common scheme or plan. That is, a knife was used in each incident, the race of the women was the same, all of the victims were in their twenties or thirties, they were all women [the defendant] had seen before, and he told each of them that if they were compliant, they would not get hurt.... [However], similarity of facts is not enough to admit other acts under [the plan exception]. *There must be some evidence that the prior acts were a step in a plan leading to the charged offense, or some other result of which the charged offense was but one step.* This linkage is simply not present here. There is no evidence that the prior acts were simply a step in a plan leading up to the [charged] incident.

Id. (emphasis added; citation omitted). According to Kern, under ***Cofield***, the Ann A. evidence is not relevant to show plan because there is no suggestion that that sexual assault in 1989 was a step in Kern's plan to assault Diane.

¶6 We acknowledge that published cases, including cases decided after ***Cofield***, hold that other acts evidence is admissible as plan evidence without engaging in the sort of analysis used in ***Cofield***. *See*, *e.g.*, ***Hunt***, 263 Wis. 2d 1, ¶59; ***Davidson***, 236 Wis. 2d 537, ¶¶56, 60-62. Still, we note that the State here makes essentially the same argument we rejected in ***Cofield***—that the facts of a prior unrelated sexual assault show a plan in the current case because of the similarity of some facts. Specifically, the State argues here: "There were sufficient similarities between the assaults of the two women. Both women were the same age. Both assaults were in a rural setting and involved threats by use of a knife. While the knife might have been used differently, both women were afraid because of the knife." (Record citations omitted.)

¶7 Next, we address absence of mistake. Kern argues that applying absence of mistake in this case is "conceptually strange." He points out that there was no suggestion that he accidentally touched or accidentally attempted to have sex with Diane. Rather, it was undisputed that Kern wanted to have sex with Diane, the only dispute being whether he used threats or force. The State's absence-of-mistake argument is exceedingly brief. According to the State, the evidence shows "absence of a mistake by [Diane]" in that "Kern asserted that he was not attempting to force [Diane] to have sexual intercourse with [Kern], and that *[Diane] was mistaken* when she came to that conclusion" (emphasis added). It is unclear why a mistaken conclusion on Diane's part has anything to do with "absence of mistake" within the meaning of other acts law. Typically, evidence is relevant to show absence of mistake when the evidence raises the possibility that a touching by a defendant was accidental. *See* ***State v. Veach***, 2002 WI 110, ¶84, 255 Wis. 2d 390, 648 N.W.2d 447 (the evidence was "probative of whether any touching that occurred was accidental or done by mistake"); *see also* ***State v.***

Gray, 225 Wis. 2d 39, 56, 590 N.W.2d 918 (1999) ("Other acts evidence is properly admitted to show absence of mistake if it tends to undermine a defendant's innocent explanation for his or her behavior."). If, in the context of other acts evidence, the State chooses to argue that absence of mistake may refer to a mistaken conclusion *on the part of an alleged victim*, we would appreciate developed argument on the topic.

¶8 Finally, we turn our attention to the "greater latitude" rule. Without much discussion, Kern asserts in his brief-in-chief that the greater latitude rule, giving courts greater latitude to admit other acts evidence in sexual assault cases, is limited to cases with children as alleged victims and, therefore, does not apply to this case involving an adult victim. The State responds, with no elaboration and relying solely on ***Hunt***, 263 Wis. 2d 1, that the greater latitude rule does apply to adult-victim sexual assault cases. In his reply brief, Kern points out that ***Hunt*** and the cases it relies on—***Davidson***, 236 Wis. 2d 537, and ***State v. Hammer***, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629—all involved child victims. Kern points out that ***Hammer*** traces the greater latitude rule's inception to ***Proper v. State***, 85 Wis. 615, 628-30, 55 N.W. 1035 (1893). And, Kern notes, ***Hammer*** also cites ***State v. Friedrich***, 135 Wis. 2d 1, 25, 398 N.W.2d 763 (1987), and ***State v. Fishnick***, 127 Wis. 2d 247, 256, 378 N.W.2d 272 (1985), the latter of which quotes ***Hendrickson v. State***, 61 Wis. 2d 275, 279, 212 N.W.2d 481 (1973)—again, all cases addressing child-victim assaults. Finally, Kern notes that in ***Hunt*** itself, the very case the State relies on, the court explained that the greater latitude rule's purpose is served in prosecutions for incest and sexual assaults of children because it offsets the difficulty in proving sexual assault accusations made by minors who have difficulty testifying in court. ***Hunt***, 263 Wis. 2d 1, ¶87. The ***Hunt*** court went on to say: "In light of such difficulty, we held [in ***Davidson***] that

the greater latitude rule 'support[s] the more liberal standard of admissibility *in child sexual assault cases*.'" ***Id.*** (emphasis added; citation omitted).

¶9 We have not exhaustively researched the greater latitude rule, but we observe that, at a minimum, the rule is normally applied in child-victim sexual assault cases and justified based on the characteristics of child victims. At the same time, numerous adult-victim sexual assault cases make no mention of the rule. *See, e.g.*, ***State v. Scheidell***, 227 Wis. 2d 285, 595 N.W.2d 661 (1999); ***State v. English-Lancaster***, 2002 WI App 74, 252 Wis. 2d 388, 642 N.W.2d 627; ***Cofield***, 238 Wis. 2d 467; ***State v. Wagner***, 191 Wis. 2d 322, 528 N.W.2d 85 (Ct. App. 1995); ***State v. Chambers***, 173 Wis. 2d 237, 496 N.W.2d 191 (Ct. App. 1992). If the State believes the greater latitude rule does or should apply to adult-victim cases, it would have been helpful if the State had provided a developed argument on the topic.

¶10 We need not resolve these issues and need not determine whether the other acts evidence was properly admitted. As demonstrated below, admission of the Ann A. evidence, if error, was plainly harmless error.

B. Harmless Error

¶11 Recently, our supreme court discussed the harmless error test:

> In determining whether a constitutional error is harmless, the inquiry is as follows: "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" This court also has formulated the test for harmless error in alternative wording. Under ***Chapman v. California***, the error is harmless if the beneficiary of the error proves "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" While we recognize that this court recently has formulated the harmless error test in a variety of ways, whichever formulation is applied,

> we are satisfied that the error here was harmless for the reasons hereafter set forth.

State v. Mayo, 2007 WI 78, ¶47, __ Wis. 2d __, 734 N.W.2d 115 (citations omitted). Similarly, we conclude that, whichever formulation is used, the error here was harmless.

¶12 We agree with Kern that the question for the jury was "whether [Diane] consented to a sexual encounter with Kern in exchange for a ride and then changed her mind, as Kern told the police, or whether Kern tried to force her to have sex with him, as [Diane] said." We disagree with Kern that the answer to that question turned simply on a credibility contest between Diane and Kern.

¶13 We begin by acknowledging the strength of the other acts evidence. Without contradiction, Ann A. testified that in 1989 she was riding her bicycle on a remote fire-lane road in Bayfield County when a truck drove past her, turned around, passed her again, and stopped. Ann A. testified that, when she approached the stopped truck, Kern was standing in the middle of the road blocking her path. Kern grabbed her by the neck, pulled her off her bicycle, and displayed a large knife in front of her face. Kern forced Ann A. into the woods and had intercourse with her. Kern was apprehended later that same day because Ann A. gave a good description of Kern's truck and was able to identify Kern based on a photograph. Plainly, Ann A.'s testimony was powerful, but we are convinced that its admission, if error, was harmless error.[1]

[1] The State's harmless error argument is not helpful. The State erroneously speaks in terms of whether there "was substantial evidence that the jury could have relied upon to convict Kern even without the other acts evidence" and whether "[Diane's] testimony alone was sufficient for the jury to convict Kern of the charge." Sufficiency of other evidence, however, is not the test used to assess whether error is harmless. Furthermore, the State's harmless error argument is completely conclusory. The State tells us that "Kern's statement played during trial (continued)

¶14 Much of the trial evidence was undisputed. On June 9, 2005, Diane S. was new to the Wisconsin Dells area. She met Kern at Job Services in Wisconsin Dells, a place Kern frequented in search of work. A job services worker who knew Kern introduced him to Diane. The job services worker suggested places Diane could look for work, and Kern offered to give Diane a ride to those places. For about three hours, Kern used his van to drive Diane to various locations in the Wisconsin Dells and Baraboo area. Eventually, Kern drove Diane to Levee Road, a country road near a river. Kern turned off Levee Road on a driveway and stopped at a location that was secluded, wooded, and "not very visible" from Levee Road.

¶15 Some of what occurred after Kern stopped his van was undisputed at trial. Kern told Diane that he had had sex with a lot of women at that location and suggested that the two of them have sex. Diane testified and Kern told police that Diane initially declined. At some point shortly after stopping, Kern got out of his van, walked around to the other side, and stood in the open door of the passenger side, where Diane was sitting. Diane and Kern agreed that, while Kern stood there, Diane patted Kern's face, rubbed his chest, rubbed his groin area, and kissed him. Diane and Kern ended up near the back of Kern's van, where Diane caught

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corroborated much of [Diane's] testimony," but provides no specifics. The State tells us that the "only disagreement is over what happened after [Diane] said she would not have sexual intercourse or oral sex with Kern." Of course this is true, but that "disagreement" is the nub of the matter. Why should this court be convinced, as to this disagreement, that the jury would have believed Diane, regardless of Ann A.'s testimony? On this key issue, we are left with only the State's bald assertion that "the jury likely relied on the numerous contradictions in Kern's own statement" and on a detective's testimony that several items found in Kern's van constituted a "rape kit." Understandably, Kern spends little time attempting to rebut the State's harmless error argument in his reply brief. Still, Kern must know that it is incorrect to say that "[t]he only evidence of guilt came from [Diane's] testimony." As set forth in the text, some of the strongest evidence against Kern came from Kern's own lips.

Kern off guard by suddenly knocking his glasses off, kicking or attempting to kick him, and running toward Levee Road. Kern went down to his knees, had trouble seeing, and began looking for his glasses. As Diane ran, she called 911 and reported that a man had just attempted to assault her. A short time after Diane got to Levee Road, she stopped a passing car by standing in the middle of the road, and the driver of that car gave her a ride to a nearby business. Shortly thereafter, police responded to the scene off Levee Road, where Kern was still looking for his glasses.[2]

¶16 The dispute at trial concerned whether Kern threatened Diane with a knife and pulled her out of the van in an effort to forcibly have sex with her or whether, instead, Diane indicated she would perform oral sex on Kern but inexplicably changed her mind. We have no doubt that the jury would have resolved this dispute against Kern, regardless of Ann A.'s testimony.

¶17 First, Diane's testimony provided a plausible account of an attempted sexual assault. Diane recounted several of the undisputed facts recited above. In addition, she testified that, after Kern stopped the van and proposed

[2] During closing argument, Kern's counsel asked the jury to consider why, if Kern had attempted to assault Diane, he would remain at the scene, rather than flee. But Kern himself provided the answer. He told police that he could not drive without his glasses and, he said, "I could have got in the van and run but run where?" Indeed, if Kern had fled, that action would have been more incriminating than remaining at the scene. Kern knew he had been seen with Diane and had to have realized that he would be identified eventually through the employee at Job Services.

Kern's attorney argued that it made no sense for Kern to attempt to assault Diane in the manner alleged since he knew that he could be identified as the person who spent time with Diane that day. We acknowledge that this argument at first glance weighs in favor of Kern. A person with common sense would not attempt to assault someone knowing he could be identified. However, as will become clear, Kern's own statements to police both strongly incriminated him and showed he lacked basic common sense. He lacked even the common sense to be consistent on major topics, such as when he displayed his large knife to Diane.

they have sex, she told him she would not do that. Diane testified that, while she sat in the van, Kern came around to the passenger-side door, which she had opened because of the heat, and Kern displayed a knife.[3] She said Kern scared her by plunging the knife toward her abdomen, but stopping. Diane said she initially told Kern she would not cooperate, but he became agitated and she attempted to stall him and calm him down. Diane told the jury that, in attempting to calm him down, she patted Kern's face, rubbed his chest, rubbed his groin area, and kissed him. But her stalling worked for only a short time and, according to Diane, Kern forcefully pulled her from the van.

¶18 Diane testified that she told Kern she would go with him if he threw his knife in the van. She told the jury that Kern was more than 100 pounds heavier than she was and that she told him he did not need a knife because he could break her neck if he wanted to. Diane testified that Kern held her while he threw the knife into the back of the van through the van's side door. Diane said that Kern was restraining her, but she was able to hit his glasses off his face and run toward the road.

¶19 Although providing no direct support for Diane's version of the events off Levee Road, several witnesses testified that Diane was visibly upset after she ran to the road, got a ride, and spoke with police and employees at the nearby business. Also, the 911 tape, which was played to the jury, reveals panic in Diane's voice that is consistent with a person who has just endured a traumatic event and is still frightened.

[3] Police located two knives, a small pocket knife and a larger folding knife Kern kept in a sheath. The smaller knife is not significant, and all further knife references are to the larger knife unless otherwise noted.

¶20 We pause here to comment on the attempt by Kern's trial counsel to discredit Diane by pointing to inconsistencies between her preliminary hearing testimony and her trial testimony. We have carefully reviewed the cross-examination of Diane at trial, and conclude that any inconsistencies identified were minor. For example, Kern's counsel attempted to show inconsistency by highlighting that at the preliminary hearing Diane spoke of Kern pulling her from the van by her arms, but at trial spoke in terms of her shoulders and neck. We think it readily apparent that the jury would have been unimpressed by this supposed inconsistency, especially in light of the clarification by the prosecutor that, prior to trial, Diane had not been asked to explain in detail exactly how Kern grabbed her. Similarly, Kern's trial counsel highlighted that, in Diane's direct testimony, she referred to kicking Kern, but did not mention that a year earlier when she testified at the preliminary hearing. But, here again, the jury would not have had reason to doubt Diane because the alleged inconsistency is minor, and especially because Kern's statement to police contains a reference to Diane trying to kick him. Other attempts to show inconsistencies are not worth discussing. It is sufficient to say they all either fell flat or amounted to the sort of minor inconsistency to be expected when a victim relates, at different times, minor details of a traumatic event.

¶21 The crux of our harmless error analysis does not, however, focus on Diane's testimony. Rather, we are confident that the admission of Ann A.'s testimony was harmless because the jury heard a recording of Kern's version of the events and Kern's version contained glaring inconsistencies on major points.[4]

[4] Our summary of Kern's statements comes from document 89 in the record, a transcript of the interview played to the jury. We have compared this transcript with the hearing that was (continued)

¶22 First and foremost, Kern incriminated himself by first denying and then admitting that he displayed a knife to Diane at the scene of the alleged attempted sexual assault. Kern was questioned by a detective the day he was apprehended.[5] Early during questioning, Kern said: "I don't remember at what point that she – you know, this business with the knife and stuff. I don't know what time she saw that, but you know I kept it down in my door there, and I use it for a tool. I was using it the other day on the job site." The detective responded, "What knife is that? I found a small pocketknife in your front pocket," and Kern then explained he was talking about a larger knife that he kept in the empty sheath that was found on Kern's person when he was apprehended. Kern went on to say that he kept the larger knife in its sheath in the side pocket of the driver's door. Kern said he did not know when during the day he pulled the knife out of the side pocket and showed it to Diane. But he said that when he did show her the knife, she told him to put the knife away and she got "queasy" about it. Kern said he put the knife in the back of the van "somewhere." He said he "chucked it back there," referring to the back of his van. In an apparent effort to explain how the empty sheath ended up in one of his pockets when he was apprehended by police, Kern said he "must have just forgot that I had the sheath with me." Kern maintained that he did not remember at what point he put the sheath in his pocket that day.

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held to redact and mute portions of the interview. We rely only on portions of the interview that were played to the jury.

[5] Kern was questioned by two detectives. Detective Michael Reimer began the questioning and, part way through the interview, Detective Wayne Smith entered the room and joined in the questioning. For ease of discussion, we speak as if there had been a single questioner. There is nothing in the taped interview to suggest that the presence of two detectives matters.

Kern asserted that, when he had his "altercation" with Diane, he did not "have any control of any knife."

¶23 Later during questioning, the detective said to Kern that Kern had "brought up the fact … about holding a knife or something" and asked: "And you never did hold a knife to her or anything like that?" Kern responded: "I probably had a knife in my hand, but I never went hey, you're going to do what I want bitch, you know." Moments later, Kern was asked at what point he was holding the knife, and Kern responded, "Sometime during the day. I can't remember." The detective said it sounded like Kern was saying he had the knife when Kern and Diane were at the scene of the altercation, and Kern responded, "No, no, no, no, no, no."

¶24 Later in the interview, Kern repeated that he did not have the knife out when discussing sex with Diane:

> DETECTIVE: Let's go back to the knife. That's what I'm concerned about. That's the part of the consensual sexual encounter that's wrong because you wouldn't need a knife in a consensual sexual encounter, right?
>
> KERN: No.
>
> DETECTIVE: You would agree with that, right?
>
> KERN: No. You wouldn't need anything.
>
> DETECTIVE: So why do you have one that you displayed to her during this?
>
> KERN: Define displayed during this.
>
> DETECTIVE: Well you're sitting in the van, you want sex. She doesn't want to have sex. She says maybe I'll give you a blowjob or whatever but you've got a knife out.

> KERN: I didn't have a knife out when I asked her for sex.
>
> DETECTIVE: How does she get –
>
> KERN: I know it was during the day sometime.

During questioning, the detective asked Kern how it might be that there was evidence that Kern put a knife to Diane's abdomen. Kern incriminated himself by admitting that it was possible a knife was pressed against Diane. Here are Kern's own words:

> KERN: You're saying this knife was pressed against her? I don't know.
>
> DETECTIVE: Well, could it have happened and you don't know it happened?
>
> KERN: Well, anything is possible.
>
> DETECTIVE: You could have pressed the knife against [her] and not remember that happened? Is that what you are saying? Do you have blackouts or do you have memory loss?
>
> KERN: As far as I know, I didn't do that.

A short time later, Kern effectively admitted that a knife was involved by not denying the knife was used and instead saying he did not know why the knife had "come into play":

> DETECTIVE: … Why did the knife come into play?
>
> KERN: I don't know.

Still later, the following incriminating exchange occurred:

> DETECTIVE: She didn't agree to have a knife pushed up against her.
>
> KERN: I don't know that I did push the knife against her.

DETECTIVE: Were you just bold in showing it to her talking smart?

KERN: Yup.

DETECTIVE: While you [were] standing there at the side of the van?

KERN: I don't know if that's when it happened or not.

DETECTIVE: So when she said she didn't want to have sex and somewhere between that and the oral sex is when this knife was shown to her like that, right?

KERN: Well, you mean somewhere between –

DETECTIVE: I know the knife was shown to her while you were standing out on that side of the van because that's when you walked to the back of the van and put it in the van, right?

KERN: Yeah.

DETECTIVE: You could have said that five or six minutes ago. That's when you showed her this knife and had it up against her belly. It's not that big of a deal.

KERN: I didn't have it up against her belly.

….

DETECTIVE: … At some point you get out of the van you go over [to] the driver's side door which is open and [you're] standing in there, essentially, leaning up against her with your hands up on it. Correct so far? [Sentence muted for presentation to the jury.] Maybe pushed in is the wrong way to say it, but pushed against her stomach, pushed on her stomach, laying against her and she gets this mark.

KERN: I don't know.

….

DETECTIVE: Then you guys are out of the van towards the back, and then that's when you threw the knife in the back of the van because she's worried about it, right?

KERN: Yeah. You'll probably find it in the back by the toolbox.

> DETECTIVE: And that goes in the sheath that you had on you out there?
>
> KERN: Yeah.

Thus, the jury heard Kern go from spontaneously raising the topic of the knife and denying that he displayed it at the scene of the "altercation" to admitting that he did show it to Diane at that time and was uncertain whether he pressed it against her.

¶25 Kern also failed to explain why, if he was simply showing Diane the knife, he did not return the knife to its sheath and put it back in the side-door pocket where he got it from when she got "queasy." His account does not provide an innocent explanation as to why he would toss the knife in the back of the van and put the empty sheath in his pocket. Indeed, he eventually acknowledged that he had the knife out while discussing sex with Diane and that he tossed the knife in his van as the two walked toward the back of the van where Kern hoped to have sex with Diane. As to why the empty sheath ended up in Kern's pocket, Kern only made confusing statements, such as the following:

> DETECTIVE: At what point – I just want to go back to the knife when you pulled it out of the sheath out of the door panel, and then you showed it to her at some point. And then you tossed it in the back of the van. When did you put that sheath in your back pocket, the leather sheath? When was that? Don't know.
>
> KERN: I was walking around the other day, I reached in my pocket. The sheath was in my pocket the other day, you know. I'm going home. Got throwed away.
>
> DETECTIVE: So you put it away?
>
> KERN: The other day, yeah. I usually carry it right there in the door panel. It's a handy place to keep it. I tie wire with it, strip wire with it and stuff. It's a tool, it's not a weapon.

¶26 We also observe that Kern provided no explanation as to why he showed his knife to Diane. Asked what he was doing with the knife when Diane saw it, Kern responded: "Nothing. I was just saying, here I got a knife. I don't have any reason. I didn't threaten her or anything."

¶27 The inescapable conclusion is that Kern provided highly incriminating evidence regarding his use of the knife.

¶28 Separate from the knife statements, Kern helped the prosecution by admitting that Diane expressed fear for her life. During one exchange, when the detective was asking Kern about his discussion with Diane about sex, Kern said that after he walked around to the passenger door where Diane was sitting and "talked her into" giving him a "blowjob," Kern suggested they go into the woods. Unprompted, Kern then admitted that Diane declined to go into the woods with him because she feared he would kill her. Kern said that Diane refused, saying "if you take me back in the woods, then you'll kill me." The detective gave Kern an opportunity to clarify his statement, asking whether Kern was saying that Diane told him she was afraid to go into the woods because she was afraid of getting killed, but that she was all right with going to the back of the van and felt comfortable with that. Kern responded, "Yeah." Later during questioning, Kern repeated that Diane was fearful, and specifically mentioned her fear of Kern's knife:

> DETECTIVE: Why was she saying she wouldn't go back in the woods?
>
> KERN: Well she was saying oh, you'll get the knife out and you'll kill me and that. I said I'm not going to kill anybody. In fact I swear to god I'm not going to kill you, you know. She said something about well you can break my neck, you know. I'm going no, no.

¶29 Kern also gave inconsistent statements regarding whether Diane agreed to oral sex or vaginal intercourse. Early during questioning, Kern said Diane asked what Kern wanted and he said oral sex, and Diane responded: "[W]hy don't you screw me?" But minutes later, Kern told the detective that Diane told him she did not want to have intercourse because she had "herpes and all that stuff, you know." Rather, according to Kern, Diane agreed to give him oral sex. This is no minor inconsistency. In context, Kern was first asserting that Diane suggested vaginal intercourse instead of oral sex. Minutes later, Kern asserted that Diane preferred oral sex because she had herpes.

¶30 We also note that the jury might have wondered why, after Diane knocked Kern's glasses off and ran, Kern did not give chase. But, here again, Kern himself gave an answer consistent with guilt. Kern told the detectives that Diane agreed to give him oral sex, voluntarily walked to the back of the van, and then, "the first thing I know is my glasses go flying off my face, and [Diane] tries to kick me in the groin" and "then she takes off." Kern said that, after his glasses flew off, "right away I'm blind for a moment, you know." The only evidence before the jury suggested that Kern could not see well enough without his glasses to effectively chase after Diane.

¶31 In the end, the jury had before it a credible account by Diane of an attempted sexual assault, with Kern himself corroborating a key assertion—that, while discussing having sex, Kern displayed his knife and then tossed it in the side door of his van to the back of the van where police later found it. At the same time, apart from Kern's admission that he displayed a knife and that Diane expressed fear for her life, Kern's statement contains no suggestion whatsoever as to why Diane would voluntarily agree to sexual contact with Kern but then suddenly knock his glasses off, run, and report that he tried to rape her. Toward

the end of the interview, Kern stated: "Basically, I guess she agreed to it and then she decided not to, and I would have just taken her home. But for some reason she just wants to get hysterical and run off so, you know." When the absence of any suggestion as to why Diane would falsely accuse Kern is combined with Kern's own highly damaging admissions and inconsistencies, the unavoidable conclusion is that the admission of Ann A.'s testimony, if error, was harmless error.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.