COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2894-CR **Cir. Ct. No. 2006CF503**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID D. AUSTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. David Austin appeals from a judgment of conviction of first-degree sexual assault of a child and from an order denying his motion for postconviction relief. He argues that his examination of one of his defense witnesses was prejudicially limited and that the evidence is insufficient to

support the conviction because no reasonable jury could believe the victim's testimony. We reject his claims and affirm the judgment and order.

¶2 About a month after Austin came to live with nine-year-old Jasmine F. and her mother, Jasmine was left alone with Austin. Jasmine testified that Austin called her over to the couch and asked her if she had any questions about sex. Austin grabbed her hand and had her feel his penis under his clothes. He then put his hand on her vagina under her clothes. Jasmine's mother was suspicious when she returned home because both Austin and Jasmine had taken showers. When asked by her mother if anything had happened between her and Austin, Jasmine denied that anything occurred.

¶3 Two or three days later, Jasmine revealed to her mother what occurred. When Jasmine's mother confronted Austin, Austin denied any contact. Jasmine was called into the room and she said she lied about the assault. Jasmine also denied the assault when taken to a counselor by her mother.

¶4 Jasmine's mother had reported the allegation to her ex-boyfriend, Perry Sharpe. Sharpe reported it to the police. Police detective April Hinke interviewed Jasmine in her police car. At first Jasmine denied that Austin had touched her but after a few minutes she told the detective what occurred. Jasmine was then interviewed at the police station. Two separate interviews, one by detective Hinke and another by a child protective service worker, were recorded and played for the jury.

¶5 Austin's theory of defense was that Jasmine was completely untruthful. Jasmine's mother testified that Jasmine was not always truthful with her. During cross-examination, Jasmine admitted that she was not always truthful with her mother. Sharpe also testified that Jasmine was not always truthful with

him and that at one point Jasmine told Sharpe that Austin had not touched her. Austin presented the testimony of a psychotherapist who counseled Jasmine after she had revealed the assault to her mother. Jasmine indicated that she was uncomfortable with her mother's new boyfriend, Austin. She denied being touched or any attempt to touch her private parts. At a session months later and after Austin was charged, Jasmine indicated that Austin had touched her between her legs but she did not want to talk about it. Jasmine reported to the counselor that Austin said she was breaking up the family by her disclosure and she changed her report to say that it did not happen.

¶6 Austin sought to present the testimony of James Dillon, a retired police officer, an attorney, and a law enforcement and criminal law instructor at the Moraine Park Technical College, as an expert witness to identify for the jury "problems that exist in interviewing children and in particular the problematic process undertaken in this particular case." The prosecution objected because it has not been provided a report of Dillon's conclusions. The trial court found that the discovery statute, WIS. STAT. § 971.23(2m) (2007-08),[1] had not been complied with and excluded Dillon from testifying as an expert witness. Austin then called Dillon as an impeachment witness because he had interviewed both Jasmine's mother and Sharpe. Just before Dillon took the stand, the trial court warned Austin that it was not going to let Dillon "ramble on and on about what was said and what wasn't said," because it had previously allowed great leeway with other impeachment witnesses. The trial court limited Dillon's testimony to whether Sharpe had told Dillon, in Dillon's capacity as a state public defender investigator,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that he wanted to get custody of Jasmine and her younger half-sister.[2] Dillon testified that Sharpe was unhappy that Austin was still in the house after Jasmine revealed the assault and that Sharpe said he went to court with that information.

¶7 Austin argues that he was denied his right to present a defense when the trial court limited Dillon's testimony to just a single point of impeachment of Sharpe. He claims Dillon should have been allowed to testify as an expert about the interviewing techniques employed by the police and to impeach every one of the prior witnesses, including Jasmine's mother. We do not address the claim that Dillon should have been permitted to impeach any other witness because it is raised for the first time on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). During the trial, Austin did not explain how Dillon could impeach any other witness, including Jasmine's mother.[3] No offer of proof was made and the claim of error is waived. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996); WIS. STAT. § 901.03(1)(b).

¶8 Whether a defendant's right to present a defense has been improperly denied by the trial court is a question of constitutional fact which we review de novo. ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994). Here the trial court excluded the proposed expert testimony as a sanction for the failure to disclose the expert's conclusions as required by the discovery statute,

[2] Sharpe testified that if Jasmine's younger half-sister, Sharpe's child, wanted to come live with him he would like that. He also indicated that he never threatened custody proceedings in order to get the child to live with him. He denied reporting the incident for the purpose of keeping the children away from their mother. On cross-examination he said he did not try for custody of the children during the timeframe.

[3] Rather, the only mention of Jasmine's mother in the context of Dillon's proposed testimony was that Dillon would impeach Sharpe's testimony that he had a good relationship with Jasmine's mother by testimony that Sharpe said Jasmine's mother was deceptive.

WIS. STAT. § 971.23(2m)(am). The decision to exclude evidence for the failure to comply with § 971.23 is committed to the trial court's discretion, and we affirm the decision if there is a reasonable basis for it. ***State v. Gribble***, 2001 WI App 227, ¶29, 248 Wis. 2d 409, 636 N.W.2d 488. The trial court is required to exclude evidence that is not properly disclosed unless the court finds good cause for the failure to comply. ***Id.***, ¶28; § 971.23(7m)(a).

¶9 It appears that Dillon did not prepare a report or written statement in connection with his proposed expert testimony. Thus, Austin was required to provide "a written summary of the expert's findings or the subject matter of his or her testimony, and including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial." WIS. STAT. § 971.23(2m)(am). Whether information sufficient to meet the requirements of the discovery statute has been provided is a question of law we review de novo. ***State v. Schroeder***, 2000 WI App 128, ¶8, 237 Wis. 2d 575, 613 N.W.2d 911.

¶10 Austin's only pretrial disclosure of the scope of Dillon's expert testimony was:

> James Dillon has conducted investigative work in this matter speaking with a number of individuals and having reviewed the police practices including the interviews done with the alleged victim. Mr. Dillon is a retired police officer and prior educator of law enforcement. Using his training and experience he will identify for the jury problems that exist in interviewing children and in particular the problematic process undertaken in this particular case.

¶11 We conclude that this was inadequate to serve the purposes of the disclosure requirement in WIS. STAT. § 971.23(2m)(am). The purpose of the requirement is to enable the opposing side to prepare for trial, ***Schroeder***, 237

Wis. 2d 575, ¶9, and "'[t]o save court time in trial and avoid the necessity for frequent interruptions and postponements.'" ***State v. Revels***, 221 Wis. 2d 315, 330, 585 N.W.2d 602 (Ct. App. 1998) (quoted source omitted). Relevant substantive information must be disclosed. ***Id.*** Austin's summary lacks substantive information about what interviewing techniques were problematic in this particular case—Dillon's "findings" with respect to the case. The summary is not much more than the statement deemed inadequate in ***Revels*** that merely signaled that the witness would testify as an expert. *See* ***id.*** at 329. That the police detective and social worker testified about the interview techniques employed may have opened the door for expert testimony on those techniques but did not relieve Austin of his obligation under the statute to provide the substantive findings that the expert would expound on.[4] The disclosure was inadequate and the trial court properly exercised its discretion in excluding Dillon's expert testimony.[5]

¶12 We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451

[4] In his reply brief Austin states that "[t]he defense was not going to call Dillon as an expert, but as an investigator for impeachment purposes." Dillon cannot now disavow the notion that Dillon's evaluation of the interviewing techniques employed in this case was as an expert when he specifically indicated that Dillon's testimony would be based on his training and experience. We are at a loss to understand how a critique of the interviewing techniques could be provided by a lay fact witness and serve only to impeach.

[5] We observe that no offer of proof was made regarding the excluded evidence. Where no offer of proof is made, an exclusion of evidence, even if erroneous, cannot be held prejudicial. ***State v. Mendoza***, 80 Wis. 2d 122, 164-65, 258 N.W.2d 260 (1977). There is nothing here to suggest even a possibility that the exclusion of Dillon's testimony violated the right to present a defense.

N.W.2d 752 (1990). It is the function of the jury to decide issues of credibility, to weigh the evidence, and to resolve conflicts in the testimony. ***Id.*** at 506.

¶13 Austin argues that no reasonable jury could have believed Jasmine's testimony that the sexual assault occurred in light of her repeated denials and reputation for untruthfulness. However, a witness's testimony is not incredible as a matter of law unless it is in conflict with the uniform course of nature or with fully established or conceded facts. ***Haskins v. State***, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). Inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve. ***Id.*** We must adhere to the rule that we defer to the jury's function of weighing and sifting conflicting testimony because of the jury's ability to give weight to nonverbal attributes of the witnesses. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

¶14 Explanations were given for Jasmine's repeated denials that the assault occurred. Jasmine herself testified that she made denials because she was afraid of Austin and of creating family turmoil. The jury was free to believe her testimony. The victim's testimony alone is sufficient to support the conviction. *See* ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1024, 480 N.W.2d 842 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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