COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1465-CR **Cir. Ct. No. 99 CF 4666**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CALVIN R. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Calvin R. Mitchell appeals from a judgment of conviction entered after he was convicted by a jury of two counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1), and one count of

second-degree sexual assault of an unconscious victim, contrary to WIS. STAT. § 940.225(2)(d) (1999-2000).[1] Mitchell claims that: (1) the trial court erroneously exercised its discretion when it admitted impeachment evidence of his prior convictions; (2) the trial court erred in admitting expert testimony about the victim's absence of visible injuries, testimony about the victim's delay in reporting an incident, and the expert's alleged opinion on whether the victim was telling the truth; and (3) there was insufficient evidence to support the jury verdict. We affirm.

I. BACKGROUND

¶2 Calvin R. Mitchell was tried for sexually assaulting his eight-year-old stepdaughter E.A. At trial, E.A. testified that she was at her aunt's house with her mother and younger brother the night she was assaulted. Mitchell came over around 9:15 p.m. to take the children home. At home, E.A. fell asleep on her mother's bed while watching a movie. She woke up to find Mitchell "putting his finger in my vagina and my bottom." E.A. got up and walked approximately a mile-and-a-half to her aunt's house, where she told her mother about the assaults.

¶3 E.A.'s mother testified that when E.A. arrived at her aunt's house around 10:20 p.m. she was "crying and really upset." E.A.'s aunt called the police and Officer Isabel Monreal responded. Officer Monreal testified that when she arrived "[t]ears were rolling down" E.A.'s face as E.A. repeated her allegations of sexual assault. E.A. told Officer Monreal that it hurt when Mitchell inserted his finger into her vagina and her rectum because Mitchell had long fingernails. E.A.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

also told Officer Monreal that Mitchell had "put his finger in my bottom" a few weeks earlier, but that she did not report that incident because she did not want to get into trouble with her mother.

¶4 About two-and-one-half hours later, E.A. was examined by sexual assault nurse Juanita Malloy at the Sinai Samaritan Medical Center. Malloy testified that she did not find any cuts or redness after she examined E.A. Malloy stated that it is common, however, not to find injuries when digital touch or penetration is involved because the vaginal and anal areas are "quite stretchable;" thus, the penetration may not "damage the tissue in a large enough manner to leave … marks." Malloy also testified that it is common for children to delay reporting an incident of sexual assault because children often feel guilty and worry that they will be disciplined for what happened.

¶5 Mitchell testified at trial, denying the charges of sexual assault. He claimed that he was watching a movie with E.A. and her brother when he fell asleep. He testified that he woke up when the police came to his house and that he did not even realize that E.A. was gone. Mitchell stated that he usually has long fingernails and admitted on cross-examination that he had four prior convictions.

II. ANALYSIS

A. Prior Convictions

¶6 First, Mitchell alleges that the trial court should have granted his motion to exclude the evidence of his prior convictions. He claims that the probative value of these convictions was substantially outweighed by the danger of unfair prejudice because none of the convictions was for a sex-related offense. Mitchell also alleges that the admission of these convictions diminished his

credibility; thus, this was prejudicial because sexual assault cases require the jury to weigh the victim's credibility against the defendant's. We disagree.

¶7 "[A]ll criminal convictions … [are] generally admissible for impeachment purposes" under WIS. STAT. RULE 906.09, ***State v. Kuntz***, 160 Wis. 2d 722, 751–752, 467 N.W.2d 531, 542 (1991), because "one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted," ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11, 14 (1971).[2] When deciding whether to admit evidence of prior convictions, a trial court should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). These factors are weighed in a balancing test to determine whether the probative value of the prior conviction evidence is "substantially outweighed by the danger

[2] WISCONSIN STAT. RULE 906.09 provides, in relevant part:

> **Impeachment by evidence of conviction of crime or adjudication of delinquency.** **(1)** GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.
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> **(2)** EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
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> **(3)** ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

of unfair prejudice." WIS. STAT. RULE 906.09(2). We review a trial court's decision to admit evidence of prior convictions for an erroneous exercise of discretion. ***Kruzycki***, 192 Wis. 2d at 525, 531 N.W.2d at 435.

¶8 The trial court considered the appropriate factors. First, the trial court considered the lapse of time since Mitchell was convicted. Three of Mitchell's convictions were from 1986, and his fourth conviction was from 1996. Thus, the court concluded that the lapse of time "really isn't long," given that Mitchell was in prison for part of the time. Second, the trial court considered Mitchell's rehabilitation, concluding that Mitchell did not show any signs of rehabilitation because he was "convict[ed] in [1986], out in [19]89, convict[ed] in [19]96, [and charged with] new allegations in [19]99." Third, the court concluded that the gravity of the crimes—armed burglary, armed robbery, operating a vehicle without the owner's consent, and fleeing a traffic officer—"speak for themselves." It also concluded that fleeing from an officer showed clear disregard for the law. Finally, the court determined that Mitchell's prior crimes did not involve testimonial dishonesty (the trial court indicated that "[i]t doesn't appear that there is dishonesty or false statements in the crime"). The court then weighed these factors and determined that the prior convictions were admissible.

¶9 The fact that none of Mitchell's prior convictions was for a sex-related crime is irrelevant. Nowhere does Rule 906.09 state that prior convictions must be for the same crime to be admissible. Moreover, the purpose behind the introduction of Mitchell's prior convictions was to impeach his credibility, not to show that Mitchell had a propensity to commit a sexual assault. *See* ***State v. Sohn***, 193 Wis. 2d 346, 351–353, 535 N.W.2d 1, 3 (Ct. App. 1995). Thus, as noted below, Mitchell's argument misses the purpose for which prior convictions are admitted under Rule 906.09.

¶10 Mitchell's argument that the introduction of his prior convictions was prejudicial because they diminished his credibility also fails. That is precisely the purpose of Rule 906.09, and it does not contain an exception for cases, such as sexual assault, where the defendant's credibility is particularly relevant to the outcome of the trial. Indeed, Rule 906.09 was designed exactly for such a purpose, that is, to allow the factfinder to accurately assess a defendant's credibility in cases where it is an important factor. *See* ***Kuntz***, 160 Wis. 2d at 751–752, 467 N.W.2d at 542 ("all criminal convictions … [are] generally admissible for impeachment purposes").[3] Accordingly, the trial court did not erroneously exercise its discretion when it admitted impeachment evidence of Mitchell's prior convictions.

B. Expert Testimony

¶11 Next, Mitchell claims that the testimony of sexual assault nurse Juanita Malloy should have been excluded because her testimony did not assist the jury in understanding the absence of visible injury to E.A. or why E.A. did not immediately report the first incident. Mitchell also claims that, although Malloy "did not specifically render an opinion about E.A.'s truthfulness," she "violated the spirit of the law" when she admitted that she believed E.A.'s allegations.[4] We disagree.

[3] The danger of unfair prejudice to Mitchell was further minimized when the trial court instructed the jury to consider the evidence of Mitchell's prior convictions only to assess Mitchell's credibility and not to use them as substantive evidence that Mitchell committed the charged crimes.

[4] Mitchell also claims that Malloy should not have been allowed to repeat what "she was told by E.A. regarding the sexual assault." Mitchell does not explain, however, why this information should have been excluded under the circumstances as they existed when E.A. related the assaults to Malloy. Thus, this argument is insufficiently developed and we decline to (continued)

¶12 Under WIS. STAT. RULE 907.02, an expert witness may testify if the witness "has specialized knowledge that is relevant because it will assist the trier of fact to understand the evidence or determine a fact in issue." ***State v. Watson***, 227 Wis. 2d 167, 187, 595 N.W.2d 403, 412 (1999).[5] An expert witness may not, however, testify "that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). Whether expert testimony is admissible is determined by examining the purpose for which the testimony is submitted and the effect of the testimony, ***State v. Richardson***, 189 Wis. 2d 418, 423, 525 N.W.2d 378, 380–381 (Ct. App. 1994), and is largely within the trial court's discretion, ***State v. Jensen***, 147 Wis. 2d 240, 246, 432 N.W.2d 913, 915–916 (1988).

¶13 Malloy's testimony was offered for a permissible purpose. First, she testified that she did not observe any injury to E.A., but that, in her experience, this was not necessarily inconsistent with a sexual assault that occurs by touch or digital penetration:

> It's common not to find any injuries…. When there is touch or penetration with a digit, it usually doesn't leave any marks because it doesn't damage the tissue in a large

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address it. *See* ***Barakat v. Wisconsin Dep't of Health and Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398–399 (Ct. App. 1995) (an appellate court may decline to review an issue that is "amorphous and insufficiently developed").

[5] WISCONSIN STAT. RULE 907.02 provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> enough manner to leave those marks. So that to not find bruises, to not find tears would be consistent.

This testimony was not offered as Malloy's opinion on whether E.A. was sexually assaulted, but to explain the post-assault circumstances—that the alleged sexual contact would not necessarily cause injury to the victim. Accordingly, this testimony helped the jury understand that the lack of physical injury did not necessarily mean that E.A. was not telling the truth. *See* ***State v. Hernandez***, 192 Wis. 2d 251, 255, 531 N.W.2d 348, 349 (Ct. App. 1995) ("Expert testimony of general characteristics of child sexual assault victims is admissible to assist the jury in understanding that physical evidence of the assault is not a common occurrence. Absent this testimony, which is beyond the normal ken of jurors, the jury may attribute the lack of physical evidence to prevarication."), *overruled on other grounds by* ***State v. Eugenio***, 219 Wis. 2d 391, 404, 579 N.W.2d 642, 648 (1998).

¶14 Malloy also testified about why children often delay reporting incidents of sexual assault:

> Very often children will [delay reporting because they] feel somehow at fault. They feel threatened that they're going to be disciplined by their parent if they tell. They also feel somewhat guilty. And there's an inherent imbalance of power between adults and children that automatically make [sic] children very reluctant to say what they feel is something bad an adult has done to them.

This testimony was offered to explain E.A.'s post-assault behavior—why E.A. did not report the first incident of sexual assault immediately after it happened. Malloy's testimony merely helped the jury understand that a delay in reporting is common among child sexual assault victims and, again, that the delay did not necessarily mean that E.A. was not telling the truth. *See* ***Haseltine***, 120 Wis. 2d at 97, 352 N.W.2d at 676 (expert testimony explaining why children are reluctant to

report accusations of incest could help the jury understand that such behavior is common among incest victims and not necessarily an indication that the victim is not telling the truth).

¶15 Finally, on cross examination, Mitchell's trial attorney asked Malloy: "as a health care provider, you have to accept what's told to you by a patient is true, correct?" Malloy responded "Yes." Mitchell now claims that the jury could have inferred that because Malloy indicated that she believed E.A., E.A. was telling the truth. This argument fails, however, because it was Mitchell who elicited this testimony from Malloy on cross-examination. Thus, he cannot now change his strategy and claim error. ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817, 820 (1996) (judicial estoppel prevents "a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position"). Moreover, Malloy's testimony was that she "ha[d] to accept what's told to" her by a patient, not that she necessarily believed E.A. here.

C. Sufficiency of the Evidence

¶16 Finally, Mitchell alleges that there was insufficient evidence for the jury to convict him. He claims that, given the undisputed fact that he had long fingernails, there should have been redness or other visible injury to E.A. Thus, he contends that, because there was no injury or redness, E.A.'s testimony was "intrinsically improbable and almost incredible." Again, we disagree.

¶17 A conviction of first-degree sexual assault requires the State to prove, beyond a reasonable doubt, that Mitchell "ha[d] sexual contact … with a person who has not attained the age of 13 years." WIS. STAT. § 948.02(1). A conviction of second-degree sexual assault of an unconscious victim requires proof that the defendant "ha[d] sexual contact … with a person who the defendant

knows is unconscious." WIS. STAT. § 940.225(2)(d). Sexual contact is defined as "[i]ntentional touching by the … defendant, either directly or through clothing by the use of any body part or object, of the complainant's … intimate parts." WIS. STAT. §§ 940.225(5)(b)1 and 948.01(5)(a).

¶18 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "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 N.W.2d 752, 755 (1990). The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony, ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575, 580 (1978), and resolves any conflicts in the evidence, ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983).

¶19 Here, there is ample evidence to support the jury's verdict. At trial, E.A. testified that Mitchell "put[] his finger in my vagina and my bottom." E.A. also repeated these allegations to her mother, a police officer, and a health care professional, all of whom testified at Mitchell's trial. While Mitchell claims that his fingernails would have caused visible injury to E.A. because they were long, a sexual assault nurse testified that digital contact or penetration does not commonly cause injury because the vaginal and anal areas are "quite stretchable."

¶20 Moreover, E.A. walked a mile-and-a-half to her aunt's house, at night, to tell her mother about the sexual assaults. E.A.'s mother testified that when E.A. arrived she was crying and shaken up. A police officer also testified that E.A. was crying when E.A. told her about the assaults. Accordingly, there is

enough evidence to support the jury's finding that Mitchell had sexual contact with E.A. despite the lack of physical injury. The jury was free to accept or reject the witnesses' testimony and we cannot conclude, on the basis of this evidence, that the jury could not have found guilt beyond a reasonable doubt.

By the Court.—Judgment affirmed.

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