COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-1613-CR
02-1614-CR

Cir. Ct. Nos. 00-CF-269
01-CF-496

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. E.,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 LUNDSTEN, J. Edward J.E. appeals two judgments convicting him of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1)

(1995-96)[1] and felony bail jumping contrary to WIS. STAT. § 946.49(1)(b) (1997-98). Following a jury trial, Edward was convicted of sexually assaulting his then-twelve-year-old adoptive daughter, Heather, and also convicted of bail jumping for leaving the state prior to trial. Edward asserts four errors, each of which he contends warrants a new trial. Edward argues that: (1) joinder of the two charges in a single trial was error because "other acts" evidence admissible with respect to the sexual assault charge was inadmissible with respect to the bail jumping charge; (2) the trial court improperly excluded a nonhearsay statement that would have strengthened Edward's attack on the alleged victim's credibility; (3) the trial court admitted evidence of bond conditions, with no probative value, suggesting that Edward was a patron of "adult entertainment"; and (4) the prosecutor improperly referred to facts outside the record and appealed to the jury's religious beliefs. While we agree with Edward that some errors occurred, we conclude that such errors were harmless and affirm both judgments.

Background

¶2 On September 13, 2000, a criminal complaint was filed charging sixty-two-year-old Edward J.E. with the sexual assault of his then-twelve-year-old adoptive daughter, Heather. Edward posted a $50,000 cash bail and agreed to a number of bond conditions, including that he not leave the State of Wisconsin. On December 19, 2000, Edward left Wisconsin without permission and was arrested in Arizona on April 11, 2001. Edward was charged with felony bail jumping.

[1] All further references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 Prior to trial, over Edward's objection, the trial court granted the prosecutor's motion for joinder of the sexual assault and bail jumping charges. The prosecutor also sought a pretrial ruling admitting evidence of all of Edward's bond conditions to prove that Edward had a motive to flee Wisconsin. Edward objected, claiming that some of the bond conditions were irrelevant because there was no allegation that he had violated those conditions and they were unduly prejudicial. Edward's defense to the bail jumping charge was that he was justified in fleeing Wisconsin because he feared for his safety. The trial court ruled in favor of admission. Edward directs his challenge to the admission of the following four bond conditions:

1. That Edward have no direct or indirect contact with his wife, Bonnie.

2. That Edward have no direct or indirect contact with any child under the age of eighteen years, including Heather.

3. That Edward not possess any "adult material."

4. That Edward not be present in any adult entertainment establishment.

The trial court reasoned that all of Edward's bond conditions, including the four above, were probative of Edward's motive to flee Wisconsin because "the more restrictive [the] Conditions of Bond are on him the more likely he is to flee."[2] The trial court concluded that the evidence was not unduly prejudicial to Edward

[2] Although the trial court actually used the word "intention," it is clear from its comments that the court was talking about Edward's *motive* to flee, and we will use that term.

because his charged offense was so serious that any inference that Edward possessed adult material or frequented adult establishments would be minor in comparison. By way of contrast, the court suggested that if Edward had been charged with a non-sex-related crime, such as shoplifting, admission of the bond conditions would be unduly prejudicial.

¶4 Edward and Bonnie adopted Heather in 1995 when she was eight years old. Heather turned twelve on August 3, 1998, during the same month she alleges Edward had sexual intercourse with her. Heather was fifteen years old at the time of trial in 2001. The following brief summary of testimony presented during Edward's four-day trial will give context to the discussion that follows.

¶5 Heather testified that when she was about ten years old, and for the following two years, Edward often walked in on her while she was dressing. She told the jury she began leaning against her bedroom door to keep Edward out. In the spring of 1998, Bonnie observed Edward around Heather's bedroom door while Heather was changing and instructed Heather to change in the bathroom because there was a lock on the bathroom door.

¶6 Heather testified that Edward had been fondling her breasts regularly since she was ten years old and that, on nearly a daily basis, she had to tell him to stop. Typically Edward would come up from behind Heather while she was working in the kitchen or doing homework and reach over her shoulder and fondle one of her breasts. Once in December 1998 and once in January 1999, Bonnie observed Edward fondling Heather's breasts. In February of 1999, Bonnie filed for a legal separation from Edward and secured a restraining order preventing Edward from having contact with Heather. On February 18, Edward moved out and did not return. The breast fondling was reported to authorities, Edward was

charged, and he eventually admitted the fondling behavior and entered a plea to a charge of fourth-degree sexual assault. He was given two years of probation and four months of jail time with work release privileges.[3]

¶7 Bonnie testified against Edward at trial. On cross-examination, she agreed that she had helped authorities locate Edward in Arizona, the state to which Edward fled, that she was angry with him over divorce issues, and that she thought his punishment for fondling Heather was "a slap on the wrist." Bonnie agreed that she would do anything to help the prosecution.

¶8 Regarding the charged sexual intercourse incident, Heather testified that she was alone in her bedroom sitting on her bed reading one evening when Edward entered the room, pulled his pants and underwear to his ankles, pulled Heather's pants and underwear to her ankles, and had sexual intercourse with her. Heather testified that initially she pulled her pants up and Edward pulled them down again and that this happened two or three times. She said Edward got on the bed and put his penis inside her. On cross-examination, after Heather agreed that Edward got on the bed and put his penis inside her, she agreed with a series of statements suggesting that, during intercourse, Edward did not touch Heather with any part of his body except his penis.

¶9 One dispute at trial concerned inconsistencies in Heather's various statements of when the intercourse occurred. Heather tied the timing of the assault

[3] Although the trial evidence only explicitly shows Edward's guilty plea, it is apparent that Edward admitted fondling Heather for purposes of trial. His trial attorney characterized Edward's plea as an admission during closing arguments, and one of Edward's theories was that Heather's intercourse claim was fabricated because it made no sense that she would report the fondling but not report the intercourse at the same time.

to a day in August 1998 when she attended an auto auction with Edward, without specifying on which date the assault occurred. It was undisputed that Edward attended auto auctions on both August 4 and August 18 and that Heather attended only one auction with Edward. When Heather testified at the preliminary hearing in September 2000, she said the sexual intercourse occurred during "[t]he first part of August," but other parts of Heather's testimony suggested that the intercourse occurred on August 18. At trial, a police officer testified that, in July of 2000, Heather said the incident occurred on a Tuesday near the end of August 1998 before school started. Some of the relevant testimony on that point follows.

¶10 Heather stated that the intercourse occurred after she attended an auto auction with Edward. Edward was an auto dealer and frequently attended auto auctions on Tuesdays. Heather attended only one auto auction with Edward. According to Heather, on the day of the assault, she and Edward left the auto auction before 6:00 p.m. in a black truck with a manual transmission, drove about forty-five minutes, arrived home at a time when it was still light out and no one else was home, and shortly thereafter Edward sexually assaulted her. Heather admitted that she has difficulty distinguishing black from purple, but her difficulty has not been diagnosed as a medical condition.

¶11 The prosecution sought to buttress the proposition that the intercourse occurred on August 18 by introducing evidence demonstrating that Edward attended an auto auction on Tuesday, August 18, 1998, and bid on two pick-up trucks that day: one maroon and one black, both with manual transmissions. The defense elicited the following contradictory information: only the maroon truck was actually purchased on August 18, 1998; the black truck was not purchased until August 24, 1998. On August 18, Edward entered his last bid for the day at 6:55 p.m. Edward also attended an auction two weeks earlier, on

August 4, 1998, which was Edward's birthday. After the defense presented testimony suggesting that Heather attended the August 4 auto auction, Heather was re-called to the stand and testified that the sexual assault did not occur on August 3, her birthday, or on August 4, Edward's birthday. She was not asked to explain why she remembered this or how certain she was.

¶12 Bonnie testified that Edward frequently attended the Tuesday auto auctions and usually returned home between 8:30 and 9:00 p.m. Bonnie recalled that on the day Heather went to the auto auction with Edward, Bonnie was out shopping in the evening and returned home to find Heather and Edward in the house alone.

¶13 Edward introduced testimony from a fellow car dealer named Kai Halverson. Halverson regularly attended the Tuesday evening auctions. Halverson testified that she met Heather at a car auction in August 1998, and recalled that it was August 4, 1998, because she remembered that her parents' anniversary was the same week she met Heather. The defense attempted to introduce testimony from Halverson that, on the day she met Heather at the auction, Edward invited Halverson to his house for a birthday party.[4] The trial court sustained the prosecutor's objection to the offered testimony, concluding that it was inadmissible hearsay.

¶14 The trial court instructed the jury that the information alleged that Edward had intercourse with a person who was under age thirteen "on or about the

[4] We refer to the event as a birthday "party" because Edward's offer of proof stated that Halverson would testify that Halverson was invited to Edward and Bonnie's house for cake and ice cream. In addition, Edward's appellate counsel characterizes the offer of proof as Edward inviting Halverson "to his new home for a birthday celebration."

end of August, 1998." The trial court further instructed the jury that the prosecutor need not "prove that the [sexual assault] was committed on the precise date alleged in the Information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient." The jury found Edward guilty of both first-degree sexual assault of a child and felony bail jumping.

Discussion

I. Joinder of Charges for Trial

¶15 Edward argues that joinder of the bail jumping and sexual assault charges was unduly prejudicial because evidence that was admissible with respect to the sexual assault charge was inadmissible with respect to the bail jumping charge. The decision to join two charges for trial is left to the trial court's discretion. ***State v. Griffin***, 220 Wis. 2d 371, 388, 584 N.W.2d 127 (Ct. App. 1998). In order to demonstrate that the trial court misused its discretion, Edward must demonstrate that joinder caused him "substantial prejudice." *See* ***id.*** at 388-89.

¶16 Edward contends that joinder under the facts of his case was impermissible under WIS. STAT. § 971.12(3), which provides, in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

To determine whether separate trials are required, the trial court must balance the potential for prejudice to the defendant against the public's interest in conducting a

single trial. ***State v. Bettinger***, 100 Wis. 2d 691, 696, 303 N.W.2d 585 (1981). The supreme court has explained:

> [W]hen evidence of both counts would be admissible in separate trials, the risk of prejudice arising due to a joinder of offenses is generally not significant. The simple logic behind this rule is that when evidence of one crime is relevant and material to the proof of a second crime, virtually identical evidence will be submitted to the jury whether or not one crime or both crimes are being tried.

Id. at 697 (citations omitted). Therefore, the appropriate inquiry is the same as the one applied to determine whether "other acts" evidence, admissible on one charge, would also be admissible to prove the other charge. *See* ***id***. A three-step framework governs admissibility of "other acts" evidence:

(1) Is the other acts evidence offered for an acceptable purpose?

(2) Is the other acts evidence relevant, that is, does the evidence relate to a fact or proposition of consequence to the determination of the action and does the evidence have probative value regarding that consequential fact or proposition?

(3) Is the probative value of the other acts evidence 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?

State v. Sullivan, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

¶17 Edward does not dispute that, in general, evidence that he sexually assaulted his daughter and that he was charged with sexual assault would be admissible at a separate bail jumping trial to establish his motive for violating his

bond conditions by fleeing Wisconsin. And, he does not dispute that evidence showing he fondled Heather's breasts and intruded on her while she was changing clothes would be admissible in a separate sexual assault trial. Rather, Edward argues that the fondling and intruding evidence would not be admissible in a separate bail jumping trial because, unlike testimony about the charged sexual assault itself, the fondling and intruding evidence was not probative of his motive to flee the state. Edward argues there was no reason to think he was legally sophisticated enough to realize that the fondling and intruding evidence could be used against him on the charge of sexual assault involving intercourse. He argues it is unreasonable to think he was knowledgeable enough about the rules of evidence to realize that his prior bad acts toward Heather might be used as "other acts" evidence to strengthen the pending sexual assault case.

¶18 We conclude that just the opposite is true. Only a person with sophisticated knowledge of evidentiary rules would anticipate that evidence he previously fondled the breasts of a twelve-year-old girl might *not* be admissible in a trial against him for having sexual intercourse with the same twelve-year-old girl. We think that people in general would assume that jurors are informed of the entire relevant sexual history between an accused sex offender and the alleged victim. In the case of a sixty-two-year-old father and his twelve-year-old daughter, this relevant history would obviously include evidence of breast fondling on multiple prior occasions to show that the father was sexually attracted to the daughter. We reject the defense proposition that Edward's knowledge of his other sexual conduct with Heather did *not* provide him with reason to believe that his conviction on the sexual intercourse charge was more likely. Therefore, we conclude that, as is the case with other inculpatory evidence presented to support

the sexual assault charge, the fondling and intruding evidence was admissible against Edward in the bail jumping case.

II. Alleged Evidentiary Errors

¶19 Edward contends that the trial court erred when it prevented him from eliciting testimony from Halverson that Edward invited Halverson to his house to celebrate his birthday on the day Halverson met Heather at the auto auction. Edward also asserts that the trial court erred when it admitted evidence of certain bond conditions other than the one he violated, contending that this evidence was irrelevant and prejudicial.

¶20 "The decision whether to admit or exclude evidence lies within the sound discretion of the circuit court." ***State v. Head***, 2002 WI 99, ¶43, 255 Wis. 2d 194, 648 N.W.2d 413. Upon review of evidentiary issues, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). An appellate court will uphold an evidentiary ruling when the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Sullivan***, 216 Wis. 2d at 780-81.

A. Edward's Out-of-Court Statement Extending an Invitation

¶21 Although the decision to admit or exclude evidence is generally a matter of discretion for the circuit court, we review the application of the hearsay rules to undisputed facts *de novo*. *See* ***State v. Peters***, 166 Wis. 2d 168, 175, 479

N.W.2d 198 (Ct. App. 1991) ("The application of the hearsay rules embodied in secs. 908.01 and 908.03, Stats., to the undisputed facts before us is a question of law."). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Moreover, "[w]here a declarant's statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay." ***State v. Wilson***, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991).

¶22 During the trial, the defense attempted to attack Heather's credibility by establishing that Edward and Heather attended the car auction on August 4, 1998, rather than on August 18. As a part of this effort, the defense presented the testimony of Kai Halverson, another automobile dealer, who asserted she met Heather at the August 4 auto auction. Further, to buttress Halverson's assertion that she met Heather at the August 4 auction, the defense offered testimony from Halverson that, on the day she met Heather, Edward invited Halverson to his house to celebrate his birthday. Since Edward's birthday is August 4, the defense contended this testimony supported Halverson's contention that she did, indeed, meet Heather on August 4. Edward argues that his out-of-court statement was not offered to prove the date of his birthday and not offered to prove that he wanted Halverson to come to his house. Rather, Edward argues, if the jury believed that Edward extended a birthday party invitation to Halverson on the day Halverson met Heather, the mere fact that the invitation was extended, regardless of any factual assertion implicit in the statement, makes it more likely that Halverson met Heather on August 4 because it is unlikely that Edward would have extended a party invitation to Halverson two weeks after his birthday on August 18.

¶23 It appears the trial court, regardless of the argument made by the defense at trial, perceived that the statement was effectively being offered to prove the truth of a matter asserted, that is, that it was Edward's birthday. Similarly, the prosecutor at trial and the State on appeal argue that the claimed invitation was only relevant if in fact Edward was being truthful when he said that it was his birthday that day. According to the State, if Edward was lying about the fact that his birthday was that day, it could have been August 18 when Halverson met the victim.

¶24 We agree with Edward. Although the prosecution had not overtly tied Heather's allegation to the August 18 auction at the point during trial that Halverson's testimony was offered, the testimony about Edward purchasing a maroon truck on August 18 tended to establish the date of the intercourse as August 18 because of Heather's testimony that they drove home from the auction on the night of the sexual assault in a black truck and she had difficulty distinguishing between black and purple. Although we admit Edward's argument before the circuit court often lacked clarity, our review of the record reveals that it should have been apparent to both the court and the prosecutor that Edward sought admission of the out-of-court statement solely to demonstrate that Halverson heard Edward extend a birthday party invitation, with the logical inference being that Edward was more likely to extend this invitation on a date close to his birthday, rather than on August 18, two weeks after his birthday. The defense informed the trial court that Edward's out-of-court statement was not being offered to prove the date of Edward's birthday which, in any event, had already been established through testimony from Edward's wife, Bonnie.

¶25 We agree with the trial court and the State that if the statement had been offered to show that Edward's birthday was on or about August 4, then it

would be hearsay. However, because Edward had independently established the date of his birthday and, in any event, such date was not in dispute, the remaining content of the statement was an invitation, not a statement of fact. *Cf.* ***State v. Hilleshiem***, 172 Wis. 2d 1, 19, 492 N.W.2d 381 (Ct. App. 1992) (a threat is not hearsay when not offered to prove the truth of the matter asserted).

¶26 Accordingly, we conclude that the trial court erred when it excluded Halverson's testimony that Edward extended her a birthday party invitation on the day Halverson met Heather. Nevertheless, our review of the record persuades us the error was harmless. As explained below, this particular attack on Heather's credibility was one small part of a much larger, multi-pronged attack. The error does not undermine our confidence in the verdicts.

¶27 The erroneous exclusion of evidence is subject to harmless error analysis. ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. We must determine whether "'there is a reasonable possibility that the error contributed to the conviction.'" ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276 (quoting ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919). A "reasonable possibility" in this context means a possibility sufficient to undermine our confidence in the verdict. ***Moore***, 257 Wis. 2d 670, ¶16. When determining whether error is harmless, the reviewing court considers the entire record. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶28 We have reviewed the entire trial transcript. Regardless of what the parties at the time hoped to prove to the jury, our review of the totality of the evidence convinces us that the specific date of the incident would not have been a significant factor in the jury's appraisal of Heather's credibility. The focus of

dispute at trial was not on whether the sexual intercourse occurred on August 18, as alleged by the prosecution, but rather more generally on whether Heather's assertion that Edward had sexual intercourse with her, after any auction or at any time, was credible.

¶29 While our summary of facts and discussion so far suggest that testimony relating to whether Heather tied the assault to August 18 was important credibility evidence, the main prongs of the defense attack on Heather's credibility were unrelated to whether Heather accurately tied the assault to one or the other August auction. The main defense prongs of attack can be summed up as follows: (1) Heather's testimony was suspect because, when Heather disclosed that Edward had been fondling her breasts, she did not claim that Edward had sexual intercourse with her, despite being specifically asked whether Edward had touched any of her other private parts; (2) Heather's testimony was suspect because she and Edward's wife Bonnie were very close, Bonnie had a motive to inflict punishment on Edward and, therefore, Bonnie may have used her influence over Heather to encourage Heather to press false charges; (3) Heather's description of the sexual intercourse was physically implausible because Heather testified that her underwear and Edward's underwear remained around their ankles and that Edward did not touch Heather with his hands during the assault; and (4) it was unlikely that Edward and Heather were home alone after any auction, given the time Heather alleged they arrived home. We now explain these defense attacks in more detail as a means of putting Halverson's testimony in context.

¶30 First, there was substantial trial testimony and argument regarding Heather's failure to report the sexual intercourse incident at the same time she reported Edward's fondling and intruding. In February 1999, after Bonnie observed fondling, Heather reported the fondling and intruding behavior to a

police detective and a social worker, but when asked if Edward had touched any of her other private parts, including her vaginal area, Heather told them "no." In May 1999, Heather testified at a CHIPS[5] hearing about the fondling and intruding behavior, but did not mention her sexual intercourse allegation. Further, prior to disclosing that Edward had sexual intercourse with her, Heather had also met with three therapists to discuss the fondling and intruding incidents. While Heather spoke freely with them about the fondling and intruding behavior, she did not mention the sexual intercourse allegation.

¶31 In regard to Heather's delay in reporting the sexual intercourse, the prosecutor presented expert testimony that many children report sexual abuse in a fragmented fashion for various reasons, including shyness, youth, loyalty to the abuser, shame, fear of not being believed, and fear of retaliation. Edward did not provide rebuttal expert testimony; instead, he attempted to demonstrate that Heather did not possess the characteristics that would make her less likely to disclose evidence of her assault. To that end, Edward elicited testimony that everyone Heather spoke to about the fondling and intruding behavior believed her and supported her, including the three therapists, the social worker, the police detective, and her mother. Furthermore, Heather testified that she was angry with Edward, that Edward was no longer acting as a parent to her, that she felt very close to Bonnie, and that she knew Edward had moved out and would not be living with her for a long time. From this evidence, Edward's attorney argued that Heather did not feel shame or a sense of loyalty to Edward, or feel threatened by him.

[5] CHIPS is an acronym for children in need of protection or services.

¶32 Second, there was substantial trial testimony and argument regarding Bonnie's motive to influence Heather to falsely accuse Edward of having sexual intercourse with her. During closing arguments, Edward's attorney pointed to the following evidence to show Bonnie's motive: Bonnie was upset and angry with Edward over his behavior towards Heather; Bonnie has suffered the stigma associated with being separated from her husband; Bonnie believed that Edward cheated her in the division of their assets during divorce proceedings; Bonnie believed that Edward was hiding money from her; Bonnie asked a lawyer about a civil lawsuit; and Bonnie felt that Edward's punishment for fondling Heather's breasts was "a slap on the wrist." Edward's attorney also argued that Heather testified that she was very close to Bonnie and that Bonnie could have helped fabricate the case against Edward because Bonnie had access to the records from the dealership which tended to corroborate Heather's story.

¶33 Third, there was substantial trial testimony and argument regarding Heather's account of how the intercourse occurred. Heather testified that she pulled her pants up and Edward pulled them down again and that this happened two or three times. She said Edward got on the bed and put his penis inside her. On cross-examination, when Heather agreed that Edward got on the bed and put his penis inside her, the following exchange occurred:

> [Defense attorney]: And at the time he was doing that he did not touch your vaginal area with his hands first, right?
>
> [Heather]: Right.
>
> [Defense attorney]: And he did not touch any other part of your body, right?
>
> [Heather]: Yes.
>
> [Defense attorney]: He had his hands on either side of the – on the edges of the twin bed?

> [Heather]: Yes.
>
> ….
>
> [Defense attorney]: He was on his knees.
>
> [Heather]: Right.
>
> ….
>
> [Defense attorney]: So the only part of his body that was really touching you was … his penis, correct?
>
> [Heather]: Right.

¶34 The very first argument made by Edward's attorney during closing argument was the implausibility of Heather's account. Edward's attorney argued it was "virtually impossible" for a grown man and an unwilling twelve-year-old child to have intercourse under circumstances in which their legs were held together at their ankles. Moreover, Edward's attorney argued that she could not imagine how Edward was able to have intercourse with Heather when, according to Heather, Edward did not use his hands to assist in penetrating her and did not touch her during the assault with any part of his body except his penis.

¶35 Fourth, apart from which auction Heather attended, the defense presented evidence casting doubt on Heather's account of how and when she and Edward left the auction. Heather testified that on the day of the assault, she and Edward left the auto auction before 6:00 p.m. and arrived home forty-five minutes later. Heather stated that Edward usually attended the Tuesday auctions in the early afternoon and returned by 6:00 p.m. However, Bonnie stated that Edward usually returned home from Tuesday auctions at 8:30 or 9:00 p.m. In addition, Kai Halverson testified that in 1998 the Tuesday auctions did not begin until 5:00 or 5:30 p.m. Records introduced at trial showed that Edward purchased vehicles at 6:59 p.m. on August 4 and 6:55 p.m. on August 18, indicating that he was at

both auctions until at least 7:00 p.m. Thus, Heather's recitation of when she left the auction was contradicted at trial. Also, Heather testified that she and Edward arrived home at a time when no one else was present. However, Heather testified that in August 1998 at least two young children and one or two adult children were living at the home, and Bonnie testified that the night Heather went to the auction Bonnie was out shopping with two younger children and was likely home before 9:00 p.m. If Heather arrived home later than she testified, it was less likely that she would have arrived home when no one else was there. In addition, Edward's attorney argued that Edward was unlikely to assault Heather at home on a weekday when other family members could be home at any minute. In sum, there was defense testimony disputing whether any assault occurred after any auto auction, regardless of the date.

¶36 We have mostly summarized the defense evidence and arguments, but the prosecutor also presented extensive counter-testimony and arguments on all of these points. Our discussion here is not an attempt to show that the jury would or would not have found merit to the various attacks on Heather's credibility, but to demonstrate that the bulk of the trial evidence directed at Heather's credibility involved topics other than whether Heather attended the August 4 or August 18 auction. Moreover, as the following discussion demonstrates, the prosecutor's effort to tie the sexual assault to the August 18 auction, even absent the excluded invitation testimony, resulted in conflicting testimony and we do not believe the jury would have placed significant weight on this testimony when assessing the credibility of Heather's sexual intercourse allegation. When viewing the trial evidence as a whole, we simply do not believe a reasonable jury would have focused on Heather's consistency or inconsistency in connecting the assault to one or the other of the August auctions.

¶37 Furthermore, while we agree with Edward that the excluded invitation testimony would have, to some degree, bolstered Halverson's assertion that she met Heather at the August 4 auction, the excluded testimony was itself subject to attack and was cumulative to other evidence showing that Heather may have been mistaken when she testified that the assault occurred after she attended an auto auction and rode home in a black truck.

¶38 The excluded testimony was subject to attack because the offer of proof and argument regarding Edward's invitation contained no mention of any evidence showing that Edward actually had a birthday party on or near August 4. Thus, so far as the record shows, if Halverson had testified that Edward invited her to his birthday party, the prosecutor would naturally have impeached Halverson's testimony by pointing out that there was no evidence of a party to which Halverson could have been invited.

¶39 The excluded testimony was cumulative to other evidence casting doubt on Heather's implicit claim that the assault occurred on August 18 because of her testimony that it did not occur on or near August 4. For example, witnesses testified that Edward did not purchase a black truck on either August 4 or August 18. Also, Halverson testified she remembered that it was the August 4 auction at which she met Heather because she made a connection with her parents' anniversary, which was August 6. Moreover, this topic overlaps to some extent with the conflict between Heather's assertion that they arrived home from the auction at about 6:45 p.m. and the testimony of both Halverson and Bonnie, and the auction records, indicating that they would have arrived home much later.

¶40 In addition, while the contradictory evidence detailed above casts doubt on the State's attempt to corroborate one part of Heather's testimony, that

evidence also damaged the defense's argument that Heather's allegations were the product of her mother's hatred for Edward. During trial, the central defense theory was that Bonnie was an angry wife who concocted Heather's story based on her knowledge of Edward's activities and the business records at her disposal. However, if that were true, why would Heather make specific assertions about timing that contradict Bonnie's testimony?

¶41 Finally, we observe that the information only specified that the assault occurred "on or about the end of August, 1998." The jury instructions stated: "[I]t is not necessary for the State to prove that the offense was committed on the precise date alleged in the Information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient."

¶42 All of this persuades us that the excluded invitation evidence was such a small part of the effort to impeach Heather that there is no reasonable possibility that its erroneous exclusion affected the verdicts.

B. Bond Conditions Evidence

¶43 The jury convicted Edward of bail jumping based on evidence that he left Wisconsin after he was charged with sexual assault, thereby violating a condition of his bond. In order to prove the bail jumping charge, the prosecutor presented evidence of the bond condition prohibiting Edward from leaving the state. Edward contends that while the jury properly heard evidence of the bond condition prohibiting him from leaving the state, the jury erroneously heard about other conditions which were irrelevant and unfairly prejudicial. The jury was shown an exhibit listing all of the conditions "imposed by the court." These included:

1. No direct or indirect contact with his wife.

2. No direct or indirect contact with any child under the age of eighteen years, including his own child.

3. Not possess any "adult material."

4. Not be present in any "adult entertainment" establishment.

Edward's defense to the bail jumping was that he left the state because he feared for his safety. He asserts the four bond conditions listed above had no probative value and that parts of conditions 2, 3, and 4 carried with them a significant risk of unfair prejudice.

¶44 To the extent the jury was informed of conditions prohibiting Edward from contacting his wife and daughter, Edward does not spend much time complaining. This is understandable. Edward was tried on the charge of sexually assaulting his twelve-year-old adoptive daughter. Edward's wife Bonnie reported the alleged crime, sought and obtained a restraining order against Edward, and testified against him. Consequently, these no contact provisions would draw little attention and would create no danger of unfair prejudice. Similarly, the jury would not be distracted by the fact that a man charged with sexually assaulting a child was prohibited from contact with children during the pendency of the prosecution.

¶45 The focus of Edward's challenge is on the conditions prohibiting possession of "adult material" and prohibiting his presence in "any 'adult entertainment' establishments." Edward argues that these conditions were presented as conditions imposed *by the court* and, therefore, carried the implicit message that there had been a judicial finding that Edward had possessed adult

material and patronized adult entertainment establishments. Edward complains that the prosecutor compounded the problem by highlighting these bond conditions during his opening statement and closing argument. In Edward's view, these bond conditions amounted to inadmissible other acts evidence because they would have been interpreted by the jury as evidence that Edward had engaged in deviant sexual behavior apart from the charged crime.

¶46 We agree with Edward that there is a danger that bond conditions evidence of this type would have been construed by his jury as an indication that authorities believed that Edward had possessed adult material and visited adult entertainment establishments in the past because there was no indication to Edward's jury that these were standard conditions placed on all persons charged with sexual assault. Thus, while the jurors might have inferred that such conditions were standard, they might also have inferred that the conditions were geared specifically toward Edward and allegations of his past behavior. We conclude the challenged bond conditions had no probative value with respect to the charged crimes.

¶47 The State argues that Edward waived his right to complain because the trial court offered to consider the submission of a limiting instruction, but Edward made no such request. We agree with Edward, however, that his failure to request a limiting instruction does not preclude him from challenging the trial court's initial evidentiary ruling admitting the bond conditions evidence.

¶48 We acknowledge that, had Edward requested and received a limiting instruction, the limiting instruction would likely have rendered any error in the admission of the bond conditions harmless because the jury would have been instructed to disregard the evidence for exactly the purpose Edward now

complains it might have been used: to infer he had a propensity to view adult material and attend adult entertainment establishments. However, Edward argues that a request for a limiting instruction presumes the evidence in question is properly admitted for some purpose. In this case, according to Edward, the disputed bond conditions evidence had no proper probative value and it is illogical to require defendants to request limiting instructions to minimize the impact of erroneously admitted evidence; an objection to the evidence itself is sufficient to preserve the issue for review. We agree.

¶49 We think it obvious that when defendants object to evidence that is subsequently determined to be wrongly admitted, such defendants have preserved their objection to admission, regardless whether they sought a limiting instruction to minimize the impact of the erroneously admitted evidence. Consequently, we consider whether the trial court erred when admitting the bond conditions evidence.

¶50 Adopting the reasoning of the trial court, the State argues that the challenged bond conditions evidence was admissible to prove that Edward left the state to "avoid the conditions of the bond rather than out of fear for his life." However, as Edward points out, by leaving the state he did not violate the no-contact provision with his wife and daughter. More importantly, if the jury was being asked to infer that part of his motive for leaving the state was to avoid the prohibition on possessing adult material or visiting adult entertainment establishments, such a motive presupposes Edward's desire to possess adult material and visit such establishments. Thus, the State's argument implicitly assumes the conditions are evidence of that proclivity.

¶51 The State also adopts the trial court's reasoning regarding the danger that the jury would infer that the bond conditions evidence indicated Edward's pattern of behavior. The court reasoned this danger was diminished by the fact that he was charged with first-degree sexual assault, rather than a crime unrelated to sexual behavior, such as shoplifting. The State argues that, under these circumstances, the jury "might reasonably conclude that the bond conditions were imposed because of the pending sexual conduct charge ..., not because of past uncharged acts." Thus, it is the State's theory that, unlike a shoplifting trial, the jury in this case would have assumed that the bond conditions at issue here were typical conditions imposed on persons charged with child sexual assault.

¶52 This line of argument is unpersuasive for two reasons. First, we have already explained why there was a danger the jury would conclude the bond conditions were evidence that Edward had a propensity to view adult material and patronize adult entertainment establishments. Second, it is inconsistent with the very reason the trial court believed the evidence was admissible: to show that Edward wanted to avoid bond conditions he found undesirable.

¶53 The State also repeats the trial court's general argument that the more restrictive the bond conditions, the more likely Edward had an incentive to abscond. This argument adds nothing. The only reason the challenged bond conditions would have been restrictive was if Edward desired to possess adult material and to frequent adult entertainment establishments. Accordingly, we conclude that the evidence of additional bond conditions was irrelevant and its admission was error.

¶54 However, our analysis does not end there. Once again we consider whether the error undermines our confidence in the verdicts. *See* ***Moore***, 257 Wis. 2d 670, ¶16. We conclude it does not.

¶55 As stated above, the focus of Edward's challenge is on the admission of the bond conditions preventing Edward from possessing adult material or patronizing adult entertainment establishments. Edward claims that the error was not harmless because "[t]he prosecutor highlighted these bond conditions during both opening statements and closing arguments."

¶56 We disagree with Edward's characterization of the prosecutor's references to the challenged conditions. In his opening statement, the prosecutor simply listed all of the conditions as a means of emphasizing that Edward "understood [the conditions] and knew what they were." In his closing argument, the prosecutor listed some of the conditions, but did not emphasize or even separately discuss the challenged conditions. Here, the context was the general argument that the conditions would have conveyed to Edward that he was in very serious trouble:

> So in order not to rock the boat, in order to continue her silence, he's going to plead to that charge, because you're going to let sleeping dogs lie. You don't want to fight that thing so that people are going to be questioning Heather more and one day maybe discover what all went on. So you plead. But once there is that second disclosure, everything changes for the defendant at that point, because the big secret is out, and now there is big trouble in [Edward's] Little China, and this Bond form starts to tell you what he certainly knew. He signed it. There is no question about it, and what he knew was he's now charged with a felony, a felony sexual assault. He was convicted of a misdemeanor the time before, remember. Now he's charged with a felony.

> He's got a 50,000-dollar Cash Bond—ding, ding, ding—I think that's ringing a bell that there's a storm brewin' in [Edward's] direction, and he's in the eye of it.
>
> You look at all these Conditions:
>
> He can't have any contact with his wife;
>
> Can't have any contact with his children;
>
> Can't leave the County or the adjoining County, because he lives and works in Watertown.
>
> He's got to surrender his passport, not going out of the country any more, at least not legally.
>
> Can't be in adult establishments;
>
> Can't have contact with children, and on and on the list goes.
>
> Don't you think that there's now a whole other dimension in a whole other field to this prosecution?—The kind that [Edward] knows that things are closing in on him, because it's not going to be such easy sledding this time around. And that is creating for him motive to want to get out of Dodge—to just get out of Dodge.

The prosecutor did not mention any of the conditions in his rebuttal closing argument.

¶57 Viewing the erroneously admitted bond conditions evidence in the context of this four-day trial compels the conclusion that its admission had no effect on the verdict. There is nothing to suggest that a reasonable juror would have found the challenged conditions particularly noteworthy. Although, as explained above, the challenged conditions carried no probative value as to the charged crimes and at the same time carried some danger of unfair prejudice, we view that danger as minimal; so minimal that it does not undermine our confidence that the verdicts were based on properly admitted evidence. At worst, the disputed conditions were vague evidence of prior acts with no clear tie to the

allegation that Edward had intercourse with his twelve-year-old daughter. In light of the substantial amount of plainly relevant evidence in this case, including the very damaging evidence that Edward fondled Heather's breasts in the past, and the absence of evidence showing a correlation between the consumption of "adult entertainment" and the propensity to sexually assault children, we conclude there is no reasonable possibility that the verdicts were affected by admission of the challenged conditions.

III. Closing Argument

¶58 Edward contends that, during closing arguments, the prosecutor improperly asserted facts not in evidence and appealed to the jurors' religious sympathies. "Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). "We will affirm the court's ruling unless there has been a misuse of discretion which is likely to have affected the jury's verdict." ***Id***. On review, we determine "whether the prosecutor's remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Id***. (quoting ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992)).

¶59 Edward first complains about the prosecutor's closing argument suggestion that, in between episodes of squeezing his daughter's breasts, Edward fantasized about having sex with his daughter and masturbated while having these thoughts. The prosecutor said:

> And do you think that during all of that time in between those episodes of squeezing her breasts that the defendant never fantasized about having sex with his

> daughter, never masturbated thinking about having sex with his daughter?

Edward argues that this comment suggested the prosecutor had knowledge in addition to the evidence presented at trial. We disagree. The prosecutor's comments were made in the context of arguing that Edward was sexually attracted to Heather. It would have been readily apparent to any reasonable juror that the prosecutor was simply speculating that Edward fantasized about his daughter. While prosecutors are generally wise not to engage in such rank speculation, it was obviously speculation in this case with no likelihood of affecting the verdicts.

¶60 Edward next contends that the prosecutor improperly invoked moral and religious sensibilities when he argued:

> Sex is fleshable and, when it's healthy and good, that's a beautiful thing, that is the thing that God gave us, and it's fine. But this was not what was intended. When [Edward] had his opportunity in August of 1998, he took advantage of it, and he took advantage of Heather.

Edward contends that the jury might have "returned a verdict of guilty … because [Edward] engaged in immoral conduct with his daughter that went beyond what God intended." We disagree. Regardless of the jurors' particular religious viewpoints, they would have believed that sexual contact between an adoptive father and a twelve-year-old girl was despicable behavior by the father. Further, the jurors would have understood that they were not being asked to contemplate the depravity of the conduct, but rather to determine whether the prosecutor proved that Edward had engaged in the conduct.

¶61 We think it unwise and possibly improper for prosecutors to appeal to religious beliefs during closing argument, but the comments in the case before

us by no means infected the trial with the sort of unfairness that requires reversal. *See* ***Neuser***, 191 Wis. 2d at 136.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.