

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP3039-CR

Cir. Ct. No. 2007CF3348

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY COLUNGA,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Tony Colunga appeals a judgment convicting him of one count of first-degree sexual assault of a child. He argues: (1) that the circuit court violated his constitutional right to confront the witnesses against him when it limited his cross-examination of the victim and a social worker who

interviewed the victim about the assault; and (2) that the circuit court erred in providing a limiting instruction to the jury concerning the fact that the State did not introduce into evidence the victim's videotape interview with the social worker. We reject these arguments. Therefore, we affirm.

¶2 Colunga was charged with one count of first-degree sexual assault of a child and one count of second-degree sexual assault of a child, both counts against his girlfriend's daughter, E.Z., who was twelve at the time. After a jury trial, Colunga was convicted of first-degree sexual assault, but acquitted of second-degree sexual assault.

¶3 Colunga contends that the circuit court's evidentiary rulings limiting his cross-examination of E.Z. and Nadine Sherman, the interviewing social worker, violated his constitutional right to confront and cross-examine the witnesses testifying against him. He points to nine specific instances when the circuit court sustained objections by the prosecutor to defense counsel's questions intended to elicit information from E.Z. or the social worker about E.Z.'s motive to fabricate the allegations and about alternative sources for her sexual knowledge. Colunga does not challenge the individual objections; he argues that taken together they prevented him from confronting his accusers and presenting his defense, which was that E.Z. accused him of sexual assault because she disliked him.

¶4 "A Wisconsin criminal defendant's right to confront witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution." *State v. Hoover*, 2003 WI App 117, ¶6, 265 Wis.2d 607, 666 N.W.2d 74 (footnotes omitted). "The right of confrontation includes the right to cross-examine adverse

witnesses to expose potential bias.” *Id.* (citation omitted). “The fundamental inquiry in deciding whether the right of confrontation was violated is whether the defendant had the opportunity for effective cross-examination.” *Id.* (citations omitted). Although the decision to admit or exclude evidence is generally committed to the circuit court’s discretion, “[w]hether the limitation of cross-examination violates the defendant’s right of confrontation is a question of law that we review de novo.” *Id.*

¶5 After reviewing the trial testimony, we conclude that the sustained objections, taken together, did not violate Colunga’s right to confrontation because Colunga was nevertheless able to effectively explore E.Z.’s motives to fabricate the allegations of sexual assault and her alternative sources of sexual knowledge. On cross-examination, E.Z. acknowledged that she did not like Colunga, who was her mother’s boyfriend, and that she did not get along with him. She testified that she thought Colunga was a bad person, that he was mean toward her mother and her family, and that she resented the attention her mother gave to Colunga. E.Z. acknowledged that she knew Colunga was attempting to get custody of her little brother and knew that her allegations of sexual assault would hurt his efforts to get custody. As for alternative sources of sexual knowledge, E.Z. acknowledged during cross-examination that she and her mother had previously discussed sex and she knew about sexual matters. Because the circuit court allowed a significant amount of cross-examination about E.Z.’s motive to fabricate the allegations of sexual assault and her alternative sources of sexual knowledge—much of which defense counsel reiterated for the jury in closing argument—Colunga “had the opportunity for effective cross-examination.” *Id.* Therefore, we conclude that the circuit court did not violate Colunga’s constitutional right to confront the witnesses against him.

¶6 Colunga next argues that the circuit court misused its discretion in providing a limiting jury instruction concerning the fact that a videotape interview E.Z. did with social worker Nadine Sherman was not introduced into evidence. In his closing argument, Colunga pointed out the fact that the videotape had not been introduced by the prosecutor, implying that it had not been introduced because it was not helpful to the State's case. In response, the prosecutor told the jury during her closing argument that there were legal reasons for not introducing the videotape and explained that she had called E.Z. to testify in person in court instead. The prosecutor suggested to the jury that if Colunga "felt this video could help his case, he arguably could have showed it to you." After this comment, Colunga objected on the ground that the State had impermissibly shifted the burden of proof.

¶7 The circuit court sustained Colunga's objection and issued a limiting instruction to the jury, stating:

Members of the jury, evidence was received during the trial that there was a videotaped interview of [E.Z.]. Now, both parties have commented on the fact that the videotape was not shown to you, suggested perhaps what inferences can or cannot be drawn from that. I'm going to instruct you that while the State has the burden of proof and while the defendant has no obligation to present evidence, neither side has the right to present evidence and an equal right to present evidence subject to the rules of evidence that apply.

There are times when jurors can reasonably draw inferences from the absence of evidence based on evidence you do hear. That may sound confusing. So I'll repeat it. There are times when jurors can draw inferences about the absence of evidence based on the evidence you did hear. But you must not speculate about the absence of evidence and you must keep in mind that there may be many reasons, both based on the rules of evidence and other reasons, why the evidence might not be presented.

¶8 We will reverse a conviction and order a new trial “[o]nly if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of the law.” *State v. Laxton*, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. The circuit court “has broad discretion in deciding whether to give a particular jury instruction.” *State v. Fonte*, 2005 WI 77, ¶9, 281 Wis. 2d 654, 698 N.W.2d 594.

¶9 We reject Colunga’s argument that the circuit court misused its discretion in providing the limiting instruction to the jury. The circuit court correctly informed the jury that the State had the burden of proof and that Colunga did not have an *obligation* to present the evidence, but he had the *right* to present it if he wanted to, subject to the rules of evidence. The limiting jury instruction also correctly informed the jury that it should not speculate about the reasons that the videotape was not introduced at trial. Because the jury instruction accurately stated the law and was appropriate under the circumstances, we conclude that the circuit court properly exercised its discretion in giving the instruction.¹

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

¹ Colunga contends that the jury was entitled to draw an unfavorable inference from the fact that the State did not produce the videotape without providing a satisfactory explanation, citing *Valiga v. National Food Co.*, 58 Wis. 2d 232, 246, 206 N.W.2d 377 (1973). Colunga is wrong on the law. The criminal evidentiary rules in this case differ from the civil evidentiary rules applicable in *Valiga*. Moreover, the prosecutor *did* provide a satisfactory explanation for not producing the videotape—E.Z. was sixteen years old when the videotape was made and the prosecutor therefore believed that the tape was inadmissible under WIS. STAT. § 908.08 (2009-10) (audiovisual recordings of statements of children *under* the age of sixteen are admissible in some circumstances).

