

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 03-0726-CR

Cir. Ct. No. 01-CF-00627

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHNNY RUSSO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. John Russo appeals a judgment convicting him of engaging in repeated sexual assault of the same child. He argues (1) the evidence was insufficient to support his conviction; (2) the State was permitted to ask inappropriate questions to potential jurors during voir dire; and (3) the jury was erroneously allowed during deliberation to listen to a tape recording of a phone conversation between Russo and the victim. We conclude the evidence was

sufficient to sustain the conviction, any error during voir dire was harmless, and the court's discretionary decision to allow the tape into the jury room was not erroneous. We consequently affirm the judgment.

BACKGROUND

¶2 Russo was charged with engaging in repeated sexual assault of the same child based upon conduct with his then sister-in-law between December 1998 and August 2000. The victim was fourteen to sixteen years old at the time the incidents took place. At trial, the prosecution relied primarily on the victim's testimony. The jury found Russo guilty and the court sentenced him to ten years and six months in prison followed by nine years and six months of extended supervision. Russo appeals. Additional relevant facts are provided in the discussion of the issues.

DISCUSSION

A. Sufficiency of the Evidence

¶3 Russo first contends the evidence does not establish his guilt beyond a reasonable doubt. "When the defendant challenges the sufficiency of the evidence, our standard of review is whether the evidence adduced, believed and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt." *State v. Johnson*, 135 Wis. 2d 453, 456, 400 N.W.2d 502 (Ct. App. 1986). "It is not necessary that this court be convinced of the defendant's guilt." *Id.* "Rather, this court need only be satisfied that the jury, acting reasonably, could be so convinced." *Id.* Thus, if any possibility exists that the jury could have drawn the appropriate inferences from the evidence to find guilt, we will not overturn the verdict. *Id.*

¶4 Russo points to a number of elements of the victim's testimony and argues that there are "substantial doubts about the credibility of the allegations." For example, Russo argues that because the victim only described the incidents in general terms without specificity of time, date or circumstance, the jury could conclude the allegations were fabricated. He also notes that the victim never protested, she took no steps to avoid Russo, there were no witnesses to any incidents, and the victim did not come forward until three years after the incidents. Russo therefore claims the allegations are not supported by the evidence. We disagree.

¶5 Russo's complaints amount to credibility determinations. 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 (1978), and resolves any conflicts in the evidence, *State v. Daniels*, 117 Wis. 2d 9, 18, 343 N.W.2d 411 (Ct. App. 1983). If a jury could reasonably have drawn more than one inference from the evidence, a reviewing court must accept the jury's choice. *State v. Alles*, 106 Wis. 2d 368, 377, 316 N.W.2d 378 (1982).

¶6 The victim's testimony addressed many of the issues about which Russo argues. She stated she never protested because she "was shocked" and "didn't know what was happening." She also testified that she did not report the incidents for three years because she was protecting her sister and her nephew. However, because her sister and Russo were getting divorced, her nephew "was going to grow up without his dad anyway" and "[t]he family was breaking apart." She also stated she did not think anyone would believe her if she reported the incidents. The jury obviously believed the victim's testimony was credible.

¶7 The jury was instructed it was to find Russo guilty if it found (1) Russo committed three or more sexual assaults of the victim; (2) the victim had not yet attained the age of sixteen at the time of each incident; and (3) at least three of the assaults took place within a specified period of time, here between November 1998 and August 2000. *See* WIS. STAT. § 948.025(1); WIS JI—CRIMINAL 2107. As to the first element, the victim testified regarding at least three incidents. The second element is not in question because the victim testified as to her age at the time of the incidents. Regarding the third element, although the victim did not testify to the specific dates of the incidents, she did testify that they took place during the specified period of time. The jury, believing the victim’s testimony to be credible, was reasonably able to find that the State established the elements of the offense. We will not reverse that decision simply because Russo believes the jury should have come to a different decision.

B. Voir Dire

¶8 Next, Russo contends the court erroneously allowed the State to ask impermissible voir dire questions. A trial court has broad discretion how to conduct voir dire, including the form and number of questions asked of prospective jurors. *Hammill v. State*, 89 Wis. 2d 404, 408, 278 N.W.2d 821 (1979). Accordingly, we will not disturb the court’s voir dire decisions without a showing that the court misused its discretion. *Id.*

¶9 WISCONSIN STAT. § 805.08(1)¹ discusses the purpose and scope of voir dire:

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

The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. ... This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

¶10 Russo argues the State's questioning was not limited to uncovering potential bias, was about more than the qualifications of the jurors, amounted to a fishing expedition, and made use of hypothetical questions.

¶11 The voir dire questions to which Russo objects are:

Without knowing anything about the facts of the case or if there's corroboration of one person's story over another, would age alone, just age alone, teenager versus adult, cause you to believe the adult more than the teenager?

....

How many people here would agree with the statement – [m]ost sexual assault cases, especially sexual assaults where there's just touching of a victim involved, you wouldn't expect to see physical evidence.

....

How many people here agree with this statement that in a sexual assault case where there's, for example, touching, how many of you would not expect to have physical evidence, for example, semen or fingerprints, for example, fingerprints on a person?

....

Again, how many people here agree with this: If there's not some DNA or fingerprint evidence in a trial, a sexual assault case, that equals a not-guilty verdict. How many people agree with that?

....

[H]ow many people believe that children that are sexually abused always report those incidents immediately?

Russo argues that he lost his presumption of innocence because these questions “planted a seed of guilt in the minds of the jury.”

¶12 Assuming without deciding that the court erred by allowing the State to ask these questions, we conclude the error was harmless. The test for harmless error is whether, but for the error, there probably would have been a different result. *Jax v. Jax*, 73 Wis. 2d 572, 582, 243 N.W.2d 831 (1976).

¶13 We are not persuaded the few questions Russo complains of would, in the context of the entire trial, have caused the jury to be biased against Russo and therefore affect its impartiality. The victim’s testimony fulfilled the elements of the crime, and the jury, as it was entitled to do, believed her testimony. Our review of the record shows the court gave the jury proper instruction that the burden of proof was on the State to prove its allegations beyond a reasonable doubt. Jurors are presumed to act according to instructions. *State v. Adams*, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

C. Jury Room Evidence

¶14 Last, Russo maintains the jury was impermissibly allowed to listen during its deliberations to a tape recording of a phone conversation between Russo and the victim. The phone call, which was monitored by law enforcement, took place on May 16, 2001, about two weeks after the victim reported the incidents to the police. The tape recording was played twice during the trial, and both Russo and the State referred to it during closing arguments. Russo argued the tape showed he was not guilty because he at no time during the taped conversation admitted to the charges. The State argued that Russo’s guilt could be inferred

because Russo's statements were not ones "that some innocent person would make."

¶15 During its deliberations, the jury requested all the exhibits, including the tape recording. Russo objected, arguing the jury would put too much emphasis on the tape. There was also concern about some mumbling after the relevant portion of the recording, which was not heard when the tape was played during the trial. The judge determined the jury should be given the recording along with the other exhibits, and sent the bailiff along to make sure the tape was turned off at the same time it was when played in court.

¶16 It is within the circuit court's discretion to determine what exhibits are permitted in the jury room. *Shoemaker v. Marc's Big Boy*, 51 Wis. 2d 611, 619, 187 N.W.2d 815 (1971). The criteria the circuit court should consider include whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibit, and whether the exhibit could be subjected to improper use by the jury. *State v. Jensen*, 147 Wis. 2d 240, 259-60, 432 N.W.2d 913 (1988).

¶17 Russo argues the jury would not gain anything by hearing the recording in the jury room because it was played twice during the trial; it is unduly prejudicial because the jury could hunt for words to support the State's theory; and it could be subjected to improper use because the jury could overemphasize or misinterpret portions of the tape.

¶18 Russo cites two cases. First is *Franklin v. State*, 74 Wis. 2d 717, 724, 247 N.W.2d 721 (1976), where the supreme court determined the jury should not have been allowed to hear a tape recording of the defendant's statement to police. The court stated there was a risk the tape could have been accidentally

erased while outside the trial court's supervision. Further, it presented a "danger of overemphasizing of the confession relative to testimony given from the witness stand" *Id.* However, here there were several copies of the tape so the danger of the tape being erased is eliminated. Also, the danger of the tape being overemphasized by the jury is lessened because each party argued the tape supported its theory of the facts. The jury needed to listen to the tape to draw a conclusion as to which side it felt the tape supported.

¶19 The second case Russo cites is *Wagner v. State*, 76 Wis. 2d 30, 49, 250 N.W. 2d 331 (1977), where the supreme court determined the jury should not be permitted to take taped jury instructions into the jury room during deliberations. Instead, the court concluded it is better practice to have the jury return to the courtroom to replay the jury instructions. Russo argues, therefore, that the jury here should have returned to the courtroom to hear the tape of Russo's conversation with the victim. However, *Wagner* deals with jury instructions, while here we are dealing with evidence. Consequently, the supreme court's concern in *Wagner* was that there would be no record of how the tape was used during deliberations. *Id.* Here, the court knew what purpose the jury was to use the tape and the bailiff was instructed how to play the tape to ensure it was properly used by the jury. The supreme court's concern in *Wagner* therefore is not present here.

¶20 We conclude the court was within its discretion to allow the tape into the jury room. First, the jury was aided by being able to hear the tape during deliberations. Both parties spoke about the tape during closing arguments, each arguing the tape supported its position. The jury would naturally want to give the tape consideration during its deliberations to determine which position it believed the tape actually supported.

¶21 Second, the jury was not unduly prejudiced by the recording. The court sent in a bailiff to ensure the tape was played properly and that the jury heard no more than was heard during the trial. Russo argues that allowing the jury to hear the tape in the jury room caused him to lose his “chance to confront his accusers.” However, Russo fails to cite any authority that states that allowing an exhibit into a jury room interferes with a defendant’s right to confront his or her accusers. Further, Russo argued at trial that the tape supported his innocence. The jury could have accepted this argument. We see no prejudice in allowing the jury to hear the tape during its deliberations.

¶22 Third, there is nothing in the record indicating that the tape could have been subjected to improper use by the jury. The court sent in a bailiff to ensure the tape was played properly. Russo argues the jury could have used the tape to hunt for support for the State’s position; but, as we have already noted, the jury could have interpreted the tape to support Russo’s theory of the case. Consequently, it was not an erroneous exercise of discretion to allow the tape into the jury room.

By the Court.—Judgment affirmed.

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