COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1620-CR **Cir. Ct. No. 2007CF522**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY G. TACKETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge, and FRED H. HAZLEWOOD, Reserve Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Timothy Tackett appeals from a judgment of conviction of second-degree sexual assault of a child under sixteen and from an

order denying his postconviction motion for a new trial.[1] He argues that the trial court erred in communicating with the jury outside his and defense counsel's presence. The trial court concluded that the error was harmless and we agree. We affirm the judgment and order.

¶2 At trial Tackett's daughter testified that she and her father were watching movies and drinking alcohol. Because he was upset over a fight with his wife, Tackett asked his daughter to lay down with him. The daughter woke to find Tackett on top of her touching her breasts and with his penis inside her vagina. She indicated that later Tackett came and apologized stating that he would not do anything to hurt her but thought she was his wife. The assault was reported nine days after it happened.

¶3 Tackett's brother, David, a Fond du Lac county sheriff's deputy, testified that the day before the assault was reported, Tackett called David about 10:30 p.m. Tackett told David that he had fallen asleep with his daughter while watching movies and woke up thinking his wife was next to him and that they were doing "stuff." David understood "stuff" to mean sexual contact of some sort.

¶4 After the jury retired for deliberations in the morning of the second day of trial, the jury asked if it could "review Deputy Dave Tackett's testimony?" The trial court read the question on the record and the prosecutor indicated no objection. There is nothing in the record reflecting that Tackett or his defense counsel was present when the jury's question was addressed. The court directed

[1] Judge Steven W. Weinke presided at the jury trial and entered the judgment of conviction. Reserve judge Fred H. Hazlewood heard and decided Tackett's postconviction motion.

the bailiff to inquire whether the jury had a specific question about David's testimony or wanted to review his entire testimony. The record does not include the court's ultimate ruling. That David's entire testimony was made available for the jury's review is evidenced by the presence in the record of a separate transcript of David's testimony stapled to the jury's question and marked as Exhibit A on the last day of trial. At the postconviction motion hearing, defense counsel testified that he did not recall being called back to court to address a question from the jury. Defense counsel also indicated that Tackett had been taken back to jail after the jury began deliberations and he did not recall Tackett being returned to the courtroom prior to the reading of the verdict. Tackett also testified that he was not brought to court regarding a question from the jury. The trial court concluded that it was a fair inference that defense counsel did not participate in addressing the jury question. However, it concluded that even if providing the jury with the transcript of David's testimony was an improper response to the question or unduly highlighted David's testimony, it was harmless error in light of the other evidence at trial.

¶5 A defendant has the right to be present and have his counsel present during communications with the jury during deliberations. ***State v. Anderson***, 2006 WI 77, ¶¶43, 67-69, 291 Wis. 2d 673, 7171 N.W.2d 74. Although the record is not clear on whether defense counsel and Tackett were present when addressing the jury's question and the trial court did not make a specific finding of fact,[2] we will assume there was error in addressing the jury's question without the presence

[2] The trial court concluded that it was not necessary that Tackett be present when the jury question was addressed so it had no reason to make a finding of fact on that point. However, despite the prosecutor's vague recollection that the jury's question came before anyone left the courtroom, the record strongly suggests that Tackett was not present.

of defense counsel and Tackett. Such error is subject to the harmless error analysis in which the State, the beneficiary of the error, bears the burden of persuasion that the error was harmless. ***Id.***, ¶¶45, 76. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998). A reasonable possibility is one which is sufficient to undermine confidence in the outcome of the proceeding. ***State v. Patricia A. M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). We must look to the totality of the record. *See* ***id.*** at 556-57.

¶6 As the trial court recognized, the error created the potential that David's testimony was overemphasized to the jury. But David was not the only person who testified that Tackett had admitted sexual contact because he thought the person laying with him was his wife. The victim indicated that Tackett had put forth that excuse in his apology to her the next day. A family relative to whom the assault was reported confronted Tackett about the accusation prior to the police being contacted. The relative testified that Tackett had said he had sex with his daughter thinking it was his wife. David's testimony simply confirmed what the jury had already heard. Moreover, David's report of Tackett's excuse for his conduct was less harmful than the testimony of the victim and family relative. David merely said Tackett had said that he had done "stuff" with his daughter whereas the victim and relative both indicated that Tackett admitted he had sex with her.

¶7 Additionally, it was a short trial. Only five witnesses testified and all testimony was completed in the first day of trial. There was little possibility that the jury did not fully recall the victim's or family relative's testimony.

Tackett's testimony was the last evidence the jury heard.[3] Tackett testified that in his conversation with David he only stated he was being accused of something he did not want to go into. He also made it murky whether David had first talked to the involved family relative or their sister. The jury could have just sought clarification on the last points.

¶8 With or without David's testimony, there was ample evidence to support the conviction. Soon after the assault occurred the victim called a cousin to pick her up from Tackett's place in the morning. The cousin observed the victim visibly upset and the victim immediately told him that her father had "raped" her. She swore her cousin to secrecy. Contrary to the defense's argument that the victim had motivations for a false accusation, the victim tried to keep the assault a secret and revealed it only under threat of being returned to her father. The assault was revealed only two days before the victim was scheduled to go back to her home state of Washington.

¶9 The testimony of the prosecution's witnesses fit together logically while the defense theory was improbable in face of the other evidence. Our confidence in the outcome is not undermined by the trial court's handling of the jury question in the absence of defense counsel and Tackett. The potential error was harmless beyond a reasonable doubt.

[3] Tackett testified that he had slapped his daughter for an unkind remark she made about his wife. He explained his apology and multiple phone calls to his daughter related to having struck the girl. He denied admitting to the family relative and David that he had sexual contact with his daughter. He admitted he told David he thought he had lost his daughter forever and discussed the need to "turn himself in" on the following Monday because of the slap.

By the Court.—Judgment and order affirmed.

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