COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1888-CR **Cir. Ct. No. 2006CF130**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS KEITH DUROCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Dennis Durocher appeals a judgment convicting him of first-degree sexual assault of a child under the age of thirteen. The sole issue on appeal is whether the circuit court erred in refusing to admit evidence that the child had previously reported a sexual assault by another person. For the

reasons discussed below, we conclude that the circuit court properly excluded the evidence and therefore affirm the judgment of conviction.

BACKGROUND

¶2 The charge against Durocher was based upon allegations that he had touched and licked the vaginal area of a five-year-old child when she was staying overnight at his home. Durocher sought to introduce evidence from a protective service report about an incident that had happened when the child was two years old. A caretaker reported that the child had nightmares in which she yelled "don't do that" and "don't touch me." When the caretaker questioned the child, the child said that her daddy hurt her and showed the caretaker that her daddy touched her in her vaginal area. The child repeated her allegations in the presence of the investigating caseworker. However, for the following reasons the caseworker could not determine whether any touching had in fact occurred, and if so, whether it was sexual in nature: the child could not provide the context in which the touching had occurred; the child did not appear traumatized or reluctant to see her father; the father stated the only time he had ever touched the child's vaginal area was while changing diapers; and a doctor who examined the child did not find any physical injuries. The caseworker concluded that the allegation was unsubstantiated and closed the file.

DISCUSSION

¶3 WISCONSIN STAT. § 972.11(2) (2009-10),[1] commonly known as the rape shield law, generally prohibits the introduction of evidence about a

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

complaining witness's prior sexual history. However, a defendant's right to present a defense may in some circumstances require the admission of testimony that would otherwise be excluded under applicable evidentiary rules, including the rape shield law. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 648, 456 N.W.2d 325 (1990). One such circumstance is when the alleged victim in a sexual assault case is a young child, and the defendant seeks to introduce evidence that the child had some prior sexual experience that would explain the child's knowledge of certain sexual practices. ***Id.*** at 652-53.

¶4 ***Pulizzano*** sets forth a five-part test for the admissibility of evidence regarding a prior sexual act involving a child in a sexual assault case. The defendant must show that: (1) the prior sexual act clearly occurred; (2) the past act closely resembles allegations in the current case; (3) the prior act is clearly relevant to a material issue; (4) the evidence is necessary to the defendant's case; and (5) the probative value of the evidence outweighs its prejudicial effect. ***Id.*** at 656. If the defendant establishes all five elements, the court must also consider whether the State has any compelling state interest that would outweigh the defendant's constitutional right to present a defense. ***Id.*** at 656-57. We will independently determine whether the application of the rape shield law in a particular case violated the defendant's constitutional rights. ***Id.*** at 648 (citations omitted).

¶5 Here, the circuit court excluded the proffered evidence on the grounds that it did not satisfy the first element of the ***Pulizzano*** test. The court reasoned that, if the caseworker investigating the allegation could not substantiate abuse, it was not clear that any sexual act had in fact occurred.

¶6 We agree with the circuit court's assessment. While we recognize that the mere fact that an allegation of sexual abuse involving a young child was not substantiated does not eliminate the possibility that something improper actually happened, a defendant would need to present additional evidence to establish that such an unsubstantiated act "clearly occurred." Here, we know nothing about when or how the child's father allegedly touched her beyond the initial vague statements that could not be verified. We therefore conclude that Durocher's right to present a defense was not violated by the exclusion of the evidence under the rape shield law.

By the Court.—Judgment affirmed.

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