COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3179-CR **Cir. Ct. No. 99-CF-90**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY A. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: FREDERICK A. HENDERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Larry Peterson appeals a judgment of conviction for second-degree sexual assault by use of force against Jacqueline Thompson. Peterson argues the court erred by failing to allow him to cross-examine Thompson regarding a civil action that Thompson filed against the residential

facility where Peterson and Thompson lived. We disagree and affirm the judgment.

BACKGROUND

¶2 Peterson and Thompson were residents of the Romies Apartments, a residential care facility in Chippewa Falls. Peterson lived upstairs from Thompson. The two were friends and Peterson sometimes visited Thompson in her apartment. On April 9, 1999, Peterson entered Thompson's unlocked apartment. Thompson testified she was on her sofa when Peterson picked her up, carried her into the bedroom, placed her on the bed, and performed oral sex on her without her consent. Peterson claimed the sexual contact was consensual. The State charged Peterson with one count of second-degree sexual assault by use of threat or force.

¶3 This was Peterson's third trial on these charges. The first trial ended in a guilty verdict. However, on appeal we reversed the conviction and remanded for a new trial.[1] The second trial ended in a mistrial when a juror discussed the case with his wife on the evening before the last day of trial.

¶4 Before the third trial began, Thompson commenced a civil action against the residential care facility for negligence and violation of the safe place statute. Peterson filed a motion seeking permission to cross-examine Thompson regarding the civil action. He wanted to show that Thompson was biased because she could use Peterson's criminal conviction to establish an element of her civil claim. Thus, Peterson claimed Thompson had a pecuniary motive for wanting

[1] ***State v. Peterson***, No. 00-3413-CR slip op. (Ct. App. June 5, 2001).

Peterson convicted. Peterson stated he would limit questioning to whether Thompson "has filed a civil lawsuit seeking monetary damages from the owner and insurer of the Romies Apartments as a result of the alleged incident."

¶5 The court ruled Peterson could not cross-examine Thompson about the civil action unless the State opened the door to it. It concluded that the probative value of that line of questioning would be outweighed by its prejudicial effect, and that its relevance was limited. After a two-day trial, a jury found Peterson guilty and he was sentenced to seven years' imprisonment.

DISCUSSION

¶6 Peterson claims his right to confront witnesses was violated because he was unable to cross-examine Thompson regarding the civil action. However, Peterson failed to make this argument to the trial court. Instead, the motion was framed under WIS. STAT. § 906.08(2),[2] which allows cross-examination regarding specific instances of conduct in order to attack a witness' credibility. This is not the same as arguing he had a right to cross-examine under the Confrontation Clause. Thus, Peterson failed to preserve for appeal the Confrontation Clause argument. However, even if he had preserved the issue for appeal, we conclude that he cannot prevail.

¶7 The essential purpose of the Confrontation Clause is to secure for the opponent the opportunity for cross-examination. ***State v. Lindh***, 161 Wis. 2d 324, 346, 468 N.W.2d 168 (1991) (citations omitted). "Generally speaking, the

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

Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ***State v. Kirschbaum***, 195 Wis. 2d 11, 35, 535 N.W.2d 462 (Ct. App. 1995) (citation omitted). In ***Delaware v. Van Arsdall***, 475 U.S. 673, 679 (1986) (citation omitted), the United States Supreme Court stated that the Confrontation Clause does not

> prevent[] a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

There is no constitutional right to present prejudicial evidence with little or no probative value. *See* ***Taylor v. Illinois***, 484 U.S. 400, 410 (1988).

¶8 A defendant is entitled to significant latitude regarding the extent and scope of inquiry into a witness' bias. However, it is the trial court's duty to curtail any undue prejudice by limiting cross-examination. The court may exclude evidence of a witness' bias that would "divert the trial to extraneous matters or confuse the jury by placing undue emphasis on collateral issues." ***State v. McCall***, 202 Wis. 2d 29, 41-42, 549 N.W.2d 418 (1996). The scope of cross-examination is within the trial court's discretion. ***State v. Olson***, 179 Wis. 2d 715, 722, 508 N.W.2d 616 (Ct. App. 1993). We will not overturn such a decision unless there was an erroneous exercise of discretion. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994).

¶9 We conclude the court properly declined to allow Peterson to cross-examine Thompson regarding the civil action. To begin with, questioning

regarding the civil action would have been highly prejudicial. The circuit court previously granted a defense motion not to refer to the first two trials during the third trial. If Peterson had been allowed to question Thompson about the civil action, one of two things would have occurred. First, the court could have stayed with its pretrial ruling not to mention the first two trials. The State would then have been foreclosed from rehabilitating Thompson by showing that she had testified consistently two other times before any lawsuit was filed. Second, the court could have reversed its pretrial ruling and allowed the State to rehabilitate Thompson by bringing out her testimony from the first two trials. The jury would then have known about the two previous trials. Either course of action would have been prejudicial to one party.

¶10 Furthermore, questioning regarding the civil action could have confused the jury. Other than noting that Thompson had filed a civil action against the residential care facility, Peterson did not show what the basis of that action was. Peterson was merely speculating that the basis of the civil action was the sexual assault. As the State points out, there are several possible bases for the suit: failure to protect Thompson from harassment by Peterson after he was charged with sexual assault, failure to have adequate security in the facility, or failure to conduct an adequate background check on prospective residents. If Peterson had been allowed to cross-examine Thompson regarding the civil action, the door would have been opened to a discussion of the facts surrounding the civil action. That would have sidetracked the jury from the facts of the criminal charge.

¶11 Finally, Peterson contends that Thompson delayed filing the civil action until before the third trial began because she "may have been trying to hide her pecuniary motive." Peterson maintains Thompson had been waiting for the outcome of the criminal action before she filed the civil action. He argues that

because the statute of limitations was about to expire, she could delay no longer. This argument is purely speculative. Although Thompson commenced the action on the last day of the limitations period, there is nothing in the record to show that Thompson was trying to hide any pecuniary motive.

¶12 We conclude that the court did not err by prohibiting cross-examination of Thompson regarding the civil action. Testimony on this issue would have "divert[ed] the trial to extraneous matters or confuse[d] the jury by placing undue emphasis on collateral issues." ***McCall***, 202 Wis. 2d at 41-42.

By the Court.—Judgment affirmed.

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