COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP532-CR **Cir. Ct. No. 2008CF1353**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA L. HOWLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. A jury convicted Joshua L. Howland of three counts of second-degree sexual assault of a child as a persistent repeater. At trial, the court denied defense counsel's request to question a State's witness about her

pending criminal charges. Postconviction, Howland argued that the trial court's ruling should have prompted defense counsel to assert his right to confrontation and was ineffective for failing to do so. Instead of finding counsel ineffective, however, the trial court concluded that the error was its own. It nonetheless held that the controversy was fully tried, that any error was harmless and that a different result was not likely. Here, the issue again is framed as ineffective assistance rather than trial court error. Whether counsel should have made a confrontation argument or the trial court on its own should have permitted the cross-examination, we conclude that the failure to make the jury aware of the testifying witness' pending criminal charges was prejudicial error. We reverse.

¶2 The thirteen-year-old complainant accused twenty-six-year-old Howland of fondling her genitals and breasts. The girl lives with Candace Isenhart, her aunt and legal guardian. The girl calls Isenhart and Isenhart's husband "Mom" and "Dad." Howland, a relative of Isenhart, was staying temporarily with the Isenharts around the time of the alleged assault.

¶3 The girl testified that the assault occurred one night when Isenhart was not home and that she later crawled into bed with her dad. She placed the date as July 22, 2008, the night before she flew to Boston to visit her grandparents. Isenhart also testified that it was July 22 because after work that night she went to a music festival, "Country Thunder," where she met up with her daughter, Jessica Ivy. Ivy's testimony corroborated her mother's. Isenhart also testified that when she arrived home, the girl was in Isenhart's bed, and she recalled taking the girl to the airport the next morning.

¶4 Several months later, the girl disclosed the claimed assault for the first time. Howland ultimately was charged with three counts of second-degree

sexual assault of a child as a persistent repeater, due to a prior child sex offense. A conviction as a persistent repeater exposed him to life imprisonment without the possibility of parole. Nonetheless, Howland rejected the State's plea offer to dismiss two of the counts and to drop the penalty enhancer on the other, opting instead to take his chances with a jury. He rejected a similar offer during the trial.

¶5 Isenhart testified for the State. At the time she testified, Isenhart had six criminal charges pending—also, like Howland's case, in Kenosha county.[1] One alleged physical abuse of a child, and the victim of the abuse was the complainant in this case. Defense counsel wanted to cross-examine her on the charges. The State argued that no reference should be made at least to the child-abuse charge, as no offers had been made to Isenhart in exchange for her testimony. The trial court acknowledged that a conviction would bear on credibility but, since the charge was only pending, it would not allow questioning on it.[2] Defense counsel did not press the matter.

¶6 Howland presented an alibi defense. Witnesses testified that on July 22 Howland was at the Henry VanGalder farm at a party that lasted into the early morning hours of July 23, and that Howland slept that night in one of the tents put up for the party. Some testified that Howland had been staying at VanGalder's farm from July 17 through July 25. Despite defense counsel's pre-testimony

[1] Case No. 08-CF-1179 alleged felony child abuse and misdemeanor battery and disorderly conduct. Case No. 09-CF-493 alleged felony bail jumping and misdemeanor battery and disorderly conduct.

[2] The colloquy is unclear as to whether the trial court disallowed cross-examination on only the child-abuse charge or on all six.

instructions to the contrary, two of his witnesses inadvertently referenced his recent incarceration and his failure to keep in contact with his probation officer.

¶7 The jury convicted Howland on all three counts. After the trial and before proceeding with sentencing, Howland moved for a new trial on the grounds that the real controversy had not been fully tried. He challenged the credibility of the testimony of Isenhart and Ivy by showing that they could not have been at Country Thunder on July 22, 2008, because the event ran from July 16 through July 19. Also, neither had mentioned the music event during discovery, but raised it for the first time at trial. When it was verified that the alleged victim did travel to Boston on July 23, the court concluded that the critical date was the date of her flight, not that of Country Thunder. It denied Howland's motion and subsequently imposed three concurrent life sentences without the possibility of parole.

¶8 Howland moved for postconviction relief, asserting three bases for vacating his convictions: (1) that trial counsel rendered ineffective assistance by failing to assert a violation of Howland's right to confront witnesses when the trial court precluded questioning Isenhart about her then pending criminal charges; (2) that trial counsel rendered ineffective assistance by failing to ask the court for permission to instruct Howland's alibi witnesses, before they testified, not to mention his prior periods of incarceration or community supervision; and (3) that the court should exercise its discretion to order a new trial on the grounds that the real controversy was not fully tried because the jury was unaware that Isenhart and Ivy could not have been at Country Thunder on July 22, 2008, or that Isenhart was facing criminal charges while testifying, but it was aware that Howland was released from prison shortly before the alleged sexual assault and stopped reporting to his probation agent shortly after the alleged sexual assaults.

¶9 At the postconviction motion hearing, trial counsel acknowledged not raising a confrontation challenge to the court's ruling. He did not recall the rationale, if any, that guided his course of action. He also testified, however, that he individually instructed the witnesses to refrain from any mention of Howland's criminal history.

¶10 The trial court did not find that counsel was ineffective. Instead, it determined that it had erred in precluding cross-examination of Isenhart. Further, since trial counsel had acted preemptively to keep damaging testimony from the jury, the court found that counsel could not be held responsible for Howland's own witnesses blurting out the negative information. The court conceded that Howland's challenges presented "a close call." Nonetheless, after considering the issues individually and collectively, the court concluded that the real controversy had been fully tried and that any error was harmless, because there was no likelihood of a different result had the errors not been made. The court denied Howland's request to have the convictions vacated.

¶11 On appeal, Howland asserts that trial counsel should have been allowed to cross-examine Isenhart about her pending criminal charges. He once again presents the issue as a denial of his right to the effective assistance of counsel on the basis of counsel's failure to assert a confrontation clause violation.

¶12 The essential purpose of confrontation is to secure the opportunity to cross-examine a witness against the accused. ***Delaware v. Van Arsdall***, 475 U.S. 673, 678 (1986); *see also* ***State v. Lenarchick***, 74 Wis. 2d 425, 441, 247 N.W.2d 80 (1976). Of particular relevance, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." ***Van Arsdall***, 475 U.S. at 678-79 (citation omitted).

¶13 The decision to admit or exclude evidence ordinarily is within the trial court's discretion. ***State v. Barreau***, 2002 WI App 198, ¶48, 257 Wis. 2d 203, 651 N.W.2d 12. This discretion may not be exercised, however, until the court has accommodated the defendant's right of confrontation. ***Id.*** Whether the limitation on cross-examination violates that right is a question of law that we review de novo. ***Id.*** "The fundamental inquiry in deciding whether the right of confrontation was violated is whether the defendant had the *opportunity* for effective cross-examination." ***State v. Seymer***, 2005 WI App 93, ¶7, 281 Wis. 2d 739, 699 N.W.2d 628.

¶14 When Isenhart testified for the State, she had six pending criminal charges in Kenosha County. Howland's defense counsel wanted to question her about those charges. The court prohibited defense counsel from questioning Isenhart about the pending charges after the State advised the court that it had not offered Isenhart anything in exchange for her testimony.

¶15 Regardless of whether the State made any promises to Isenhart, the law required that a meaningful cross-examination about her pending charges was essential to properly assess the reliability of her testimony. Our supreme court recognized this in ***Lenarchick***. A testifying witness who has pending criminal charges is both "subject to the coercive power of the [S]tate" and "the object of its leniency." ***Lenarchick***, 74 Wis. 2d at 447-48. The witness' awareness of that fact well may influence him or her to "testify[] favorably to the [S]tate in the hope and expectation that the [S]tate would reward him [or her] by dropping or reducing pending charges." ***Id.*** at 447. Thus, a defendant "must have the right to explore the subjective motives for the witness' testimony." ***Id.*** at 448.

¶16 At closing argument, the prosecutor repeatedly told the jurors to ask themselves what Isenhart had to gain from her testimony if the assault allegations were untrue.[3] Without also being told that Isenhart testified for the State while six criminal charges hung over her head, jurors could not fairly answer that question.

¶17 The State ignores ***Lenarchick***; its harmless error argument goes nowhere. We conclude that the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case. Whether the fault was defense counsel's or the trial court's, denying Howland the opportunity to explore Isenhart's possible bias constituted prejudicial error. *See* ***id.*** We conclude that the real controversy was not fully tried. We therefore order a new trial in the interest of justice. *See* WIS. STAT. § 752.35.

By the Court.—Judgment and order reversed and cause remanded.

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

[3] Isenhart's charges were resolved forty-eight days after she testified pursuant to a "stipulated hold-open agreement." Under the agreement, Isenhart entered no-contest pleas to one count each of misdemeanor battery and disorderly conduct. If she complied with the agreement's terms for twelve months, those two misdemeanors would be amended to ordinance violations. In addition, the felony charge of physical abuse of a child filed in Case No. 08-CF-1179 would remain dismissed, as would the felony bail jumping charge and two misdemeanor charges.