COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2578-CR **Cir. Ct. No. 2009CF714**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. FARGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Paul Fargo appeals from a judgment convicting him of first-degree sexual assault of a child under the age of thirteen. He raises multiple issues on appeal. We reject his claims and affirm the judgment.

¶2 Fargo challenges the admission into evidence of the videotaped interview of the three and one-half-year-old victim because two subsections of WIS. STAT. § 908.08(3) (2009-10)[1] were not satisfied. Section 908.08(3)(c) requires that the child understand "that false statements are punishable and … the importance of telling the truth." Section 908.08(3)(d) requires "[t]hat the time, content and circumstances of the statement provide indicia of its trustworthiness."

¶3 At the hearing on Fargo's motion to exclude the videotape from evidence, Fargo argued that the child could not distinguish the truth from a lie and her statement lacked indicia of trustworthiness. Fargo also complained that there were numerous unrecorded pre-interview contacts with the child, and the forensic interviewer asked leading questions, including leading questions about the distinction between the truth and a lie.

¶4 The State countered that the child understood the distinction between the truth and a lie because she agreed that if she told a lie, she would get a time out or lose recess. The child also agreed to say only truthful things during the interview. Finally, the State asserted that the pre-interview contacts with the child did not render the videotape inadmissible.

¶5 The circuit court found that WIS. STAT. § 908.08(3)(c) was satisfied. In so finding, the court relied upon the child's response to the spilled milk scenario: if the child were accused of spilling milk when someone else did it, that accusation would be a lie. The court did not find any support in the statute for Fargo's argument that the court should disregard the child's understanding that

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

lies are punishable because the statement resulted from the interviewer's leading question.

¶6 The court also found that WIS. STAT. § 908.08(3)(d) was satisfied because the statement had indicia of trustworthiness. The court was unconcerned about pre-interview contacts with the child. The court admitted the videotape into evidence.

¶7 Whether to admit the videotape into evidence was discretionary with the circuit court. ***State v. Muckerheide***, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930. A court properly exercises its discretion if it examines the relevant facts, applies a proper legal standard and reaches a decision a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶8 We agree with the circuit court that the child's response to the spilled milk scenario indicated that she understood the difference between the truth and a lie. The interaction between the child and the interviewer about the consequences for telling a lie to a teacher, such as a timeout and loss of recess, confirms that the child understood that telling a lie was punishable.

¶9 There were also sufficient indicia of trustworthiness: the interview took place the day after the child disclosed the sexual assault. Fargo does not complain about the manner in which the interviewer conducted the interview. The court did not err in admitting the videotape.

¶10 Fargo next argues that the circuit court erroneously excluded evidence of the child's prior sexual knowledge. The charge against Fargo arose from the child's claim that Fargo inserted his finger into her vagina and repeatedly

"itched" her vagina. Fargo sought to introduce evidence that the child and a four-year-old playmate were engaged in "sex play" a few weeks before Fargo allegedly assaulted her. The court declined to admit evidence of this "sex play" incident.

¶11 WISCONSIN STAT. § 972.11(2) generally prohibits introduction of evidence concerning the alleged victim's prior sexual conduct. ***State v. Carter***, 2010 WI 40, ¶39, 324 Wis. 2d 640, 782 N.W.2d 695. In the individual case, however, a defendant may make a showing sufficient to admit "otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge." ***Id.***, ¶42 (citation omitted). The five-prong ***Pulizzano***[2] test requires a defendant to show:

> (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.

Carter, 324 Wis. 2d 640, ¶42. Evidentiary rulings under WIS. STAT. § 972.11(2) are within the circuit court's discretion. *See* ***State v. Ringer***, 2010 WI 69, ¶28, 326 Wis. 2d 351, 785 N.W.2d 448.

¶12 The circuit court addressed the "sex play" evidence over two hearings. The child's mother testified that she discovered her daughter and a playmate with their pants down. She saw the playmate standing over her daughter, who was on her back. The mother did not observe any touching. A defense investigator testified that the mother told her that she saw both children

[2] ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

naked, the playmate was on top of the child, and the playmate's penis was on the child's stomach. The mother denied making these statements to the investigator.

¶13 The court excluded the evidence because there was no evidence of touching, intercourse or sexual contact. The court noted that children frequently bathe together and sometimes they take their clothes off. Admitting this evidence would necessitate a mini-trial on the question of what happened between the children when the real issue was Fargo's conduct. The court found that there would be a danger of unfair prejudice if the evidence were admitted. The court excluded the "sex play" evidence.

¶14 The circuit court's findings about the "sex play" evidence are supported by the record. We agree with the court that there is a dispute about exactly what happened between the children and whether the conduct could even be described as sexual at all. Fargo's offer of proof did not establish that the playmate's act closely resembled the allegations against him. Because Fargo did not show that the prior act clearly occurred and closely resembled the allegations against him, as required by the first two prongs of the ***Pulizzano*** test, *see* ***Carter***, 324 Wis. 2d 640, ¶48, the circuit court did not err in excluding this evidence.

¶15 Fargo's next issue relates to the testimony of Rita Kadamian, a nurse practitioner who examined the child the day after she disclosed the alleged sexual assault. At the beginning of the trial, Fargo moved the court to exclude, as a discovery sanction, those portions of Kadamian's testimony that did not relate to her physical examination of the child because the State did not disclose to Fargo all of Kadamian's anticipated testimony. The court granted Fargo's request to limit Kadamian's testimony in the State's case-in-chief.

¶16 On direct examination, Kadamian testified that the child had a normal gynecological examination, and that a normal examination was typical in child sexual abuse victims, even when the child claimed she had been touched sexually. On cross-examination, Fargo inquired about whether Kadamian had examined the child's hymen. Kadamian responded that she had. At that point, the parties addressed with the court if further testimony would be taken from Kadamian. The court's discovery sanction had already barred from the State's case-in-chief Kadamian's anticipated testimony about the significance of the hymen's condition. The court stated that it was inclined to permit Kadamian to testify in rebuttal after Fargo's nurse expert testified. However, Fargo wanted Kadamian to continue testifying in the State's case-in-chief to avoid giving Kadamian "the last word" in rebuttal.

¶17 We do not see any error here. Fargo complains that Kadamian's testimony during the State's case-in-chief was not actually rebuttal testimony. We disagree. Fargo raised a new issue on cross-examination relating to the condition of the victim's hymen; he knew that his expert witness, Nurse Cynthia Kadziulis, would also address this issue, thereby rendering Kadamian's views on the topic proper for rebuttal testimony. The discovery sanction only applied to the State's case-in-chief, not to rebuttal evidence. Fargo asked the court to permit Kadamian to continue testifying in the State's case-in-chief about matters that would have been the proper subject of rebuttal. Fargo cannot complain on appeal that the court granted his request that Kadamian finish her testimony during the State's case-in-chief.

¶18 Fargo next complains that the circuit court allowed the State to amend the information from sexual intercourse to sexual contact to conform to the evidence at trial. WISCONSIN STAT. § 971.29(2) permits amendment "to conform

to the proof where such amendment is not prejudicial to the defendant." In support of the amendment, the State cited Kadamian's testimony that a very young child does not necessarily know what "inside" means for purposes of determining whether the evidence supports a charge of intercourse under WIS. STAT. § 948.02(1)(b). *See* WIS. STAT. § 948.01(6) ("sexual intercourse" means penetration "or any other intrusion, however slight, of any part of a person's body … by [a person]."). Therefore, the State moved to amend the information to allege sexual contact. *See* § 948.01(5)(a) ("sexual contact" means intentional touching which sexually degrades or humiliates the victim and sexually arouses or gratifies the defendant).

¶19 Fargo objected to amending the information because his entire defense had been based on denying that sexual intercourse occurred. The court found that the difference between an allegation of intercourse and an allegation of contact turned on whether the child understood the concept of "inside" for purposes of proving penetration or intrusion. The court found that even with the amendment, neither Fargo's alleged conduct nor his defense that he merely tickled the girl changed. The court granted the State's motion to amend the information.

¶20 Fargo argues on appeal that he was prejudiced by the amendment because if he had been defending against a charge of sexual contact, he would not have needed a nurse expert to opine that a young child penetrated by an adult finger would likely have genital injuries. Fargo argued that the absence of injuries defeated the claim of sexual intercourse. The State counters that Fargo has not shown prejudice arising from the amendment.

¶21 Whether to amend the information to conform to the proof was discretionary with the circuit court. *See* ***State v. Frey***, 178 Wis. 2d 729, 734, 505

N.W.2d 786 (Ct. App. 1993). In ***Frey***, we held that the circuit court did not err when it amended the information to charge first-degree sexual assault by sexual contact rather than by sexual intercourse. ***Frey***, 178 Wis. 2d at 733, 737. We noted that the conduct that formed the basis of the charge was the same. ***Id.*** at 736.

¶22 In this case, Fargo told police that he only tickled the child, thereby denying any sexual component to his interaction with the child. Fargo's defense applied equally to intercourse or sexual contact. Fargo was not prejudiced by the amendment, and the court did not misuse its discretion in amending the information.[3]

¶23 Finally, Fargo argues that the circuit court should have granted his motion for a mistrial because the bailiff spoke with a juror about the status of the deliberations. While the jury was deliberating, the court learned that one of the jurors had asked the bailiff what to do "if we're 50/50." The bailiff told the juror that "you need to discuss it further or if you want any additional information you need to write a note to the judge asking more information." Fargo sought a mistrial based upon the bailiff's interaction with the juror. Fargo argued that the bailiff essentially gave the "dynamite instruction" to the juror, WIS JI—CRIMINAL 520,[4] which is given when a jury reports that it is deadlocked. The court denied

[3] During his closing argument, Fargo repeatedly condemned the amendment and the shift in trial focus from sexual intercourse to sexual contact.

[4] WIS JI—CRIMINAL 520 states:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.

(continued)

the mistrial motion because no harm arose from the bailiff's interaction, even if the bailiff should not have answered the juror's inquiry.

¶24 Fargo argues that if the jury was deadlocked, the court would have had the opportunity to grant a mistrial. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995) (a mistrial is discretionary with the circuit court). This is pure speculation. There is no evidence that the jury was deadlocked at the time the bailiff interacted with the juror. While the bailiff should have directed the juror's inquiry to the judge, the bailiff's remarks were nevertheless consistent with the thrust of the dynamite instruction.

¶25 Fargo argues that the bailiff's communication with the juror was critical. The circuit court did not agree with this assessment, and neither do we. The bailiff's remark was made to one juror and did not carry the weight of a remark or instruction from the judge.

By the Court.—Judgment affirmed.

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

> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> You will please retire again to the jury room.