COURT OF APPEALS
DECISION
DATED AND RELEASED

July 25, 1996

No. 94-2322-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARTIN T. HOLTET,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

DYKMAN, J. Martin T. Holtet appeals from a judgment convicting him of four counts of first-degree sexual assault of a child as a repeater, one count of intimidating a victim as a repeater, and one count of violating a child abuse injunction as a repeater. He also appeals from an order denying his postconviction motion for relief. Holtet argues that he is entitled to a new trial because the State relied upon perjured and inherently incredible testimony in his prosecution and that the real controversy was not fully tried.

We conclude that because the trial court instructed the jury to accept certain testimony as true, no reasonable possibility exists that the jury relied on the false testimony to convict him, and therefore Holtet was not prejudiced by it. Accordingly, we affirm.

BACKGROUND

In 1993, Martin T. Holtet was charged with four counts of sexual abuse of a child as a repeater, contrary to §§ 948.02(1) and 939.62(1)(c), STATS., one count of violating a child abuse injunction as a repeater, contrary to §§ 813.122(11) and 939.62(1)(a), STATS., and one count of intimidating a victim as a repeater, contrary to §§ 940.44(3) and 939.62(1)(a), STATS. The charges stemmed from allegations that Holtet sexually abused Adam, his girlfriend Rita's twelve-year-old son, during the fall and winter of 1992-93.

At trial, Adam testified that Holtet was his mother's boyfriend and that he began living with the family in 1992. Adam admitted feeling very close to Holtet and referred to him as "dad." Adam described how Holtet delivered newspapers on several routes and that he occasionally accompanied him on the trips. During one such time, Holtet stopped the car and masturbated while staring at Adam. Holtet did not touch Adam but Adam stated that the incident made him feel sick.

Adam also recounted the sexual assaults that Holtet perpetrated upon him. Adam claimed that on every Friday night and early Saturday morning when his mother and brother, Jason, were out delivering newspapers, Holtet would sexually assault him by rubbing his penis against Adam's leg and ejaculating. Adam stated that the assaults made him feel ashamed and dirty. He also testified that the assaults only occurred during those Friday nights when his mother was delivering newspapers on the Tomah route. Adam also testified that on two occasions, Holtet bit his buttocks. Additionally, after Holtet moved out of the home and after Adam had reported the sexual assaults to the police, Adam claimed Holtet followed him to school one morning.

Jason and Rita corroborated some of Adam's testimony. They testified that they were not at home on Friday nights in the fall of 1992 because

they were delivering newspapers on the Tomah route. According to Rita, she and Jason left home between 1:00 a.m. and 2:00 a.m. to pick up the ST. PAUL PIONEER PRESS in La Crescent even though the newspapers did not arrive in La Crescent until around 3:00 a.m. Jason also described how the two of them picked up the newspapers in La Crescent at about 2:30 a.m. and delivered them to several stores and businesses. Rita explained that it took about five hours to deliver the newspapers on the Tomah route, resulting in their returning to home at about 8:00 a.m. Saturday mornings. Jason also testified that he saw the bite marks on Adam's buttocks allegedly caused by Holtet.

Several defense witnesses testified that the ST. PAUL PIONEER PRESS was not delivered on Friday nights on the Tomah route during the fall of 1992 as claimed by Rita, Jason and Adam. Faced with this testimony, the prosecutor agreed to a stipulation. The trial court instructed the jury as follows:

> There is a stipulation between the parties that the Saint Paul Pioneer Press was not delivered on Friday night or Saturday morning during October, November, and December of 1992 and January of [19]93 to the Kwik Trip Stores in Tomah and Sparta, and the Holiday Gas Station, the Lark Inn, Steele Drugstore, and the Holiday Inn.
>
> Based on that stipulation, you can accept those facts as I have recited them as having been proven.

During rebuttal, the prosecutor recalled Rita and asked her, in light of this information, where she might have been during those nights when Adam was assaulted. Rita, however, maintained that she was delivering the newspapers on the Tomah route on Friday evenings with Jason. Indeed, during cross-examination, Rita emphasized that she was positive that she delivered newspapers on the Tomah route in October and the beginning of November.

The jury found Holtet guilty of all six charges and the trial court sentenced him to a five-year prison term and imposed three concurrent fifteen-year probationary terms and two concurrent three-year probationary terms. Holtet moved the trial court for postconviction relief arguing that the

prosecution's reliance on perjured testimony[1] was prejudicial and that he is entitled to a new trial.

After a hearing on the matter in which the ST. PAUL PIONEER PRESS's district manager testified that the newspapers were not delivered to Tomah on Friday nights and Saturday mornings and that Holtet worked every Friday night and Saturday morning delivering papers on a different route, the trial court denied the motion. In so doing, the court found that Rita "got on the witness stand and committed perjury."[2] Holtet appeals.

DUE PROCESS VIOLATION

Holtet contends that his right to due process was violated because perjured or inherently incredible testimony was used to convict him. He points to the fact that the prosecutor, although stipulating that the newspapers were not delivered to several businesses on the Tomah route, did not correct the false testimony that Rita and Jason picked up the newspapers in La Crescent or that they travelled that particular route. He also argues that the prosecutor improperly elicited testimony from Rita during rebuttal in which she maintained that she was delivering newspapers on the Tomah route, contrary to the stipulation.

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[1] Holtet and the dissent refer to the testimony as "perjured." It may have been that indeed. However, § 946.31(1), STATS., requires that a perjurer make a false statement under oath which he or she does not believe to be true. Without further inquiry, it is difficult to conclude that Rita, Jason and Adam knew that what they testified to was not true.

[2] As the dissent correctly points out, the trial court reached this conclusion after it had met with the jury and determined that the jury had not relied upon the improper testimony when rendering its decision. However, how or why the trial court came to its decision is irrelevant. We review the issues raised by this appeal *de novo*. *See* ***State v. Penigar***, 139 Wis.2d 569, 586, 408 N.W.2d 28, 36 (1987). We have had no conversations with the jury. We have reviewed the evidence presented at trial *de novo*. We have independently concluded that the false testimony did not prejudice Holtet. Given our *de novo* review, Holtet's rights to a public trial, to be heard with counsel or *pro se*, and to be present at an evidentiary hearing are not implicated in this appeal. The dissent's assertion that our holding is dependent upon the trial court's *ex parte* communication with the jury is therefore incorrect. There can be no such relationship because we have concluded *de novo* that the false testimony did not prejudice Holtet.

A prosecutor's knowing use of false or incredible evidence to obtain a conviction violates a defendant's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. ***State v. Nerison***, 136 Wis.2d 37, 54, 401 N.W.2d 1, 8 (1987). When false evidence appears, the prosecutor is responsible for correcting it. ***Giglio v. United States***, 405 U.S. 150, 153 (1972); ***Napue v. Illinois***, 360 U.S. 264, 269 (1959). A new trial is warranted if the prosecutor used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury. ***Nerison***, 136 Wis.2d at 54, 401 N.W.2d at 8. In order to show a due process violation, Holtet must demonstrate that the false testimony in question was "used" or "relied on" by the prosecutor to deliberately deceive the jury. ***State v. Whiting***, 136 Wis.2d 400, 418, 402 N.W.2d 723, 731 (Ct. App. 1987).

Holtet attempts to create a dichotomy in the stipulation where none exists by limiting the scope of the stipulation, thus leaving a portion of the false testimony standing uncorrected. But the stipulation is not as limited in scope as Holtet suggests. Rita testified that the newspapers she picked up in La Crescent were delivered to locations on the Tomah route, which the prosecutor later stipulated did not receive them. The stipulation made it clear that Rita and Jason, if out on Friday nights, were not delivering newspapers on the Tomah route and had not picked them up in La Crescent. The prosecutor also permitted defense witnesses to testify that no newspapers were delivered on the Tomah route and did not cross-examine them on that issue. The stipulation fulfilled the prosecutor's obligation not to let false testimony go uncorrected and addressed the discrepancies amongst Rita's, Jason's and Adam's testimony and the evidence showing that the newspapers could not have been delivered on those Friday nights on the Tomah route.

Holtet also argues that the prosecutor improperly attempted to elicit an explanation from Rita as to her earlier false testimony, thereby casting doubt on the stipulation and violating her duty to correct false testimony. He points to ***United States v. Wallach***, 935 F.2d 445 (2d Cir. 1991), in support of his argument.

In ***Wallach***, the court determined that the prosecution used false testimony when it consciously ignored evidence that its chief witness was lying and attempted to rehabilitate the witness by eliciting a dubious explanation of the events in question. ***Id***. at 457. In the instant case, however, the false evidence was clearly brought to the attention of the jury and was never

challenged by the prosecutor. Instead, during rebuttal, the prosecutor reiterated that Rita could not have been delivering the newspapers in Tomah on the nights in question and asked Rita if that information "caused [her] to reflect on what [she] might have been doing during those times[.]" Rita replied that she delivered newspapers on Friday nights and Saturday mornings with Jason as well as on Sunday and that there may have been other days when she was delivering the newspapers. She explained that she did not have any records of the nights that she worked and that Holtet had taken her monthly report forms when he moved out of her home. Through rebuttal, the prosecutor gave Rita the opportunity to change her testimony as to where she was on those Friday nights. The prosecutor did not attempt to provide Rita with an opportunity to rebut the stipulation. That Rita, when confronted with the falsity of her testimony, stuck to her earlier story only made her appear less credible in the eyes of the jury.

The prosecutor stipulated that certain evidence was false. When a jury is instructed that certain facts must be accepted as true thereby rendering certain contradictory testimony false, we presume that the jury disregarded the false testimony in coming to its decision. *See* ***In re D.S.P.***, 157 Wis.2d 106, 117, 458 N.W.2d 823, 828 (Ct. App. 1990), *aff'd*, 166 Wis.2d 464, 480 N.W.2d 234 (1992) (a trial court's ameliorative instruction cures the prejudicial effect flowing from improper testimony). Holtet's conviction demonstrates only that the jury believed the testimony of Adam that he was assaulted on several occasions when he was either home alone with Holtet or in a room alone with Holtet. That Adam incorrectly identified *when* the assaults occurred does not mean, as the dissent concludes, that the assaults did not happen. We permit a jury to believe some of a witness's testimony and disbelieve other parts. ***Nabbefeld v. State***, 83 Wis.2d 515, 529, 266 N.W.2d 292, 299 (1978). It is merely second guessing a jury to conclude that it was required to disbelieve all of Adam's testimony. ***Id.*** That Rita and Jason were not delivering newspapers on the Tomah route does not mean that the acts complained of by Adam did not occur. We conclude, under the facts of this case, that the prosecutor did not use false testimony which, in any reasonable likelihood, affected the judgment of the jury. Thus, Holtet's right to due process was not violated.

NEW TRIAL IN THE INTEREST OF JUSTICE

Holtet seeks a new trial in the interest of justice under § 752.35, STATS., which provides,

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Holtet argues that the prosecutor's reliance on false testimony prevented the real controversy from being fully and fairly tried. In ***State v. Penigar***, 139 Wis.2d 569, 586, 408 N.W.2d 28, 36 (1987), the court granted a new trial in the interest of justice because the conviction "hinged" on false testimony which a broadly worded admonitory instruction did not cure. Based upon our review of the record, we conclude that the real controversy was fully tried and that a new trial is not warranted. Adam testified that Holtet sexually assaulted him on several occasions while his mother and Jason were out delivering newspapers on the Tomah route. Despite subsequent evidence demonstrating that his testimony was inaccurate regarding where his mother and Jason were on the nights he was assaulted, the jury apparently found part of his testimony credible. Without a showing that the false testimony was not corrected or that the prosecutor relied upon it to prosecute Holtet, we see no reason to exercise our discretionary reversal power.

On April 2, 1996, we ordered supplemental briefing as to whether trial counsel was ineffective by failing to advise Holtet of his right to individual polling of the jury and by failing to request an individual jury poll. Subsequently, we decided ***State v. Yang***, No. 95-0583-CR (Wis. Ct. App. Apr. 18, 1996, ordered published May 28, 1996), which we conclude disposes of this issue adversely to Holtet. Accordingly, we conclude that Holtet's counsel was not ineffective by failing to advise Holtet of his right to individual polling of the jury and by failing to request an individual jury poll.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 94-2322-CR(D)

SUNDBY, J. (*dissenting*). It is undisputed that a critical witness against the defendant perjured herself on a material issue of fact. We propose to hold that despite the State's concession that defendant's trial was permeated with the perjury of the State's principal corroborating witness, the defendant received a fair trial because the trial court conferred with the jury *ex parte* after the verdict was entered and satisfied itself that the jury didn't believe the witness and therefore her perjury was harmless. The implications of this astounding decision are appalling.

Jury deliberations take place in the jury room in secret. A juror may express an opinion in the privacy of the jury room he or she would not express when faced with the daunting presence and questioning of a trial judge convinced of defendant's guilt who wishes to see that the defendant gets his just desserts. Jurors respect judges; a judge committed to defendant's guilt may convey to jurors by his or her demeanor how the judge wishes the jurors to decide. I can think of no practice more pernicious to our jury system than to allow the trial judge to consult with the jury, out of the presence of the defendant and his or her counsel, as to which witnesses they believed and which they did not believe. I therefore dissent.

The trial court denied Holtet's motion for a new trial because the court concluded that the perjured testimony was not crucial to his conviction. The trial court described how it arrived at that conclusion:

The reality is she [the alleged victim's mother] lied.

> I will relay something to counsel, `cause I think it's illustrative of what occurred. At the end of the first day of trial, I went home, and my wife asked me how the trial was going. And I indicated to her that I thought the young man had been sexually assaulted by the defendant, I thought the mother of the young man found out about it, I think there was some bad blood between the mother and Mr. Holtet, I think she realized there might be some weaknesses in the child's testimony, and that she made up a lie to cover those weaknesses. And I told my wife, "I wonder if the jury is going to realize that and see through that?"

After the verdict I informed the jury that if they had any questions or comments, or anything they wanted to discuss with me, they were certainly free to do so. And if they'd just wait in the jury room, I'd be happy to talk to them. Many times they do wait. This was one of those cases.

And I talked to the jury, and guess what they said? They said, "We know darn well she's lying through her teeth, but we're satisfied that this defendant sexually assaulted that little boy." Sometimes jurors can be pretty perceptive.

There is no doubt in my mind that [the mother] lied....

The only issue before this Court is whether or not Mr. Holtet is entitled to a new trial.

The issue in this case boiled down to whether or not ... [Adam] was telling the truth ....

The jury felt that he was telling the truth, they believed him as to that issue, and they found the defendant guilty. It's a verdict with which I agree.

Was that issue fairly tried? Yes, it was. Did Mr. Holtet get a fair trial as to that issue? Yes, he did. Do I have faith in this verdict as to that issue? Yes, I do.

... [T]his jury was instructed that if any witness had lied, they were, at their discretion, allowed to totally disregard that testimony. *Based on my conversations with them, they certainly did. They didn't believe [the*

> *mother] any more than I did. But they did believe [Adam] when he said this defendant sexually assaulted him.*
>
> Now, the question, the only question before this Court as I see it, is whether or not the testimony, the perjured testimony, was so crucial to the conviction that the conviction cannot stand on its own without that. I don't believe, as a matter of law, that it is so crucial.

(Emphasis added.)

The trial court's inquiry of the jury as to its deliberations was highly improper. The prosecutor should have joined the defendant in moving for a new trial. The prosecutor momentarily forgot that she "ha[d] a responsibility of a minister of justice and not simply that of an advocate." Supreme Court Rule 20:3.8 *Special Responsibilities of a Prosecutor, Comment*.

On the first day of trial, Adam's mother testified that she drove Holtet's paper route every Friday night and Saturday morning. Adam testified that it was on these occasions that Holtet had sexual contact with him. Adam's mother further testified: "Every single time I would take Jason, my oldest son, and some of the time I would take Amber with me also." She testified that "[t]here was never a Friday we missed." She said that the route included West Salem, Tomah, Fort McCoy and Sparta. She would leave home about 2:00 a.m. and pick up the papers in La Crescent, Minnesota at about 3:00 a.m. She testified as to the various stops she made to deliver the papers.

On the morning of the second day of trial, the prosecutor informed the court that defense counsel had presented her with documentary evidence from intended witnesses that in fact the mother had never made deliveries at

any of those locations. She then agreed that the trial court would present the following statement to the jury:

> There is a stipulation between the parties that the Saint Paul Pioneer Press was not delivered on Friday night or Saturday morning during October, November, and December of 1992 and January of '93 to the Kwik Trip Stores in Tomah and Sparta, and the Holiday Gas Station, the Lark Inn, Steele Drugstore, and the Holiday Inn.
>
> Based on that stipulation, you can accept those facts as I have recited them as having been proven.

The State argues that by agreeing to inform the jury that the facts testified to by the alleged victim's mother were untrue, the prosecutor "unquestionably complied with her obligation not to let false testimony go uncorrected." However, the prosecutor called the mother in rebuttal and attempted to rehabilitate her testimony by showing that she may have been doing other things on the route such as collecting from the machines. On cross-examination, the mother refused to admit that she did not do the Tomah route as she had testified. She testified that "[upon] reflect[ion]" she did question November and December, "[b]ut positively we did it in October and the beginning of November, yes we did. *We did it all the way through the year*." (Emphasis added.)

The trial court found that the mother "got on the witness stand and committed perjury." The State abandons any attempt to establish that the mother was merely confused in her testimony. In fact, the State argues vigorously that the mother testified falsely. The State concentrates on establishing that Holtet got a fair trial because the prosecutor did everything she needed to do to inform the jury that the mother's testimony was false.

The problem with the prosecutor's concession is that it makes Adam's testimony and his brother's testimony false as well. Adam testified that "it all started" when his mother, brother and sister "would all go on the route together." He further testified that defendant's sexual contacts with him happened "[e]very Friday and Saturday when my mom would be on the route." He further testified that these contacts would "only happen on those nights." On cross-examination, defense counsel carefully pinned down that the alleged victim was sure that the first incident happened on a Friday night, Saturday morning between 12:00 a.m. and 2:00 a.m. when his mother, brother and sister were on the Tomah paper route. He identified the date as "around five weeks after school started in September." Count one of the information charged Holtet with sexual contact with the alleged victim in late September or early October, 1992. The alleged victim also testified that the same thing happened every Friday from five weeks after school started until Christmas and the only time it happened was on these occasions when he was alone with defendant. He testified that his mother, brother and sister were always out doing the paper route in Tomah.

This testimony must be false if the mother's testimony was false. If the jury believed Adam, it necessarily had to find that the sexual contact took place sometime other than on late Friday evenings and early Saturday mornings. Yet, Adam was very positive as to the dates of the alleged sexual contacts. He was thirteen years of age at the time of trial and demonstrated a great deal of sophistication as to sexual terms.

Adam's brother, Jason, was sixteen years of age at the time of trial. He testified that "my mom and I would only do Friday nights, that's Saturday papers and ... there is a big Kwik Trip in Tomah ... with a restaurant in it and we would take the papers inside." He testified that they did this every Friday night. If Adam's mother's testimony as to the paper route trips was false, so was Jason's testimony.

Neither the prosecutor nor the trial court instructed the jury to disregard this testimony of the alleged victim and his brother. If that testimony was stricken, there was nothing left of the State's case. I therefore conclude that defendant did not receive a fair trial. The judgment must be reversed and a new trial ordered.

There is more involved here than Holtet's guilt or innocence. The jury system itself is compromised if the trial judge invades the jury room and persuades the jury by his or her questions and demeanor what testimony they should have believed. Our review is also compromised if we extend our consideration to *ex parte* after-trial meetings of the judge with the jury which are not transcribed and are not of record.