COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2012

Diane Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2811-CR **Cir. Ct. No. 2006CF279**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN R. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: MARK J. McGINNIS, Judge. *Affirmed.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. John Martin appeals a judgment convicting him of child enticement and an order denying his postconviction motion. He seeks a new trial on the grounds that: (1) a jury instruction removed an essential element of the offense, preventing the real controversy from being tried; (2) counsel provided

ineffective assistance by failing to present impeachment evidence relating to the victim; and (3) Martin was denied a fair trial because three witnesses were allowed to vouch for the victim's credibility and the prosecutor argued that the prosecutor personally believed the victim's testimony. For the following reasons, we reject each of these arguments and affirm.

BACKGROUND

¶2 Martin and the teenaged victim lived in separate units in the same apartment complex. One day, while the teenager was babysitting in the apartment next door to Martin's, Martin knocked on the neighbor's door and handed the teenager a note. The note stated in part:

> Hey, I am not going to play games, nor am I going to continue to try and be with you if you won't take the chance. My wife is gone for 1½ hours and either we do something or [I'm] not going to try no more.

The note further directed the teenager to write a response and leave it for him under an ashtray on a patio slab along the back side of the apartments.

¶3 The victim followed Martin's instructions, and the two exchanged a series of notes left out on the patio. Martin's second note stated in part that he was "thinking long term but until you take the chance and see you won't know," and asked, "[a]s far as you not ever doing it[,] what all have you done?" Martin's third note stated in part:

> As for why [I'm] so pushy it is cause I think [you're] hot and I want you bad. I really want you to give me a BJ or a hand job. [I've] wanted you for a bit plus I am scared you aren't serious about me.

Martin's fourth note reiterated that he wanted something long term, then stated:

> [Y]ou got to understand if we get caught I get life in the joint so I need you to prove to me you want me like I do you and that to me means taking the risk and being with me in a way that shows [you're] serious.

Martin's fifth note again stated that he thought the victim was "very hot." He concluded, "If you don't want to it's cool. Just please promise you are getting rid of the notes."

¶4 Although the notes did not specify where Martin wanted the proposed sexual activity to occur, the teenager testified that she thought that Martin wanted her to come to his apartment in part because he wrote that his wife was "gone for 1½ hours." The teenager further testified that on a number of prior occasions, Martin had invited her into his apartment or his garage to perform oral sex on him.

¶5 The trial court instructed the jury after the close of the evidence that to satisfy the seclusion element of child enticement, the jury would need to find that Martin had "attempted to cause" the teenager "to go into a room." During deliberations, the jury sent out a note asking for a definition of a secluded place. The court and the parties agreed to respond that, in the context of the child enticement count, a secluded place would include "Martin's apartment or the apartment where [the teenager] was babysitting." Shortly thereafter, the jury returned a verdict finding Martin guilty on that count, and acquitting him on another count.

¶6 We will set forth additional facts relevant to the issues on appeal as necessary in our discussion below.

DISCUSSION

Jury Instructions

¶7 Martin contends that the court's instruction to the jury that a secluded place would include the apartment where the teenager was babysitting removed an essential element of the offense and further raised the possibility of a conviction based upon insufficient evidence. This is so, he argues, because he could not have attempted to cause the teenager to go into the apartment where she was babysitting, since she was already there. Because Martin forfeited the right to directly challenge the jury instructions by stipulating to them, he instead asks this court to exercise our discretionary reversal power.

¶8 WISCONSIN STAT. § 752.35 (2009-10)[1] provides this court with discretion to reverse a judgment by the trial court "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." In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (internal citation omitted). To establish a miscarriage of justice, there must be "a substantial degree of probability that a new trial would produce a different result." ***Id.*** In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

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

¶9 We are satisfied that the jury instruction was sufficient to try the real controversy here. First, although Martin's notes did not specify a location for the proposed sexual contact with the teenager, the jury could reasonably infer beyond a reasonable doubt that Martin intended to have sexual contact with the teenager either in Martin's apartment or the apartment in which she was babysitting. Since Martin arranged for the teenager to retrieve the notes on a patio outside of the apartments, asking her to engage in sexual activity in either apartment was an attempt to cause her to go into a secluded place from the patio for purposes of sexual contact.

Impeachment Evidence

¶10 The teenaged victim had once been issued a citation for obstruction because a police officer believed that she had lied in claiming that a man exposed himself to her after the man's wife caught her loitering outside their home and leaving a note. Martin wanted to introduce this information as purported evidence of a pattern of the teenager, chasing after married men, and then making false accusations to shift attention from her own behavior because she feared her father would be angry.

¶11 The court had ruled this impeachment evidence inadmissible under the rape shield law prior to Martin's first trial, at which Martin had been acquitted of additional charges including a sexual assault count. Counsel did not think to renew the issue before the second trial, the subject of the instant appeal, and Martin argues now that the rape shield law would not have applied to the remaining charges that were retried. For the purposes of this appeal, we will assume without deciding that the impeachment evidence would have been admissible at the second trial, and that counsel's failure to raise the issue

constituted deficient performance. The issue then becomes whether Martin was prejudiced by counsel's failure. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (discussing framework for ineffective assistance claims). We conclude that he was not.

¶12 As we have explained above, the explicit and unambiguous notes were sufficient in and of themselves to establish the elements of the child enticement charge. Since it was not necessary for the jury to also find that Martin had previously propositioned the teenaged victim, her testimony as to prior interactions was largely unnecessary and any impeachment of that testimony was of limited value. Moreover, Martin's own statement in his first note that he would not "continue to try and be with" the teenager if she did not consent to the proposed sexual contact strongly corroborated the teenager's testimony that he had solicited her on prior occasions. Therefore, even assuming admissibility and deficient performance, we see no reasonable probability that the absence of this impeaching evidence altered the outcome of the trial.

Vouching

¶13 The State asked three different witnesses—a school counselor, a social worker, and a police officer—to testify about the consistency of statements the teenager had made to them in comparison to the statements she had made to others. The prosecutor later explicitly told the jury during closing argument that, the "bottom line is I believe that Caroline was truthful," and, specifically, that he believed her statement to police. Martin contends this testimony and argument improperly invaded the province of the jury by vouching for the credibility of the victim.

¶14 Again, for the purposes of this appeal, we will assume without deciding that error occurred and proceed to consider the question of prejudice. And again, we conclude that any error was harmless because the jury could readily find all of the elements of the offense based upon the clear import of the notes, without weighing the credibility of the victim's additional testimony regarding prior solicitation attempts.

By the Court.—Judgment and order affirmed.

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