# COURT OF APPEALS
# DECISION
# DATED AND RELEASED

May 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

## NOTICE

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**No. 95-0528-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Appellant,**

**v.**

**ROGER L. ETERNICKA,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. The State of Wisconsin appeals from an order granting Roger L. Eternicka a new trial on the grounds that the prosecutor made a factual assertion regarding a material dispute at trial during closing argument which may have influenced the jury's verdict and to which Eternicka did not have an opportunity to respond. Because the trial court properly exercised its discretion in ordering a new trial, we affirm.

Eternicka was charged with first-degree sexual assault of a child arising out of an incident involving C.B., who was five years old at the time of the offenses and six years old at the time he testified at Eternicka's trial. At Eternicka's preliminary hearing, reference was made to the fact that C.B. had been sexually assaulted two and one-half years earlier and that in the course of his mother's questioning of C.B. as to whether anyone had recently touched him improperly, C.B. responded that Eternicka had done so.

After he was bound over for trial, Eternicka moved the trial court to present evidence of the prior sexual assault to rebut the inference that C.B. would have no other source for his sexual knowledge but the alleged assault by Eternicka. At a pretrial hearing, the parties advised the court that they had agreed to inform the jury of the prior sexual assault of C.B. by reading a paragraph from the juvenile delinquency petition involving the assailant, a juvenile named D.J. The excerpt from the petition would inform the jury that on May 31, 1992, C.B.'s mother and D.J. were baby sitting for C.B. On June 1, while C.B. and his mother were watching television, C.B. told her that D.J. "had a big peter." C.B. then opened his mouth and said that D.J. "touched his peter on his tongue." A short time later, C.B. told her that D.J. "stuck his peter in his butt and tried to go pee-pee." The excerpt from the petition stated that when her child told her this, C.B.'s mother observed a mood change in him. The parties agreed that the jury would receive a limiting instruction, to be drafted by the prosecutor, stating that the evidence was being offered for C.B.'s sexual knowledge.

At trial, three witnesses testified that C.B. reported to them that he had been sexually assaulted by Eternicka. C.B. also testified regarding the assault by Eternicka. During cross-examination, Eternicka began questioning C.B. about the assault perpetrated by D.J. The State's objection on the grounds that such questioning was beyond the scope of the parties' agreement was overruled. The court allowed the defense to inquire whether C.B. might be confused about the events he described and whether Eternicka or D.J. perpetrated them.

As part of the defense's case, the agreed-upon paragraph from D.J.'s juvenile delinquency petition was read to the jury and the jury was advised that D.J. was adjudicated to have committed the described offense. Eternicka testified and denied any sexual contact with C.B.

During closing, defense counsel alleged that C.B.'s allegations against Eternicka were the result of confusion stemming from the incident which occurred with D.J. In rebuttal, the State argued that C.B. was not confused when he accused Eternicka of sexual assault. The prosecutor then advised the jury that D.J. was an African-American youth and suggested that it was unlikely that C.B. was confusing that assault with the assault allegedly perpetrated by Eternicka (who is Caucasian).

Defense counsel objected that D.J.'s race was not in evidence. The prosecutor countered that the parties' stipulation regarding the occurrence of the previous sexual assault did not encompass a defense argument that C.B. was confusing the two assaults. The prosecutor stressed that the purpose of the stipulation was to establish an alternative means by which the child would have sexual knowledge, not that he was mistaken in his allegations against Eternicka. The court sustained the objection because the prosecutor had stated facts which were not in evidence (D.J.'s race) and the statement was made in rebuttal, denying Eternicka an opportunity to respond. At that point, defense counsel requested a limiting instruction and a mistrial. The court took the mistrial motion under advisement and the proceedings resumed. The jury convicted Eternicka.

In lieu of sentencing Eternicka, the court granted Eternicka a new trial. At the hearing, the prosecutor conceded that D.J.'s race was not in evidence at the time he referred to it but argued that the error was inadvertent. The court found that the prosecutor's reference to D.J.'s race was directly relevant in light of the defense's theory that C.B. had confused the two assaults. The court found that the statement that D.J. was African-American "was a factual assertion of such magnitude that I cannot easily conclude that it was not a factor in the jury's decision in this case." The court also questioned whether its instruction cured the prejudice arising from the statement when the remark was made during rebuttal and Eternicka did not have an opportunity to respond. Under all the facts and circumstances, the court concluded that the jury likely accepted the prosecutor's statement and could have considered it in deliberations. Consequently, the court concluded that the trial was not fair and granted a new trial. The State appeals.

A circuit court's decision to grant a new trial is highly discretionary and entitled to deference because the court had an opportunity to

observe the trial and evaluate the evidence. *See* ***Krolikowski v. Chicago & N.W. Transp. Co.,*** 89 Wis.2d 573, 581, 278 N.W.2d 865, 868 (1979).

Applying this standard of review, we conclude that the circuit court properly exercised its discretion in granting Eternicka a new trial. The State argues that the court failed to genuinely assess the extent of the prejudice engendered by the prosecutor's statement during rebuttal or whether its instruction cured any prejudice. As to the latter, we note that the circuit court did consider whether its instruction was sufficient to cure the prejudice and concluded that it was not. As to the former, the record reveals that the court also considered the extent of the prejudice created by the prosecutor's statement and found that it went to the heart of a material dispute in the case and necessitated a new trial.

We reject the State's contention that by arguing that C.B. was confusing the two assaults, Eternicka invited the State's attempt to distinguish the two assaults by the race of the perpetrators. We disagree that this was the only option available to the State in responding to the defense's confusion theory. As the circuit court pointed out, the race of the perpetrators was not evidence in the case and the prosecutor's reference to it could have been a factor considered by the jury in assessing whether C.B. was actually confusing the two assaults.[1]

*By the Court.*—Order affirmed.

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

[1] Because we have affirmed the circuit court's order for new trial, we observe that the parties are free to revisit their previous stipulation regarding the extent of information to be provided to the jury about the sexual assault perpetrated by D.J. Given the role this evidence played at the first trial, the parties should be permitted to consider whether more or less information about the previous assault should be presented at a second trial. And even if the parties do not revisit the wisdom of the stipulation, the trial court is free to reconsider its approval of the stipulation.