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**DISTRICT III**

October 27, 2020

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2018AP1847-CR                      State of Wisconsin v. Roger Lee Shaw (L. C. No. 2015CF336)

Before Stark, P.J., Hruz and Seidl, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Roger Shaw appeals from a judgment convicting him of one count of repeated sexual assault of the same child and one count of child enticement with sexual contact. After reviewing

the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).<sup>1</sup> We affirm.

Shaw challenges a pretrial ruling that excluded evidence regarding an alternate source for the sexual knowledge of a child who was allowed to testify about other acts. *See generally State v. Pulizzano*, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325 (1990) (discussing admission of alternate source evidence). The other acts evidence consisted of both live testimony and excerpts from a prior video interview of a twelve-year-old girl, Mary,<sup>2</sup> whom Shaw had been charged in a prior, separate criminal complaint with sexually assaulting. In response, Shaw sought to introduce additional evidence from a recorded interview showing that Mary had been sexually assaulted by another man, Amos Day, in a manner similar to that in which Mary alleged Shaw had assaulted her. The circuit court excluded the alternate source evidence proffered by the defense—without addressing the *Pulizzano* factors—to avoid having “a trial within a trial.”

We need not address whether the circuit court erroneously exercised its discretion by excluding the alternate source evidence because we conclude that any error was harmless. An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Harris*, 2008 WI 15, ¶43, 307 Wis. 2d 555, 745 N.W. 2d 397. The test for harmless error is “essentially consistent with the test for prejudice in an effective assistance of counsel claim,” except that it is the State that bears the burden of proving harmless error. *State v. Harvey*, 2002 WI 93, ¶41, 254 Wis. 2d 442, 647 N.W.2d 189.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

<sup>2</sup> This other acts evidence involves the victim of a crime. Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim’s name.

Whether the circuit court's erroneous admission of evidence was harmless presents a question of law that this court reviews independently. *State v. Hunt*, 2014 WI 102, ¶21, 360 Wis. 2d 576, 851 N.W.2d 434.

At trial, Mary testified that while on a camping trip, Shaw had set her on his lap, unbuttoned her pants, and rubbed his finger over her vaginal area. Shaw also asked Mary whether she wanted to touch his penis. Later, during the same camping trip, Shaw picked Mary up, set her on the ground, unbuttoned her pants and pulled them down to her ankles, and licked her vagina.

The State asked Mary whether Day had done "something like this" to her as well. Mary said yes, and she further affirmed that Day had been convicted of sexually abusing her over a period of two years. In addition, a City of New Lisbon police officer testified for the defense that Shaw had been acquitted of having sexually abused Mary.

Shaw contends that additional details about Day's sexual assaults of Mary were necessary to his defense because, without them, Shaw would have no way to impeach Mary's credibility on the other acts that Mary attributed to Shaw. We disagree. Mary's testimony that Day had done "something like" what she alleged Shaw had done to her provided an alternate source of knowledge, and the fact that Shaw had been acquitted of having assaulted Mary further undermined the credibility of Mary's testimony on the other acts.

Moreover, the jury was able to separately judge the credibility of the victim in this case. The lack of specificity regarding Day's sexual assaults on Mary in no way impacted the credibility of the victim in this case, and it did not negate the similarity of the acts Mary attributed to Shaw with the acts the victim attributed to Shaw. Additionally, the victim's

testimony in this case was supported by a DNA analysis of saliva on the victim's dress. Shaw was not excluded as a donor of the saliva and testimony established the odds of a random match were 1 in 4103. In sum, we are satisfied beyond a reasonable doubt that additional evidence relating to Day's prior assault on Mary would not have led a rational jury to have acquitted Shaw of the charges in this case, given the victim's testimony as supported by the saliva analysis.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*