

An evidentiary or procedural error is harmless in a criminal case when the State can demonstrate beyond a reasonable doubt that “a rational jury would have found the defendant guilty absent the error.” *State v. Nelson*, 2014 WI 70, ¶¶29, 44, 355 Wis. 2d 722, 849 N.W.2d 317. This court will independently determine as a matter of law whether the harmless error doctrine applies. *Id.*, ¶18. In evaluating whether the State has met its burden, we will consider factors such as the pervasiveness of the error, the importance of the evidence at issue given the strength and nature of the State’s case and the defense, and the presence or absence of corroborating, duplicative, or contradictory evidence. *Id.*, ¶45. We may have more confidence that additional credibility evidence would not have changed the outcome of a case when a conviction was “strongly supported by evidence untainted by error.” *State v. Prineas*, 2012 WI App 2, ¶32, 338 Wis. 2d 362, 809 N.W.2d 68 (2011).

Here, the State charged Paulus in an amended Information with one count of sexual assault of a child under the age of sixteen and one count of child enticement with intent to have sexual contact, as a predicate to lifetime supervision of a serious sex offender. The child at issue, Katie,² gave several people various accounts of the incident giving rise to the charges. Relevant to this appeal, on January 10, 2019, Katie reported to a school resource officer about an encounter she had with Paulus at his house over the winter break. Katie told the officer that Paulus had kissed her and “it turned into more” over a period of five hours because Katie was scared to tell Paulus to stop. On January 14, 2019, Katie gave a much more detailed statement to a forensic interviewer. During the forensic interview, Katie described several explicit sexual acts

² This matter involves the victim of a crime. Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim’s name.

that she alleged had occurred, including vaginal intercourse while Katie was wearing underwear and positioned on Paulus's lap, moving her hips back and forth.

Prior to trial, the State sought to exclude evidence that, during the five days between Katie's statements to the school resource officer and the forensic interviewer, Katie made several internet searches for pornography on her cell phone. One of the searches yielded an image titled "grinding" of a woman having vaginal intercourse while wearing underwear and positioned on a man's lap. The defense argued that the pornography provided an alternate source of knowledge for some of the alleged sexual acts underlying the sexual assault charge that Katie described in her forensic interview. The circuit court excluded the pornography evidence on the grounds that its potential probative value was outweighed by its potential prejudicial effect.

Following a three-day trial, a jury convicted Paulus of child enticement but acquitted him of sexual assault. We conclude that the acquittal on the sexual assault charge rendered harmless any error that the circuit court may have committed by excluding the pornography evidence because the source of Katie's sexual knowledge was not relevant to the child enticement charge, and the defense was able to successfully undermine Katie's credibility without the pornography evidence. We emphasize several points in support of our conclusion.

As to relevance, Paulus acknowledges that the crime of child enticement does not require that any actual sexual contact took place. Rather, as the circuit court properly instructed the jury, the State had to prove only that Paulus caused Katie (a child under the age of eighteen) to go into a room with the *intent* to have sexual contact with her for his own sexual arousal or gratification. Intent must be found "from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in [the] case bearing upon intent." *See* WIS JI—CRIMINAL 2134 (2018).

The undisputed facts in this case show that Katie spent the night at Paulus's house on the date the child enticement was alleged to have occurred and that Paulus was thirty-nine and Katie was fourteen at that time. It is also uncontroverted that Katie knew Paulus because Paulus had previously dated Katie's aunt, and that Katie had in the past gone to Paulus's house with her cousin, or when she was not getting along with her father.

The State introduced a spreadsheet exhibit containing a series of statements that Paulus made to Katie on Snapchat before, on, and after the date the child enticement was alleged to have occurred. These statements, which did not rely upon Katie's credibility, established that: (1) Paulus repeatedly referred to Katie as "hon" and "babe"; (2) Paulus told Katie at 7:01 a.m. on one occasion prior to the date of the child enticement that he had a "nice dream" about her; (3) Paulus asked Katie at 12:22 a.m. on another occasion prior to the date of the child enticement whether she just needed company or was "craving more"; (4) Paulus agreed to pick up Katie on the date of the child enticement a block or two away from her house so that she could spend the night at his house, after Katie stated that she would tell her father that she was going to a friend's house; and (5) Paulus sent Katie several messages after the date of the child enticement, including ones sent during the early morning hours, asking Katie if she wanted to come over again and if they were "still friends." The State also introduced a photograph that police had taken of Paulus's bedroom showing a teddy bear that Katie had described during her forensic interview as being on Paulus's bed.

Paulus's statements—and in particular his "craving more" comment and his participation in surreptitiously picking up Katie without her father's knowledge—provided strong evidence as to Paulus's improper intent in hosting Katie overnight and taking her into his bedroom. In contrast, whether Katie downloaded pornography, or used pornography to fabricate details of her

encounter with Paulus, had no bearing on Paulus's intent or any other element of the child enticement charge.

Furthermore, as to credibility, it is apparent from the split verdict that the jury believed Paulus had taken Katie into his bedroom for the purpose of having sexual contact with her but it was not convinced as to what, if any, sexual contact had actually occurred. Given that it can be assumed that the jury must have believed that Katie had fabricated some details of what occurred in the bedroom, additional evidence undermining her credibility on that point would not have changed the outcome of the case.

Upon the foregoing,

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

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

Samuel A. Christensen
Clerk of Court of Appeals