COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2649-CR **Cir. Ct. No. 2011CF323**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN V. ERATO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Steven V. Erato appeals a judgment convicting him of one count of physical abuse of a child stemming from a physical altercation with Jordan K., his seventeen-year-old stepson. Erato also appeals the order

denying his postconviction motion seeking a new trial. He argues he should have been allowed to present evidence that Jordan burglarized Erato's home shortly before the altercation. We conclude that the trial court properly exercised its discretion in excluding the evidence. We affirm the judgment and order.

¶2 Erato is married to Jordan's mother, Merica. Jordan resides with his paternal grandparents and legal guardians, the Kabkes. Merica told the grandfather (Kabke) that Erato was upset because earlier that day she came upon Jordan in the Erato residence when no one was home. He does not have a key. The Eratos thought Jordan responsible for other recent break-ins at their home and that he had stolen money on one such occasion.

¶3 Kabke drove Jordan to Erato's business to discuss the matter. Here the stories diverge. Kabke said that he took Jordan there at Merica's request; Merica and Erato claim that Erato was so upset he emphasized that Jordan should stay away. Then, according to Kabke and Jordan, at Erato's direction Jordan went into Erato's office without Kabke. Erato claimed Kabke opted not to join them. A short time later, Jordan emerged with obvious physical injuries. He claimed one or two men had held him down while Erato and two others hit him with a bat or stick. Erato acknowledged striking Jordan, but said it was in self-defense because Jordan, a third-degree black belt in karate, approached him aggressively. Two days later, Jordan reported the incident to police.

¶4 After Jordan's report, Erato told police that Jordan had broken into his residence the day of the altercation. Police investigated and arrested Jordan for burglary. Jordan maintained he had gone there to retrieve some of his possessions. The prosecutor ultimately decided there was insufficient evidence to prosecute the case. Jordan was not charged. The burglary referral was closed.

¶5 Three days later, Erato was charged with child enticement, child abuse, and false imprisonment. Both parties filed motions in limine. At a hearing on the motions, Erato's counsel argued in support of Erato's motion to admit other-acts evidence of Jordan's karate prowess:

> The kid is a black belt. He burglarized [Erato's] house and came to his office and started to fight with him. We have videotapes of him cage fighting. We have pictures of him with weapons. We are just giving [the prosecutor] notice of what we intend to do.

¶6 The prosecutor responded that "there is no burglary" because in the end the case was "non-prossed." She emphasized that, as Jordan consistently maintained he never stole anything from Erato, she was "not going to have a burglary trial within [a] child abuse trial." The court ruled that it would allow reference only to a dispute between Erato and Jordan over some missing money but not to anything about a burglary.

¶7 The jury acquitted Erato of the child enticement and false imprisonment charges but found him guilty of child abuse. Postconviction, he moved for a new trial on the basis that there was ample evidence that Jordan repeatedly lied to the police during the burglary investigation. Erato argued that, although the case was not prosecuted, WIS. STAT. § 906.08(2) (2011-12)[1] permits cross-examination about specific instances of conduct relating to untruthfulness. In addition, from a constitutional standpoint, the trial court should have allowed him to cross-examine Jordan to explore his potential motive to falsely accuse Erato. The court denied the motion without a hearing. Erato appeals.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

¶8 WISCONSIN STAT. § 906.08(2) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in [WIS. STAT. §] 906.09, may not be proved by extrinsic evidence. They may, however, subject to [WIS. STAT. §] 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

¶9 Whether to admit or exclude evidence under WIS. STAT. § 906.08(2) lies within the trial court's discretion. *See* ***Rogers v. State***, 93 Wis. 2d 682, 689-90, 287 N.W.2d 774 (1980). Even if the evidence of prior conduct might be admissible to test credibility, the trial court still must perform a WIS. STAT. § 904.03 balancing of probative value versus prejudicial effect. ***McClelland v. State***, 84 Wis. 2d 145, 156-57, 267 N.W.2d 843 (1978). We will uphold the decision if the court reviewed the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion. ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850.

¶10 Erato contends WIS. STAT. § 906.08(2) entitled him to cross-examine witnesses on "the details of the burglary and Jordan K.'s statements to police." He asserts that inconsistencies in the evidence would have demonstrated Jordan's willingness to lie to police and general lack of credibility. We disagree.

¶11 The evidence easily could have left the jury unsure about whether Jordan had broken into the Erato residence intending to steal, resulting in a confusing trial within a trial. Even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence." ***State v. Pulizzano***, 155 Wis. 2d 633, 640 n.3, 456 N.W.2d 325 (1990) (quoting WIS. STAT. § 904.03). On the other hand, the State already had determined that such evidence against Jordan was insufficient. If no burglary occurred, Jordan's denials were true and would prove nothing about his character, particularly a willingness to lie.

¶12 Also, Erato wanted to prove his case through police officers who investigated the burglary, the burglary police report, the testimony of the friend who accompanied Jordan to the Erato home, and by questioning Merica about the circumstances of finding Jordan in the house. But WIS. STAT. § 906.08(2) expressly forbids the use of extrinsic evidence to impeach a witness's credibility on a collateral matter. ***McClelland***, 84 Wis. 2d at 158-59. Even supposing that evidence did prove that Jordan lied to police regarding the burglary, it does not establish that Jordan has a *character* for untruthfulness. *See* § 906.08(2).

¶13 Erato next contends the trial court's ruling violated his right to present evidence by abridging his federal and state constitutional rights to confrontation and compulsory process. The Sixth Amendment of the United States Constitution and Article 1, §7 of the Wisconsin Constitution guarantee a criminal defendant the right to cross-examine and confront the witnesses against him. ***Delaware v. Van Arsdall***, 475 U.S. 673, 678 (1986); ***Rhodes***, 336 Wis. 2d 64, ¶28. We review his challenge de novo. *See* ***State v. Weed***, 2003 WI 85, ¶10, 263 Wis. 2d 434, 666 N.W.2d 485.

¶14 Erato contends that wholly curtailing the burglary evidence deprived him of a meaningful cross-examination that would have allowed him to show that Jordan was motived to fabricate his version of the altercation. *See* ***Van Arsdall***, 475 U.S. at 679. Specifically, Erato contends Jordan may have wanted to deflect

attention from the fact that he actually had burglarized the Erato house, or, as he was on juvenile supervision at the time of his burglary arrest, subjectively might have hoped for leniency in exchange for his testimony, although no such promise was made. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 441, 247 N.W.2d 80 (1976).

¶15 The trial court did not wholly exclude evidence that Jordan may have wronged Erato. It allowed references to a dispute in which Erato and Merica believed Jordan took some money and Jordan denied it. The jury also heard Jordan's somewhat inconsistent trial testimony and his admission that he told his social worker that he wanted to "get back" at Erato. Furthermore, a subjective hope of leniency on these facts is too unlikely. Jordan simply was being supervised by a county social worker because of truancy issues. Moreover, different prosecutors handled Jordan's and Erato's cases, and the burglary referral was closed before Erato was charged.

¶16 The confrontation clause does not guarantee cross-examination "in whatever way, and to whatever extent, the defense might wish." ***Rhodes***, 336 Wis. 2d 64, ¶37 (quoting ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985)). Indeed, the United States Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." ***Nevada v. Jackson***, ___ U.S. ___, 133 S. Ct. 1990, 1994 (2013). Erato's rights were not abridged. The "burglary evidence" was properly excluded.

By the Court.—Judgment and order affirmed.

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