COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP57-CR **Cir. Ct. No. 1997CF268**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FAIRLY W. EARLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Fairly W. Earls appeals pro se from a judgment of conviction entered after a jury found him guilty of three counts of first-degree sexual assault of a child and from an order denying his motion for postconviction relief. Earls argues that the trial court improperly determined that by failing to

diligently procure trial counsel's appearance at the scheduled ***Machner***[1] hearing, Earls forfeited his ineffective assistance of counsel claims. He further alleges that the trial court erred by (1) admitting the redacted videotaped interview of the victim, (2) denying his motion to dismiss for loss of jurisdiction, (3) improperly commenting on the trial testimony, (4) allowing testimony concerning his custodial status after his apprehension in Panama, (5) permitting the victim to testify about a charge for which he was found not guilty, and (6) admitting other acts evidence. We conclude that the trial court properly denied Earls's ineffective assistance of counsel claims, and with the exception of one claim, decline to reach the merits.[2] Further, because we determine that the trial court did not err as alleged in Earls's preserved claims, we affirm.

¶2 In 1997, the State filed a criminal complaint charging Earls with four counts of first-degree sexual assault of a six-year-old girl, J.M.O., occurring in

[1] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel.").

[2] As will be explained, Earls's convictions are the result of a retrial following reversal by the Seventh Circuit Court of Appeals. Given the reasons for the reversal, we choose to reach the merits of Earls's forfeited claim that three witnesses improperly vouched for the victim's credibility. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980) (because waiver is a doctrine of judicial administration, we retain the authority to address an issue on appeal even if it has not been properly preserved). Though Earls's other ineffective assistance claims could similarly be denied on the merits we deem them forfeited. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on appeal."). The forfeited issues we decline to address include: (1) Earls's conclusory and unsupported assertion that the redacted videotaped interview of the child victim improperly vouched for her credibility, (2) Earls's factually inaccurate claim that social worker Ghilardi lied about her credentials on the videotape or at trial, (3) whether Detective Hess and Ghilardi were properly qualified as experts, (4) the trial court's decision not to instruct the jury on the reason for Earls's retrial, and (5) whether the trial court properly determined Earls's prior convictions for impeachment purposes based on the number of actual convictions rather than the number of separate judgments of conviction.

August of that year. During trial, the court allowed the State to play a videotaped interview between J.M.O. and a clinical social worker, Liz Ghilardi. The social worker also testified at trial. Earls was found guilty of three counts, and his judgment was affirmed on direct appeal. *See* ***State v. Earls***, No. 2000AP2303-CR, unpublished slip op. (WI App Sept. 5, 2001).

¶3 The Court of Appeals for the Seventh Circuit reversed the judgment after concluding that trial counsel's failure to redact the victim's videotaped statement in accordance with the trial court's prior ruling constituted ineffective assistance of counsel. Specifically, the Seventh Circuit determined that trial counsel was ineffective for failing to ensure that the videotape was redacted to omit the social worker's closing statements to the victim that she was "very sorry that Fairly did that to you. He should not have been touching you down there," and "we don't want him to do this to you anymore."[3]

¶4 The State elected to retry Earls. Earls was released on bail and absconded. Earls was later apprehended and a second jury found him guilty of the same three charges. The office of the state public defender appointed counsel to represent Earls for postconviction purposes. Following a hearing, the trial court granted appointed counsel's motion to withdraw so that Earls could represent himself. Earls filed a pro se motion alleging ineffective assistance of trial counsel and the trial court scheduled the motion for a ***Machner*** hearing. When Earls

[3] In addition, the Seventh Circuit determined that trial counsel was ineffective for failing to object to portions of the social worker's trial testimony that vouched for the victim's credibility. On retrial, the State did not elicit and the social worker did not offer the offending testimony.

failed to produce any witnesses at the hearing, the trial court summarily denied Earls's postconviction motion.

The Trial Court Properly Denied Earls's Ineffective Assistance of Counsel Claims

¶5 On November 6, 2013, Earls was provided notice of the December 18, 2013 ***Machner*** hearing. Earls failed to procure trial counsel's attendance. Consequently, the trial court dismissed Earls's ineffective assistance of counsel claims for lack of proof. Earls contends that the trial court erroneously exercised its discretion by "fail[ing] to address the issues on the record" and instead issuing a "blanket denial" of his ineffective assistance of counsel claims. We disagree.

¶6 In denying Earls's ineffective assistance of counsel claims, the trial court found that Earls did not request a subpoena until two days before the hearing. Though the court honored Earls's request to issue the subpoena on the day it was received, it was too late to serve the subpoena on trial counsel. The court concluded that Earls had not exercised sufficient diligence in procuring trial counsel's attendance at the hearing:

> I did not receive anything, hear from you in any manner or form, have any communication with anyone concerning this hearing following the filing of your motion and request for a ***Machner*** hearing until after lunch on Monday when I got your two subpoenas. I certainly don't find that to fall within the definition of due diligence….

¶7 In determining that Earls did not timely subpoena trial counsel, the trial court hearkened back to the "very extensive hearing" in October wherein appointed counsel was permitted to withdraw at Earls's request. The court reminded Earls that at the October hearing, it had indicated "a tremendous downside of self-representing yourself in any criminal matter but certainly on

matters of this sophistication … given the magnitude of what has all transpired." The court continued:

> I then addressed protocols that would follow with regard to the filing of motions and the securing of parties and [that] the noticing of parties and securing the availability of parties is exclusively that of the proponent, that … the State will do absolutely nothing nor will the Court, that the Court will not take and facilitate circulation of documents. If they are not properly circulated, served and facilitated, that is the proponent's responsibility to make sure that in fact is done. Given that, counsel certainly would be of assistance to make sure that those protocols would certainly be respected and followed consistent with prevailing case and statutory directives.

The court reminded Earls that it had cited to case law providing that the "failure to … procure attendance of defendant's trial attorney waives the claim of ineffective assistance" and that because Earls had filed his pro se postconviction motion at that October hearing:

> I said if for some reason trial counsel would be unavailable, just from the ***Machner*** hearing standpoint, it was important that the defendant understand that the Court will not permit him to rebut any presumption of effectiveness or ineffectiveness by his own statements and allegations.

¶8 The trial court thoroughly informed Earls that it was his obligation to procure trial counsel's appearance and warned him that the failure to do so would result in dismissal of his ineffective assistance of counsel claims. Despite these cautions, Earls did not timely subpoena trial counsel. An ineffective assistance of counsel claim must be supported by trial counsel's testimony. ***Machner***, 92 Wis. 2d 797, 804. In the absence of trial counsel's testimony, an ineffective assistance of counsel claim cannot succeed. ***State v. Mosley***, 201 Wis. 2d 36, 50, 547 N.W.2d 806 (Ct. App. 1996). Under these circumstances, because the court properly determined that Earls failed to act with due diligence and Earls did not

present the testimony of his trial counsel, the court did not err in denying his ineffective assistance claims.

The Trial Court Properly Admitted into Evidence the Victim's Videotaped Interview as Redacted

¶9 Prior to Earls's first trial, the State moved to admit the victim's videotaped interview with social worker Ghilardi. The trial court determined that the videotaped statement was hearsay and was not admissible under the WIS. STAT. § 908.08(3) (2013-14)[4] hearsay exception for audiovisual recordings of statements of children. However, the court determined that the videotape was admissible under WIS. STAT. § 908.03(24), the residual hearsay exception.[5] In Earls's direct appeal of his first trial, this court determined that the trial court properly exercised its discretion in admitting the videotaped interview:

> Earls argues first that the evidence was inadmissible hearsay and that the circuit court improperly admitted the evidence as residual hearsay. *See* WIS. STAT. § 908.03(24). Before admitting the evidence, the circuit court applied the factors set forth in ***State v. Sorenson***, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988). ***Sorenson*** held that the residual hearsay rule was appropriately used to admit hearsay statements of young sexual assault victims. ***Id.*** at 243. The court must first establish certain "guarantees of trustworthiness." ***Id.***
>
> ….

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[5] A child's videotaped statement which does not meet the requirements of WIS. STAT. § 908.08(3), may be admitted into evidence as an exception to the hearsay rule. *See* WIS. STAT. § 908.08(7); ***State v. Snider***, 2003 WI App 172, ¶12, 266 Wis. 2d 830, 668 N.W.2d 784. WISCONSIN STAT. § 908.03(24), known as the residual hearsay exception, provides for the admissibility of a "statement not specifically covered by any of the foregoing [enumerated hearsay] exceptions but having comparable circumstantial guarantees of trustworthiness."

> The record establishes that the circuit court considered all of these factors when it decided to allow the evidence. Earls has not demonstrated that the circuit court erroneously exercised its discretion when it allowed the evidence in under the residual hearsay rule.

Earls, No. 2000AP2303-CR, unpublished slip op. at ¶¶13-14.

¶10 On retrial, trial counsel objected to the admissibility of the videotaped interview, adding to the arguments made in the first trial that the victim's current age weighed against admissibility. In response, the State filed a comprehensive memorandum with numerous attachments[6] arguing that the retrial court should accept the first court's analysis as an appropriate exercise of discretion that was affirmed on appeal.

¶11 The trial court determined that the videotape was admissible under the residual hearsay exception.[7] In so ruling, the trial court acknowledged that it had not viewed the videotape, but had reviewed the State's brief and considered that the original court's admissibility ruling was affirmed on appeal and left undisturbed by the Seventh Circuit's decision.[8] The retrial court approved of the original court's analysis and ruling and determined that the passage of time only weighed in favor of admissibility:

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[6] In arguing that there was no reason to disturb the first court's admissibility ruling, the State's memo attached the transcript of that ruling, the transcript of the videotaped interview, the State's response to Earls's postconviction motion addressing the admissibility issue, and this court's opinion affirming the videotape's admission as a residual exception to the hearsay rule.

[7] The trial court determined that the videotape was not admissible under WIS. STAT. § 908.08, and instructed the jury to this effect.

[8] The court determined "it is not for this Court to revisit those five [***Sorenson***] factors, it's for me to recognize that [the previous trial court] in fact ruled on that and … that given the same law of the case, issue preclusion and claim preclusion would then permit the admissibility of that videotape" given the original trial court's decision.

> This case I think probably now more supports the admission of that videotape than it ever did for the reason that this is 2012. That forensic interview took place I believe in '97, '98, whatever it was. So we're talking 14, 15 years removed. To expect that somebody may in fact remember each and every minute detail of certain things that far removed is I think unrealistic and the best evidence as I would see it is to have the videotape.

¶12 Earls argues that the retrial court's decision to admit the videotape under the residual hearsay exception was an erroneous exercise of discretion because the court adopted the original court's analysis without viewing the videotape. The State argues that this court should affirm the videotape's admissibility as the law of the case. *See* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 ("The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'") (citation omitted).

¶13 While there are a number of potential grounds for approving the retrial court's decision, we independently determine that the record as a whole, including the transcript of the videotape, provides an ample basis for the admission of the videotape under the residual hearsay exception. *See, e.g.*, ***State v. Hunt***, 2003 WI 81, ¶¶45, 52, 263 Wis. 2d 1, 666 N.W.2d 771 ("Regardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion.") (citation omitted).

¶14 In applying the residual hearsay exception to extrajudicial statements of child sexual assault complainants, the court considers factors including:

> [T]he child's age, ability to communicate and familial relationship with the defendant; the person to whom the statement was made and that person's relationship to the

> child; the circumstances under which the statement was made, including the time elapsed since the alleged assault; the content of the statement itself, including any signs of deceit or falsity; and the existence of other corroborating evidence.

State v. Snider, 2003 WI App 172, ¶17, 266 Wis. 2d 830, 668 N.W.2d 784, citing ***Sorenson***, 143 Wis. 2d at 245-46. These factors are not exclusive and no single factor is mandatory or dispositive. ***Sorenson***, 143 Wis. 2d at 245-46.

¶15 In this case, J.M.O. was over six-years old, was verbal and able to communicate, and evinced her comprehension of the questions by offering relevant, age-appropriate responses. She corrected social worker Ghilardi when Ghilardi got the facts confused or when J.M.O. disagreed with Ghilardi's interpretation of her words. She demonstrated that she knew the truth from a lie, was able to listen to and focus on Ghilardi's questions, and related her answers in a matter-of-fact, straightforward manner. The interview was conducted three weeks after the assault and J.M.O. reported the incident to her mother within nine or ten days. There was some corroboration of the surrounding circumstances of the interaction, including that J.M.O. was sitting on Earls's lap. J.M.O. had a close relationship with Earls and had no motive to lie or deceive; she expressed fondness for Earls and was upset when she could not have contact with him after this incident.

¶16 Similarly, Ghilardi did not know any of the involved parties and had no motive to lead the victim to fabricate. She encouraged J.M.O. to provide accurate answers and not to guess. For example, when J.M.O. indicated she forgot certain details about the events of her mother's birthday, the following exchange occurred:

> [Ghilardi]: You forgot. Okay. And that's okay. You know what, if I ask you any other questions and you don't

> know or you forget, you just tell me okay? 'Cause this is a room where I don't want you to guess, okay?
>
> [J.M.O.]: Okay.
>
> [Ghilardi]: So if you don't know the answer to something you just say I don't know or I don't remember, okay?
>
> [J.M.O.]: Okay.

¶17 Further, Ghilardi asked open-ended questions that did not suggest a "correct" answer. In fact, the sexual assault discussion began when Ghilardi asked "Is there anything else you'd like to tell me about today, [J.M.O.]?" J.M.O. responded by pointing to her crotch and asking, "Do you know, do you need to know about this?" Ghilardi asked, "What, what can you tell me about that?" J.M.O. then spoke at length about the events leading up to and during the assault. Ghilardi did not ask leading or even prompting questions, and J.M.O. described distinct instances of Earls rubbing her vagina with his finger, including where the assaults occurred, how she felt, and who else was around. In sum, the interview contains circumstantial guarantees of trustworthiness and reliability sufficient to support its admissibility under the residual hearsay exception.

The Trial Court Did Not Lose Jurisdiction to Retry Earls

¶18 On December 2, 2004, following remand and pursuant to the Seventh Circuit's order, the federal district court entered an order granting Earls's petition for a writ of habeas corpus and directing "that he be released from custody unless the State elects to retry him within 120 days." The district court's order acknowledged receipt of a letter dated November 3, 2004, from Deputy District Attorney Charles Schneider indicating the State's election to retry Earls. The office of the state public defender appointed trial counsel for Earls, and Earls filed a judicial substitution request on December 20, 2004. The matter was scheduled

for a February 7, 2004 motion hearing. Earls was returned to the county jail and appeared for the hearing. The trial court set a cash bail and the attorneys were instructed to contact the clerk to schedule a status conference. Earls was released on bail and eventually fled the country.

¶19 Prior to Earls's second trial, defense counsel moved to dismiss the charges based on the State's alleged failure to retry Earls within 120 days. Earls argued that the State was required to complete any new trial within the 120-day period, or, in the alternative, that the State's letter of intent to retry Earls was insufficient to satisfy the district court's order. The trial court denied Earls's motion, finding that the State had complied with the federal district court's order. The trial court determined that the order directed the State to make its retrial election within 120 days, and did not require that the trial be completed within 120 days.[9]

¶20 The trial court properly denied the motion to dismiss. The State elected to retry Earls within the 120-day period, on November 3, 2004.[10] Consistent with the State's election, Earls filed a motion for judicial substitution, was appointed counsel and transferred to the county jail, and proceedings continued in state court. Further, the remedy imposed by the federal court was to release Earls from custody. It did not prohibit the State from recharging or

[9] In denying Earls's motion to dismiss, the trial court also considered a December 7, 2004 letter from the attorney general's office to the federal district court informing that court that the State had elected to retry Earls and the case was moving forward in the circuit court. The letter informed the federal district court that the attorney general's office considered this to comply with its December 2, 2004 order.

[10] To the extent Earls argues that the 120 days commenced on August 16, 2004, the date of the Seventh Circuit's Order, we observe that the November 3, 2004 letter falls within this period.

retrying Earls. A little more than two months after the district court granted the petition and entered its order, Earls was released on bail. The trial court properly denied his motion to dismiss the charges.

The Trial Court Did Not Improperly Comment on Trial Testimony

¶21 At trial, Earls's daughter testified that Earls had sexually assaulted her when she was five or six years old. The prosecutor asked the daughter why she did not immediately report the assaults and she answered "When I was littler he said it was our special secret and that it was just a game that daddies and daughters play." On redirect, the prosecutor attempted to refer the daughter back to this testimony but had difficulty remembering the daughter's exact words. The court interjected, "I think the testimony was that this is my little secret. I think that's what the comment was." After the daughter had been excused and released from her subpoena, defense counsel moved for a mistrial based on the court's comments:

> When we were focusing on the issue of a game that daddies and daughters play the Court intervened and said what she testified was that it's my little secret. I've reviewed the transcript and what she actually said was our special secret. … I think that that comment by the Court, although well-intentioned, compromised my client's due process rights and on that basis I would move for a mistrial.

¶22 The court denied the mistrial motion but clarified the issue for the jury so that there would be no misunderstanding. The court instructed the jury that the daughter had testified that Earls told her it was "our special secret" not "our little secret." Earls claims that the trial court's statements were improper and should have resulted in a mistrial.

¶23 Whether to grant a mistrial is within the trial court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The trial court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We will uphold the trial court's discretionary decision if it examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See* ***id.*** at 506-07.

¶24 Here, the trial court properly exercised its discretion in denying Earls's mistrial motion. Any error that the court made in misstating the daughter's testimony was quickly corrected and was harmless. *See* ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty had the error not occurred).

The Trial Court Properly Denied Earls's Motion for a Mistrial Based on Testimony Concerning Earls's Custodial Status Following His Arrest in Panama

¶25 At trial, the State introduced evidence that after Earls was released on cash bail, he fled to Panama using a false passport. This evidence was offered to prove consciousness of guilt. *See* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710. The United States Marshal in charge of locating Earls testified that Earls was arrested in Panama, deported, and escorted back to the United States. Detective Hess testified that following his deportation, she first saw Earls in custody at a court hearing, and that to her knowledge, he had not been out of custody since his return to Fond du Lac county's custody. Trial counsel moved for a mistrial based on the testimony that Earls had been in constant custody since the time of his arrest in Panama. The trial court denied the motion. On appeal, Earls does not challenge the evidence concerning his flight but claims

that the trial court erred in denying his mistrial motion after the State elicited testimony on redirect that he was taken into custody in Panama and remained in custody thereafter.

¶26 We conclude that the trial court properly exercised its discretion in denying the mistrial motion. Any error in admitting evidence that Earls was taken into custody in Panama and remained in custody until he arrived in the United States was harmless.[11] The jury knew that Earls had absconded to Panama using a false passport while on bail. It would come as no surprise that Earls had been placed in custody in Panama, was escorted to the United States, and remained in custody.

Evidence Concerning Allegations of Sexual Assault for Which Earls was Found Not Guilty in the First Trial was Admitted as Context in the Second Trial

¶27 At Earls's first trial he was charged with four counts of sexual assault occurring (1) on the way to the shed, (2) in the shed, (3) outside Rosie's trailer, and (4) in Earls's gazebo. The first jury found him not guilty of the sexual assault on the way to the shed. On retrial, Earls was charged with the three other assaults and the jury instructions and verdict forms clearly indicated that the charged offenses took place in the shed, outside Rosie's trailer, and in Earls's gazebo.

¶28 At Earls's second trial, there was limited testimony that Earls started to rub the victim as he was carrying her into the shed and continued the activity

[11] Additionally, Earls opened the door to this testimony by suggesting that the person arrested in Panama may not have been Earls, thus requiring the State to introduce evidence of his custodial status from the time of his arrest in Panama to the time the witness first observed him in custody in the United States.

inside the shed.[12] Trial counsel moved for a mistrial on the ground that Earls was acquitted of the sexual assault on the way to the shed. The trial court denied the motion.

¶29 We conclude that the trial court properly denied the mistrial motion because the evidence was not improper. The evidence of what occurred on the way to the shed was both inextricably intertwined with the evidence regarding the charged assault and was also necessary to complete the story of the crime on trial. *See* ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515 (evidence that is "part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime," is relevant and is not "other acts" evidence) (citation omitted). Moreover, because of the clear instructions and verdict forms, the jury could not have been confused over the number of convictions and allegations underlying each conviction.

The Court Properly Admitted Other Acts Evidence of Earls's Prior Conviction for Sexually Assaulting his Daughter

¶30 Prior to retrial and over defense counsel's objection, the court ruled that the State could introduce evidence concerning Earls's prior conviction for sexually assaulting his daughter. Accordingly, Earls's daughter testified at trial about the other acts. On appeal, Earls maintains that the trial court erroneously admitted this evidence because "[t]he jury more likely misused the prior

[12] For example, in the videotaped interview, the victim stated that Earls started "itching" her while he was carrying her to the shed and "itched" her again inside the shed.

conviction for purposes other than a prior conviction and considered them as evidence of propensity to commit the crime or the guilt of it."[13]

¶31 In determining whether other acts are admissible, courts employ a three-part test: (1) the evidence must be offered for an acceptable purpose, (2) the evidence must be relevant, and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). In child sexual assault cases, greater latitude is afforded the admissibility of other acts evidence. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. The decision whether to admit or exclude other acts evidence is left to the trial court's sound discretion. ***Hunt***, 263 Wis. 2d 1, ¶34.

¶32 We conclude that the trial court properly admitted evidence of Earls's conviction for sexually assaulting his daughter. First, the evidence was offered for a proper purpose, to prove intent and motive. It was probative of the notion that the touching itself was intentional and that it was performed for the specific purpose of sexual gratification. *See* ***Davidson***, 236 Wis. 2d 537, ¶¶57-59 (where charges involve sexual contact, other acts are admissible to show the defendant's purpose and motive in touching the victim, which is a requisite element of sexual contact).

[13] Earls argues that this evidence violated WIS. STAT. § 906.09, which governs the admission of prior convictions for impeachment purposes. While it is true that Wisconsin applies a "counting rule" by which a jury is informed only that a witness has been convicted of a crime and the number of prior convictions, that rule does not apply to evidence of other convictions admitted as other acts pursuant to WIS. STAT. § 904.04.

¶33 Second, the trial court properly determined that the other acts were relevant. The court determined that at the time of her assault, Earls's daughter was approximately the same age as J.M.O. Additionally, the court referred to and approved of the ***Sullivan*** analysis performed at Earls's first trial, where the original court was particularly persuaded by the similarity of the acts with respect to the age of the victims, the type of touching, and the nature of the close relationship each victim had with Earls.

¶34 Finally, the trial court determined that the probative value of the other acts was not substantially outweighed by the danger of unfair prejudice. Nearly all evidence is prejudicial to the party against whom it is offered. ***State v. Murphy***, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994). Unfair prejudice results when the evidence tends to influence the outcome by improper means or causes the jury to base its decision on something other than the established propositions in the case. ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). In recognition of this danger, the trial court instructed the jury that it was only to consider the other acts for certain specified purposes:[14]

> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. … You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person, and for that reason, is guilty of the offense charged.

[14] *See* ***State v. Kourtidias***, 206 Wis. 2d 574, 582-83, 557 N.W.2d 858 (Ct. App. 1996) ("By delivering a cautionary instruction, the trial court can minimize or eliminate the risk of unfair prejudice.").

No Witness Improperly Vouched for the Victim's Credibility

¶35 Earls contends that Hess, the victim's mother, and the prosecutor either improperly offered an opinion that the victim was telling the truth,[15] or violated WIS. STAT. § 906.08(1)(b) by offering an opinion on the victim's character for truthfulness when such character had not been attacked by the defense.[16] We disagree.

¶36 With regard to Hess, Earls complains of the following exchange at trial:

> Q: Did you ask the defendant … if he thought [the victim] was lying?
>
> A: Yes, I did.
>
> Q: And what was his response?
>
> A: He said he did not think she was lying.

Here, Hess was testifying about what Earls, himself, told her, and any claim that this testimony contained Hess's opinion that the victim was telling the truth is without merit.

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[15] A witness may not opine as to whether another witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (expert not permitted to testify that the victim was clearly an incest victim where such an opinion operated to vouch for the victim's credibility). *See also* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988).

[16] As stated previously, we will address this claim despite the fact that trial counsel did not object to any of the alleged "vouching" testimony about which Earls now complains. Additionally, in a pretrial ruling, the trial court determined that a decision on the admissibility of evidence concerning the victim's character for truthfulness would be premature. It explained that it could only make that determination after hearing the testimony at trial to determine whether the defense had first attacked the victim's character for truthfulness. Earls has not indicated any court rulings in which the court sanctioned testimony concerning the victim's character for truthfulness under WIS. STAT. § 906.08(1)(b).

¶37 With respect to the victim's mother, she testified only that at the time of the assault, the victim knew the difference between the truth and a lie. This testimony does not approach a violation of either ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984) or WIS. STAT. § 906.08(1)(b).

¶38 Finally, Earls contends that the prosecutor's statements in closing argument impermissibly vouched for the victim's credibility. To illustrate his point, he refers to examples such as the following:

> Also, considering [the victim's] credibility, she had no motive to lie. We heard of not one, not one reason why [the victim] would lie. After she reported she still wanted to see the defendant and was very upset when her mom and dad told her no, you can't see the defendant anymore. So why would she make that up? It hurt her. She did not want those consequences. She did want to see him.

¶39 We have reviewed the various examples cited in Earls's brief and conclude that the prosecutor's comments constituted proper argument. *See* ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). The prosecutor argued from the evidence that the jury should find the victim's account credible. Moreover, the jury was instructed that the attorneys' comments were not evidence and that the jury was the sole judge of witness credibility. Jurors are presumed to follow the court's instructions. ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 709 N.W.2d 497.

By the Court.—Judgment and order affirmed.

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