COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1717-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT O. SCHMIDT,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Robert O. Schmidt appeals from a judgment of conviction of two counts of first-degree sexual assault and one count of child enticement. He argues that there was improper admission of other bad acts evidence, that the prosecution improperly bolstered the credibility of the victims and improperly commented on his failure to testify, and that a written statement

was improperly permitted in the jury room. We affirm the judgment of conviction.

Schmidt was charged with improperly touching three girls under thirteen years of age—Ammie O., Sarah H. and Krystal P. Each girl was a school friend of Schmidt's granddaughters and accompanied the granddaughters to Schmidt's home. Ammie testified about two instances where Schmidt had her lie on his bed and he put his hand into her pants. On one occasion, Schmidt forced Ammie to touch his erect penis. Ammie indicated that Schmidt touched each of his two granddaughters. The granddaughters did not testify. Krystal testified that Schmidt pushed her up against the refrigerator, rubbed her sides with his sides and touched her on her vagina. Sarah testified that Schmidt rubbed her thighs and breasts with his hand. She denied that Schmidt ever touched her vaginal area. Schmidt was acquitted of the two charges pertaining to conduct with Sarah.

At trial, eleven-year-old Stephanie W. testified that Schmidt appeared to look down her shirt when she bent over to pick up a dropped card during a card game at Schmidt's home. Thirteen-year-old Donna F. testified that when she went to Schmidt's house in the company of his granddaughters, Schmidt would rub her shoulders and tell her she had a nice body and nice legs. Krystal and her mother testified that one of the granddaughters had taken a razor blade to her arm. Schmidt contends that evidence of uncharged misconduct regarding Stephanie, Donna and his granddaughters was improper evidence of other bad acts. *See* § 904.04(2), STATS.

A detailed discussion of the standards reiterated in ***State v. Sullivan***, 216 Wis.2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998), for admitting other bad acts evidence is not necessary. A relevant point that Schmidt fails to acknowledge

in his argument on this issue is that the sexual contact he was said to have with his granddaughters occurred at the same time as the contact with Ammie.[1] Seven-year-old Ammie explained how Schmidt had all three girls lie on the bed at the same time and that he touched each in succession. Ammie indicated that Schmidt touched her, then lifted her off the bed and sat her on the floor, and that he did the same thing to each of the granddaughters. On the second occasion Schmidt called each girl into the room alone and the other two watched from the doorway.

The evidence that Schmidt touched his two granddaughters was not other acts evidence. Rather, it was part of the panorama of evidence needed to completely describe the events that occurred. It was admissible evidence because it was inextricably intertwined with the crime. *See* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1606 (1994) (discussing FED. R. EVID. 404(b), which governs the admissibility of other crimes, wrongs or acts.); *see also* ***State v. Hereford***, 195 Wis.2d 1054, 1069, 537 N.W.2d 62, 68 (Ct. App. 1995) ("Testimony of other acts for the purpose of providing the background or context of a case is not prohibited by § 904.04(2), STATS."). Ammie could not have told how the crime occurred without providing the information about accompanying the granddaughters to the house and into the bedroom. There was no error in the admission of that testimony.

In his reply brief Schmidt narrows his claim about the granddaughters to attack the "separate, and separable, testimony that a

[1] Schmidt's appellate counsel, Attorney Dean A. Strang, nearly misrepresents the record by the oblique manner in which he explained the evidence of the uncharged misconduct involving the granddaughters. We admonish counsel for this lack of candor. *See* SCR 20:3.3(a)(1).

granddaughter attempted suicide because of something Schmidt did."[2] He argues that the State concedes error on the suicide gesture because its brief focuses only on the alleged touching and does not address the suicide evidence. *See* ***State ex rel. Sahagian v. Young***, 141 Wis.2d 495, 500, 415 N.W.2d 568, 570 (Ct. App. 1987) (respondent on appeal cannot complain if appellant's propositions are taken as confessed which it does not address). Even if we were to read Schmidt's brief to only challenge the evidence about the granddaughter's use of a razor blade, it comes too late.

Schmidt's objection in the trial court was confined to the evidence that he had sexual contact with the granddaughters. He argued that there was no relevancy to the allegations that he touched his granddaughters.[3] He did not object to Krystal's testimony that one of the granddaughters had a razor blade and was sticking it through her arm and making signs on her arm.[4] There was no objection when Krystal's mother mentioned that the granddaughter tried to cut at her wrists with a razor blade. We do not reach an issue raised for the first time on appeal. *See* ***State v. Divanovic***, 200 Wis.2d 210, 226, 546 N.W.2d 501, 507 (Ct. App. 1996).

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[2] Not one witness characterized the granddaughter's use of a razor blade to scratch her arm as a suicide attempt. While in closing argument the prosecutor called the granddaughter's conduct a "cry for help," the razor blade conduct was not called a suicide attempt.

[3] During pretrial motions, Schmidt sought to exclude a police detective's testimony that when Schmidt was questioned, Schmidt answered, "if this is about my granddaughters … I have never touched my granddaughters." He also asked the trial court to prohibit any evidence of the granddaughters' statements or demeanor when asked to speak to the police.

[4] Again, appellate counsel misrepresents the record when he states that Schmidt objected when the prosecutor first elicited testimony that his granddaughter had scratched at her arm with a razor blade. The objection was only to the prosecutor's question of whether Krystal, the witness, thought such behavior was dangerous. Schmidt objected on the grounds that whether Krystal "thought it was dangerous or not is irrelevant."

Moreover, Schmidt invited admission of the razor blade evidence in his cross-examination of Krystal. In an attempt to show that Krystal was biased, Schmidt asked her whether she had made the allegations against Schmidt after having a fight with one the granddaughters. On redirect, Krystal was asked what the fight was about. Krystal replied that the fight arose because the granddaughter was taking a razor blade to her arm and cutting herself. Schmidt cannot complain now about evidence that was in fair response to his theory of defense. *See* ***United States v. Robinson***, 485 U.S. 25, 32, 34 (1988); *see also* ***Shawn B.N. v. State***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) (we will not review invited error).

We next consider Schmidt's claim that the admission of evidence that he looked down Stephanie's shirt and rubbed Donna's shoulders while commenting on her body and legs was an erroneous exercise of discretion. Assuming that admission of this evidence was error, we conclude it was harmless error. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury." ***Sullivan***, 216 Wis.2d at 792, 576 N.W.2d at 41 (citations omitted).

Although the length of their testimony was the same as that of the victims, the evidence provided by Stephanie and Donna was a minor point in the evidence. The conduct they described was more easily explained away by the defense and benign when compared to the direct contact with Ammie and Krystal for which Schmidt was convicted. A cautionary instruction was given about Stephanie's and Donna's testimony. Moreover, the evidence that Schmidt had sexual contact with his granddaughters, evidence that was properly admitted, was far more incriminating than the bits revealed by Stephanie and Donna. The

inference that Schmidt was attracted to young girls would reasonably arise even in the absence of Stephanie's and Donna's testimony. The victims testified about the crimes committed against them and the jury was entitled to believe their testimony. That Schmidt was acquitted of two charges reflects that the jury was not influenced by the other acts evidence. There is no reasonable possibility that the incidents described by Stephanie and Donna contributed to Schmidt's conviction.

At trial, a police detective was asked to compare Sarah's demeanor at trial with her demeanor during the police interview and comment on whether she remembered less at trial than she had earlier. The trial court sustained Schmidt's objection to the question about whether Sarah remembered less at trial. The prosecutor asked the same detective whether Ammie's and Krystal's statements to the police were substantially the same as their trial testimony. Objections to these questions were also sustained. Schmidt relies on these questions by the prosecutor to argue that the prosecutor improperly attempted to bolster the credibility of the victim witnesses. While no witness may comment on another's veracity, *see* ***State v. Romero***, 147 Wis.2d 264, 278, 432 N.W.2d 899, 905 (1988), Schmidt's objections were sustained and the improper commentary never occurred.[5]

To the extent that Schmidt faults the trial court for failing to admonish or rein in the prosecutor's attempt to elicit improper commentary, it provides no basis for relief from the conviction. "[T]he touchstone of due process

[5] When asked if Ammie's statement was substantially the same as her trial testimony, the police detective gave an affirmative answer before the objection was capable of being placed on the record. The objection, which was sustained, included a motion to strike the answer.

analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." ***Smith v. Phillips***, 455 U.S. 209, 219 (1982). The jury was instructed to disregard any question to which the court did not permit an answer and disregard any implication from a question which implied that certain facts were true but was not permitted to be answered. Juries are presumed to follow properly given admonitory instructions. *See* ***State v. Leach***, 124 Wis.2d 648, 673, 370 N.W.2d 240, 253-54 (1985).

Schmidt also focuses on a single comment in the prosecution's closing argument as part of his claim that prosecutorial misconduct occurred in an attempt to bolster the victims' credibility. The prosecutor referred to Sarah's demeanor on the witness stand and that defense counsel had observed that same demeanor at the preliminary hearing.[6] Schmidt's objection to this reference was overruled. Even if the prosecutor's comment was improper, the error in failing to sustain the objection was harmless. The jury acquitted Schmidt of the charges involving Sarah. Any attempt to bolster her credibility failed.

Schmidt also claims that in closing argument, the prosecutor twice improperly commented on Schmidt's election not to testify. Schmidt cites the prosecutor's pointed remarks that there had been no evidence to contradict Krystal's recollection of the appearance of the refrigerator in Schmidt's kitchen and that there was no evidence that any of the touching was accidental. No objection was made to these parts of the closing argument, and the claim of

[6] The prosecutor argued: "You saw her basically freeze. She would just stop before her answer. She would sit there in silence and pause. She was unable to continue at times. And counsel also saw that at the preliminary hearing, which she testified, and he referred to that before. And he said that in his opening statement."

impropriety is waived.[7] *See* ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988).

Schmidt's final claim is that it was error to send to the jury room the entire page of a statement taken from Ammie. Schmidt had utilized one sentence in the written statement in an attempt to impeach Ammie.[8] He points out that the statement page published to the jury reiterated much of Ammie's testimony but also included a hearsay claim not adduced at trial that Schmidt's granddaughters were going to tell their grandmother about the assault. At the bottom of the page, the statement started to tell of another incident at Schmidt's home. The second page of the statement was not provided to the jury. Schmidt's objection to admitting the exhibit focused on his limited use of one line of the statement. During deliberations, the jury asked to see the second page of Ammie's statement but the request was refused.

Submission of exhibits to a jury during deliberations rests in the discretion of the trial court. *See* ***State v. Hines***, 173 Wis.2d 850, 858, 496 N.W.2d 720, 723 (Ct. App. 1993). In exercising its discretion to determine whether exhibits should be sent to the jury room, the trial court is required to consider

[7] The prosecutor's remarks were not a direct comment on Schmidt's failure to testify and do not rise to the level of impermissible indirect commentary. "Questions about the absence of facts in the record need not be taken as a comment on a defendant's failure to testify." ***State v. Werlein***, 136 Wis.2d 445, 456, 401 N.W.2d 848, 853 (Ct. App. 1987). *See* ***Bies v. State***, 53 Wis.2d 322, 325, 193 N.W.2d 46, 49 (1972) ("[I]t is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant."). We reject Schmidt's contention that the prosecutor's comments were improper because Schmidt was the only person who could contradict the evidence. *See* ***United States v. Cotnam***, 88 F.3d 487, 499 (7th Cir. 1996). Cross-examination of the victims could have revealed an accidental origin for the sexual contact if it existed.

[8] Ammie testified at trial that one of Schmidt's granddaughters was wearing sweatpants with no buttons on the fly when he assaulted the three girls. Ammie's statement indicated that Schmidt had unbuttoned the pants of all three girls.

whether the exhibits will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibits and whether the exhibits could be subjected to improper use by the jury. *See* ***id.*** at 860, 496 N.W.2d at 724. Schmidt's claim raises the possibility that the one-page exhibit could be subject to improper use by the jury.

Assuming it was error to permit the entire page of Ammie's statement to go to the jury, we conclude it was harmless error. Except for that sentence used for impeachment purposes, the entire page was consistent with Ammie's testimony. The unfinished story that commenced on the bottom of the page and continued on the second page that was not provided to the jury would not suggest to the jury that some untold incident occurred. Ammie testified about two incidents. The one hearsay statement attributed to the statement was inconsequential in light of the victim's testimony about the assaults. There is no reasonable possibility that admission of the single-page exhibit contributed to the conviction.

By the Court.—Judgment affirmed.

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