COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2785 **Cir. Ct. No. 2013JV25**

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

IN THE INTEREST OF BRANDON L. P-D., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRANDON L. P-D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Monroe County: TODD L. ZIEGLER, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Brandon L. P-D. appeals a dispositional order finding him delinquent for having committed two counts of incest with A.P.,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

contrary to WIS. STAT. § 948.06(1). Brandon contends the evidence was insufficient to support the charges, that the circuit court erred in denying his motion for in camera review of A.P.'s medical records, and in the court's denial of his request to present evidence of a previous sexual assault upon A.P. For the reasons discussed below, I affirm.

BACKGROUND

¶2 In 2013, delinquency petitions were filed against Brandon, charging him with two counts of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3), two counts of misdemeanor battery, contrary to WIS. STAT. § 940.19(1), one count of second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(f), and three counts of incest, in violation of WIS. STAT. § 948.06(1), It is undisputed that A.P. has cognitive limitations and that she functions below her age level.

¶3 The matter was tried to the court, which adjudicated Brandon delinquent of two of the counts of incest. The court entered a dispositional order placing Brandon on supervision with placement out of the home for one year, but stayed the order pending this appeal. Additional facts will be discussed below as necessary.

DISCUSSION

¶4 Brandon raises three arguments on appeal: (1) he challenges the sufficiency of the evidence; (2) he argues the circuit court erred in failing to conduct an in camera review of A.P.'s medical records; and (3) he argues the court erred in failing to allow evidence at trial of a prior sexual assault upon A.P.

Sufficiency of the Evidence

¶5 Brandon contends the evidence was insufficient to sustain the circuit court's finding that he was guilty of two counts of incest.

¶6 On a challenge to the sufficiency of the evidence,

> [A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). When reviewing a challenge to the sufficiency of the evidence in a bench trial, an appellate court will affirm the circuit court's findings of facts if they are not clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***Ozaukee Cnty. v. Flessas***, 140 Wis. 2d 122, 130-31, 409 N.W.2d 408 (Ct. App. 1987). In addition, it is the circuit court, not this court, that determines the credibility of witnesses and resolves conflicts in the evidence. ***State v. Johannes***, 229 Wis. 2d 215, 222, 598 N.W.2d 299 (Ct. App. 1999). Applying this standard, I conclude that the evidence was sufficient to uphold Brandon's convictions.

¶7 To prove that Brandon was guilty of incest, the State bore the burden of proving: (1) Brandon had sexual intercourse with A.P.; (2) Brandon knew that A.P. was related to him by blood or adoption; and (3) A.P. is related to Brandon in a degree of kinship closer than second cousin. *See* WIS. STAT. § 948.06(1); WIS. JI—CRIMINAL 2130.

¶8 Brandon argues that the State failed to present sufficient evidence to prove that he had sexual intercourse with A.P. Sexual intercourse is defined as

"any [] intrusion, however slight, by any part of a person's body or any object into the genital or anal opening …." WIS. STAT. § 948.01(6); *see also* WIS. JI—CRIMINAL 2101B. Brandon asserts that A.P. repeatedly denied that penetration occurred and that there is nothing in her testimony, or any other evidence, from which the circuit court could infer that penetration occurred. Brandon asserts that A.P. was asked thirteen times whether Brandon's penis or mouth penetrated A.P.'s vagina and that seven of those times she testified that his penis and/or mouth was only outside her vagina or she wasn't sure. Brandon acknowledges that six of the thirteen times A.P. was asked, she testified that Brandon's penis and/or mouth had been inside her vagina. However, Brandon asserts that it is clear from A.P.'s testimony that she did not understand the distinction between inside and outside of her vagina.

¶9 The State concedes that A.P.'s testimony as to whether Brandon penetrated her vagina was inconsistent. The State argues, however, that A.P. testified clearly that Brandon's penis had penetrated A.P.'s vagina, that the circuit court could reasonably accept those portions of her testimony as true, and that the circuit court was in a position to gauge A.P.'s credibility. I agree with the State.

¶10 Brandon takes the position that A.P.'s inconsistent testimony precluded the circuit court from accepting as true those portions of her testimony that were harmful to him. However, as pointed out by the State, discrepancies in a witness's testimony do not necessarily render the testimony incredible. "Even though there [are] glaring discrepancies in the testimony of a witness at trial, or between his [or her] trial testimony and his [or her] previous statements, that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible." ***Ruiz v. State***, 75 Wis. 2d 230, 232, 249 N.W.2d 277 (1977). The issue is "whether the fact finder believes one version rather than another or

chooses to disbelieve the witness altogether," which is a question of credibility for the fact finder. ***Id.*** When it comes to inconsistent testimony by a witness, an appellate court should not substitute its judgment for that of the fact finder … except where the evidence is inherently or patiently incredible. ***Gauthier v. State***, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965).

¶11 I am not persuaded that Brandon is correct that A.P.'s testimony was inherently or patently incredible.

¶12 At trial, A.P. testified that Brandon penetrated her vagina:

> [Prosecution] Okay. And during those times, was Brandon putting his penis in your vagina?
>
> [A.P.] Yes.
>
> [Prosecution] Okay. And did his penis touch you anywhere?
>
> [A.P.] Yes.
>
> [Prosecution] And where would his penis touch you?
>
> [A.P.] In my vagina.
>
> ….
>
> [Prosecution] Are you able to tell the court, and only if you know, how many times total that Brandon put his penis in your vagina?
>
> [A.P.] I'm not really for sure.
>
> [Prosecution] But you know that it happened at least once around Thanksgiving?
>
> [A.P.] Yes.
>
> [Prosecution] And once around Christmas?
>
> [A.P.] Yes.

¶13 As noted above, it is undisputed that A.P. has cognitive disabilities and that she functions below her age level. A.P.'s nurse case manager testified that A.P. has a low comprehension level and that she behaves like a seven or eight year old. A.P.'s social worker similarly estimated A.P.'s comprehension level to be equivalent to that of a nine year old. Both the nurse case manager and the social worker testified that A.P. is suggestible—the nurse case manager testified that A.P. was "more likely" to "say things were fine because she thought that's what people wanted to hear," even if things were not fine, and the social worker testified that A.P. is "suggestible" and "vulnerable."

¶14 A.P.'s guardian, however, testified that although eliciting information from A.P. is challenging, the truth can be elicited with patience and persistence. A.P.'s guardian also testified that "right before Thanksgiving" in 2012, one of the time periods when one of the convicted counts was alleged to have occurred, A.P. texted her a lot, causing her to be worried about what was going on with A.P. The guardian testified that around that time, A.P. was having difficulties at school, A.P. seemed troubled and unhappy, A.P. stopped taking the guardian's telephone calls, that A.P. had "a lot of mood changes," and that A.P. had told her that "things were not going good at home because of some abuse … some sexual stuff."

¶15 In its ruling, the circuit court recognized that A.P.'s credibility was a key issue, and found her to be credible in light of the following: her lack of interest in the outcome, her demeanor, the relative clarity of her recollections; her lack of bias; and her lack of motive for testifying falsely.

¶16 After considering trial testimony and the court's credibility determinations, I conclude that A.P's testimony was not inherently incredible and

that the evidence, viewed most favorably to the State and the conviction, is sufficient to permit a reasonable fact finder to conclude that Brandon is guilty of incest.

Preliminary Showing for In Camera Review

¶17 Brandon contends the circuit court erred in refusing to conduct an in camera review of A.P.'s gynecological medical records.

¶18 This court's review of a circuit court's decision not to conduct an in camera review is two-fold. The party seeking in camera review bears the burden of making a preliminary evidentiary showing and the factual findings made by the court in its determination are upheld unless those findings are clearly erroneous. ***State v. Green***, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298. However, whether the party seeking in camera review submitted a sufficient preliminary evidentiary showing for in camera review presents a question of law, which this court reviews de novo. ***Id.***

¶19 In ***Green***, our supreme court stated that in order to obtain an in-camera review of privileged records in a criminal case, a defendant must "set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence" and are "not merely cumulative to other evidence available to the defendant." ***Id.***, ¶34. The evidentiary showing by the defendant must be based on a reasonable investigation, and may not be "based on mere speculation or conjecture as to what information is in the records." ***Id.***, ¶33.

¶20 Brandon argues that his preliminary showing was sufficient because he "clearly articulated that he wanted details about a congenital defect in [A.P.'s]

vagina that made penetration impossible," his attorney "reviewed the police reports and noted that [A.P.] referred to the vaginal defect during her police interviews" and A.P.'s parents confirmed to counsel that A.P. "had a condition that prevented penetration," and certain questions could be answered only by those records, such as whether minimal penetration is possible, and what affect penetration would have on A.P. I disagree.

¶21 In his motion for in camera review of A.P.'s gynecological records, Brandon alleged that "Investigation … has highlighted that there are certain physical acts that [A.P.] … cannot perform due to [her] disabilities, and … [A.P.] has some type of congenital gynecological issue that would prevent penetration without causing severe injury." In a follow-up letter to the circuit court judge, Brandon's counsel stated:

> my investigation has revealed, and the police reports hint[], that [A.P.] has a congenital defect in her vagina which makes penetration impossible. Nevertheless, she claimed on several occasions that both Brandon and [another individual] penetrated her both with their penises and fingers. If in fact that happened, there would be evidence of physical trauma…. Gynecological records would demonstrate the existence or not existence of such a congenital defect as she described to police, and would reveal whether there was or was not evidence of physical trauma to her vagina.

¶22 At the hearing on Brandon's motion, no witnesses were called and no offer of proof was made. When asked by the court what evidence counsel had that A.P. had a congenital defect which would make vaginal penetration impossible, counsel stated "I know the information came from discussions with the parents …. They have taken her to medical appointments and such…. I have a memory of running across in some of the records that I have procured. It may be it is in the ones from Vernon County where I have run across a reference to it." At

the end of the hearing, the court invited Brandon to submit to the court facts justifying his request. Brandon's counsel responded with a letter in which counsel stated:

> Please find enclosed two pages from the police reports in this matter. I have underlined statements on these two pages in which [A.P.] indicates that there is a physical problem with her vaginal opening consistent with what I alleged [in] our motion for her medical records relating to the gynecological issue. Based on this I ask the Court to order that the State provide those records.

The statements with underlining by counsel are as follows: "she explained to us that the reason his penis didn't always go all the way in was because her vagina was not always open the way it is supposed to be," and "I asked her if she recalled his penis going in part of the way into her vagina and she said yes and I asked her if it would go all the way and she said it wouldn't."

¶23 Brandon failed to make a sufficient showing under ***Green*** to compel the circuit court to conduct an in camera review of A.P.'s medical records. Brandon's counsel merely asserted in his motion, in his follow-up letter to his motion, and to the court at the hearing, that counsel's investigation had indicated that A.P. has a congenital defect that prevents vaginal penetration. Counsel's mere assertions are insufficient to compel in camera review. *See* ***id.***, ¶37. In addition, nothing in the police records counsel provided to the court suggest that A.P. has a congenital defect that prevents vaginal penetration to the extent required by law for a conviction. What the evidence submitted describes is that A.P.'s condition prevents full penetration. But, full penetration is not the statutory standard. Rather, any penetration at all is sufficient and A.P. indicated that partial penetration was both possible and did occur. Accordingly, I conclude that Brandon did not meet his burden for an in camera inspection by the court.

Prior Sexual Assault

¶24 Brandon contends the circuit court erred by excluding evidence that a foster parent had previously been convicted for sexually assaulting A.P.

¶25 Whether a circuit court erred when admitting or excluding evidence is an issue this court reviews under the erroneous exercise of discretion standard. ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619. This court will affirm an evidentiary ruling if the court determines that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion of law that a reasonable judge could reach. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶26 Wisconsin's rape shield law, WIS. STAT. § 972.11(2)(b), prohibits a defendant from offering evidence related to a victim's prior sexual conduct. In some cases, however, a victim's prior sexual conduct may be so relevant and probative that to bar evidence of such conduct would deny the defendant his or her constitutional right to present a defense. ***State v. Pulizzano***, 155 Wis. 2d 633, 647, 456 N.W.2d 325 (1990).

¶27 To establish a constitutional right to present other acts evidence of a victim's prior sexual conduct, a defendant must make an offer of proof showing: "(1) that the prior act [] clearly occurred; (2) that the act [] closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect." ***Id.*** at 656-57.

¶28 The State raised the issue of the admissibility of the prior sexual assault in a motion in limine. Brandon did not file a formal response to the State's motion. At the hearing on the State's motion, Brandon's counsel informed the court that he wanted evidence of the prior sexual assault to be admissible in order to impeach A.P., depending on her testimony:

> To clarify, I don't know what the evidence is going to be that is going to come out of her mouth at this point in time. But depending on what she says, you know, if she says that this is the only time that something like this has ever happened to me, I never had any knowledge of this before, I will bring up the fact that she told the Vernon County police this, this and this because this has happened before. And if she says that nothing ever happened in the home until 2012, I want to be able to pull this up where she was asked ….
>
> ….
>
> … And I do feel like I have the right to impeach her if they are strikingly similar to what she said before.

In granting the State's motion, the court applied each of the ***Pulizzano*** factors and concluded that Brandon had not made a sufficient showing to justify the admission of evidence of A.P.'s prior sexual assault. I am satisfied that the court's decision was reasonable.

¶29 The court found that the prior sexual assault "clearly occurred," and that the first factor was met. This finding is undisputed by the parties.

¶30 As to the second factor, the court found that from the information it had before it, the acts do not closely resemble each other. At the hearing, Brandon's attorney stated that the prior sexual assault involved A.P. disclosing that her foster parent had "touched her in a way she did not like by touching her with his hands in her privates" and that A.P. had pointed towards her vaginal area,

that A.P. had disclosed that the foster parent had touched her breast, stuck his hand down her pants and touched her vagina, and that he had touched or put his mouth on her breast. Counsel stated that allegations against Brandon were similar in that they also involved the touching of A.P.'s breast and vaginal area. In finding that this factor was not met, the court stated that it did not have all the allegations from the prior sexual assault before it, but that it had "the gist of it which seems fairly straightforward." The court found that although there are similarities between the assaults, they do not closely resemble one another because the allegations against Brandon involved sexual intercourse between siblings and requests by Brandon via text messaging when Brandon wanted A.P. to come to his room for sexual contact, none of which was present in the prior assault. I agree.

¶31 As to the third factor, whether the prior act is relevant to a material issue, the court found that it was not. Brandon argues that the evidence was relevant to show that A.P. was possibly confusing the events or "merely repeating herself," or that it was relevant to show that she had learned that by making such allegations, she could be removed from a home where she might no longer want to reside. I am not persuaded. A.P.'s description of the events, while similar in some respects, contains significant differences and cannot be characterized as a mere repeating of the same description of an assault. As to Brandon's second argument, Brandon does not make a showing that A.P. wanted to be removed from either her foster home or the home she shared with Brandon, and is thus pure conjecture on Brandon's part. I agree with the court's conclusion that prior assault is not relevant to a material issue.

¶32 I also conclude that the court was correct in concluding that evidence of the prior assault was not necessary to Brandon's case. Brandon argues on appeal that the evidence was necessary because A.P.'s "testimony was confused

and uncertain. Combined with evidence of her prior and recent sexual victimization, the [prior sexual assault] evidence provides additional reasonable doubt regarding [A.P.'s] credibility." Brandon has not, however, made a showing that A.P. was confused as to whether the assaults actually occurred, and as observed by the court, "[i]t really comes down to whether this act did or didn't occur."

¶33 Turning to the fifth factor, I agree with the court that the evidence would have been prejudicial. Relying on ***State v. Dodson***, 219 Wis. 2d 65, 580 N.W.2d 181 (1998), Brandon argues that the evidence of the prior sexual assault was probative in order to show an alternative source of sexual knowledge and as to the victim's credibility. However, the victim in ***Dodson*** was a young child and, as observed by the State, a key issue was the child's sexual knowledge. *See* ***id.*** at 82. Brandon did not make A.P.'s sexual knowledge and its source an issue in this case. Therefore, Brandon has not made a showing that the probative value of the evidence outweighs any possible prejudice from that evidence.

CONCLUSION

¶34 For the reasons discussed above, I affirm the dispositional order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.