**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 27, 2000

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-2399-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JONATHAN D. PEARSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Pierce County: DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jonathan Pearson appeals his conviction for first-degree sexual assault of a child younger than thirteen. Although the jury found that Pearson had engaged in sexual contact with the child, it acquitted Pearson of a second count of first-degree sexual assault alleging he had sexual intercourse with

the child. Both charges concerned eight-year-old Chelsea S. Pearson makes four arguments on appeal: (1) the prosecutor improperly led, praised and encouraged Chelsea on direct examination; (2) the victim-witness coordinator improperly coached and encouraged Chelsea outside the jury's presence; (3) the trial court improperly allowed two medical providers to relate Chelsea's out-of-court statements; and (4) Beverly Duvall, a family friend, improperly testified to statements Chelsea made over a month after the assault. We reject these arguments and affirm Pearson's conviction.

¶2 Chelsea testified to the following facts at trial. In the summer of 1996, Chelsea and her sister Christie had been staying with their father, Pearson's roommate. Chelsea testified that she and Pearson were watching an R-rated movie alone in his bedroom. The movie scared Chelsea, and Pearson told her that she could sit on his lap. Chelsea climbed on Pearson's lap. At that point, according to Chelsea, he touched her private parts through her clothes. Pearson next took off her clothes and again touched her private parts. Pearson then took off his own clothes, went into the closet, and returned with a condom. He put on the condom and forced Chelsea to touch it with her vagina. She stated that he then "dug it in," and that it hurt. According to Chelsea, Pearson later told her that he would kill her if she told her mother.

¶3 We first conclude that the questions the prosecution posed to Chelsea did not constitute impermissible leading questions. The trial court made a discretionary decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Litigants may not ask leading questions on direct examination, except as needed to objectively develop direct testimony. *See* ***State v. Sarinske***, 91 Wis. 2d 14, 45, 280 N.W.2d 725 (1979). Ordinarily, such questions are limited to cross-examination. *See* WIS. STAT. § 906.11(3) (1997-98). To be impermissibly

leading, direct examination questions must openly suggest the answer. *See* ***Hicks v. State***, 47 Wis. 2d 38, 42, 176 N.W.2d 386 (1970). Here, we have reviewed the prosecutor's questions. They did not directly suggest the answers sought. For example, the prosecutor prefaced the questions with words like "what happened," "what did you do," "did anything happen," and "what did he do." These questions were neutral in substantive content. They were designed to overcome Chelsea's natural inhibitions due to her youth and the embarrassing subject matter. To the extent some of the question may have suggested the desired answer, trial courts may permit such neutral, nonparticular leading questions under these circumstances. *See* ***State v. Barnes***, 203 Wis. 2d 132, 138-39, 552 N.W.2d 857 (Ct. App. 1996) (objective leading questions often desirable for frightened child witness).

¶4 There is no indication that the prosecutor or victim-witness coordinator coached or otherwise improperly encouraged Chelsea. Chelsea was a reluctant, frightened witness. On several occasions, she attempted to end her testimony, asking for her mother. She refused to look at the prosecutor and refused to answer questions even after the trial court allowed her to look away. The prosecutor several times told her that she was "doing well," and the victim-witness coordinator attempted to comfort Chelsea twice outside the presence of the jury. The trial court approved this procedure, and we perceive no erroneous exercise of discretion. We know of no case barring trial courts from permitting child witnesses to receive evenhanded, protective reassurance from adults. Further, Pearson has not identified any evidence that Chelsea was encouraged by the victim-witness coordinator to testify in any particular way. We are satisfied the trial court could reasonably allow this procedure under the circumstances. *Cf.*

***Barnes***, 203 Wis. 2d at 140. The prosecutor's comments were likewise within the realm of permissible procedure for a reluctant, frightened child.

¶5 We next conclude that the trial court properly admitted the out-of-court statements Chelsea made to a physician and a physician's assistant. Pearson contends that Chelsea's statements were hearsay and were not made for the purpose of medical diagnosis and treatment.

¶6 Statements made for the purpose of medical diagnosis and treatment are admissible hearsay. *See* ***State v. Sorenson***, 143 Wis. 2d 226, 252, 421 N.W.2d 77 (1988). The decision to admit this evidence is discretionary. *See* ***Pharr***, 115 Wis. 2d at 343. Here, Chelsea's mother took her to medical providers after she suspected sexual abuse, and Chelsea was aware that she was undergoing a medical examination. Like the child witness in ***State v. Nelson***, 138 Wis. 2d 418, 432, 406 N.W.2d 385 (1987), there is nothing to indicate that Chelsea's motive in making the statements was other than as a patient seeking treatment. The physician and the physician's assistant stated that Chelsea made the statements in the course of their examination, that the purpose of the examination was to form a diagnosis and that statements by an eight-year-old could be relevant to a diagnosis. Both health care providers testified that they referred Chelsea for counseling after their respective examinations.

¶7 The trial court was the arbiter of credibility and the weight of testimony. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). It could reasonably accept the medical providers' testimony and rule that Chelsea's out-of-court statements fell within the medical statement hearsay exception. There was no erroneous exercise of discretion.

¶8 Last, we need not decide whether Chelsea's out-of-court statements to Duvall, the family friend, constituted an excited utterance or fell within the residual hearsay exception. Any error by the trial court was harmless. There is no reasonable possibility that the statement contributed to Pearson's conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The prosecution provided a great deal of similar evidence from other sources that inculpated Pearson. For example, Chelsea's mother related statements by Chelsea that described the assault. Chelsea's testimony strongly inculpated Pearson. Chelsea's sister testified to out-of-court statements Chelsea made to her that were similar to those made to Duvall. Last, the medical providers furnished strong evidence of Pearson's guilt. Under the circumstances, Duvall's testimony was cumulative evidence, and we doubt that it carried significant weight in the outcome of the trial. *See* ***State v. Morgan***, 195 Wis. 2d 388, 445, 536 N.W.2d 425 (Ct. App. 1995). Any error in admitting Duvall's statement was harmless.

*By the Court*.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).