

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2075-CR

Cir. Ct. No. 2002CF73

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN EDWARD KRAEMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County:
ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. John Kraemer appeals a judgment convicting him of two counts of second-degree sexual assault of a child, contrary to WIS. STAT.

§ 948.02(2).¹ He argues the circuit court erroneously exercised its discretion when it denied his motion for a mistrial after the prosecutor asked questions related to his post-arrest silence. Alternatively, he argues he is entitled to a new trial in the interest of justice because the error prevented the true controversy from being tried. We conclude the prosecutor's questioning was harmless error and, therefore, the circuit court properly denied Kraemer's motion for a mistrial. We also conclude the interest of justice does not compel a new trial. Therefore, we affirm the judgment.

BACKGROUND

¶2 After a jury trial, Kraemer was convicted of two counts of sexual assault of a child, one involving sexual intercourse and one involving sexual contact. The events giving rise to the charges took place in the early morning hours of July 21, 2002. The victim was fourteen-year-old Sandy K., Kraemer's next-door neighbor.

¶3 There was no physical evidence linking Kraemer to the crime, so the State's case depended on testimonial evidence. At trial, Sandy testified to the following. On several occasions prior to July 21, 2002, Kramer told her to take her clothes off. On July 20, he asked her to have sex with him. Later that night, Kraemer approached her bedroom window. She was sitting on her bed, which was next to the window. Kraemer reached through the open window, kissed her, and touched her breasts and vagina. Later, she left her house through her window and

¹ Kraemer was also convicted of one count of possession of THC, contrary to WIS. STAT. § 961.41(3g)(e), but that charge is not at issue in this appeal. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

went with Kraemer to his garage. They went into a van parked in the garage, where Kraemer undressed her and they had sexual intercourse. Kraemer told her “not to tell anybody that it was rape.” She reported the incident several days later to her youth group leader.

¶4 Sandy’s testimony was corroborated in part by her friend, who was present on July 20 when Kraemer asked Sandy to have sex with him. Sandy’s father also testified that he saw Kraemer at Sandy’s window that night and that he later saw them outside together running toward Kraemer’s garage.

¶5 Kraemer gave two different versions of the events of July 21. During a post-arrest interrogation, Kraemer initially denied having any sexual contact with Sandy, but later admitted to several touchings of her intimate parts and that she had touched his erect penis, causing him to ejaculate in his pants.² However, at trial, Kraemer testified that he had no sexual contact with Sandy, recanting statements he made during the police interrogation.

¶6 Kraemer’s defense focused on attacking Sandy’s credibility and recanting the admissions he made during his custodial interrogation. Kraemer contended Sandy fabricated the incident to avoid getting in trouble for running away and that he only confessed to sexual contact with Sandy because the questioning officers promised that he would be allowed to leave after the interrogation was complete.

¶7 In the State’s case-in-chief, the prosecutor asked the arresting officers about Kraemer’s post-arrest demeanor, which he offered as probative of

² The interrogation was audiotaped, and the tape was played for the jury.

Kraemer's consciousness of guilt. During the prosecutor's direct examination of Bill Ison, one of the officers who arrested Kraemer, the following exchange occurred:

Q. And was he told while he was arrested why he was being arrested?

A. He was after we got him out of the building.

Q. What was his reaction? He didn't go, "What are you crazy?"

A. No, not really. He was not antagonistic or upset, visibly upset or anything like that or seemed to be.

Q. And you told him that he was being arrested for sexual assault of a child?

A. I don't remember the exact wording, but I believe it was something to a child. And he didn't say, "What are you crazy? Who? What? Why?"

Defense counsel objected that the testimony was an impermissible comment on Kraemer's silence at the time of arrest. The court reserved ruling and instructed the prosecutor to move on.

¶8 During the direct examination of John Dennee, another arresting officer, the prosecutor asked what Kraemer's demeanor was at the time of arrest, but the court interjected and did not allow the question to be answered. Later in Dennee's direct examination this exchange occurred without objection:

Q. What was his demeanor after you told him that [the charge]?

A. Same. It was relaxed.

Q. What do you mean "relaxed"?

A. He just sat there and just didn't get excited.

Q. No?

A. (No verbal comment.)

Q. And I asked you who made the allegations and why?

A. I believe that he made the comment that he knew who the girl was that we were talking about.

Q. And he didn't act outraged at the accusations?

A. No.

¶9 Later, outside the presence of the jury, the circuit court addressed Kraemer's objection. It found the questioning violated Kraemer's right to remain silent, but denied his motion for mistrial, concluding the questioning was not significant enough to warrant a mistrial. Kraemer declined a curative instruction to avoid highlighting the testimony to the jury.

DISCUSSION

¶10 Kraemer argues that the circuit court erred by denying his motion for a mistrial. He contends he is entitled to a new trial because he was prejudiced by the prosecutor's questioning related to his post-arrest silence, in violation of his right to remain silent under the Fifth Amendment to the United States Constitution and Article I, § 8, of the Wisconsin Constitution. On a motion for mistrial, the circuit court must determine, in light of the whole proceeding, whether a claimed error was sufficiently prejudicial to warrant a new trial. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. The decision to grant a motion for a mistrial is within the circuit court's discretion, and we reverse only on a clear showing that the circuit court erroneously exercised that discretion. *Id.*

¶11 Here, the circuit court concluded that, while the testimony was error, it was not significant enough to warrant a mistrial. We agree. "[N]ot all errors warrant a mistrial and the law prefers less drastic alternatives, if available and

practical.” *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (citation omitted). In light of the balance of the testimony, the prosecutor’s questioning related to Kraemer’s post-arrest silence was relatively brief and the issue was not raised in closing arguments. The error also did not directly relate to the credibility battle at the crux of the case. At trial, the victim testified regarding the sexual contact and intercourse she had with Kraemer and defense counsel fully cross-examined her. Kraemer testified that no sexual contact took place and recanted his admissions to police. The jury heard an audiotape of Kraemer’s confession, and defense counsel thoroughly cross-examined the officers present at that interrogation. The jury had ample information to assess witnesses’ credibility. Kraemer has failed to demonstrate that the brief references to his silence were significant enough to prejudice the jury’s credibility assessments.

¶12 We also conclude that any error committed in the prosecutor’s questioning on post-arrest silence was harmless. Constitutional error is harmless if we can “declare a belief that it was harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 24 (1967); see also *State v. Hale*, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637. “An error is harmless if the beneficiary of the error proves ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Hale*, 277 Wis. 2d 593, ¶60 (quoting *Chapman*, 386 U.S. at 24). We may consider a number of factors to aid in our analysis, such as:

the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the

defense, the nature of the State's case, and the overall strength of the State's case.

Hale, 277 Wis. 2d 593, ¶61.

¶13 The prosecutor repeated the improper questioning several times, but the questioning was brief and elicited little information. The consciousness-of-guilt inference the prosecutor hoped the jury would draw was not compelling and was not referred to in closing arguments. The State's case rested on the witnesses' credibility, primarily Sandy's, since her testimony was the only direct evidence that the incident took place. The prosecutor's improper questioning was not related to the jury's assessment of Sandy's credibility. The nature of the defense was also witness credibility—that Sandy was lying, that Kraemer was telling the truth when he denied any sexual conduct in his trial testimony and that the police lied when they denied promising him he would be released when the interrogation ended.³ Based on these factors, we conclude beyond a reasonable doubt that the improper questioning did not contribute to the verdict and, therefore, any error was harmless.

¶14 Finally, Kraemer argues he is entitled to a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. He contends the prosecutor's comments so infected the proceedings as to prevent the real controversy from being tried. However, we have already concluded that any error was harmless.

³ Kraemer also points out that there is a discrepancy between his principal admission, that Sandy touched his penis and he ejaculated in his pants, and Sandy's allegation that they had intercourse. While this discrepancy may support his contention that he lied when he confessed, it does not relate to the prosecutor's violation of his right to silence.

By the Court.—Judgment affirmed.

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

