COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1037-CR **Cir. Ct. No. 2007CF74**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTOPHER C. ROSCHE,

DEFENDANT-APPELLANT.

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

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Kristopher Rosche appeals a judgment convicting him of second-degree sexual assault of a child as a repeat offender.[1] He challenges an evidentiary decision, a comment made by the prosecutor during closing argument, and a jury instruction. We affirm the conviction for the reasons discussed below.

BACKGROUND

¶2 The victim alleged that Rosche had sexually assaulted her in the back of his semi-truck when she was fourteen years old. She did not tell anyone about the assault until a year and a half later, however, when she finally disclosed the incident to a friend, a teacher and her mother. She said she had waited for so long to tell anyone because she felt like she had done something wrong, and she was afraid of hurting her mother, who was Rosche's ex-wife. The victim said she finally told because it was bothering her and she realized she wasn't to blame and wasn't the only one it had happened to.

¶3 The victim admitted that she had other problems in her life that made her feel suicidal, and that she had recorded many of those problems, but not the sexual assault, in her journal. She also acknowledged that she had been in counseling for some time before disclosing the assault to her teacher, even though she felt safe with her therapist.

¶4 Prior to trial, Rosche had sought to view the victim's therapy records. The trial court denied the motion after conducting an in camera

[1] The jury also found Rosche guilty of two misdemeanor counts relating to exposing genitals, but Rosche does not challenge those convictions on appeal.

inspection. Rosche moved for reconsideration, arguing that he should at least be allowed to delve into what the victim had *not* disclosed in therapy—that is, that she had not made allegations of sexual assault even in a friendly and safe environment. The court refused again at trial to allow Rosche to directly question the witness about the details of anything that was or was not said during therapy. The court noted, however, that since Rosche could ask whether the victim was going to counseling and yet had first disclosed the incident to her teacher, Rosche could still argue to the jury the obvious inference that the victim had not disclosed the incident to her therapist.

¶5 The State presented expert testimony from a child psychotherapist who stated that it is typical for child victims to delay reporting sexual assaults. He explained that the four most common reasons for delayed reporting are that the child feels helpless due to a power imbalance; that the child fears being blamed or not believed; that the child feels a sense of shame or secretness; or that the perpetrator has made actual threats to the child.

¶6 Rosche took the stand and acknowledged that the trip the victim had described had occurred, but disputed her timeframe and denied that he had sexually assaulted the victim in any way.

¶7 During closing argument, the prosecutor told the jury:

> You represent the morals and the values of our community. You have the ability to protect our children. Send a message to our community that our kids will be protected and find the defendant guilty on all counts.

The prosecutor reiterated that sentiment in her rebuttal, over the objection of the defense, saying, "Be representatives of our community, represent the values and morals of our community."

¶8 After about four hours of deliberation, the jury informed the court they were having trouble reaching a unanimous consensus. Over the objection of the defense, the court gave the pattern instruction, set forth in WIS JI—CRIMINAL 520.

DISCUSSION

Evidentiary Ruling

¶9 The admissibility of evidence is subject to multiple layers of analysis. First, evidence is not admissible unless it is relevant—meaning that it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." WIS. STAT. §§ 904.01 and 904.02 (2007-08).[2] Evidence which has some relevance may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

¶10 Next, certain types of evidence may be excluded even if their probative value exceeds their potential prejudice, based on a number of specific statutory rules. Such exclusionary rules include a privilege of confidentiality for communications made by a patient to a therapist. WIS. STAT. § 905.04. However, a criminal defendant's constitutional right to present a defense may in some cases require the admission of testimony which would otherwise be excluded under

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

applicable evidentiary rules. ***State v. Jackson***, 216 Wis. 2d 646, 663, 575 N.W.2d 475 (1998).

¶11 The right to present a defense through the testimony of favorable witnesses and the effective cross-examination of adverse witnesses is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). In order to warrant a new trial, a defendant must show that a violation of the confrontation clause or compulsory due process clause "completely" prohibited him from exposing a witness's bias or motive for testifying falsely, or deprived him of material evidence so favorable to his defense as to "necessarily" prevent him from having a fair trial. ***United States v. Manske***, 186 F.3d 770, 778 (7th Cir. 1999).

¶12 Trial courts generally have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We will only set aside such discretionary determinations if the trial court has failed to apply a relevant statute or consider legally relevant factors, or has acted based upon mistaken facts or an erroneous view of the law. ***Id.***; ***Duffy v. Duffy***, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). However, we will independently determine the legal question of whether a privilege exists in a particular set of circumstances. *See* ***Churchill v. WFA Econometrics Corp.***, 2002 WI App 305, ¶8, 258 Wis. 2d 926, 655 N.W.2d 505. We will also review *de novo* the question whether an evidentiary decision deprives a defendant of the constitutional right to present a defense. *See* ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

¶13 Here, Rosche sought to elicit testimony from the victim that she had not told a therapist about her assault, even though the therapist was a good listener and the victim felt safe with her. Rosche contends this testimony was relevant because it undermined some of the reasons the State's expert gave for why child victims might delay reporting. We agree that the victim's failure to report the sexual assault to a trusted therapist was relevant and, given that this was a credibility case, that its probative value exceeded its prejudicial effect.

¶14 Rosche further contends that the trial court erred in applying the patient/therapist privilege to the victim's failure to report her assault during therapy, and that the error deprived him of his right to a fair trial by limiting his ability to present a defense through cross-examination of the victim. He argues that the nondisclosure of something does not qualify as a "communication" within the meaning of WIS. STAT. § 905.04.

¶15 For the sake of argument, we will accept Rosche's assertion that the nondisclosure of certain information to a therapist is not itself a statutorily privileged communication. We do not agree, however, that prohibiting direct testimony from the victim about her failure to report the sexual assault to her therapist deprived Rosche of a fair trial or his right to present a defense in this case.

¶16 The basis for our conclusion that Rosche was not deprived of his constitutional right to present a defense or fair trial is that the absence of direct testimony from the victim that she did not tell her therapist about the sexual assault did not "completely prohibit" Rosche from getting that same information before the jury. As the trial court correctly noted, given testimony that the victim was in therapy and testimony that she first disclosed the sexual assault to a friend

and to a teacher a year and a half after the assault, it was an "obvious" inference that she had not disclosed the assault to the therapist. Moreover, Rosche was not prohibited from directly asking the victim why she delayed reporting, or from exploring the answer that she gave when the State asked her that question. The bottom line is that Rosche has not identified any argument he could have made to the jury based on direct testimony from the victim that she had not told her therapist about the assault that he could not also have made based upon the evidence which was already before the jury. This analysis also leads us to conclude that any evidentiary error was harmless. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.).

Closing Argument

¶17 The State is prohibited from suggesting to the jury that it should consider any factors other than the evidence to arrive at a verdict. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). However, counsel has some latitude in framing arguments for the jury, and the trial court has discretion to determine whether any particular argument or statement goes beyond the bounds of propriety. ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 741 N.W.2d 267. Furthermore, even when a particular remark has crossed the line, a new trial is not warranted unless the remark, taken in context of the entire trial, has "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted).

¶18 For the sake of argument, we will accept Rosche's proposition that the prosecutor's statements suggesting that the jury represented the values and morals of the community and urging the jury to send a statement that our kids will be protected crossed the line into impermissible argument based on factors other than the evidence. Once again, however, we are not persuaded that the error rose to the level of a due process violation depriving Rosche of a fair trial.

¶19 The context of this trial was a credibility contest between Rosche and the victim. The prosecutor did not improperly vouch for the victim, misrepresent the state of the record, or say anything else which would directly impact the balance of that credibility contest. Rather, the challenged statements relate to child sexual assault cases generally, and are rhetorical in nature. We do not see how the challenged statements would have likely altered the jury's consideration of the case, particularly since the court had already instructed the jury that closing argument was not evidence and that the jury should base its verdict on the evidence, not sympathy, prejudice or passion.

¶20 Rosche also argues that the court should have repeated an instruction that the jury was to decide the case on the evidence alone after the challenged remarks had been made. However, he cites no authority that would require a court to give the same instruction multiple times, and we are aware of none. In any event, the requested instruction was sent to the jury room in written form. We therefore conclude that any impropriety in the prosecutor's closing argument was harmless error and not a due process violation.

Jury Instruction

¶21 Finally, Rosche objects to WIS JI—CRIMINAL 520, the standardized supplemental instruction on jury agreement. He acknowledges that substantially

similar instructions have been found acceptable by the Wisconsin Supreme Court in a series of cases. *See* ***Kelley v. State***, 51 Wis. 2d 641, 647, 187 N.W.2d 810 (1971); ***Madison v. State***, 61 Wis. 2d 333, 339, 212 N.W.2d 150 (1973); ***Quarles v. State***, 70 Wis. 2d 87, 90, 233 N.W.2d 401 (1975). He nonetheless asks this court to "depart from established precedent" and find that the jury instruction is unconstitutionally coercive. Even if we were inclined to do so, we could not because we are bound by the precedent of our supreme court. ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993). Arguments requesting a change in established law must be directed to the Wisconsin Supreme Court.

By the Court.—Judgment affirmed.

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