COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2439-CR **Cir. Ct. No. 2005CF1178**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN C. BERARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Reversed and cause remanded.*

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Following a 2006 jury trial, John C. Berard was convicted of first-degree sexual assault of a child under thirteen, exposing a child

to harmful material and possession of child pornography. Because Berard vehemently denied the accusations, the principal issue was the perpetrator's identity. A series of postconviction proceedings followed, including an extended ***Machner***[1] hearing, an appeal to this court, *see* ***State v. Berard***, No. 2008AP3187-CR, unpublished slip op. (WI App Feb. 3, 2010), *review and cross-review denied* (Apr. 19, 2010), a remand to the trial court and several motions for reconsideration. This appeal arises from the denial of Berard's motion to reconsider his request for a new trial based on ineffective assistance of trial counsel, newly discovered evidence and insufficiency of the evidence. Using our discretionary authority under WIS. STAT. § 752.35 (2009-10),[2] we reverse in the interest of justice and remand for a new trial because we conclude that the real controversy—identity—was not tried.

Background

Trial

¶2 The charges against Berard involved four-year-old Sierra B. Sierra's mother and Berard's wife, Dawn, were long-time friends. Sierra often played with the Berard children, sometimes in the Berards' basement in an area separated by a pegboard divider from the area where a computer was located. One day Sierra told her mother she did not want to go there anymore because she was "sick of their dad." She explained by miming fellatio and said he showed her "naughty" pictures on the computer of a young girl named "Vicky" doing the same thing.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

Sierra gave a similar account to a social worker, naming "Marcus's dad." One of Berard's sons is named Marcus. The police found child pornography on the computer, including a video entitled "Best Vicky BJ & Hand Job."

¶3 After Berard was arrested, Dawn discovered that Berard's former business partner, Peter Biewer, had a prior conviction for sexually assaulting two young girls. Berard and Biewer ran a home-remodeling business from the basement of the Berard home and used the Berard computer for their business. Biewer had access to the Berard home and used the computer in Berard's absence. Berard testified at a postconviction motion hearing that when he and Biewer were at jobsites, people sometimes asked them if they were twins. Berard asked defense counsel, Jonathan Smith, to focus the defense on Biewer.

¶4 Smith knew that Biewer was a registered sex offender from having represented him in a 2003 theft. There were witnesses willing to testify that Biewer was around the children when Berard was not home, that Biewer had the children call him "Daddy" or "Big Daddy," and that the Berard children had complained to Dawn that Biewer would make them leave the basement because he wanted to show only Sierra something on the computer. Dawn told Smith that, under threats to harm her family, Biewer had repeatedly demanded "sexual favors" from her when Berard was in Huber on a probation hold. Berard, however, was the sole defense witness. He testified that he generally worked twelve- to fourteen-hour days, five to seven days a week. On days that Biewer did not also go to the jobsite, Berard would leave the house door unlocked and Biewer would work on the computer.

¶5 The day before Sierra testified, she was shown the courtroom, allowed to sit in the witness chair and told where the various players would be

seated. Sierra's mother showed her where "Marcus's dad" would sit. At trial, Sierra testified that it had been "[a] long time" since she had seen "Marcus's dad." The prosecutor asked if she could "see Marcus's dad here today." Sierra answered: "No—Yes, I see him." Sierra never was asked to identify the perpetrator in a photo array or line-up that included Biewer. The jury viewed the videotaped session with the social worker where Sierra described what "Marcus's dad" had made her do.

¶6 Police officer Steven Livermore, who examined the computer, testified that he was unfamiliar with "LimeWire," a peer-to-peer file-sharing program installed on the computer through which the pornographic files were downloaded. Livermore also testified that a "Last Accessed" time stamp indicated the last time files were accessed on Berard's computer. The prosecutor based his closing argument on Livermore's testimony and argued that the time stamps reflected times of day that it was unlikely that people other than Berard would have been using the computer. The jury found Berard guilty.

Postconviction Proceedings

¶7 Berard moved for postconviction relief seeking a new trial. He contended that the jury was misled by Livermore's testimony and prosecutor's argument about the significance of time stamps relative to intentional access of the files. Berard also claimed that trial counsel was ineffective in numerous respects, including failing to focus the defense on Biewer, creating a presumptive conflict of interest. A multi-day ***Machner*** hearing followed.

¶8 Berard presented a computer expert, Edward King, who disputed Livermore's trial testimony regarding the significance of date and time stamping. King asserted that a "Last Accessed" time stamp does not, by itself, indicate

intentional access of a file; rather, access could result from a virus scan or another source, such as access by another LimeWire "peer." The State conceded that King was correct.

¶9 Detective Robert Grall of the Waukesha County Sheriff's Department computer forensics lab testified that the computer had three user names, dawn, jberard and mrbobo. The jberard and mrbobo user names were password-protected. Grall testified that, although it was not possible to determine with certainty which person used which user name, the "Vicky" video originally was downloaded to the file path connected to the mrbobo user name.[3]

¶10 Smith testified that he "explored" the idea of filing a "***Denny***[4] motion" but rejected it because he saw little benefit in putting Biewer on the stand since Biewer likely would have denied any culpability or invoked his Fifth Amendment privilege. He denied that Dawn told him about Biewer sexually assaulting her, and decided not to call other potential witnesses because he did not think their testimony would have added anything. He did not recall the Berards telling him there was money available to hire experts. He admitted he never checked into the possibility or cost of hiring a computer, or other, expert.

¶11 The trial court found incredible Dawn's testimony that she had informed Smith about Biewer assaulting her. It noted that if she had provided

[3] At one of the postconviction hearings, Biewer was asked whether he ever heard of the "password" mrbobo. He denied that he had. mrbobo was a user name, or screen name, however, not a password. His denial, therefore, proves nothing.

[4] *See* ***State v. Denny***, 120 Wis. 2d 614, 623-24, 357 N.W.2d 12 (Ct. App. 1984) (to introduce evidence that a third party committed a crime, a defendant must be able to establish motive, opportunity and a direct connection to the crime—in other words, "legitimate tendency" that the third person could have committed it).

something to prove her claim, "that would certainly change my view in terms of this entire proceeding." The court denied the motion, concluding that, even if deficient, Smith's representation was not prejudicial.

¶12 Berard moved for reconsideration. The motion was supported by Dawn's affidavit to which was attached a copy of a fax she had sent Smith in 2005 telling him that Biewer had demanded "sexual favors" from her and a copy of the letter Smith sent to Berard in prison in response to Dawn's letter. At the hearing on the motion, Smith acknowledged he must have been aware but that at this point could not see how such evidence could be admissible.

¶13 In view of the fact that Smith had represented Biewer in 2003, the trial court granted Berard a new trial solely to eliminate any potential conflict of interest. The State appealed and this court reversed on the basis that the conflict had to be "actual." *See* ***Berard***, No. 2008AP3187-CR, unpublished slip op., ¶¶12-15. The supreme court denied Berard's petition for review and the State's petition for cross-review. On remand, the trial court found no actual conflict. Berard's judgment and sentence were reinstated.

¶14 Berard then moved for reconsideration of the court's ruling on his claim of ineffectiveness of trial counsel, and moved for a new trial on the grounds of insufficiency of the evidence and the newly discovered evidence. The new evidence was three-fold: a claim by one of Berard's sons that he witnessed sexual activity between Sierra and Biewer; the affidavit of Kimberly Cavey, an acquaintance of Berard's, stating that Biewer was "lewd and disrespectful," made "perverted threats" toward her and called himself and told others to call him "Big Daddy"; and the affidavit of a friend of Dawn averring that Dawn told her in 2005 about Biewer sexually assaulting her. The court denied the motion.

¶15 Berard again moved for reconsideration. Nathan, the son, testified at the motion hearing that he witnessed Biewer making Sierra "rub" Biewer's penis and heard him tell Sierra she had to do as he said because he was "Marcus's dad." He stated that he watched them through the holes of the pegboard divider in the basement. Nathan said he also had seen Biewer on occasion sitting at the computer with his pants off, looking at pictures of "naked ladies." Nathan said he was five or six years old when the events occurred but did not tell anyone until he was eight because Biewer was "big" and "yelled a lot" and he feared that Biewer "would hurt me if I told a living soul."

¶16 Dawn testified at the hearing that Nathan divulged the information when she took him to a therapist for recurring nightmares and "anger issues." Dawn testified that she did not know what to do with Nathan's revelation, because she, too, was afraid of Biewer and also did not think she would be believed. The court credited Nathan's testimony but, since it was not presented to the court for two years after coming to light, it was not "new," nor did it disprove that Berard also assaulted Sierra. The court denied Berard's motion, and he appeals.

Discussion

¶17 The appeal is brought in the context of a claim of ineffective assistance of counsel, newly discovered evidence and insufficient evidence. We need not address these arguments because we conclude he is entitled to a new trial

in the interest of justice.[5] *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the narrowest possible ground).

¶18 "[R]egardless of whether the proper motion or objection appears in the record," this court possesses a broad power of discretionary reversal under WIS. STAT. § 752.35. The statute provides authority to achieve justice in individual cases when it appears from the record that the real controversy has not been fully tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) ; *see also* ***State v. Peters***, 2002 WI App 243, ¶18, 258 Wis. 2d 148, 653 N.W.2d 300. This calls us to consider the totality of the circumstances to determine whether a new trial is required to accomplish the ends of justice. *See* ***State v. Wyss***, 124 Wis. 2d 681, 735–36, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 505-06 and n.6, 451 N.W.2d 752 (1990). We need not determine that a new trial likely would yield a different result. ***State v. Watkins***, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244. "[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citation omitted).

¶19 The question here is whether the identity of "Marcus's dad" was fully tried. For starters, we are troubled by how Sierra was asked to identify Berard at trial. The prosecutor asked her only whether she "[saw] Marcus's dad

[5] In any event, an argument framed as ineffective assistance also may support a motion for a new trial because the real controversy was not fully tried. *See* ***State v. Williams***, 2006 WI App 212, ¶17, 296 Wis. 2d 834, 723 N.W.2d 719.

here today." Sierra answered: "No—Yes, I see him," and pointed to the person seated where, just the day before, her mother had said "Marcus's dad" would be seated. Moreover, Sierra could not recall the names of the other three Berard children. We are not convinced that her in-court identification of Berard was based on her independent recollection of the alleged encounter with him. *See* ***State v. Roberson***, 2006 WI 80, ¶34, 292 Wis. 2d 280, 717 N.W.2d 111.

¶20 In addition, the jury did not hear Berard's later testimony that he and Biewer were similar in appearance, that Biewer's nickname was "Daddy" or "Big Daddy," that he was in the basement when the children were there and that he used the computer when Sierra was there. It did not hear that Biewer is a lifetime registrant as a sexual offender for his conviction for assaulting two young girls. Smith's decision not to put Biewer on the stand gave the jury no opportunity to assess any similarity in appearance to Berard. Had the jury heard that "Daddy" or "Big Daddy" used the computer in the Berard residence during the day when Berard was not home, it might have cast reasonable doubt on whether four-year-old Sierra knew that Berard was "Marcus's dad."

¶21 The jury also did not hear Nathan's testimony describing what he claimed to witness and hear, or Dawn's testimony about Nathan's nightmares, his need for counseling, her children's complaints about Biewer sending them from the basement while keeping Sierra behind, or about the sexual assaults she asserts Biewer committed against her. It did not hear from a friend of Berard's who was prepared to testify, supported by credit card records, that he and Berard were in Chicago on one of the dates a sexual assault was thought to have occurred.

¶22 The jury did not hear an explanation of LimeWire or accurate testimony and argument about the significance of time and date stamping relative

to accessing the pornographic files. The jury also did not hear Dawn's testimony that Biewer called her after the computer was seized, concerned about "what they found" on it.

¶23 The credibility of witnesses and the weight of the evidence are for the jury to decide. ***Poellinger***, 153 Wis. 2d at 503-04. It should have had the opportunity to hear that evidence, to draw logical inferences from it and to "connect[] its dots into a coherent pattern." *See* ***State v. Sarnowski***, 2005 WI App 48, ¶12, 280 Wis. 2d 243, 694 N.W.2d 498. We recognize that the power of discretionary reversal is formidable and should be exercised sparingly and with great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We are convinced that, under the totality of the circumstances, it should be applied here.

By the Court.—Order reversed and cause remanded.

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