

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP1175-CR

Cir. Ct. No. 2009CF2728

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY D. WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Larry D. Wright appeals from a judgment of conviction, following a jury trial, of two counts of second-degree sexual assault of a child under sixteen years of age, and one count of child enticement. Wright

contends that the trial court erroneously exercised its discretion in instructing the jury. We affirm.

BACKGROUND

¶2 On May 28, 2009, Wright was charged with three counts of second-degree sexual assault of a child under the age of sixteen, stemming from the sexual assaults of S.F.¹ An amended information later added two charges of child enticement of the same victim. The victim was fourteen years old at the time of the assaults.

¶3 According to the complaint and the amended information, the victim knew Wright as an employee of the Metro Quick Mart, 5011 West Fond du Lac Avenue, Milwaukee, a convenience store that the victim frequented. The complaint states that on May 15, 2009, Wright picked the victim up from her home, took her to the Quick Mart, and led her to the basement of the store. Wright then removed the victim's clothing and they engaged in sexual intercourse.

¶4 Three days later, on May 18, 2009, Wright again picked the victim up and drove her to a motel in Oak Creek where they engaged in sexual intercourse twice. The victim told her legal guardian about the sexual activity with Wright, prompting the guardian to take the victim to the Quick Mart, where the victim identified Wright's car.

¹ We note that defense counsel addresses the victim by her first and last name in his briefs. WISCONSIN STAT. RULE 809.19(1)(g)(2011-12) prohibits the use of a victim's full name in cases with confidential records. Although appellants are not statutorily prohibited from identifying juvenile victims of sensitive crimes by their first names and last initials, it is our own internal policy to protect the identity of juvenile assault victims by only identifying them by their initials where possible. We urge appellants do the same.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶5 Wright pled not guilty to all of the charges and the case proceeded to a jury trial. At trial, the victim testified that she engaged in sexual intercourse with Wright three times—once in the basement of the Quick Mart and twice at a motel. The victim also testified that Wright had twice bribed her to submit recantation letters, stating that she lied about the assaults. Because she wanted the money, the victim testified, she submitted letters stating that she lied about having sexual intercourse with Wright. The first letter, written by Wright’s girlfriend, Apolonia Jackson, but signed by the victim, stated that the victim made up the events of May 15, 2009 “for attention.” The second letter, written by the victim herself, stated that she felt “guilty” for what she said to the police, and that she “had never been in a hotel” with Wright. The victim told the jury that the contents of the letters were not true and that she did, in fact, engage in sexual intercourse with Wright at the Quick Mart and at the motel.

¶6 Demetrius Wright,² a close family friend of the victim, and an acquaintance of Wright, also testified at trial. Demetrius testified that he was with the victim when she wrote the second letter. However, his testimony about the events surrounding the victim’s authoring of the second letter disputed the victim’s testimony. Demetrius told the jury that he was concerned for the victim because she was “a known liar.”

¶7 Jackson also testified at trial. She told the jury that she wrote a recantation letter on behalf of the victim because the victim approached her (Jackson) and admitted to lying about the events of May 15, 2009. Jackson testified that she told the victim to write a letter, but because the victim struggled to spell, Jackson wrote the letter for her.

² Demetrius Wright is not related to the defendant.

¶8 Wright did not testify. After the jury heard all of the testimony, the State requested that the trial court give the jury WIS JI—CRIMINAL 172, which states:

**CIRCUMSTANTIAL EVIDENCE: FLIGHT,
ESCAPE, CONCEALMENT**

Evidence has been presented relating to the defendant's conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.^{3]}

¶9 Wright requested that the trial court issue WIS JI—CRIMINAL 330, which states:

**IMPEACHMENT OF WITNESS: CHARACTER FOR
TRUTHFULNESS**

Evidence has been received regarding a witness' character for truthfulness. You may consider this evidence in weighing the testimony and determining credibility.

³ The State argues that Wright did not object to its request for WIS JI—CRIMINAL 172, and therefore waived any arguments pertaining to this instruction. The State's argument is based on the following dialogue with the trial court:

[TRIAL COURT]: Is 172 being requested by either party?

[STATE]: I'd like it in.

[TRIAL COURT]: Any position on the defense?

[DEFENSE COUNSEL]: I don't know that there was evidence to show that would be appropriate to give. If the Court is going to give it, though, it's not going to be bolded?

[TRIAL COURT]: Right, exactly.

[DEFENSE COUNSEL]: Okay.

We decline to conclude that this dialogue unambiguously demonstrates a waiver of Wright's rights to appeal the trial court's issuance of WIS JI—CRIMINAL 172. We address the merits of Wright's argument.

Wright argued that the instruction was relevant because both Demetrius's and Jackson's testimony called the victim's believability into question. The trial court denied Wright's request, finding that Demetrius's comment about the victim's reputation as a liar was made without proper foundation. The trial court stated:

[Demetrius] did say the words, I know that. I did hear him say that she was a liar, she had a reputation for being a liar. But I don't believe he had foundation, quite frankly, to have said that. Since I wouldn't have otherwise certified him or allowed him to testify to character based on the foundation at trial, I'm going to exclude 330.

¶10 Wright was found guilty of two counts of second-degree sexual assault and one count of child enticement. He was sentenced to nine years of initial confinement and seven years of extended supervision on each sexual assault charge, and five years of initial confinement and five years of extended supervision on the child enticement charge. The three sentences were concurrent. This appeal follows. Additional details are provided as relevant to the discussion.

DISCUSSION

¶11 On appeal, Wright contends that the trial court erroneously gave WIS JI—CRIMINAL 172 and erroneously denied his request to give WIS JI—CRIMINAL 330. We conclude that WIS JI—CRIMINAL 172 was supported by evidence presented at trial. We also conclude that the trial court properly exercised its discretion in not giving WIS JI—CRIMINAL 330 because the trial court adequately instructed the jury on witness credibility.

Standard of Review.

¶12 “A [trial] court has broad discretion in determining whether to give a particular jury instruction.” *State v. Gonzalez*, 2011 WI 63, ¶31, 335 Wis. 2d 270,

802 N.W.2d 454. “We examine the challenged jury instructions in light of the proceedings as a whole.” *State v. Burris*, 2011 WI 32, ¶24, 333 Wis. 2d 87, 797 N.W.2d 430. Our review is limited to whether the trial court acted within its discretion and we will reverse “only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury.” See *State v. Randall*, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998).

WISCONSIN JI—CRIMINAL 172.

¶13 WISCONSIN JI—CRIMINAL 172 provides:

Evidence has been presented relating to the defendant’s conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.

¶14 Wright contends that by giving this instruction, the trial court unfairly gave additional weight to the evidence surrounding the recantation letters, which he argues was prejudicial to his defense. He also contends that had evidence been presented by the State in the context of this instruction, the evidence would not have been admissible. Wright also contends that the trial court abrogated his right not to testify against himself by instructing the jury that his conduct could be construed as evidence of guilt. Wright is mistaken.

¶15 The jury heard substantial testimony from the victim detailing the circumstances surrounding her recantation letters. With regard to the first letter, she told the jury that the day after she talked to police about the assaults, Wright “popped up out of nowhere” while she was walking from her home. The victim stated that Wright was wearing a wig, asked her if he could talk to her, and then

told her that he would give her one hundred dollars if she wrote a letter for him. The victim stated that after Wright gave her the money, he said, “there’s more where that came from.” He then instructed her to go to the Quick Mart, where she was to write the letter, and that his girlfriend (Jackson)⁴ would give the victim cigarettes after completing the letter. The victim was instructed by Jackson to “write a letter about I was lying and stuff like that just to get attention and all that.” The victim said that Jackson gave her (the victim) a pencil and a notepad upon arriving at the store, but because the victim was not a good speller, she began drawing pictures on the notepad instead of writing. Jackson then told the victim that she (Jackson) was going to write the letter for the victim and that the victim was to sign it. The victim signed the completed letter, which stated that she made up the events of May 15 “for attention,” got her cigarettes, and left the store.

¶16 With regard to the second recantation letter, the victim stated that after running away from the St. Charles group home,⁵ she went to her cousin’s boyfriend’s house, looking for her cousin. When the victim saw that her cousin was not there, she called Wright to pick her up and asked him if he had twenty dollars. Wright told the victim that he did have twenty dollars to give her if she wrote another letter for him. The victim agreed. She then walked to a nearby McDonald’s, where Wright picked her up. Wright handed the victim a notepad and a pencil and instructed her to write a recantation letter. Wright waited in his car while the victim wrote that she felt “guilty” for what she said to the police, that she “had never been in a hotel,” and that she “like[d] [Wright] and ... I wanted to

⁴ The victim refers to Jackson as Wright’s “girlfriend or wife.” Because the record is clear that the victim was referring to Jackson, we use Jackson’s name when discussing the victim’s testimony.

⁵ The victim was staying at the St. Charles group home because of a juvenile adjudication.

think we were together.” The victim told the jury that the contents of the letter were not true, but that she wanted the money because she was hungry.

¶17 Under these circumstances, the jury could reasonably consider Wright’s actions as his consciousness of guilt. The instruction properly stated the law and was supported by the victim’s testimony. Giving the jury WIS JI—CRIMINAL 172 was not erroneous.

WISCONSIN JI—CRIMINAL 330.

¶18 Wright argues that the trial court erroneously denied his request to instruct the jury on the victim’s character for truthfulness. Wright’s argument is based on the testimony of Demetrius and Jackson. Both Demetrius and Jackson testified that the victim was untruthful.

¶19 Wright contends that his defense theory was that the victim was untruthful about the assaults, thus, the jury should have been given the instruction on the victim’s character for truthfulness. Because the trial court adequately instructed the jury on how to assess witness credibility, we disagree.

¶20 WISCONSIN JI—CRIMINAL 330 provides:

Evidence has been received regarding a witness’ character for truthfulness. You may consider this evidence in weighing the testimony and determining credibility.

¶21 At trial, Demetrius’s testimony about the circumstances leading up to the victim writing the second letter disputed the victim’s testimony. Demetrius testified that the victim attempted to call Wright after fleeing the St. Charles group home, but Wright kept hanging up on her. Demetrius testified that he was the one that eventually reached Wright and gave the phone to the victim. Demetrius stated

that the victim offered to write the letter for Wright. Demetrius also testified that he asked his brother to convince the victim not to come to court because the victim “is a known liar” and he (Demetrius) wanted to “help [the victim] out.”

¶22 Jackson testified that she owned the convenience store where Wright worked. Jackson also testified that on May 20, 2009, the victim came to the convenience store and told Jackson, “I’m not supposed to be down here, but I need to talk to you about something.” According to Jackson, the victim admitted to lying about the events of May 15, 2009, at which point Jackson told the victim: “this was serious business, this wasn’t anything to play with and I needed her to write out a statement that I could give to the police and give to the attorney going forward.” Because the victim struggled to spell properly, Jackson wrote a letter on the victim’s behalf.

¶23 The trial court, the State and defense counsel discussed the jury instructions outside the presence of the jury. When discussing WIS JI—CRIMINAL 330, the trial court determined that the instruction “doesn’t apply” because Demetrius did not “lay the type of foundation that ... is really appropriate to allow him to provide testimony regarding character truth as it relates to [the victim.]”

¶24 Wright contends that because the heart of his defense was that the victim was not truthful about the events leading to Wright’s charges, he was entitled to the instruction on the victim’s character for truthfulness. We conclude that although the trial court could have given the requested instruction, it was not required to do so because the instructions as a whole properly explained how to assess the victim’s credibility. See *Gonzalez*, 335 Wis. 2d 270, ¶25 (We “view the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation.”) (citation omitted).

The trial court instructed the jury:

You are the sole judges of the credibility, that is, believability of the witnesses and of the weight to be given to their testimony. In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors ... possible motives for falsifying testimony; and all other facts and circumstances during trial which tend either to support or to discredit the testimony.

....

The testimony of a child should be weighed in the same manner as testimony of other witnesses. Considerations of age, intelligence, ability to observe and report correctly, ability to understand the questions and answer them, sense of duty to speak the truth, conduct on the witness stand, interest, appearance and other matters bearing on credibility apply to a child witness in common with all witnesses.

¶25 Two witnesses presented testimony that disputed the victim's testimony. The defense, in its closing argument, made multiple references to the victim's credibility by stating that the victim "is lying," "lied," "just lies," is "a bad person," and "doesn't have a conscious." Even without the requested instruction, the victim's credibility was explicitly put before the jury. Given the comprehensiveness of the credibility instruction, it was well within the trial court's discretion to determine that the more general instructions were adequate. *See State v. Kemp*, 106 Wis. 2d 697, 705-06, 318 N.W.2d 13 (1982). The instructions state that there may be "possible motives for falsifying testimony" and they instruct jurors to consider a child witness's "sense of duty to speak the truth." These instructions adequately informed the jurors that they could consider evidence and inferences of the victim's lack of truthfulness. We conclude that the trial court properly exercised its discretion when it denied the requested instruction.

CONCLUSION

¶26 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

