COURT OF APPEALS
DECISION
DATED AND FILED

January 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2242-CR **Cir. Ct. No. 2009CF1333**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT C. KEMPEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Robert Kempen appeals a judgment of conviction for repeated sexual assault of the same child. Kempen argues the circuit court erroneously excluded evidence. We conclude the circuit court properly

determined the disputed evidence was inadmissible hearsay. Further, we determine any error was harmless. Accordingly, we affirm.

BACKGROUND

¶2 Kempen and the victim, his stepsister Hazel, were part of a blended family for several years. Kempen was born in January 1986, and Hazel was born in November 1990. In addition to Kempen and Hazel, the family included Hazel's older sisters, twins Heather and Holly, who were born in early 1989.

¶3 Between June and September 2002, Heather (one of the twins) and Kempen had consensual sexual intercourse; Heather became pregnant. According to Heather, Kempen told Heather to have a miscarriage and he twice attempted to cause one. Kempen's second attempt occurred five months into the pregnancy. Four days later, Heather experienced vaginal bleeding. The following day, she learned her baby was deceased. Kempen pled no contest to second degree sexual assault of a child and felony child abuse. The girls' father, Matthew, evicted Kempen from the home following the miscarriage.

¶4 A criminal complaint filed in November 2009 alleged Kempen had repeatedly sexually assaulted Heather's younger sister, Hazel. Hazel testified that Kempen assaulted her about 300 to 400 times between the fall of 1998 and October of 2002, when he was 12 to 16 years old. Most of assaults involved Kempen rubbing his penis between Hazel's legs and ejaculating. Approximately ten times each, he performed anal sex on Hazel and forced her to perform oral sex on him.

¶5 Hazel and Matthew both testified that she reported the assaults to Matthew in the summer of 2008. Matthew stated he did not report the assaults to

police because he "was trying to keep [his] marriage together" and Kempen was no longer living in the home. After Matthew separated from Kempen's mother in 2009, Matthew and Hazel reported the assaults to police. Hazel provided police a statement on June 11, 2009.

¶6 Before trial in this case involving Hazel, the State filed an "other acts" motion seeking to introduce evidence about the case involving Heather. The court ruled that evidence concerning the sexual assault and pregnancy would be permitted, but evidence concerning how the miscarriage occurred would be excluded.

¶7 At trial, Kempen sought to introduce testimony from Holly that Heather asked Holly to falsely accuse Kempen of sexual assault, and that when Holly declined, Heather stated she would ask Hazel to do so. Following an objection from the State, the court permitted Kempen to present an offer of proof outside the jury's presence. The following exchange occurred between Holly and defense counsel:

> Q Do you have any personal knowledge of why Hazel would falsely, assuming these accusations are false, do you have any personal knowledge of why she would make these accusations against [Kempen]?
>
> A Because my sister asked me—my sister Heather asked me to do that, and I said no, and Hazel decided she was going to do it. All because of her miscarriage.
>
> Q So if I understand correctly, you're saying that, to put it in a kind of simplistic way, Heather put her up to it?
>
> A Yes. And Hazel willingly did it.
>
> Q Now, and what is your basis for knowing this, if you see what I mean?
>
> A [Be]cause Heather called me the summer of 2009, all the way from Kansas, to ask me to do it.

In a follow-up question, the State asked Holly, "the summer of 2009, what month? Holly responded, "July."

¶8 Following a discussion of hearsay between the court and the attorneys, Kempen's attorney presented an additional offer of proof. Kempen's attorney explained he believed Holly would testify consistently with a prior written statement, where she asserted:

> One day, my sister, Heather, came to me saying she was still angry about [Kempen] not getting more time in prison for what happened to the baby. She asked me to make up a lie about him doing things to me and to tell that to the police. I told [Heather] that I wouldn't do that. My sister then said, well, if you won't do it, then I will get Hazel to …. I know for a fact that Hazel is a liar, period.[1] Shortly after talking to Heather, Hazel started saying that [Kempen] did these things to her, which are not true.

¶9 The court determined that Holly's proposed testimony would be hearsay and that no exceptions applied. Accordingly, the testimony was not permitted. The jury found Kempen guilty, and he now appeals.

DISCUSSION

¶10 Kempen argues the trial court erroneously excluded Holly's testimony about Heather's statements. The decision to admit or exclude evidence is generally a matter within the trial court's discretion. ***State v. Kutz***, 2003 WI App 205, ¶33, 267 Wis. 2d 531, 671 N.W.2d 660. We affirm such rulings if the court properly exercised its discretion by applying the correct legal standard to the

[1] As the State emphasizes, no witness may testify whether another witness is truthful. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Kempen does not, however, seek admission of Holly's statement that Hazel is a liar.

relevant facts of record. ***Id.*** When the trial court bases its decision on an erroneous view of the law, it has exceeded its discretion. ***Id.***

¶11 Kempen first addresses the admissibility of Heather's request that Holly "make up a lie about [Kempen] doing things to [Holly] and to tell that to the police." Kempen argues, "First of all, and most importantly, Heather's [request] … does not constitute hearsay." He then recites the following legal proposition: "There is no dispute that an out-of-court instruction to do something is not hearsay when offered to prove that the instruction was given and, accordingly, to explain the effect on the person to whom the instruction was given." ***Id.***, ¶36.

¶12 Kempen does not, however, develop any argument that Holly's testimony about Heather's utterance would serve to explain any effect that it had upon Holly. We need not address undeveloped arguments. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). Further, as the State emphasizes, because Holly stated she rejected the request to make allegations, there is no "effect" to be explained.

¶13 Kempen instead addresses a different issue discussed in the ***Kutz*** case, whether a request or instruction to another can be a "statement" within the statutory definition of hearsay. "A 'statement' is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion." WIS. STAT. § 908.01(1).[2] In ***Kutz***, 267 Wis. 2d 531, ¶34, the defendant argued an instruction to do something was hearsay because it contained an implicit assertion

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

of fact or opinion. Although ultimately rejecting the argument based on the facts, the court agreed with the defendant's rationale, explaining:

> The State contends that [the declarant's] utterance to her mother cannot be considered an assertion because it is an instruction. It is generally true that commands, instructions, and questions are not considered assertions under the federal rule because they are not expressions of a fact, opinion, or condition, but instead are telling someone to do something or asking someone for information. However, this principle is not as rigid as the State suggests. …
>
> We can see no logical reason why the grammatical form of an utterance—whether a declarative sentence, command/instruction or question—should conclusively determine whether an utterance is intended by the speaker as an assertion within the meaning of WIS. STAT. § 908.01(1). We therefore conclude that the fact that [the declarant's] utterance to her mother was in the form of an instruction does not automatically mean it was not an assertion.

Id., ¶¶41-42 (footnote omitted).

¶14 After discussing various competing approaches employed in foreign cases, the ***Kutz*** court held:

> We conclude that the preferable approach is to include within the meaning of "assertion" in WIS. STAT. § 908.01(1) an expression of a fact, opinion, or condition that is implicit in the words of an utterance as long as the speaker intended to express that fact, opinion, or condition. From the standpoint of the principles underlying the rule against hearsay, we see no reason to distinguish between an explicit and an implicit assertion.

Id., ¶46. Kempen does not, however, directly argue that Heather did not intend to convey any fact or opinion when asking Holly to frame him.

¶15 Instead, Kempen relies on ***Kutz***'s holding that the "burden is on the party claiming that an utterance contains an implicit assertion" to present evidence

of the declarant's intent, *see* ***id.***, and argues the State failed to do so. We are not persuaded. ***Kutz*** also observed that, "Sometimes it will be evident from the utterance itself that the speaker necessarily intended an implicit assertion." ***Id.***

¶16 We agree with the State that Heather's utterance itself, particularly when considered together with her other alleged utterances, demonstrates the necessary intent—that is, intent to implicitly convey either knowledge or an opinion that Kempen had not sexually assaulted Holly. By asking Holly to accuse Kempen falsely, Heather was expressing her factual knowledge or opinion that Kempen was innocent of bad conduct towards Holly.

¶17 Admittedly, Heather had no need to convey to Holly whether Holly had been assaulted; Holly would know whether she had been assaulted. Thus, there was no implicit assertion conveyed in the traditional sense. However, Heather's request necessarily assumes the fact of Kempen's innocence. Under ***Kutz***, it is permissible to "arrive[e] at the intent of the speaker or writer by considering what assertions are necessarily implied in the utterance." ***Id.***, ¶44 (discussing ***Lyle v. Koehler***, 720 F.2d 426, 432-33 (6th Cir. 1983)). Therefore, Heather's request constituted an excludable hearsay "statement." *See* WIS. STAT. § 908.01(1).

¶18 Kempen next addresses the admissibility of Holly's testimony that "[o]ne day, my sister, Heather, came to me saying she was still angry about [Kempen] not getting more time in prison for what happened to the baby" and that if Holly refused to make false accusations against Kempen "then [Heather] will get Hazel to." Kempen argues, for the first time on appeal, that these statements were admissible under the "then existing mental, emotional, or physical condition" hearsay rule exception set forth in WIS. STAT. § 908.03(3). By failing to present

this ground to the trial court, Kempen has forfeited his right to raise it now. *See* ***State v. Sveum***, 220 Wis. 2d 396, 407-08, 584 N.W.2d 137 (Ct. App. 1998) (the proponent of evidence excluded as hearsay must present the trial court with the specific exception under which the hearsay could be admitted).

¶19 We have already determined that Kempen failed to demonstrate the trial court erred by excluding his proffered testimony as hearsay. We further hold that any error in omitting the evidence would have been harmless error. An evidentiary error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189.

¶20 Holly claimed that Heather asked her to falsely accuse Kempen in July 2009. As the State observed during argument on whether to admit Heather's statement, Holly's proffered testimony was inconsistent with the other evidence in the case. Both Matthew and Hazel testified that Hazel told Matthew about Kempen's assaults in the summer of 2008, one year before Heather's alleged request to Holly. Additionally, the police witnesses testified that Hazel took her complaint to the police in June 2009, one month before Heather's alleged request to Holly. Moreover, as Kempen concedes, introducing Holly's proffered testimony would have opened the door to the State's introduction of evidence concerning the highly prejudicial circumstances of Heather's miscarriage. Considering these factors together, we are satisfied that Holly's testimony would not have aided Kempen's defense.

By the Court.—Judgment affirmed.

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