COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0010-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN L. SIMMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Benjamin L. Simms appeals from a judgment of conviction entered after a jury convicted him of one count of second-degree sexual

assault of a child in violation of WIS. STAT. § 948.02(2) (1997-98).[1] Simms claims that the trial court erroneously exercised its discretion when it charged the jury with several curative instructions during the course of the trial. Because the substantial rights of Simms were not affected, we affirm.

I. BACKGROUND

¶2 On May 12, 1997, Simms, after receiving a page on his beeper, drove his Warner Cable van to the home of Debra S., the mother of the victim, thirteen-year-old, Chanel B. Chanel was acquainted with Simms from church. When Simms arrived at Debra's residence, Debra was leaving with two of her other daughters to perform an errand. Debra asked Simms to check her cable television and informed him that Chanel was in the residence. What transpired in the residence while Debra was absent was disputed. Both Simms and Chanel admitted that sexual activity occurred between them. Who initiated the sexual activity, however, was in dispute.

¶3 Before trial testimony began, the trial court conducted a ***Miranda-Goodchild***[2] hearing relating to a statement Detective Kim Stein had elicited from Simms. The trial court ruled that the statement was voluntary and admissible. Before the hearing concluded, defense counsel stated his intention to "disavow the statement" attributed to Simms by Stein. During opening statement, defense counsel assailed the trustworthiness of the statement by pointing out, among other things, that the statement was not in Simms's handwriting, that he was not given

[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

an opportunity to fully read it, and that it was not cast in his own words. Counsel suggested that when the statement was procured, Simms was scared, had not been given food or drink, and did not have a lawyer present.

¶4 Before testimony commenced, the trial court gave a general credibility instruction to the jury. During the State's case-in-chief, Detective Stein testified in detail as to the substance of Simms's statement and the circumstances under which it was given.

¶5 In his defense, Simms admitted signing the statement and initialing the corrections. He conceded that he was read his rights, but claimed he did not understand them because he was worried, distraught, and not thinking with a clear mind. He denied the accuracy of certain portions of Stein's summary of his statement. In particular, he denied that Chanel reached into his pants or unzipped his pants, or that his pants were ever unzipped. He also denied that he inserted or attempted to insert his penis into Chanel's vagina. On cross-examination, the State asked him to explain the presence of facts in the statement, which he claimed never occurred. He responded that he did not see these portions because part of the statement was covered when he signed it.

¶6 On rebuttal, Stein denied covering the statement when Simms signed it. On rebuttal cross-examination, the following pertinent exchange took place:

> Q. [Defense Counsel] So you read I think that is pretty fair to say when you read someone their constitutional rights for a lawyer, the right to make a phone call, all that stuff, you don't really know if they actually understand the rights. The best you can do is read them the rights?
>
> A. [Detective] Read them and ask them if they understood them.
>
> Q. [Defense Counsel] Yeah, if they say yes they may still not understand it because of the situation they are in or they

> may say no they don't understand even though they don't understand; is that fair?
>
> A. [Detective] That's fair. I don't know what is going on in their head if somebody is telling me yes.
>
> Q. [Defense Counsel] So on the surface he understood his rights?
>
> A. [Detective] Yes.
>
> Q. [Defense Counsel] But you don't know whether or not he truly did understand his rights because you can't read his mind?

¶7 With this question, the State asked for a sidebar conference. Unfortunately, the sidebar conference was not recorded, a practice which this court discourages. *See* ***State v. Mainiero***, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994). The trial court then gave the following instruction:

> Members of the jury, I need to clear up some misapprehension that perhaps you are under about the legalities involved in taking suspects' statements and in admitting them in court. First of all, as far as what the police department is required to do before interviewing a suspect and their legal requirements about advising suspects who are interviewed in custody of their constitutional rights, those are all issues for the Judge to decide in advance of the trial before the statement is even referred to in court in front of a jury.
>
> And we did have such a motion in this case, and I have already issued a ruling and you never would have heard the statement that is being referred to in this case if that ruling had not been made in favor of the state's use of that statement. So the statement in question has already been ruled admissible. The legal decision has already been made by me that the defendant was fully and adequately advised of all of the required constitutional rights before he gave his statement and that he made a knowing and voluntary waiver of those constitutional rights before giving his statement and that the statement was not coerced from him in any way. In other words, that it was a voluntary statement.
>
> The only issue and we will get to this in a few moments when we get to the jury instructions, but I feel I need to intervene at this point because of the line of questioning

> that has been pursued here. The only factual issue for you to decide once you go in to your deliberations will be whether or not that statement is believable. Whether you ought to believe it and what weight you should give to the statement. That will be the issues [sic] for you to decide. But this line of questioning about the legality of the statement and whether the defendant has fully and adequately advised of his constitutional rights is required by law and the Miranda decision which has been referred to here now many times on the record by everyone, that decision has already been made and you never would have even heard of the statement if there had been any evidence that he did not get his constitutional rights read to him as required by law or that he did not knowingly and voluntarily waive those rights and agree to make a statement. So those decisions have already been made by me.
>
> That is how the law operates in this context. The Judge makes those decisions before the jury even gets to hear the statement and it will be up to you to decide the credibility of the statement, the believability of the statement and what weight it ought to be given. Just to clarify the situation. There was also an [al]lusion in one of the prior questions to the right to make a phone call. Ladies and Gentlemen of the jury, that's television. That is not real life. There is no constitutional right a suspect in custody be given permission or given the right to make a phone call. That is not a legal requirement and it is not a constitutional requirement so to the extent that you're under the impression by virtue of that question that the Detective was obligated to give Mr. Simms the right to make a phone call, that is simply not true. You should disregard.

¶8 After the close of testimony and evidence, the trial court again gave the general instruction on credibility and additionally instructed the jury:

> The state has introduced evidence of a statement which it claims was made by the defendant. It is for you the jury to determine how much weight if any to give to this statement.
>
> In evaluating the statement you should consider three things. First, you must determine whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence. Second, you must determine whether the statement was accurately restated here at trial.

> Finally, if you find that the statement was made by the defendant and accurately restated here at the trial, you must determine whether the statement is trustworthy. Trustworthy simply means whether the statement ought to be believed. You should consider the facts and circumstances surrounding the making of the statement along with all of the other evidence in the case in determining how much weight if any the statement deserves.

¶9 We note that during final argument, defense counsel reminded the jury of this same instruction.

II. ANALYSIS

¶10 Although not stated with exactitude, essentially Simms's sole claim of error is that the trial court erroneously exercised its discretion by giving the curative instruction set forth above.

¶11 When reviewing a trial court's jury instructions, we do so with deference. We examine only whether the trial court erroneously exercised its broad discretion to give the instruction or instructions in question. *See* ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988). We shall reverse the trial court only if the jury instructions, taken as a whole, misled the jury or communicated an incorrect statement of the law. *See* ***Miller v. Kim***, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995). Any particular instruction must be considered in context with all the other jury instructions given. *See* ***State v. Vick***, 104 Wis. 2d 678, 691, 312 N.W.2d 489 (1981).

¶12 Simms proffers two points to support his claim of error: (1) the curative instruction was improper and unnecessary; and (2) the instruction impugned his credibility. We both agree and disagree with his contentions.

¶13 We first address the impropriety of the instruction. It appears from the record that the trial court received the impression, from the cross-examination of Detective Stein, that Simms was contesting the voluntariness of the statement he gave to Stein and hastened to prevent such an impression being adopted by the jury. Simms argues that this action by the trial court was improper under ***McKinley v. State***, 37 Wis. 2d 26, 154 N.W.2d 344 (1967). We agree.[3] Our analysis, however, does not stop with this conclusion.

¶14 WISCONSIN STAT. § 805.18(2) mandates:

> No judgment shall be reversed or set aside or new trial granted … on the ground of … misdirection of the jury … unless in the opinion of the court to which the application is made, after an examination of the entire action … it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment.

¶15 To determine whether the "substantial rights" of a party have been affected, we use the harmless error test. *See* ***Heggy v. Grutzner***, 156 Wis. 2d 186, 196, 456 N.W.2d 845 (Ct. App. 1990). An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543-45, 370 N.W.2d 222 (1985).

---

[3] The State contends that reliance upon ***McKinley v. State***, 37 Wis. 2d 26, 154 N.W.2d 344 (1967) is misplaced because the statement referenced therein is "dicta," and does not forbid a court from instructing the jury that the court had determined voluntariness. We conclude otherwise. ***McKinley*** involved three issues. *See* ***id.*** at 30. The first two issues, concerning the improper admission of two of four statements given by the defendant, required a new trial. *See* ***id.*** The third issue involved whether the trial court erred by instructing the jury on the trustworthiness of the statements with the instruction then, but no longer, in use. *See* ***id.*** Recognizing that a new trial might occur, the supreme court explained the separate function of a trial court when handling the question of "voluntariness" versus "trustworthiness." *See* ***id.*** at 42-43. It confirmed that the proper procedure for the trial court to pursue is not to inform the jury that it found the defendant's statements voluntary, but to instruct the jury on trustworthiness. *See* ***id.***

¶16 The question remains then, did the trial court's improper mentioning of its ruling on the voluntariness of Simms's statement, and the emphasis placed on its ruling, preempt the jury's proper evaluation of the trustworthiness of the statement so as to create a reasonable possibility that the impropriety contributed to the conviction? We conclude it did not for two reasons.

¶17 First, a jury is presumed to have followed the court's jury instructions. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 20, 496 N.W.2d 96 (Ct. App. 1992). At the same time that the trial court uttered its curative instruction, it also declared: "The only factual issue for you to decide once you go in to your deliberations will be whether or not that statement is believable. Whether you ought to believe it and what weight you should give to the statement. That will be the issues [sic] for you to decide."

¶18 At the conclusion of evidence, the trial court instructed the jury on the principles of law it was to follow in evaluating the evidence. The trial court again told the jurors that they were the sole judges of the credibility of the witnesses. The jury was informed that Simms was a competent witness on his own behalf and that his testimony should not be discredited merely because he was charged with a crime. Finally, in reference to the statement given by Simms, the trial court instructed:

> Finally, if you find that the statement was made by the defendant and accurately restated here at the trial, you must determine whether the statement is trustworthy. Trustworthy simply means whether the statement ought to be believed. You should consider the facts and circumstances surrounding the making of the statement along with all of the other evidence in the case in determining how much weight if any the statement deserves.

¶19 Although, as pointed out earlier, the trial court inappropriately addressed the voluntariness issue before the jury it, nevertheless, in clear and direct terms, informed the jury of its responsibility in assigning weight and credibility to Simms's statement and the elements it should consider in discharging its responsibility.

¶20 Second, before the trial court gave its curative instruction, defense counsel, with some latitude, was able to explore Simms's understanding of his ***Miranda*** rights, the circumstances under which they were administered, and the manner in which the statement was taken. Further, although not determinative, the credibility of Chanel and Simms was the central theme of both closing statements. Both counsel asked the jury to closely examine the seemingly contradictory testimony and to accept the inferences they respectively drew.

¶21 From this review, we are satisfied that the impropriety that occurred was well enough insulated, not only in other parts of the curative instruction, but also in the trial court's final instructions, to avoid any reasonable possibility that it contributed to the conviction.[4]

By the Court.—Judgment affirmed.

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

[4] Initially on appeal, Simms claimed error on the part of the trial court for correcting the impression left by trial counsel in his cross-examination that Simms had a right to make a phone call. We deem this claim waived because Simms concedes in his brief that the question was "inartful" and reference to the right to make a phone call was "inaccurate and unfortunate." Further, Simms fails to return to the alleged error contention in his reply brief.