COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2000

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

Nos. 99-1157
99-1786

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

IN THE INTEREST OF ASHLEY S.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ASHLEY S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JOHN W. MICKIEWICZ, Reserve Judge, and KAREN E. CHRISTENSON, Judge. *Affirmed.*

¶1 SCHUDSON, J.[1] Ashley S. appeals from the adjudication of delinquency for first-degree sexual assault of a child, and for exposing genitals or pubic area to a child, following a court trial, and from the order denying her postadjudication motion. She argues that the trial court denied her a fair trial by admitting evidence of the victim's prior consistent statements, and by excluding evidence of an alternative source of the victim's knowledge and anxiety. Ashley also argues that the evidence was insufficient to support the adjudication, and that this court should grant her a new trial in the interest of justice.

¶2 Ashley, then age twelve, was baby-sitting for Patrick, then age seven, and his two sisters. She was adjudicated delinquent for touching Patrick's penis as she put a "penis bandage" (what the State assumed to be a condom) on him, and for exposing her genitals or pubic area to him. The State's trial evidence consisted of testimony from Patrick, describing the alleged events, and from Patrick's mother and a police detective relating Patrick's statements describing the events to them, within a few weeks of the alleged incident.

¶3 Ashley first argues that the trial court denied her a fair trial by allowing Patrick's mother and a police detective to testify about Patrick's statements to them. Quoting ***State v. Peters***, 166 Wis. 2d 168, 176, 479 N.W.2d 198 (Ct. App. 1991), she contends that their testimony was inadmissible because it provided Patrick's prior consistent statements, despite the fact that they were not "'offered to rebut an express or implied charge of recent fabrication or improper influence or motive.'" *See also* WIS. STAT. § 908.01(4)(a)2. The State responds

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), 3 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

that Ashley waived her challenge to the admissibility of the prior consistent statements by failing to offer timely and specific objections. The State is correct.

¶4 "Error may not be predicated upon a ruling which admits … evidence unless a substantial right of the party is affected; and … [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." WIS. STAT. § 901.03(1)(a). In this case, the trial record reveals the defense's failure to offer timely and specific objections.

¶5 Defense counsel first offered a hearsay objection when the prosecutor asked Patrick whether he remembered telling a police officer "that Ashley showed you her lumps," a statement the parties apparently considered *inconsistent* with his trial testimony that she had not done so.[2] Counsel objected that the question was leading and called for hearsay. The trial court overruled the objection, stating: "You can always introduce prior inconsistent statements. And the rule on consistent statement is adults, no, and as to children, probably yes." Following many more questions provoking no further hearsay objections from defense counsel, the prosecutor asked Patrick whether he had told his mother that Ashley "asked [him] to touch her lumps." After Patrick answered, counsel neither objected nor moved to strike the answer but stated: "Judge, could I have the continuing objection to introduction of prior statements for this witness? I know you made the ruling." The trial court responded: "Yes. The record will reflect

[2] At trial, when asked what he called girls' privates, Patrick replied, "The breast I call the breast, and the hole I call the hole, and that's all." Patrick never testified that he had ever called breasts "lumps," but, for reasons that are not clear in the record, the parties seemed to assume that if, in fact, he had previously referred to "lumps," he had done so meaning "breasts."

it." The defense offered no further hearsay objections to any of Patrick's testimony.

¶6 Thus, by that point in the proceedings, the defense had failed to offer an objection that prior consistent statements were inadmissible on the specific grounds Ashley now presents on appeal. Moreover, although the trial court had ruled on an objection to a question eliciting testimony about a prior *inconsistent* statement, it had done nothing more than relate, generally, its understanding of the law regarding the admissibility of prior *consistent* statements of adults and children. Therefore, counsel's continuing objection added nothing that specifically addressed the issue Ashley now attempts to raise.

¶7 During Patrick's mother's testimony, defense counsel objected first to "narrative" testimony, next to "leading" testimony and, later in her testimony, asked, "Judge, can I have a continuing objection, the same as I did the last witness [Patrick] about prior consistent statements introduced by the State?"[3] The trial court responded, "Sure." Given, however, that the previous objections to Patrick's testimony had never specified the grounds on which Ashley now bases her hearsay argument, "the same" objection to his mother's testimony added nothing. Thus, counsel's "continuing objection" continued to be insufficient to advise the trial court as required under WIS. STAT. § 901.03(1)(a).

¶8 During the testimony of Randy Olewinski, a detective with the City of Franklin Police Department, defense counsel offered objections, on foundation and hearsay grounds, to testimony relating statements Patrick had made to him

[3] Counsel also offered a hearsay objection during Patrick's mother's testimony when she answered that "[t]hey noticed [a change in Patrick] at school." This, however, was unrelated to Ashley's argument regarding Patrick's prior consistent statements.

(Olewinski).[4] Counsel asked, "And can I have a continuing objection as to hearsay as to what Patrick related to him that he's now testifying?" The court responded, "Sure the record can reflect your continuing objection, but it continues to be overruled." Once again, counsel's "continuing objection" added nothing to his prior objections, which were insufficiently specific to satisfy WIS. STAT. § 901.03(1)(a).[5]

¶9 Ashley next argues that the trial court erred in excluding evidence of an alternative source of Patrick's sexual knowledge, and of his anxiety. The defense sought to introduce testimony of Ashley's grandmother that "approximately two weeks after she was contacted by social services regarding this incident …, [Patrick's mother] came over to her house and told her that they had had problems with a prior baby sitter because that baby sitter had shown her breast to her children." The defense conceded, however, that its information "wasn't anything more specific than that." Defense counsel explained that the defense had been "a little bit hampered in an offer of proof" because Patrick's family had declined to talk to the defense's investigator. Counsel contended, however, that the information was relevant to establish an alternate source of Patrick's sexual knowledge under the rape shield law, *see* WIS. STAT. § 972.11(2)(b), as well as an alternate explanation for what the defense anticipated

[4] Counsel also offered a hearsay objection to Detective Olewinski relating statements that Patrick's mother had made to him. This also, however, was unrelated to Ashley's argument regarding Patrick's prior consistent statements.

[5] Resolution of Ashley's hearsay claims on the basis of waiver does not imply that this court would have agreed with her argument had counsel preserved the issue she now attempts to raise. *See* ***State v. Sharp***, 180 Wis. 2d 640, 653-57, 511 N.W.2d 316 (Ct. App. 1993) (rule of completeness may allow for admission of child's prior consistent statements); *see also* ***State v. Eugenio***, 219 Wis. 2d 391, 412, 579 N.W.2d 642 (1998) ("the common law rule of completeness as applied to oral statements is codified as part of Wis. Stat. § 906.11"); Charles B. Schudson, *What Children Can't Tell Us and Why*, FAM. ADVOC., Summer 1996, at 57.

would be the State's evidence of Patrick's symptoms of anxiety following the incident with Ashley.

¶10 Acknowledging that the defense "certainly can get in evidence of prior sexual exposure [e]specially with a 7-year-old to indicate a source of sexual activity or terminology or whatever," the trial court did not exclude the defense's evidence under the rape shield law. But after questioning defense counsel about whether he had any evidence to provide "psychological support" for his implicit proposition that Patrick's "prior exposure" to a baby-sitter's breast would result in anxiety "every time he's alone with a fully clothed, female baby sitter," and after receiving defense counsel's concession that he had none, the court excluded the evidence. Commenting that even if the testimony could clear hearsay hurdles, it was irrelevant, the court explained:

> Okay. Let's suppose on a prior occasion that … some baby sitter had exposed her breast to the child and this created some form of anxiety in the 7-year-old[.] [D]o you want the Court to infer that the next time he sees a girl fully clothed, a baby sitter, and nothing happened that he's going to display anxiety because the baby sitter is there?
>
> ….
>
> You're suggesting in some way that that incident would trigger anxiety in this victim by the presence of any other female, fully clothed baby sitter. Otherwise you can't logically much less psychologically link the two.

¶11 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. This court will not overturn a trial court's decision to admit or exclude evidence based on relevance unless the trial court has erroneously exercised discretion. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Generally, a trial court reasonably exercises discretion when it

examines the relevant facts, applies a proper legal standard, and reaches a conclusion a reasonable judge could reach using a "demonstrated, rational process." *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶12 This court is satisfied that the trial court reasonably exercised discretion in excluding testimony of Ashley's grandmother. As the defense conceded, it had nothing more than Ashley's grandmother's account of Patrick's mother's reference to the conduct of another baby-sitter, and nothing to connect that conduct to Patrick's allegations or anxiety following the alleged incident with Ashley. The relevance, if any, was tenuous. Even if marginally relevant, introduction of the evidence could have caused a "confusion of the issues." *See* WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ….").

¶13 Ashley next argues that the evidence was insufficient to support the adjudication. She contends that the "admissible evidence as to Count 1 consisted exclusively of the testimony of Patrick W. which was peppered with 'I don't know,'" and that the admissible evidence as to Count 2 was "non-existent." This court concludes that the evidence was sufficient for adjudication of delinquency on both counts.

¶14 This court applies a rigorous standard in reviewing a challenge to the sufficiency of evidence:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact,

> acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted).

¶15 Regarding count one, first-degree sexual assault of a child, Ashley offers little argument other than to maintain that some of the evidence was inadmissible hearsay and that "the testimony of Patrick W. alone is insufficient to sustain the adjudication." She is incorrect. Patrick's testimony, standing alone, was sufficient. Although, as Ashley argues, Patrick's testimony "was peppered with 'I don't know,'" such concessions could very well have enhanced his credibility in the trial court's estimation. Further, in addition to what Patrick said he did not know, he testified that Ashley touched him "[j]ust a little bit" as she tape-measured his penis.

¶16 Regarding count two, exposing genitals or pubic area to a child, Ashley notes that Patrick testified that Ashley had not exposed herself to him. Ashley fails to acknowledge, however, that Patrick also testified:

> Q: Today in court you said that you didn't see any of Ashley's private parts?
>
> A: Um, um change that because I meant to say that I did see some of her private parts.

Ashley provides no authority to suggest that the trial court could not have weighed Patrick's contradictory statements, evaluated them in light of all the other evidence including the hearsay accounts of his statements to his mother and Detective Olewinski, and concluded that Ashley exposed her genitals or pubic area to Patrick. The evidence was sufficient.

¶17 Finally, Ashley argues that the trial court should have granted a new trial in the interest of justice. She contends:

> The trial court admitted a plethora of clearly inadmissible evidence and relied substantially upon that evidence in making its adjudication; additionally the trial court excluded significant relevant evidence directly relating to Patrick W.'s credibility. Under these circumstances, Ashley S. posits that a retrial is likely to produce a different result, even though such a showing is not required under the facts of this case.

To grant a new trial in the interest of justice, this court would have to conclude that "'there has been an apparent miscarriage of justice and it appears that a retrial under optimum circumstances will produce a different result.'" *See* WIS. STAT. § 752.35; ***Garcia v. State***, 73 Wis. 2d 651, 654, 245 N.W.2d 654 (1976) (quoted source omitted). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." *See* ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). In the instant case, this court has found no error in the challenged trial court rulings, and nothing in the record of the trial that establishes any "apparent miscarriage of justice."

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.