COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2842-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PEDRO FIGUEROA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Pedro Figueroa has appealed from a judgment convicting him of the repeated sexual assault of a child in violation of WIS. STAT.

§ 948.025(1) (1997-98)[1] and intentionally causing a child to view sexually explicit conduct in violation of WIS. STAT. § 948.055(1). He has also appealed from an order denying his motion for postconviction relief. We affirm both the judgment and the order.

¶2 Figueroa was convicted following a jury trial. The jury found him guilty of the repeated sexual assault of V.R. and of intentionally causing V.R. to view a sexually explicit video. The jury acquitted Figueroa of a charge of intimidating a victim in violation of WIS. STAT. § 940.45(3) and of sexual exploitation of a child in violation of WIS. STAT. § 948.05(1)(b). The latter charge was based on an allegation that Figueroa took a photograph of V.R. in the nude.

¶3 Figueroa's first argument on appeal is that the trial court erred in permitting a police officer to describe the content of the video viewed by V.R., and by permitting copies of the video box covers, which had been marked as exhibits during trial, to be given to the jury at the jury's request during its deliberations. Figueroa contends that because he stipulated that the video depicted sexually explicit conduct, the State had no legitimate purpose in permitting the officer to testify regarding the video's content or in permitting the jury to view the box covers. He contends that the only effect was to inflame and prejudice the jury.

¶4 We conclude that Figueroa waived his right to object to the police officer's description and to the submission of the box covers to the jury by entering the stipulation and by failing to object to either the officer's testimony or the jury's request for the box covers. The record reveals that the offer of a

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

stipulation was made by the prosecutor at the beginning of the trial. The prosecutor suggested a stipulation that the video depicted sexually explicit conduct. He indicated that although he was prepared to play the video for the jury, he was also prepared to stipulate that the video depicted sexually explicit conduct and to limit his presentation of evidence to "the description of the tape provided by the officers and maybe marking the box cover into evidence." He indicated that V.R. would generally describe the video she watched. He contended that the officer's testimony regarding the general content of the video was relevant to corroborate V.R.'s testimony that this was the particular video she viewed.

¶5 Defense counsel indicated that he was willing to stipulate that the video depicted sexually explicit conduct and that he had no problem with V.R. describing what she saw in the video. However, he questioned whether the officer should be permitted to describe the video, stating that he would like to hear how it was going to be described before stipulating. He also expressed concern that he had not yet seen the video.

¶6 Because defense counsel had not yet viewed the video, the trial court made no final ruling on the matter, stating that it would not allow the officer to testify concerning the content of the video until defense counsel had an opportunity to view it and prepare for cross-examination. The subject of the stipulation was raised again the next day. The parties then stipulated that the video contained sexually explicit material without any additional discussion as to whether the officer would be permitted to describe its content, and with no mention by them of the concerns previously expressed by defense counsel. Subsequently, the police officer testified that the video depicted acts of fellatio, that it was extremely explicit and left nothing to the imagination, and that, in his opinion, it was "triple X." Defense counsel did not object to the officer's

testimony. He also failed to object when the prosecutor moved to have copies of the video box covers introduced into evidence or when the jury asked for the exhibits, including the box covers.

¶7 Under these circumstances, we conclude that any objection to the officer's testimony and the submission of the video box covers to the jury was waived. Although defense counsel initially expressed some concerns about the prospect of the officer describing the content of the video, when the ultimate decision regarding the stipulation was made and the stipulation was put on the record, defense counsel did not qualify the stipulation to provide that no testimony about the content of the video would be forthcoming from any witness. Based upon these facts, the trial court could reasonably understand the stipulation to be made on the terms as originally proposed by the prosecutor—that is, that the parties would stipulate that the video depicted sexually explicit conduct, the officer would describe the tape, and the box covers would be admitted into evidence. However, the video would not be played for the jury.

¶8 It was incumbent upon Figueroa to bring any objections to the trial court's attention in such a manner that the trial court would understand that it was being called upon to make a ruling on the tentative objection made by defense counsel when the subject of the stipulation was first introduced. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). If he believed the officer's testimony and submission of the video box covers to the jury violated the stipulation or was otherwise subject to an evidentiary challenge, defense counsel was required to make a timely objection. *See* ***Holmes v. State***, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977). By failing to bring an objection to the attention of the trial court when the stipulation was entered and by failing to object to the officer's

testimony or the submission of the box covers to the jury, Figueroa waived his objections.

¶9 Figueroa's next argument is that the State was barred from prosecuting him for intentionally causing a child to view sexual activity in violation of WIS. STAT. § 948.055(1) when it also charged him with the repeated sexual assault of a child in violation of WIS. STAT. § 948.025(1). Section 948.025(3) provides:

> The state may not charge in the same action a defendant with a violation of this section and with a felony violation involving the same child under ch. 944 or a violation involving the child under s. 948.02, 948.05, 948.06, 948.07, 948.08, 948.10, 948.11 or 948.12, unless the other violation occurred outside of the time period applicable under sub. (1).

¶10 While acknowledging that a violation of WIS. STAT. § 948.055 is not one of the offenses specified in WIS. STAT. § 948.025(3), Figueroa contends that § 948.025(3) is ambiguous, and that resort to its legislative history establishes that the legislature intended to include the provisions of § 948.055 within the list of barred offenses. Based upon the plain language of § 948.025(3), we reject Figueroa's argument.

¶11 Statutory construction presents an issue of law which we review independently of the trial court. *See* ***State v. David L.W.***, 213 Wis. 2d 277, 281, 570 N.W.2d 582 (Ct. App. 1977). We look first to the words of the statute, and if the language of the statute is clear we do not look beyond the statute. *See* ***id.*** at 282. Only if a statute is ambiguous will courts resort to extrinsic aids to construction. *See* ***id.*** Ambiguity exists if reasonable persons could disagree as to the meaning of the statute. *See* ***id.*** Ambiguity can be found in the words of the

statute itself or in the way the words of the statute interact with and relate to other statutes. *See* ***State v. Sweat***, 208 Wis. 2d 409, 416, 561 N.W.2d 695 (1997).

¶12 WISCONSIN STAT. § 948.025(3) is unambiguous. It specifically enumerates the charges which are barred in a prosecution under § 948.025(1) and does not include WIS. STAT. § 948.055. *Cf.* ***David L.W.***, 213 Wis. 2d at 282.

¶13 Figueroa contends that WIS. STAT. § 948.025(3) is ambiguous when examined in the context of related statutes. However, Figueroa's real contention is that he believes it is unreasonable to exclude WIS. STAT. § 948.055 from the list of barred offenses when other similar offenses are included. However, this claim does not establish ambiguity in either the language of § 948.025(3) or in the way § 948.025(3) relates to other statutes. Because no ambiguity is shown to exist, the prosecution of Figueroa under both § 948.025(1) and § 948.055 was permissible.

¶14 Although the prosecution of Figueroa under both WIS. STAT. § 948.025(1) and WIS. STAT. § 948.055 was permissible, the prosecution for sexual exploitation of a child in violation of WIS. STAT. § 948.05(1)(b) was clearly barred under § 948.025(3). This error was conceded by the State at the postconviction hearing. However, the State also argued that the error was harmless. We agree.

¶15 The parties dispute whether the proper test to be applied in assessing prejudice is the harmless error test set forth in ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985), or the "prejudicial spillover" test set forth in ***State v. McGuire***, 204 Wis. 2d 372, 379, 556 N.W.2d 111 (Ct. App. 1996). We find it unnecessary to resolve this dispute because, even under the ***Dyess*** test, inclusion of the charge under WIS. STAT. § 948.05(1)(b) was harmless.

¶16 The test for determining harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *See* ***Dyess***, 124 Wis. 2d at 543. The burden of proving no prejudice is on the State. *See* ***id.*** The defendant's conviction must be reversed unless this court is certain that the error did not influence the jury. *See* ***id.*** at 541-42.

¶17 Figueroa was acquitted of the sexual exploitation charge. Admittedly, that fact alone does not render the error harmless. However, the exploitation charge was based on allegations that Figueroa photographed V.R. in the nude. Regardless of whether the photograph was properly the subject of a sexual exploitation charge, evidence that Figueroa photographed V.R. in the nude permitted the inference that he had a sexual interest in her. The evidence thus was relevant and admissible on the issue of whether Figueroa sexually assaulted V.R. in violation of WIS. STAT. § 948.025(1).

¶18 Figueroa's defense was that he did not take the picture. That defense would have been the same regardless of whether the photograph was introduced into evidence as proof of the sexual exploitation charge or merely as evidence that Figueroa sexually assaulted V.R. Consequently, there is no reasonable possibility that the error in bringing the sexual exploitation charge contributed to Figueroa's convictions.

By the Court.—Judgment and order affirmed.

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