COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP782-CR **Cir. Ct. No. 2013CF388**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Michael Jones appeals a judgment of conviction for two counts each of first-degree sexual assault of a child under the age of twelve and incest with a child, and an order denying his motion for postconviction relief. Jones contends that he is entitled to a new trial because the court erred in

admitting certain evidence at trial, permitting a trial witness to be present in the courtroom during the victim's testimony, and denying his request that the jury be instructed on fourth-degree sexual assault. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Jones was charged with two counts each of first-degree sexual assault of a child under the age of twelve and incest with a child. *See* WIS. STAT. §§ 948.02(1)(b) and 948.06(1) (2013-14).[1] The complaint alleged that Jones had engaged in sexual intercourse with R.J., who was born in July 2006, between July 2012 and January 2013. Jones was convicted of all counts following a jury trial.

¶3 Jones filed a motion for postconviction relief with the circuit court, which the court denied. Jones appeals.

DISCUSSION

¶4 Jones contends that the circuit court erred in denying his motion for postconviction relief. He argues that his motion should have been granted because the circuit court erred in: (1) admitting into evidence a videotaped interview of R.J.; (2) permitting R.J.'s mother to be present in court during R.J.'s trial testimony; (3) admitting at trial evidence of R.J.'s "long-standing behaviors"; and (4) not allowing the jury to consider what Jones describes as "the lesser[]included offense of fourth[-]degree sexual assault." We address each of these contentions below.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

A. Admission of Videotaped Interview

¶5 At trial, the circuit court admitted into evidence, over Jones's objection, a video recording of an interview of R.J. by detectives. Under WIS. STAT. § 908.08(3), a child's videotaped statement is admissible if the circuit court makes certain enumerated findings, including a finding that "the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth." *See* § 908.08(3)(c).

¶6 Jones argues that the court erred in admitting the videotape into evidence because the State did not establish that WIS. STAT. § 908.08(3)(c) was satisfied. Jones argues that it is not clear from the recording that R.J. understood the importance of telling the truth, stating that it is "unclear whether [R.J.] under[stood] that a fairytale story, like those in books she may have read, are not the truth" and that "there is no indication that [R.J.] under[stood] that it is wrong to tell stories."

¶7 The decision to admit the videotape into evidence lay within the circuit court's discretion. ***State v. Muckerheide***, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930. A circuit court properly exercises its discretion if it examines the relevant facts, applies a proper legal standard, and reaches a decision a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶8 The videotape is not part of the record before this court on appeal, nor has a transcript of the videotape been made part of the record. However, there appears to be no dispute that a transcript of the video was before the circuit court

when the court found that WIS. STAT. § 908.08(3)(c) was met. The court read on the record, as follows, a portion of the transcription of the interview that is relevant to the issue of whether R.J. understood the importance of telling the truth:

> [Officer] "All right. Another rule is whatever we talk about here has to be the truth. Okay? …."
>
> [R.J.] … "Yes."
>
> [Officer] "All right. Do you know what it means to tell the truth.?"
>
> [R.J.] "No."
>
> [Officer] "Okay. Well, telling the truth means telling what really happens. Okay? You know what it means to tell a lie?"
>
> ….
>
> [R.J.] "No."
>
> [Officer] "Well, telling a lie is when you make something up or don't tell everything that really happens. Okay? So if someone came in here and said its raining, is it raining in here right now? …."
>
> [R.J.] … "No."
>
> [Officer] "Okay. So if someone came in here and said it was raining, would that be a truth or would that be a lie?"
>
> [R.J.] "A story."
>
> [Officer] "When someone tells a story, is that a truth or a lie?"
>
> [R.J.] "Story."
>
> [Officer] "All right.… If someone came in here and said it was raining, would that be right or would that be wrong?"
>
> [R.J.] "Wrong."
>
> ….

> [Officer] "All right. Is it important to tell the truth?"
>
> [R.J.] "Yes."
>
> [Officer] "Okay. If a kid is at school and tells a lie, what can happen to that kid? Or he tells a story, what can happen to that kid?"
>
> [R.J.] "Get a whooping."
>
> [Officer] "Okay. They get in trouble or get a whooping …?"
>
> ….
>
> [R.J.] "From their moms."

¶9 In finding that WIS. STAT. § 908.08(3)(c) was met, the circuit court found that a six year old would understand a story to be something that is not true and the court placed emphasis upon R.J.'s response that if a child tells a story, the child will receive a "whooping" from that child's mother, Jones has not argued that the court was clearly erroneous in finding that a six year old would understand a story to be something that is not true. We conclude that from that finding and the discussion between R.J. and the officer about the consequence of telling a story, receiving a "whooping … from their moms," the court could reasonably infer that R.J. understood that telling something that is not true is punishable.

B. Presence of R.J.'s Mother in Court During R.J.'s Testimony

¶10 Jones contends that the circuit court erred in allowing R.J.'s mother, whom the State planned to call as a witness later in the trial, to be in the courtroom during R.J.'s testimony.

¶11 When R.J. initially began to testify at trial, the attorneys and court had a difficult time hearing what she was saying. During a discussion with the court over the matter, the State informed the court that R.J. had stated that she was

scared and that she would like her mother to be in the courtroom. R.J.'s mother was scheduled to testify after R.J. and the court had previously entered an order sequestering R.J.'s mother from the courtroom. However, the State requested that R.J.'s mother be allowed in the courtroom during R.J.'s testimony in light of R.J.'s age and the fact that the mother's statement had already been recorded. Jones's trial counsel objected, arguing that R.J.'s mother was a pivotal witness and that she should not be permitted in the court room while R.J. was testifying.

¶12 The circuit court ruled that R.J.'s mother would be allowed in the courtroom during R.J.'s testimony. However, the court restricted her presence, stating R.J.'s mother would have to sit in the back row of the courtroom and be "absolutely dead silent, no talking, no gesturing, no waiving, no moving, no standing up, basically no anything other than sitting there." The court also stated that during his cross-examination of R.J.'s mother, Jones would have an opportunity to "make it clear that she was in the courtroom" during R.J.'s testimony.

¶13 Both parties agree that the proper standard of review of this issue is whether or not the circuit court erroneously exercised its discretion. We will not reverse a discretionary determination by the circuit court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***State v. Shanks***, 2002 WI App 93, ¶6, 253 Wis. 2d 600, 644 N.W.2d 275.

¶14 Jones argues that allowing R.J.'s mother to be present during R.J.'s testimony was "unfairly prejudic[ial]" to Jones because R.J. "had the ability … to alter her [own] testimony so as to bolster the testimony of [R.J.], and [to] provide additional testimony that she may not otherwise have offered." However, Jones

has not argued that there was no reasonable basis for the court's decision to allow R.J.'s mother to be present during R.J.'s testimony, and we conclude that there was.

¶15 A circuit court has the power to alter courtroom procedures in order to protect the well-being of a child witness. ***Id.***, ¶10. Here, the circuit court was aware that R.J. was having a difficult time testifying, that R.J. was only seven, that she was scared, that she had asked for her mother to be present, and that the case involved sexual assaults by a close relative. The court limited R.J.'s mother's presence to the back row of the courtroom and instructed R.J.'s mother that while R.J. was testifying, she had to "sit there stone-faced, no reaction, no noise, no talking, no standing up."

¶16 The extent to which the court imposed these restrictions on the behavior of the mother indicates that the court engaged in a process of reasoning, attempting to balance the needs of the child with the rights of the defendant. In other words, the court engaged in a conscious exercise of discretion and Jones has given us no reason why the court's action was inconsistent with either the law or the facts.

¶17 Moreover, although Jones contends that the mother's presence during R.J.'s testimony gave the mother the ability to alter her testimony so as to bolster R.J.'s testimony, Jones has not identified anything that the mother told the jury that was possibly based on R.J.'s testimony and that deviated from or was in addition to the mother's pretrial statement. That is to say, Jones has failed to demonstrate that the circuit court's decision to unsequester the mother had any effect on the mother's testimony. Therefore, we can perceive no misuse of

discretion in allowing R.J.'s mother to be in the courtroom during R.J.'s testimony to help make testifying easier for R.J.

C. Expert Testimony Regarding R.J.'s Behavior

¶18 Jones contends that the circuit court "erred when it allowed the State to introduce expert testimony [by Amanda Didier] regarding long-standing behaviors of [R.J.]." As best we can tell, Jones is arguing that because those "long-standing behaviors" began years before the sexual assaults were alleged to have occurred, Didier's testimony about that behavior was not relevant, and that even if it was relevant, the testimony was unfairly prejudicial.

¶19 A circuit court's decision to admit expert testimony is discretionary and will not be reversed if the court has a rational basis for its decision and the decision was made in accordance with accepted legal standards and the facts of record. ***State v. Giese,*** 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687.

¶20 Jones does not indicate in his brief on appeal exactly what portions of Didier's testimony he believes were not relevant, nor does he specify where that testimony may be found in the record. The appellant has the burden to direct this court's attention to those portions of the record that support his or her claim. *See* ***Anic v. Board of Review of Town of Wilson***, 2008 WI App 71, ¶2 n.1, 311 Wis. 2d 701, 751 N.W.2d 870. This court will not search the record for evidence to support a party's argument. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2006 WI App 109, ¶36, 293 Wis. 2d 668, 721 N.W.2d 127.

¶21 That being said, we observe that at trial, Didier, a forensic interviewer, testified as to her methods of interviewing children who have been victims of crimes. She also testified, over Jones's objection, that children who

have been sexually abused "can become withdrawn[,] … angry or sad or flat. [The child] can also become … easily agitated."

¶22 If Jones means to argue that the testimony related to the behaviors exhibited by children who are the victims of sexual assault that is described in the preceding paragraph is not relevant, he fails to present this court with a developed argument explaining *why* testimony that a child victim of sexual assault may exhibit certain behaviors is not relevant because R.J. exhibited those behaviors both before the sexual assaults were alleged to have occurred in this case, and during the time period of the assaults. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are not adequately briefed). However, even if Jones had presented a developed argument, we would reject it because the fact that R.J. exhibited some or all of those behaviors prior to the sexual assaults goes to the weight of the evidence, not its admissibility. These weight issues are best addressed on cross-examination and in closing argument.

¶23 To the extent that Jones means to argue that the testimony described in ¶20 was unfairly prejudicial, we disagree. Even if evidence is relevant, it may still be inadmissible if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03. "Prejudice is not based on simple harm to the opposing party's case, but rather [on] 'whether the evidence tends to influence the outcome of the case by improper means.'" ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399 (quoted source omitted).

¶24 Jones argues that the "[i]ntroduction of testimony that sexual assault was the cause of behavior changes that occurred [] prior to the assault [was]

extremely prejudicial" because the testimony "created a situation where the jury was given the opportunity to overlook the fact that [R.J.'s] behavior changes occurred prior to the alleged assaults, and attribute that behavior to the alleged sexual assault[s]." Jones did not specify where in the record Didier testified that R.J.'s sexual assaults were the cause of the changes in [R.J.'s] behavior, and we did not find such testimony in our review of the transcript of Didier's testimony. Furthermore, on cross-examination, Jones was able to establish that in some children who have exhibited, *prior* to any sexual assault, the behaviors Didier testified she has observed in children who have been sexually assaulted, the sexual assault can have no affect on the child's behaviors.

¶25 Viewed somewhat differently, Jones's argument suffers a Catch-22 problem. If the jury could reasonably have inferred from the evidence that there was some change in R.J.'s behavior that was explained by the expert's testimony, then the expert's testimony was properly admitted and considered. If undisputed trial evidence showed that all of R.J.'s relevant behaviors predated the alleged sexual assault, then it might be that the expert's testimony was improperly admitted, but then there is no unfair prejudice. In the latter scenario, there is no reasonable possibility that the expert testimony affected the verdicts because then that expert testimony would have no value when applied to the evidence before the jury.

¶26 Accordingly, we conclude that the testimony was not prejudicial.[2]

[2] Jones also asserts that Didier's testimony was prejudicial because "Didier did not personally interview [R.J.]." Jones does not present this court with a developed, persuasive argument explaining why this renders Didier's testimony prejudicial. This court does not address undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App (continued)

D. Consideration of Fourth-Degree Sexual Assault

¶27 Jones argues that the circuit court erred when it denied his request to submit fourth-degree sexual assault to the jury as a lesser included offense.

¶28 "Whether the evidence at trial supports the submission of a lesser included offense is a question of law," which we review de novo. ***State v. Moua***, 215 Wis. 2d 511, 517, 573 N.W.2d 202 (Ct. App. 1997). We apply a two-part test to determine whether to instruct the jury on a lesser offense. ***State v. Carrington***, 134 Wis. 2d 260, 262 n.1, 397 N.W.2d 484 (1986). First, we must determine whether the lesser offense is, as a matter of law, a lesser included offense of the crime charged. ***Id.*** If it is, then we must determine whether the instruction is justified based on the evidence. ***Id.***

¶29 Wisconsin uses an "elements only" test to determine if a crime is a lesser included offense of another crime. ***Id.*** at 264. Under this test, a lesser included offense may not include any additional element beyond those essential for conviction of the crime charged. ***Id.*** at 265.

¶30 First-degree sexual assault of a child under the age of twelve has two elements: (1) the defendant had sexual intercourse with the victim; and (2) the victim had not attained the age of twelve. WIS. STAT. § 948.02(1)(b); *see also* WIS JI—CRIMINAL 2102A. Fourth-degree sexual assault has two elements: (1) the defendant had sexual contact with the victim; and (2) the victim did not consent. WIS. STAT. § 940.225(3m); *see also* WIS JI—CRIMINAL 1219. Thus,

300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. Accordingly, we do not address the argument further.

elements of the crimes differ. Fourth-degree sexual assault requires proof that the victim did not consent to the sexual contact. First-degree sexual assault of a child does not require proof that the victim did not consent. Because fourth-degree sexual assault requires poof of an additional element, it is not a lesser included offense of first-degree sexual assault of a child. Accordingly, we conclude that the circuit court did not err when it denied Jones's motion to instruct the jury on fourth-degree sexual assault.

CONCLUSION

¶31 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

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