COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP2219-CR **Cir. Ct. No. 2002CF516**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK S., JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Frank S. appeals a judgment convicting him of child abuse. The charge was based on an allegation by Frank's daughter, A.S., that Frank struck her a total of ten times with a belt. Frank argues that the trial court erroneously prohibited him from introducing evidence showing that on a

prior occasion A.S. made a similar allegation of abuse against her mother and then, in the course of the investigation in this case, denied having been previously hit like that. We affirm the trial court.

Background

¶2 During the relevant time period, A.S.'s father, Frank, and her mother were separated or divorced and lived in separate residences. They had joint custody of A.S., and A.S. normally switched homes weekly, that is, she spent one week with Frank followed by one week with her mother.

¶3 According to a police report, in January 2001, Frank brought A.S., who was then six years old, to the police department, complaining of an incident involving A.S.'s mother. A.S. told police that her mother had "whipped" her twice with a belt in late December 2000. A.S. indicated that the belt left a bruise on her upper left thigh near her buttock area. The bruise was approximately two inches in length. A.S. also stated that her mother told her not to tell anyone.

¶4 The police investigated further, and a social worker became involved. A social worker's report, which references police reports, indicates that A.S.'s mother denied using a belt on A.S. The social worker's report also indicates the disposition of the matter as "Abuse 'Unsubstantiated'" and indicates that A.S.'s mother was never prosecuted.

¶5 Over a year later, in February 2002, A.S.'s mother contacted police to report that she had discovered bruising on A.S.'s left leg, from below A.S.'s hip to her knee. A.S. told police that Frank "whooped" her with a belt. The responding officer observed that A.S. had "extensive" bruising on her left upper thigh and buttock area, approximately six by nine inches.

¶6 Less than a week later, a specially trained social worker conducted a videotaped interview of A.S. In that interview, A.S. said that Frank hit her with a doubled-over black belt five times on her upper thigh; that she fell down; that Frank told her to get up, which she did; that Frank hit her five more times; and that she fell down again. A.S. also stated that Frank told her not to tell anyone. The social worker asked A.S. during the interview whether anything "like this" had ever happened before with her father and whether anyone else had ever hit A.S. "like this." A.S. responded to both questions in the negative.

¶7 The State charged Frank with child abuse under WIS. STAT. § 948.03(2)(b) and (5) (1999-2000).[1] Prior to trial, the trial court determined that A.S.'s videotaped interview was admissible under WIS. STAT. § 908.08, which outlines a special hearsay exception for videotaped statements of children. That determination is not disputed on appeal. The jury was shown a portion of the videotaped interview, not including the part in which A.S. denies having been abused "like this" in the past.

¶8 Before trial, Frank filed a notice of intent to present other acts evidence. The notice references "various police reports summarizing the allegation, and the investigations which followed in January of 2001." In the notice, Frank asserted that this evidence would be admissible under WIS. STAT. § 904.04(2) as "other acts" evidence. The trial court heard argument on Frank's notice on the morning of trial. Frank argued that the evidence showed knowledge,

[1] All further references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

opportunity, and motive on the part of A.S. and motive on the part of A.S.'s mother.

¶9 In addition to his "other acts" theories, Frank argued that the trial court should admit both A.S.'s videotaped denial of previous abuse and evidence of A.S.'s prior allegation against her mother under WIS. STAT. § 906.08(2). Frank asserted that he should be able to impeach A.S. under § 906.08 by cross-examining her on this topic. At the same time, he conceded that, under this theory, he could not present extrinsic evidence, but would be limited to A.S.'s answers.

¶10 The trial court examined each of Frank's theories, recognizing the constitutional dimensions to Frank's arguments. The court ultimately determined that A.S.'s denial of previous abuse and evidence of A.S.'s allegation against her mother should not be admitted. At trial, the jury heard much of A.S.'s videotaped interview, along with testimony from a number of witnesses, including A.S. and her mother.

¶11 The jury found Frank guilty, and the trial court entered a judgment of conviction. We incorporate additional facts as needed below.

Discussion

¶12 Frank makes several arguments, but does not provide a fully developed argument showing trial court error. Frank's approach is to challenge various parts of the reasoning used by the trial court. But he must do more than demonstrate that particular reasoning used by the trial court is wrong. An appellant seeking to overturn an evidentiary ruling must show that the ruling itself is wrong, that is, that there is no proper basis for the ruling. This is true because

we may affirm a trial court's evidentiary ruling on grounds that the trial court did not rely on. ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). Nonetheless, we will address each of Frank's appellate arguments that we are able to discern.[2]

¶13 In the first argument section of his brief, Frank contends that the trial court erroneously viewed the "evidence" as collateral and, therefore, not relevant. Frank relies on ***McClelland v. State***, 84 Wis. 2d 145, 151-53, 267 N.W.2d 843 (1978), for the proposition that the credibility of a witness is not collateral. This is an apparent reference to cross-examination under WIS. STAT. § 906.08(2), but we are unsure. Frank complains that he was prevented from showing the jury A.S.'s videotaped denial of previous abuse and, in some unspecified form, evidence of her prior allegation against her mother. Frank does not, however, appear to complain that he was prevented from cross-examining A.S. or her mother. To the contrary, Frank asserts, relying on WIS. STAT. § 908.06 and ***State v. Pulizzano***, 155 Wis. 2d 633, 653, 456 N.W.2d 325 (1990), that the court was wrong to assume that A.S. needed to be asked about her allegedly inconsistent statements before the defense could present the conflicting statements through evidence other than A.S.'s testimony. Adding to our confusion, Frank seems to concede in a footnote that his § 908.06 argument is not viable under ***State v. Evans***, 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994), because that case requires that a declarant

[2] We do not address arguments that Frank makes for the first time in his reply brief. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) ("We do not generally address arguments raised for the first time in reply briefs.").

who is present at trial, as was A.S., first be asked about the alleged inconsistency.[3] In that footnote, Frank says he makes the § 908.06 argument to preserve it for possible supreme court review.

¶14 We glean from our reading of this section of Frank's brief that he is complaining that the trial court erred by prohibiting him from showing the jury A.S.'s videotaped denial and from presenting additional witnesses or documents as evidence of A.S.'s prior allegation against her mother. In fact, nowhere in his brief-in-chief does Frank complain that he was not allowed to cross-examine A.S. Accordingly, we address the trial court's decision to prohibit admission of extrinsic evidence of both A.S.'s denial and A.S.'s prior allegation against her mother.

¶15 To the extent Frank relies on WIS. STAT. § 906.08(2), his argument misses the mark. Section 906.08(2) addresses permissible cross-examination of a witness and generally prohibits the introduction of extrinsic evidence to attack credibility.[4] Frank's counsel expressly conceded before the trial court that, if he

[3] We take no position on whether ***State v. Evans***, 187 Wis. 2d 66, 522 N.W.2d 554 (Ct. App. 1994), speaks to a requirement that a declarant who is present in court must be asked about the alleged inconsistency before evidence of the inconsistency can be demonstrated through other means.

[4] WISCONSIN STAT. § 906.08(2) reads:

> SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to [the rape shield statute], if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

were allowed to cross-examine A.S. about her videotaped denial and her prior allegation, he would be limited to her answers and could not introduce extrinsic evidence on either the denial or the prior allegation.

¶16 Further, even had Frank argued on appeal that he was erroneously denied the opportunity to cross-examine A.S. about her denial and her previous allegation, the record does not disclose what A.S. would have said. In order to preserve this claim of error, Frank needed to preserve the evidence he now claims would have made a difference. Frank could have requested permission to question A.S. out of the presence of the jury.[5] If the court had denied such a request, we might have been able to make assumptions in Frank's favor. As it is, we are left to guess whether A.S.'s answers would have bolstered Frank's defense. Moreover, as we explain below, it is entirely possible that A.S. would have responded that the "whooping" she got from her mother more than a year earlier was not at all "like" the severe beating she received from Frank.

¶17 If Frank seeks reversal based on WIS. STAT. § 908.06,[6] or hopes to preserve for supreme court review an argument based on that statute, his problem

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[5] Error "may not be predicated upon a ruling which ... excludes evidence unless ... the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." WIS. STAT. § 901.03(1) and (1)(b). The purpose of the offer-of-proof requirement is twofold: "first, [to] provide the circuit court a more adequate basis for an evidentiary ruling and second, [to] establish a meaningful record for appellate review." ***State v. Dodson***, 219 Wis. 2d 65, 73, 580 N.W.2d 181 (1998). Although an offer of proof need not be in question and answer format, that is the preferred method for making offers of proof because it significantly reduces the possibility of an erroneous ruling. *See* ***State v. Brown***, 2003 WI App 34, ¶18, 260 Wis. 2d 125, 659 N.W.2d 110.

[6] WISCONSIN STAT. § 908.06 reads:

> **Attacking and supporting credibility of declarant.** When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for

(continued)

is that he made no such argument before the trial court. On appeal it is too late to preserve the argument because it was waived at the trial court level. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal."). Moreover, the applicability of § 908.06 is far from apparent. That statute speaks to permitted impeachment of hearsay that has already been admitted in evidence; it does not seem to support an argument for admission of A.S.'s videotaped denial in the first instance. Thus, the starting point for the application of § 908.06 is not present.

¶18 We turn our attention to Frank's relevance arguments, all of which are directed at A.S.'s credibility. Frank argues that A.S.'s videotaped denial and evidence of her prior allegation are relevant regardless whether A.S.'s prior allegation was true or false.

¶19 If the prior allegation was false, according to Frank, then the jury would have learned that A.S. lies about significant things, not just minor things as asserted by A.S.'s mother at trial. This relevancy argument, however, does not address admissibility. As already noted, Frank's trial counsel agreed that, under WIS. STAT. § 906.08(2), he would be limited to answers given by A.S. on cross-examination. Frank has presented no argument on appeal showing a *preserved*

> those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

argument that supported admission of extrinsic evidence of A.S.'s prior allegation, much less a showing that the prior allegation was false.[7] And, to repeat, Frank did not attempt to preserve A.S.'s answers for our review. We do not know if A.S. would have agreed she lied, insisted she told the truth, or something else.

¶20 If the prior allegation was true, according to Frank, then the evidence is relevant to show that A.S. lied during the videotaped interview. We disagree. As the State explains, even if A.S. told the truth when she alleged that her mother hit her with a belt, the videotaped question on the topic was ambiguous and, consequently, elicited an ambiguous response. During the taped interview, the questioner asked A.S. if anything "like this" had ever happened with her father before or if anyone else had ever hit her "like" that. A.S. responded in the negative by saying "uh-uh" and by shaking her head.

¶21 There are several undeniable similarities between the conduct A.S. alleged against Frank and the conduct she had, about fourteen months earlier, alleged against her mother. Still, there is a difference that defeats Frank's argument that A.S.'s videotaped denial is inconsistent with her prior allegation. That difference is severity. A.S.'s allegation against her mother involved only two hits and a two-inch bruise. In contrast, A.S. alleged that Frank "turned the music up loud," had A.S. put on a pair of pants (presumably to reduce the injury or pain he intended to inflict), hit A.S. with a belt five times until she fell, told A.S. to get up, and then hit her with the belt five more times until she fell again. This beating resulted in bruising covering an area six by nine inches. Given the difference in

[7] The State points out that the reports show that the prior allegation was not determined to be true or false. For example, the social worker's report states that the social worker did not have any way of determining whether A.S. told the truth about the allegation.

the severity of the beatings, we have nothing on which to base a conclusion that A.S.'s statements were inconsistent. If cross-examined on the topic, A.S. might well have answered: "No, not like that, never so hard and never so many times."

¶22 We turn to another one of Frank's relevance arguments. Frank seems to be arguing that evidence of the prior allegation was relevant, regardless whether it was true or false, because the jury might have believed that A.S. learned, from her prior experience accusing her mother, that if she accused a parent of abuse, she could avoid placement in that parent's home. Frank cryptically asserts that, at the time of the alleged beating, he had disciplined A.S. by grounding her. There are several flaws in this argument. If A.S. was beaten severely by her mother, why would she accuse her father? The natural inference from that scenario is that A.S. would want to get away from her mother. If, on the other hand, the severe bruising was not inflicted by either Frank or A.S.'s mother, what is the evidence Frank was prepared to present that his discipline—i.e., grounding or other non-abusive discipline—of A.S. was so severe that she would falsely accuse him to get away from him? Moreover, why would A.S. think that an allegation against Frank would lead to anything more than a short respite from placement with Frank? What information was Frank prepared to present showing the length of time A.S. was kept away from her mother after the prior allegation? This length of time is important because it would have to be substantial to make it plausible that A.S. would fabricate such a serious charge against Frank in order to get away from him. We could go on with more questions, but it is sufficient to say that this is an underdeveloped argument unsupported by a sufficient offer of proof.

¶23 We pause to take note of a few arguments that Frank does not make on appeal.

¶24 Frank does not argue in his brief-in-chief that evidence of A.S.'s prior allegation against her mother was admissible to show that the mother may have been the perpetrator of the present offense. Before a defendant may present evidence that a different person committed the crime, the defendant must satisfy the "legitimate tendency" test. *See* ***State v. Denny***, 120 Wis. 2d 614, 622-25, 357 N.W.2d 12 (Ct. App. 1984); *see also* ***State v. Avery***, 213 Wis. 2d 228, 248-49, 570 N.W.2d 573 (Ct. App. 1997). We decline to develop and resolve this issue.

¶25 Also, we need not address whether the evidence was admissible to show that A.S.'s mother encouraged A.S. to falsely accuse Frank. Frank argued before the trial court that the mother might have hoped to shift blame from herself to Frank or was motivated by revenge because Frank had allegedly initiated the process that led to A.S.'s prior allegation against A.S.'s mother. This argument is not pursued in Frank's appellate briefing. Perhaps Frank does not pursue these theories on appeal because he recognizes that the record is insufficient to determine whether admissible evidence would have supported either theory.

¶26 Finally, Frank does not develop an argument based on the notion that A.S.'s mother's trial testimony opened the door to admission of A.S.'s videotaped denial or evidence of A.S.'s prior allegation. During trial, when A.S.'s mother testified, Frank renewed his argument that evidence of A.S.'s allegation against her mother should be admissible under WIS. STAT. § 906.08. The mother, who had been called as a witness by the State, was asked about A.S.'s truthfulness during cross-examination. When the mother responded, in essence, that A.S. told lies, but not about "big" things like the charged conduct, Frank's counsel attempted to question the mother about A.S.'s prior allegation against the mother. The ensuing objection and arguments, and subsequent questions, answers, and arguments, are fodder for debate, but Frank does not, on appeal, develop an

argument based on these events. We decline to develop and resolve the various issues suggested by this part of the trial.

¶27 Frank correctly points out that relevant evidence is admissible unless its admission is prohibited by the state or federal constitution or by an evidentiary rule. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 550, 500 N.W.2d 289 (1993). We agree with this general proposition, but it does not help Frank. First, as the proponent of the evidence, it was incumbent on Frank to explain what evidence he intended to present and what that evidence would show. As we have already discussed, the possible relevancy arguments are many, and their individual merit depends on the evidence Frank was actually prepared to present. We may not reverse the trial court based on the general theory that A.S.'s credibility was important and the videotaped denial and prior allegation might shed light on her credibility.

¶28 Second, the posture of this case is of Frank's own making. In the trial court, Frank did not take the position that he was entitled to present A.S.'s videotaped denial and evidence of A.S.'s prior allegation *unless the prosecutor* showed that the evidence was inadmissible. Rather, he raised the topic prior to trial and requested permission to introduce the evidence on two grounds: under WIS. STAT. § 904.04(2) and under WIS. STAT. § 906.08(2). When the trial court used those statutes as a framework for analysis, Frank did not object. More to the point, Frank never suggested that it was the prosecutor's burden to show why the evidence was not admissible. Frank's arguments before the trial court provided the framework for that court's analysis, and he cannot now shift course and argue that it is the State's burden to show that the evidence was inadmissible.

¶29 Frank next argues that exclusion of the evidence—showing that A.S. made a similar allegation against her mother that was inconsistent with her videotaped denial—violated his constitutional right to present a defense. Essentially, Frank is asserting that his defense turned on A.S.'s credibility and that the trial court's evidentiary rulings deprived him of the ability to attack her credibility.

¶30 "The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution." ***Pulizzano***, 155 Wis. 2d at 645. The confrontation clause "grants defendants the right to 'effective' cross-examination of witnesses whose testimony is adverse." ***Id.*** The compulsory process clause "grants defendants the right to admit favorable testimony." ***Id.*** at 645-46. These constitutional provisions grant defendants the right to present "relevant evidence not substantially outweighed by its prejudicial effect." ***Id.*** at 646.

¶31 Here, again, our review of Frank's brief-in-chief leads to the conclusion that the target of Frank's argument is the exclusion of extrinsic evidence: A.S.'s videotaped denial and testimony of police officers or a social worker about A.S.'s prior allegation against her mother. Frank's relevancy arguments in this section of his brief address this extrinsic evidence.[8] Our conclusion is further reinforced by Frank's discussion of ***Delaware v.***

[8] For example, Frank argues: "The jury would have observed the videotaped interview during which [A.S.] said that nothing like this had ever happened before with her dad or anyone else. Then, the jury would have learned that 14 months earlier, A.S. accused her mother of hitting her with a belt."

Van Arsdall, 475 U.S. 673, 684 (1986). He relies on ***Van Arsdall*** for the proposition that a confrontation violation occurs when a defendant is prevented from a line of *cross-examination* that "might have" left a reasonable jury with "a significantly different impression of a witness's credibility." But then, instead of applying ***Van Arsdall*** to some legal theory directed at an impermissible limitation on cross-examination, Frank asserts that a "reasonable extension" of ***Van Arsdall*** is that it applies to "evidence."

¶32 As should be clear by now, we are not persuaded that Frank makes any viable argument on appeal showing that the trial court excluded evidence with significant probative value. At best, the evidence *might* be probative, depending on several unknown variables. Given the state of the record, the arguments made by Frank's trial counsel, and the arguments made by his appellate counsel, we have no basis for concluding that the trial court's rulings denied Frank his constitutional right to present a defense.[9]

¶33 Finally, Frank argues that he is entitled to a new trial in the interest of justice because the real controversy was not fully and fairly tried. Frank does not present any new arguments, but instead generally complains that he was prevented from fully exploring A.S.'s credibility. We decline to order a new trial. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("Zero plus zero equals zero.").

[9] In this section of his brief, Frank asserts that WIS. STAT. § 906.13(2) permits extrinsic evidence of prior inconsistent statements. This argument is raised for the first time on appeal and, therefore, is waived. Moreover, like Frank's WIS. STAT. § 908.06 argument, this argument lacks a starting point. It might bear on how Frank would have been able to respond to A.S.'s videotaped denial, but it does not speak to the admission of that denial in the first place.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.