COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2495-CR **Cir. Ct. No. 2012CF117**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY D. HENDRICKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kelly Hendrickson appeals a postconviction order that granted him a new trial, but denied his motion to vacate the conviction and dismiss the complaint due to insufficient evidence at trial. The only issue before

us is sufficiency of the evidence. We conclude that the evidence is sufficient, and we affirm.[1]

¶2 Hendrickson was convicted of perjury. In this opinion we discuss the legal standard that the pattern jury instruction provides for a jury to decide whether a false statement is "material," and we describe a potential problem with the instruction. The problem is that the instruction may prevent a conviction when a witness's false statement was made in relation to a foundational evidentiary matter that does not, by itself, meet the instruction's definition of materiality. This is significant because such false statements may have the effect of preventing further exploration of evidence that *would* have been material. Ultimately, however, we conclude in this case that even if we use the problematic definition of "material" in the instruction, there is sufficient evidence to sustain the court's finding on the element of materiality.

¶3 The perjury charge was based on Hendrickson's testimony at an injunction hearing before a court commissioner. The transcript of the injunction hearing was an exhibit at the perjury trial. It showed that at the hearing the petitioner testified that Hendrickson sexually assaulted her. She testified that the results from a DNA test "came back," and that "the DNA is a positive match to Kelly," meaning Hendrickson. She did not present any report or other independent evidence to support those assertions.

[1] Hendrickson commenced this appeal by notice of appeal. We questioned whether an order granting a new trial is final and ordered memoranda. We then concluded that the order was nonfinal, but that we would grant leave to appeal under WIS. STAT. § 808.03(2) (2015-16).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 When Hendrickson testified, he denied committing the sexual assault. Then, on cross-examination, he described his contact with police, in which he gave a statement and allowed a DNA sample to be taken. He was then asked: "But you haven't heard the results of the DNA?" He answered: "Correct. I haven't heard anything." The perjury charge was based on that answer.

¶5 At the perjury trial, a police detective testified that, approximately a week before the injunction hearing, Hendrickson called him to ask about the DNA test result, and that the detective told Hendrickson it was a match to Hendrickson. The court found Hendrickson guilty of perjury.

¶6 We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶7 On appeal, Hendrickson argues only that the evidence was insufficient to prove the element of materiality. He does not dispute that the State proved he made a false statement when he testified that he did not know the DNA test result.

¶8 Hendrickson's argument relies on the definition of "material statement" in the pattern jury instruction for perjury: "A material statement is one which tends to prove or disprove any fact that is of consequence to the determination of the proceeding in which the statement was made." WIS JI—CRIMINAL 1750. This test appears to be substantively identical to the definition used for relevancy in admission of evidence: "'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.

¶9 Using that materiality definition in the instruction, Hendrickson argues that his false statement about not knowing the DNA test result did not tend to prove or disprove any fact of consequence in the injunction proceeding, because whether he knew the test result was not, *by itself*, a fact of consequence in that proceeding. Hendrickson acknowledges that the *test result* was "arguably material" to the proceeding, because the result would have a tendency to prove or disprove his participation in the alleged sexual assault. However, he argues that because the charge in this perjury case is limited to only his false statement about whether he *knew* the test result, his statement, when looked at by itself, fails to meet the definition of "material statement" provided in the instruction.

¶10 Hendrickson asserts that he is not aware of any authority for the proposition that a statement is material simply because it may lead to *other* evidence that is material. He contends that no law supports a view that the materiality of a false statement can be established based on what might hypothetically have happened later if the statement had been truthful.

¶11 The State does not appear to respond directly to this argument. Instead the State offers other arguments, which we will consider further below. However, we discuss Hendrickson's argument further here because it appears to reveal a potential problem with the existing jury instruction.

¶12 We regard Hendrickson's argument as relating to the concept of foundational questions, although neither the parties nor the circuit court have used that term. If the attorney questioning Hendrickson had started into the subject of the DNA test by simply asking Hendrickson what the test result was, the question

would be lacking a proper foundation, because it assumes that the witness knows the answer. As a result, it is a common practice to first ask a witness whether the witness has information on a subject or to establish prior knowledge through one or more questions placing the witness in a context in which prior knowledge could be reasonably inferred. If the witness denies knowledge or cannot supply the proper context, then usually no further inquiry into that subject will occur.

¶13 Looked at in that context, there appears to be considerable force to Hendrickson's argument that his false statement does not meet the instruction's definition of "material." If the question to Hendrickson about his knowledge of the DNA test result is seen purely as a foundational one, intended to establish whether he could answer additional questions, he may be correct that his knowledge, or lack of knowledge, about the DNA test result does not, by itself, have any tendency to prove or disprove a fact of consequence in the injunction proceeding. As a general proposition, the mere *existence* of a witness's knowledge on a subject will rarely have probative value.

¶14 It might then be asked, if these types of foundational questions do not satisfy the perjury instruction's test for materiality, which is substantively identical to the relevancy test for admissibility, why are such questions permitted, when the answer to them is not admissible as relevant evidence?

¶15 The answer may lie in the evidence rule regarding preliminary questions on admissibility, WIS. STAT. § 901.04(1). It provides that questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge. In doing so, the judge is "bound by the rules of evidence only with respect to privileges" and a statute about certain medical test results. ***Id.***

¶16 As we understand that provision, its practical effect is to eliminate the relevancy requirement when a judge is deciding witness qualification, privilege, or admissibility. It has that effect because the relevancy requirement is contained in the rules of evidence, but the judge is not bound by those rules, except in very limited respects.

¶17 To return, then, to why foundational questions are permitted even though they do not themselves produce relevant evidence, the answer may be that such questions are understood as going to preliminary matters about qualifications of witnesses and admissibility of evidence. That is so even though the questions are rarely described as such at the time, and no express ruling by the judge is asked for. Thus, a question like "have you heard the DNA test result?" is permitted because it is asked to establish witness qualification or a proper foundation for admissibility, rather than to elicit an answer that in itself meets the relevancy test for admissibility.

¶18 If we have correctly described the legal status of foundational questions, the implication of Hendrickson's argument in this case is potentially significant. The practical effect of the perjury instruction may be, contrary to what the legislature may have intended, to prevent perjury convictions when false statements are made in response to questions that are asked to obtain information that allows a judge to make the preliminary admissibility determinations.

¶19 For example, assume that a witness in a criminal case claims the husband-wife privilege under WIS. STAT. § 905.05. The witness falsely states that he or she is married, and the court applies the privilege to exclude otherwise relevant evidence. Assume further that whether the witness was married does not tend to prove or disprove any fact of consequence to the determination of the

criminal case. Under these facts, it appears that the lying witness could not be convicted of perjury.

¶20 As another example, assume that a party seeks to admit business records under the hearsay exception for records of regularly conducted activity, WIS. STAT. § 908.03(6). The record custodian, who is not otherwise a witness at trial, is called outside the presence of the jury to establish the requirements of that provision, but makes false statements that lead to exclusion of the evidence. Assuming further that those record-keeping facts do not, by themselves, tend to prove or disprove any fact of consequence in the underlying case, it appears that the record custodian could not be convicted of perjury.

¶21 It is not immediately obvious to us that these apparent limitations on the reach of perjury liability would be consistent with the intent behind the perjury statute, or are compelled by existing case law. The perjury statute requires the false statement to have been "material," but does not define that term. WIS. STAT. § 946.31(1)(a).

¶22 As we said above, the definition of "material" in the pattern jury instruction appears to be substantively identical to the concept of relevancy, as used for deciding admissibility of evidence. In a comment to that instruction, the committee notes that the definition of "material" is "adapted from part of the definition of 'relevant evidence.'" WIS JI—CRIMINAL 1750, cmt. 7. The comment does not directly explain the committee's reliance on the definition of relevant evidence.

¶23 It may be that the committee was relying, in part, on a passage in a Wisconsin Supreme Court opinion from 1971 that quoted an evidence treatise. Without attempting to fully quote or dissect that passage here, we understand the

treatise to have drawn a distinction between "materiality" and "relevancy." ***State v. Becker***, 51 Wis. 2d 659, 667, 188 N.W.2d 449 (1971) (quoting McCormick, *Evidence* (hornbook series) at 315-16, sec. 152). It appears that the instruction committee may have concluded from this treatise discussion that the concept of materiality does not extend beyond the concept of relevancy. However, we note that ***Becker*** did not involve the perjury statute. Instead, its discussion of materiality was related to the extent to which a court can limit cross-examination without violating the confrontation right. ***Id.*** at 666-67.

¶24 A more recent opinion, in a perjury prosecution, quoted the jury instruction with apparent approval. *See* ***State v. Munz***, 198 Wis. 2d 379, 382-83, 541 N.W.2d 821 (Ct. App. 1995). However, ***Munz*** also quoted a description of perjury that appears to be broader than the one in the instruction, in a way that would potentially encompass foundational questions: "'The false testimony must be given willfully and corruptly for the purpose of drawing the curtain over a material fact under investigation, in order to lead the tribunal to a conclusion contrary to the actual fact.'" ***Id.*** at 383 (quoting ***State v. Evans***, 229 Wis. 405, 409, 282 N.W. 555 (1938)). Under this description of perjury, false answers to foundational questions might be seen as having the effect of "drawing the curtain over a material fact" that might have been explored if a truthful answer had been given.

¶25 In short, it is not clear to us that the current definition of materiality in the perjury instruction is compelled by the language or intent of the perjury statute, or by existing case law. If Wisconsin law does not sufficiently address this topic in the perjury context, federal law may provide useful guidance, because the federal perjury statute also includes a materiality component. *See* 18 U.S.C.

§ 1621. Regardless, the jury instruction committee may want to consider whether the instruction should be modified.

¶26 Having said all that, we ultimately conclude that for purposes of this appeal we need not resolve any question about the proper legal definition of materiality. As we discuss further below, we conclude that, even when applying the existing pattern instruction, there is sufficient evidence to affirm the conviction.

¶27 This case was tried to the court. Accordingly, there are no jury instructions in the record to provide the legal background against which we measure the sufficiency of the evidence. However, the parties appear to agree that we should review the evidence by applying the pattern jury instruction. Therefore, we confine ourselves to the definition that we have already referred to for the remainder of this opinion: "A material statement is one which tends to prove or disprove any fact that is of consequence to the determination of the proceeding in which the statement was made." WIS JI—CRIMINAL 1750.

¶28 As part of the State's response to Hendrickson's argument, the State may be arguing that, even if his knowledge of the DNA test result was not itself material, his *next* statement was sufficient to sustain the perjury conviction. After Hendrickson stated that he had not heard the results of the DNA test, the cross-examining attorney stated: "So there is still a chance, but—." Hendrickson replied: "It is a possibility but doubtful."

¶29 If intended as an argument it fails, most fundamentally because Hendrickson was not charged or tried based on that second statement. The complaint relies on only his first statement, his denial of knowledge of the DNA test result. The State's closing argument at trial discussed only that first statement.

Furthermore, the State does not develop an argument on appeal showing how this second statement satisfies *all* elements of a perjury charge. Therefore, we confine our remaining discussion to Hendrickson's first answer.

¶30 The State also argues that Hendrickson's false statement that he did not know the DNA test result satisfies the test for materiality because it had the effect of undermining the credibility of testimony by the injunction petitioner. More specifically, the State argues that Hendrickson's statement tended to disprove her testimony that the DNA test result implicated Hendrickson.

¶31 In reply, Hendrickson asserts that "[w]hether *Hendrickson* had been informed of the test results had no tendency to prove or disprove whether [*the injunction petitioner*] had been told those results." (Emphases in original.) We do not agree. Instead, as we now explain, we conclude that his statement had at least some tendency to disprove the petitioner's testimony that she knew the test result.

¶32 In the context of this credibility argument advanced by the State, the question and answer at issue had more than a foundational effect. As described above, the DNA sample was taken from Hendrickson in the context of a sexual assault investigation in which the injunction petitioner was the complainant. Hendrickson's statement about not knowing the test result, if accepted as true, cast doubt on the petitioner's testimony that she knew the result. It did so because, if there was a DNA result that "match[ed]" Hendrickson's DNA, as the petitioner testified, it would be reasonable for Hendrickson to have also learned that fact, such as through further contact from police. This inference is meaningful.

¶33 In other words, Hendrickson's false answer gave at least some reason to doubt whether the petitioner had been told the result. Or, in the language of the perjury instruction, Hendrickson's false statement was material because it

had some tendency to disprove a fact of consequence in the injunction proceeding, that fact being whether Hendrickson's DNA had been found.

¶34 Our conclusion is not altered by the fact that the court commissioner hearing the injunction case ultimately appears to have entirely disregarded the petitioner's testimony about the DNA test result in making his decision. The commissioner described the petitioner as presenting "absolutely no evidence" that Hendrickson was involved in the assault. The commissioner also said that he "cannot take into account the hearsay that [the petitioner] attempted to present here." That appears to be a reference to the DNA test result.

¶35 The commissioner's reference to hearsay appears to be based on the following events. When the injunction petitioner first testified on direct examination that she knew the test result, and that the result implicated Hendrickson, there was no hearsay objection. Then, on redirect, her attorney asked *how* she knew the test result, but Hendrickson's attorney objected on hearsay grounds. The commissioner sustained the objection. However, in doing so, the commissioner did not strike any prior testimony. It was not until the commissioner announced his decision on the injunction petition that he appeared to reject *all* of the DNA test evidence.

¶36 The significance of those events is in the sequence. They show that *at the time Hendrickson testified*, the petitioner's testimony about the DNA test result match had not been objected to or stricken. When Hendrickson made his false statement, it had the effect of attacking the credibility of evidence that was in the record, and that the commissioner might have relied on.

¶37 Our focus on the situation at the time the false statement was made, and not on the court's final decision, is supported by ***Munz***. There, the perjury

defendant argued that her false statement was not material because the court ultimately convicted her on a ground that would have applied even if she had testified truthfully. ***Munz***, 198 Wis. 2d at 384. We rejected the argument: "We conclude that what makes testimony material is the fact that the trial court *could* have relied on this testimony in rendering a decision." ***Id.*** at 385 (emphasis in original).

¶38 Hendrickson also argues that his false statement about not knowing the test result was not material because evidence of the test result *itself* was inadmissible hearsay. In practical effect, he appears to be arguing that a witness cannot be convicted for answering a foundational question falsely, if the evidence that the foundation was being laid to support was not admissible. That argument appears flawed for several reasons. However, we need not decide the point because it does not appear to undercut our conclusion that there was a *non*-foundational way in which Hendrickson's false statement was material.

¶39 In summary, we conclude that the evidence was sufficient to establish the element of materiality because there was a non-foundational way in which Hendrickson's false statement tended to disprove a fact of consequence in the injunction proceeding. Accordingly, we affirm on the only decision now appealed, namely, that part of the postconviction order denying Hendrickson's motion to dismiss the complaint for insufficient evidence.

By the Court.—Judgment and order affirmed.

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