COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2499-CR **Cir. Ct. No. 2012CF22**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. MARQUARDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Daniel Marquardt appeals from a judgment of conviction for sexual assault of a child under sixteen years of age and sexual exploitation of a child, and an order denying postconviction relief. Marquardt argues: (1) the circuit court erred in admitting hearsay testimony at the

preliminary hearing; (2) the court denied his right of confrontation by limiting his cross-examination of the victim at trial; (3) the court erred in admitting into evidence a nude photo of the victim; (4) the state impermissibly vouched for the credibility of the victim in closing argument; and (5) he is entitled to a new trial in the interests of justice. We reject these arguments and affirm.

BACKGROUND

¶2 The victim was a fifteen-year-old daughter of Marquardt's fiancée.[1] During a weekly home visit with Iron County Human Services social worker Sarah Eder, the victim stated, "I need to tell you something …." The victim also stated, "I've been doing something I'm not supposed to." The victim told Eder she had sexual intercourse with Marquardt seven times over the last month, and the most recent was the previous day.[2]

¶3 When Eder asked the victim if she knew what the impact of her allegations would be, the victim became upset and said, "I knew you wouldn't believe me." The victim then told Eder that she could prove the sexual relationship with Marquardt by evidence on her body and stains on her bed comforter.

¶4 Eder called the sheriff's department to have an officer dispatched to the home. Officer Paul Samardich spoke with the victim and her grandmother

[1] Marquardt was fifty-three years old at the time.

[2] Marquardt, the victim, and her grandmother all lived together. The victim's grandmother had custody of the victim because her mother was incarcerated at the time. Eder was at the grandmother's home for a weekly visit preparing for the victim's mother to be released from prison.

about the allegations, and also collected the comforter, as well as a cell phone that depicted nude photographs of the victim.

¶5 After this evidence was collected, Eder, the victim, and her grandmother went to the sheriff's department where the victim was interviewed. After the interview, the victim was taken to the hospital for a sexual assault nurse examination (SANE) conducted by Lauri Munn. Munn testified at trial that the victim told her the day prior to the SANE exam that the victim and Marquardt were watching television when the conversation turned sexual. Marquardt then told the victim to get ready for some pictures, and she went to her bedroom where the nude photographs were taken. Marquardt touched the victim while taking the photographs and then asked if she was ready for sex. The victim said no, but Marquardt then positioned her "with my back curved" and proceeded to have sexual intercourse with her. The victim stated Marquardt kept saying, "[B]aby I'm going to [come]." Marquardt then ejaculated on the victim's buttocks. The victim told Munn that Marquardt was also "sucking on my tit and fingering me." Munn took swabs of the left breast nipple, labia, vagina, cervix, and gluteus.

¶6 The swabs were submitted for DNA analysis to the State Crime Laboratory. Analysis of a swab from the victim's left breast nipple showed that saliva from Marquardt was present on the breast. Analysis of the gluteal and labia swabs showed the presence of DNA that matched Marquardt's.

¶7 An arrest warrant was issued. When the sheriff's department attempted to execute the warrant, Marquardt "took off running" out the back door and hid in the woods for a night. When he turned himself in the next day, he was interviewed and denied any sexual contact with the victim. Marquardt was

charged with three counts of sexual assault of a child under age sixteen and one count of sexual exploitation of a child.

¶8 At the preliminary hearing, the victim was called to testify but was so distraught she turned pale and stated, "I'm going to pass out." She had to be physically carried out of the courtroom, and after the circuit court took a recess to have her attended to, she was unable to go forward. Due to the victim's unavailability, Eder testified the victim told her she was in a sexual relationship with Marquardt, and that the most recent occurrence of intercourse was the day prior to the victim's statement to Eder. The victim also explained to Eder that Marquardt told the victim to get ready for some pictures, whereupon he took nude photographs of the victim and had sexual intercourse with her. Marquardt was bound over for trial over his counsel's objection to the admission of hearsay testimony.[3]

¶9 At trial, the victim's recorded sheriff's department interview was played for the jury, with the transcript sealed by the circuit court. After the recording was played, the State called the victim to testify through closed circuit television from the law library located approximately fifty feet from the courtroom. However, the victim almost immediately left the room where the closed circuit television was located. The circuit court determined that because of the victim's delicate condition, questions would be directed through Eder to the victim. The victim then returned to the law library and testified on direct

[3] At the time Marquardt was charged, most hearsay was prohibited at preliminary hearings. On April 12, 2012, WIS. STAT. § 970.038 (2015-16), made hearsay admissible at preliminary hearings and authorized courts to find probable cause based on hearsay evidence. *See* ***State v. Hull***, 2015 WI App 46, ¶6, 363 Wis. 2d 603, 867 N.W.2d 419. References to Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

examination via closed circuit television that the recorded statement was truthful and that she was traumatized by the events to the point of having nightmares every night. She also testified that Marquardt made her watch pornography "before this started."

¶10 During cross-examination, the defense questioned the victim about her statement that Marquardt forced her to watch pornography. The defense established that she was not restrained in any way and also that she could not remember what day this event occurred. The victim testified she had sex with Marquardt seven times; three times on the first occasion and four times on the second day it occurred, but she was unable to remember specific dates. She also testified Marquardt took four nude photographs of her when the first assault occurred, but those photos were deleted from her phone. Marquardt then took four more nude photographs of her the day prior to her recorded statement with police.

¶11 The victim became increasingly upset by the questions and it appeared she was having an anxiety attack. The circuit court took a brief recess. The guardian ad litem advised the court the victim was having anger issues because the questioning was causing flashbacks to the events, and asked for some time to speak with the victim in private. After a short break, the court found the victim was under an "exceeding amount of stress" and further cross-examination would be counter-productive to the victim's health and the pursuit of the truth. The court then found the victim unavailable and ended the cross-examination.

¶12 The jury ultimately found Marquardt guilty of two counts: sexual exploitation of a child based upon the taking of the nude photographs and sexual assault based on the sexual intercourse that occurred on that date. The jury

acquitted Marquardt of the other two charges of sexual assault that allegedly occurred on prior dates.

¶13 The circuit court denied Marquardt's postconviction motion. Marquardt appealed, but before the State filed its brief, Marquardt sought dismissal to seek a new trial based on a recent recantation by the victim. At a hearing on the motion, the victim testified her original allegations were true and her mother had coached her to recant. The court denied the new trial motion on the grounds that the victim had testified under oath and in open court that her recantation was untruthful. Marquardt again appealed, and after the State filed its brief, Marquardt again moved to voluntarily dismiss the appeal so as to re-litigate whether the victim had recanted. The appeal was dismissed, and the circuit court denied Marquardt's motion for a new trial after a hearing. This appeal follows.

DISCUSSION

1. Hearsay testimony admitted at preliminary hearing

¶14 Marquardt first argues the circuit court erred by admitting hearsay testimony during the preliminary hearing. However, a defendant who claims error occurred at his or her preliminary hearing may only obtain relief before trial. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Any perceived errors at the preliminary hearing were cured by Marquardt's trial. *See* ***State v. Noll***, 160 Wis. 2d 642, 645, 467 N.W.2d 116 (1991).

2. Denial of right of confrontation at trial

¶15 Marquardt next contends the circuit court should have granted a mistrial, sua sponte, when the court cut short his cross-examination of the victim. We do not discern Marquardt to be challenging the court's decision to admit the

audiovisual recording of the sheriff department's interview. Rather, Marquardt argues that once cross-examination was terminated, the court should have declared a mistrial because there was no applicable hearsay exception to admit the recorded interview absent full cross-examination and confrontation of the victim regarding her credibility.

¶16 However, the circuit court did not admit the recorded statement under a hearsay exception. The court determined that pursuant to WIS. STAT. § 908.08(4) the interests of justice warranted the admission of the recording because the victim was only fifteen years old and she had diminished capacity due to mental illness or infirmity. The court considered other proper factors, including that the admission of the recording would reduce the mental and emotional strain of testifying and reduce the number of times the child would be required to testify. The court also specifically noted it had observed the victim testifying at the preliminary hearing, "and she literally had to be carried out of the courtroom, and was unable to provide testimony under the pressure of being in the courtroom under the watchful eye of observers." The victim was then made available under § 908.08(5) for cross-examination via closed-circuit television from the law library located less than fifty feet from the courtroom. We reject Marquardt's contention the court should have sua sponte ordered a mistrial under these circumstances.

¶17 Marquardt lists six areas of examination he claims he was impermissibly prevented from addressing during the victim's cross-examination,

all of which Marquardt insists would have emphasized her lack of credibility.[4] A circuit court's decision to limit cross-examination in the context of a constitutional challenge is reviewed for an erroneous exercise of discretion. *See* ***State v. Rhodes***, 2011 WI 73, ¶¶22-23, 336 Wis. 2d 64, 799 N.W.2d 850. "Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985).

¶18 Review of the record reveals Marquardt was given the opportunity for effective cross-examination. He was able to establish the victim was not restrained when she claimed Marquardt forced her to watch pornography. Marquardt highlighted a number of discrepancies in the victim's testimony and her lack of clear recollection as to the dates and times of events. The defense also questioned the victim about her general relationship with Marquardt, as well as her recorded statement. The victim stated she only told one person about the events before she gave the statement, but she refused to identify the person, stating she was scared, crying, and shaking when she told what Marquardt had done. She was so traumatized she had a hard time recalling details.

¶19 The victim testified she had sex with Marquardt seven times, but she was unable to remember specific dates. She also testified under cross-examination concerning the nude photographs. However, defense counsel's questions were

[4] At the postconviction hearing, Marquardt's trial counsel testified that had full cross-examination been allowed he would have delved into the following six areas: (1) details about the separate accusations of sexual relations the victim claimed had taken place with Marquardt; (2) details that were lacking from the video testimony; (3) other discrepancies in the victim's accusations; (4) questions regarding the victim's memories of other sexual encounters that were not part of the accusations against Marquardt; (5) testing the victim's memory regarding the timing of each accusation; and (6) general prior inconsistent statements.

often confusing to the victim. When counsel asked her about the sex acts, she became defensive and asked, "Why is he asking like it was consensual. Well, it wasn't. I'm the child. He's responsible. It was not consensual." Counsel continued to phrase questions in the form of when "you had sex with Dan," which made the victim increasingly upset, and she became unresponsive. She stated she was "[t]ired of the pain," and it was hard to live with what Marquardt had done to her. She also questioned if defense counsel knew "how people feel when things like that happen to them." After the victim became non-responsive, the court took a break and the guardian ad litem advised the victim was having anger issues because the questioning was causing flashbacks.

¶20 Marquardt was given adequate opportunity on cross-examination to test the reliability of the victim's statements, and the jury was able to assess the victim's demeanor and credibility. After observing over a period of time the trauma inflicted by the judicial process, the circuit court concluded, "[I]t is apparent to this Court that to proceed any further with this young lady's testimony would be counter-productive to her health and not productive for finding the truth of the matters that need to be found." The court appropriately weighed the emotional trauma of the judicial process against the remaining areas that Marquardt claims were necessary to pursue on cross-examination and properly exercised its discretion by limiting the cross-examination.

¶21 Moreover, any limitation on Marquardt's cross-examination was harmless. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. The DNA evidence was overwhelming and it clearly tied Marquardt to the victim's allegations related to sexual assault occurring on the day the nude photographs were taken. The jury acquitted Marquardt of all other charges. Further attacks on the victim's credibility, no matter how artful, would

not change the fact that Marquardt's DNA was found on the victim's breast, buttocks and labia. There is no reasonable basis to believe that Marquardt would not have been convicted if allowed to continue with the cross-examination of the victim. *See* ***id.*** Accordingly, even if we could somehow assume the decision to limit cross-examination was erroneous, it was harmless.

3. Admission of photographs

¶22 Marquardt also argues the circuit court erred by admitting the nude photographs because the State did not establish by expert testimony how the photographs were extracted from the victim's cell phone. Marquardt also complains this lack of expert testimony made it impossible for him to prove there was a timer on the phone to show the victim could have taken the photos herself. During the examination of officer Samardich, the court admitted two physical photographs as well as the victim's phone containing the digital photographs. The physical photographs were admitted as demonstrative evidence, which is used to illustrate or amplify a witness's testimony. *See* ***State v. Denton***, 2009 WI App 78, ¶11 n.6, 319 Wis. 2d 718, 768 N.W.2d 250. The foundation for authentication and relevance was satisfied by officer Samardich's testimony that the physical photographs were a true and accurate depiction of what he observed on the victim's phone. *See* ***Simpson v. State***, 83 Wis. 2d 494, 504, 266 N.W.2d 270 (1978). He also testified he had the physical photographs produced from the digital photograph on the cell phone. No further foundation for admission of the photographs was required, and the court properly admitted the physical photographs for demonstrative purposes. If Marquardt wished to raise the possibility of the victim photographing herself using a timer, he could have called an expert witness to testify about the phone's capabilities.

4. Prosecutor vouching for victim credibility in closing

¶23 Marquardt also argues the prosecutor improperly vouched for the victim's credibility during closing arguments. When a defendant alleges a prosecutor's closing argument constituted misconduct, the test applied is whether the closing argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115.

¶24 Here, the victim's mother testified at trial that she had a conversation with the victim concerning how Marquardt's saliva "might have gotten on her breast." The mother testified the victim said "something about putting her boob in his mouth when he was sleeping …." The prosecutor argued in closing that this was an "outrageous explanation." He then argued that the victim was telling the truth based upon the DNA analysis from the victim's left breast nipple, as well as the gluteal and labia swabs showing the presence of Marquardt's DNA. This argument derived from the evidence at trial, and there was no suggestion that the jury consider factors other than the evidence. The prosecutor did not improperly vouch for the victim's credibility, and the closing argument did not infect the trial with unfairness.

5. New trial in the interests of justice

¶25 Finally, Marquardt argues this court should use its discretionary power to order a new trial in the interests of justice. He contends that the real controversy has not been tried, or that it is probable that justice was miscarried. *See* WIS. STAT. § 752.35.

¶26 Marquardt insists the real controversy was not tried because the jury was not able to hear the victim's recantation. However, the victim's recantation after trial was not corroborated. In fact, the victim testified under oath at the postconviction hearing that her recantation was not truthful and her mother told her, "you need to recant your story, because it's the only way to get him out." The court properly concluded there was a "huge difference" between the uncorroborated recantation and the victim's subsequent testimony under oath, which the court found was "credible, clear and convincing." Marquardt is not entitled to a new trial.

By the Court.—Judgment and order affirmed.

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