COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1753-CR **Cir. Ct. No. 2012CF111**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VALENTIN R. SANCHEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Valentin Sanchez appeals a judgment convicting him of three counts of first-degree sexual assault of a child under the age of twelve. Sanchez first argues the circuit court violated his right to present a defense and erroneously exercised its discretion by denying his motion to admit

evidence of the child-victim's alternative basis for her knowledge of the type of sexual contact alleged in the complaint. Second, he contends the court again erroneously exercised its discretion in denying his motion for a mistrial when one of his witnesses testified on cross-examination that Sanchez was incarcerated prior to trial. Finally, Sanchez asserts he is entitled to a new trial in the interests of justice. We conclude the circuit court properly exercised its discretion with regard to the first two issues and a new trial in the interest of justice is not warranted. We therefore affirm the judgment.

BACKGROUND

¶2 The State charged Sanchez with repeated sexual assault of a child, Ellie, who was born in May 2003.[1] An amended Information alleged Sanchez sexually assaulted Ellie on three occasions: May 1, 2010; November 1, 2011; and between April 22 and 30, 2012.

¶3 The complaint alleged Ellie told Karin, and Ellie's younger sister, Lucy, that Sanchez was "sticking his privates in her butthole" and that he first did so about two years ago while she was at his residence. Ellie made a statement to the police that Sanchez did this at his residence and in the basement of her house. She stated he would sometimes "bend[] her over," have her "lay[] on her back with her legs up," and have her stand "in front of [him] and … bend[] [her] over in front of him" during these incidents. Ellie also described an instance where Sanchez "put his private in her private hole where she pees …." Ellie further

[1] We refer to the victim, her sister, and her mother using pseudonyms, pursuant to the policy of protecting the privacy and dignity interests of crime victims. *See* WIS. STAT. RULE 809.86 (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

stated "that it hurts really badly and … a couple of times she screamed really loudly …." The complaint alleged that a medical examiner discovered bruising consistent with anal penetration.

¶4 Sanchez filed a motion in limine to admit evidence that Ellie had an alternative basis for knowing about the type of sexual contact alleged in the complaint because she purportedly observed Karin engaging in similar acts of sexual intercourse. Melinda Schultz and her seventeen-year-old daughter, Alana, testified at the hearing on the motion. Schultz dated Sanchez for over ten years and lived with him for a number of years prior to and during the alleged assaults. Schultz, Sanchez, Karin, and their families were previously close with each other, as Karin was in a long-term relationship with Sanchez's brother, Bathuel Sanchez, prior to when the assaults allegedly occurred. Ellie and Lucy frequently visited Sanchez and Schultz's residence.

¶5 At the hearing, Schultz testified about a conversation she had with Lucy and Ellie during a visit about "a year and a half" before Sanchez was arrested. A man named Arturo was living with Karin, her daughters, and Bathuel at that time. While Schultz was cooking in her kitchen with Alana and Sanchez, Schultz testified that the girls entered her kitchen and

> [Lucy] looked at me and said Mindy, I heard some noises like somebody was being hurt, and I came out of my room; and I went to the staircase, and I seed [sic] my mom and Arturo [ ] naked, standing on the staircase; and Arturo was taking his privates and smashing them into my mom's butt, and she was screaming.

Schultz asked Ellie if she also saw what Lucy described, to which Ellie said "yes" while making what Schultz described as a "nervous" facial expression. Alana testified that Lucy said "he [Arturo] was taking his private parts and putting it in

her [Karin's] butt." Alana also testified that Lucy appeared "scared," but she could not recall Ellie's expression, only that she "just agreed" with Lucy's statement. Neither Schultz nor Alana testified that they personally observed the staircase incident. They testified they never told anyone else about the incident until they reported it to police on the date Sanchez was arrested.

¶6 Karin also testified at the motion hearing. She denied that she ever had a physical relationship with Arturo or that her children ever witnessed any contact of the nature they described. Ellie, Lucy, and Arturo did not testify at the hearing.

¶7 The circuit court denied admission of Sanchez's requested alternative-knowledge evidence regarding the alleged staircase incident. In its oral decision, the court first determined WIS. STAT. § 972.11, also known as the "rape shield" statute, did not apply because Sanchez did not seek to admit evidence that Ellie engaged in sexual contact. Although the court determined the testimony about the staircase incident was relevant as to Ellie's knowledge about sexual contact, it concluded that any probative value was "significantly diminished" by the potential for undue prejudice. Specifically, the court concluded that the alleged staircase incident was not similar in nature to the alleged acts in the complaint, there was "considerable risk that the jury [would] be confused," and the proffered evidence would become the "central object of the trial" if admitted.

¶8 At trial, Ellie testified regarding the charged incidents. The medical expert testified that bruising was discovered around Ellie's anal area consistent with penile penetration. Karin testified that Sanchez admitted to her the allegations were true. A law enforcement officer who investigated the report testified that, as he arrived at Ellie's residence, he observed Karin become visibly

upset after she had a private conversation with Sanchez. An audio recording of a phone call between Schultz and Sanchez was played in which Schultz asked Sanchez if he did "something like this," and Sanchez told her he was sorry and hoped she could forgive him.

¶9 Sanchez testified that the assaults Ellie alleged never occurred. Schultz and Sanchez testified that he was generally never alone with Ellie at any point. Schultz testified that Ellie sustained an injury on a trampoline while at her residence six days before Ellie accused Sanchez. Specifically, Schultz testified that Ellie told Schultz she "broke [her] butt," although she stated that Ellie did not receive medical attention for the injury afterward and that Karin was never told about the incident.

¶10 Bathuel testified that Karin kept pornographic magazines in their residence to which the children had access. He also testified that he and Sanchez worked together at their jobs "all the time" and that they had a similar schedule that kept them both away from their homes for weeks at a time. On cross-examination regarding that topic, the following exchange occurred between the prosecutor and Bathuel:

> Q: The allegations made by [Ellie] against your brother occurred on May 6th, 2012. Where were you on that date?
>
> A: I was in Madison.
>
> Q: Did you testify that your brother had substantially the same schedule as you did?
>
> A: Yes. He couldn't go because he had some problems with gout. He was ill or—now I don't remember now why he couldn't go.
>
> Q: Isn't it true that he wasn't working for the same company as you were back in April and May of 2012?

> A: Yes. He was working about the time that—when this happened, he was working before that.
>
> Q: How soon before?
>
> A: Okay. Before this thing happen, before that he had work with me all—the whole time.
>
> Q: And the question I'm asking you is how long had Valentin not been working with you?
>
> A: All the time that *he*'s *been in jail*. Now that *he's incarcerated*, I don't know how long he's been there.

(Emphasis added.)

¶11 Defense counsel moved to strike that final answer, and circuit court responded that the matter would be taken up outside the jury's presence. After the jury was excused, defense counsel moved for a mistrial regarding Bathuel's statement on Sanchez's "jail" and "incarcerat[ion]." The court denied the motion, determining that neither Bathuel nor his interpreter "highlighted" the statement and that the court "glossed over that quickly" to avoid drawing the jury's attention to the statement. Defense counsel stated he might consider proposing a limiting instruction on this topic, but he did not do so at the final instruction conference.

¶12 The jury found Sanchez guilty of all three counts of first-degree sexual assault. Sanchez now appeals.

DISCUSSION

I. "Alternative Source of Knowledge" Evidence

¶13 Sanchez raises three arguments that the circuit court erred when it denied admission of testimony regarding the alleged staircase incident. First, he claims the court, in excluding Schultz's and Alana's testimony on the subject, improperly held him to a higher legal standard than what WIS. STAT. § 904.03

requires. Second, he claims the court wrongly determined that unfair prejudice substantially outweighed any probative value of the testimony. Finally, Sanchez claims he was unconstitutionally denied his right to present a defense.

¶14 WISCONSIN STAT. § 904.03 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "The term 'substantially' [in § 904.03] indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted." ***State v. Speer***, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). Unfair prejudice may result "if the evidence tends to influence the outcome by improper means … or otherwise causes the jury to base its decision on extraneous considerations." ***State v. Patricia A.M.***, 176 Wis. 2d 542, 554, 500 N.W.2d 289 (1993).

¶15 A circuit court's decision to admit or exclude evidence is generally reviewed under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercised its discretion if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. A court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record. ***Id.***, ¶14. Our review is highly deferential: "The test is not whether [an appellate] court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised." ***Martindale***, 246 Wis. 2d 67, ¶29.

¶16 Sanchez first argues the circuit court in its decision to exclude the testimony regarding the staircase incident improperly relied upon ***State v. Molen***, 231 P.3d 1047 (Idaho Ct. App. 2010) by requiring him to show the sexual conduct about which Schultz and her daughter testified was "similar" to that described in the complaint. The State disagrees, arguing that the court properly applied WIS. STAT. § 904.03, and it could consider the similarity of the two sets of conduct when weighing the probative value of the evidence against any undue prejudice.

¶17 We agree with the State. In ***Molen***, the Idaho Court of Appeals held that evidence regarding sources of a child-victim's sexual knowledge may be relevant to rebut the presumption that an alleged child-victim lacks the knowledge necessary to potentially fabricate the charge.[2] *See* ***Molen***, 231 P.3d at 1052. The defendant in ***Molen*** alleged that the complaining eight-year-old child-witness was frequently exposed "to a constant, graphic, sexually charged lifestyle" and thus had an understanding of sexual conduct. ***Id.*** at 1050. The ***Molen*** court held that, in determining the relevance of evidence regarding an alternative source of a child-victim's sexual knowledge, a court should consider the child's age and the

[2] The Idaho Court of Appeals cited ***State v. Pulizzano***, 155 Wis. 2d 633, 655, 456 N.W.2d 325 (1990), in recognizing that a child-victim's presumed lack of sexual knowledge greatly bolsters the credibility of his or her allegations. *See* ***State v. Molen***, 231 P.3d 1047, 1052 (Idaho Ct. App. 2010). ***Pulizzano*** also held that to admit evidence of a victim's prior sexual conduct as an exception to the WIS. STAT. § 972.11, a defendant must show

> that the prior acts clearly occurred; that the acts closely resembled those of the present case; that the prior act is clearly relevant to a material issue; that the evidence is necessary to the defendant's case; that the probative value of the evidence outweighs its prejudicial effect; and that there was a related pattern of behavior.

Pulizzano, 155 Wis. 2d at 651. Despite vaguely arguing that the circuit court selectively applied the second ***Pulizzano*** test to his case, Sanchez concedes the court did not apply ***Pulizzano*** or the "rape shield" statute here.

similarity between the defendant's alleged acts and the prior sexual activity to which the child-victim was exposed." ***Id.*** at 1052. Regarding similarity, the ***Molen*** court explained:

> Logical relevance turns upon whether the child's prior sexual experience or observation would have enabled the child to describe acts of the particular type that she now ascribes to the defendant. For example, evidence that a child previously had been subjected to digital penetration might not be relevant on a charge of penile penetration. Thus, to be admissible, alternative source evidence must demonstrate the child's experience of or exposure to sexual behavior sufficiently similar to that which the child has described in her allegations against the defendant.

Id. at 1053.

¶18 Here, the circuit court first determined that a complaining witness's source of knowledge of sexual contact is relevant in a sexual assault case.[3] It then explained:

> Part of the analysis … is to consider whether a [WIS. STAT. §] 904.03 analysis—not only as to whether it's relevant but whether the evidence may be excluded because its probative value is substantially outweighed by the danger of unfair prejudice, or the introduction of the evidence would confuse the issues for the jury ….
>
> And that's really the analysis adopted by [***Molen***]. There, the Court focused its analysis on a couple things: The age of the complaining witness, and then the similarity or dissimilarity between the acts for which the—the complaining witness says occurred and the other acts or other observations the witness had.

[3] The circuit court expressly relied upon WIS. STAT. § 904.01 and the concurrence in ***State v. Vonesh***, 135 Wis. 2d 477, 401 N.W.2d 170 (Ct. App. 1986), in reaching this conclusion on relevance. *See* ***id.*** at 492-93 (Gartzke, P.J., concurring).

¶19 We reject Sanchez's argument that the circuit court imposed an improper "similarity" threshold on the relevancy analysis. Although the circuit court referenced ***Molen***'s reasoning regarding relevance, the court clearly considered and incorporated the similarity of observed conduct into its WIS. STAT. § 904.03 analysis regarding undue prejudice. Sanchez asserts "[t]here is ample authority in Wisconsin *not* requiring courts to examine" the similarity of conduct in cases when the rape shield statute is not implicated. However, the "ample authority" he cites does not involve application of § 904.03 to sexually-related conduct falling outside WIS. STAT. § 972.11(2).[4] While Ellie's knowledge of sexual contact may be relevant in this case, it does not follow that all evidence of such knowledge must be admitted under § 904.03 once relevancy is determined.

¶20 Sanchez next asserts the circuit court improperly determined the probative value of the proposed testimony regarding the staircase incident was outweighed substantially by the danger of confusion of the issues. Sanchez asserts the proposed testimony on the alleged staircase incident was highly probative and, therefore, at least equal to any danger of undue prejudice. He then argues both Schultz's testimony and the complaint generally described anal penetration and screaming, which he considers "strikingly similar" to what Lucy told Schultz and what Ellie affirmed she also saw, creating a basis for which Ellie could comprehend—and presumably feign accusations of—Sanchez's alleged conduct.

[4] The "ample authority" Sanchez cited consists of only two cases. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 731-32 499 N.W.2d 641 (1993) (testimony of complaining child-witness's friend regarding whether she may have discussed her sexual past with child-witness was admissible under WIS. STAT. § 901.06 to the extent the friend only testified about her own personal experiences); ***Vonesh***, 135 Wis. 2d at 488-90 (addressing whether complaining child-witness's writings about sexual desires qualified as "sexual conduct" under the terms of WIS. STAT. § 972.11(2)).

¶21 The circuit court properly disagreed. While the court determined the evidence was relevant, it observed that

> [t]he detail for which the child presented the evidence compared to the proffered evidence of other knowledge, is so dissimilar and so dramatically different, both in the positioning of the child witness, positioning of the female participant in the sexual contact, time of the day, the location, the various positions, the pain, the confusion between anal and vaginal intercourse, and the frequency, I'm satisfied that those differences are so significantly varying such that the evidence becomes too confusing and will only confuse the jury … from the ultimate fact that needs to be [decided] here.

¶22 The circuit court determined the dissimilarities could cause undue prejudice. It was unconvinced, based upon its review of the evidence, that the jury could have been able to infer the particular characteristics described in the complaint could have been learned from witnessing the staircase incident. *See supra* ¶3. In the court's view, this evidence of Ellie's purported alternative basis for knowledge of sexual conduct also could invite the jury to speculate on why else the evidence was presented.

¶23 The circuit court, however, did not stop at these dissimilarities. Continuing its WIS. STAT. § 904.03 analysis, the court then determined there was a "considerable risk" the alleged staircase incident could overtake the sexual assault allegations and become "the central object of the trial." Sanchez asserts that conclusion was erroneous because the court improperly "relied on Karin's assertion that the described acts never occurred" and usurped the jury's function to determine the credibility of the witnesses. The court did no such thing. Instead, it recognized a considerable credibility dispute surrounded the proposed testimony. The court noted Karin testified at the motion hearing "so emphatically that the … intercourse that the child purportedly observed did not occur." It also observed

neither Schultz—in a relationship with Sanchez at that time—nor her daughter Alana personally observed the alleged staircase incident, having only been informed of it second hand by Lucy. Accordingly, the jury would have had to determine which account was more credible, causing distraction from the pertinent issues and a probable trial within a trial.

¶24 For the above reasons, we conclude the circuit court did not erroneously determine that "confusion of the issues" under WIS. STAT. § 904.03 could result if the source of alternate knowledge testimony was presented at trial. *See* ***Patricia A.M.***, 176 Wis. 2d at 554. Sanchez's proposed evidence would essentially require the court to conduct a trial within a trial on whether the staircase incident even occurred, and also whether Ellie did in fact observe it, before the jury could even begin to consider whether that testimony could establish an inference of Ellie's sexual knowledge. In light of these considerations, the proposed evidence's significance and reliability regarding the ultimate issue—did Sanchez sexually assault Ellie—would have been disproportionate to the predictably large amount of attention it would receive at trial. The court reasonably determined the testimony could mislead the jury into believing the occurrence on the staircase governed the outcome of the trial. That result would create undue prejudice which substantially outweighed any probative value of the proposed testimony. *See* ***id.*** We thus conclude the circuit court properly exercised its discretion when it denied admission of the testimony from Schultz and Alana regarding the alleged staircase incident.

II. Constitutional Right to Present a Defense

¶25 Sanchez argues the circuit court denied him his constitutional right to present a meaningful defense by excluding evidence regarding the alleged

staircase incident. Whether any evidentiary ruling implicates a defendant's constitutional right to present a defense is a question of "constitutional fact" reviewed de novo. *See* ***Michael R.B. v. State***, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993). Due process grants criminal defendants "the right to admit favorable testimony." ***State v. Pulizzano***, 155 Wis. 2d 633, 645-46, 456 N.W.2d 325 (1990) (citing ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973)). "The right to present evidence is not absolute …. Confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect." ***Id.*** at 646. Here, the court excluded the testimony because it was unduly prejudicial, and we therefore reject Sanchez's constitutional claim on that basis.

¶26 Sanchez still had his defense at trial that he did not sexually assault Ellie even without the evidence regarding the staircase incident. Sanchez presented testimony that Ellie was never assaulted, having sustained an unrelated injury on a trampoline that could potentially match what the medical examiner reported. He also presented evidence that Ellie gained knowledge of sexual conduct from pornography Karin kept in her residence and had reason to fabricate the incidents. The fact that the latter testimony was, in Sanchez's view, not as powerful evidence as the alleged staircase incident forming an alternative basis for the victim's knowledge does not mean he was denied any constitutional rights.

III. Motion for Mistrial

¶27 Sanchez next contends the circuit court erred by denying him a mistrial because Bathuel's testimony about Sanchez's pretrial incarceration was irrelevant and highly prejudicial. Sanchez draws an analogy between Bathuel's statement and a defendant who wears identifiable prison clothing at trial. *See*

State v. Clifton, 150 Wis. 2d 673, 679, 443 N.W.2d 26 (Ct. App. 1989). He argues that the State gratuitously "pushed" Bathuel on cross-examination into making the jury aware Sanchez was incarcerated prior to trial and that the mention of "jail" or "incarceration" similarly impaired his presumption of innocence.

¶28 When a circuit court is presented with a motion for mistrial, and the claimed error is not structural, the court must "determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). We review a denial of a mistrial for erroneous exercise of discretion. ***Id.***

¶29 We reject Sanchez's argument. First, the record does not support Sanchez's assertion that the State purposely "pushed" Bathuel into telling the jury that Sanchez was incarcerated. *See supra* ¶10. Bathuel made a broad claim that Sanchez was with him "all the time" when they traveled outside of town because of their jobs and that the work trips would occur for weeks at a time. The State's line of questioning was clearly directed at whether Bathuel could confirm Sanchez's whereabouts at the times the assaults allegedly occurred.

¶30 In his reply brief, Sanchez criticizes the State for inartfully phrasing the question that elicited Bathuel's response on "jail," claiming that the State should have reasonably known Bathuel could have given an answer reflecting Sanchez was in jail after the complaint was filed. However, Bathuel revealed Sanchez was incarcerated without any direct questions from the State on the topic. The State cannot be held responsible for Sanchez's own witness offering the fact Sanchez was in jail, which occurred to the surprise of both parties.

¶31 Second, the circuit court reasonably determined the statement was not sufficiently prejudicial because it was not "highlighted" to the jury. Sanchez initially claims the statement "did not have to be emphasized" to cause sufficient prejudice, but he does not explain why this is so.[5] Sanchez additionally asserts the statement was made "noteworthy" because the court stated the matter would be taken up outside the jury's presence after defense counsel made the motion to strike. It is unclear whether Sanchez faults the court for not immediately granting his motion to strike in front of the jury or for causing the statement to be "noteworthy" because the court excused the jury in order to rule on the motion. If it is the former, the court was not required to grant a mistrial once it did not to strike Bathuel's answer. If it is the latter, Sanchez ignores the fact that such motions are appropriately argued and considered outside the presence of the jury, and he cannot base a mistrial motion upon a common and appropriate trial procedure.

¶32 We conclude the court did not erroneously exercise its discretion when it determined Bathuel's statement did not warrant a mistrial. The decision on a motion for mistrial must be made "in light of the whole proceeding." ***Bunch***, 191 Wis. 2d at 506. The court reasonably concluded a single reference to Sanchez's incarceration status during a three-day trial with seven witnesses presented was insufficiently prejudicial to warrant a new trial.

[5] At other points, Sanchez cites the circuit court's order entered prior to trial that he not appear in a prison jumpsuit and shackles, apparently to illustrate the danger posed if the jury found out he was incarcerated. His comparison of Bathuel's statement to jail garb, however, can only carry him so far in regards to any resulting prejudice. It is recognized "that the *constant reminder* of the accused's condition implicit in such distinctive, identifiable [prison] attire may affect a juror's judgment." ***Estelle v. Williams***, 425 U.S. 501, 504-05 (1976) (emphasis added). Bathuel's single remark about jail or incarceration did not rise to the level of a constant reminder.

IV. New Trial in the Interests of Justice

¶33 Sanchez argues he is entitled to a new trial in the interests of justice. Under WIS. STAT. § 752.35, this court may reverse and remand for a new trial if the real controversy has not been fully tried. ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456. Sanchez argues that occurred here, but he merely reiterates his objections to the circuit court's rulings, all of which we have rejected. The real controversy was whether Sanchez sexually assaulted Ellie with respect to each of the charges. That controversy was tried. Our power of discretionary reversal is reserved for "exceptional cases" and "should be exercised sparingly and with great caution." *See* ***id.*** (citations omitted). Sanchez's case falls well short of that standard.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).