COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP213-CR **Cir. Ct. No. 2013CF143**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD R. CARDENAS,

DEFENDANT-APPELLANT.

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

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

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purpose specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Leonard Cardenas appeals a judgment that convicted him of second-degree sexual assault of a child and bail jumping, each as

a repeat offender. Cardenas claims: (1) the evidence was insufficient to support the sexual assault conviction; (2) the State improperly struck the only Hispanic juror from the jury panel; and (3) the circuit court admitted improper rebuttal evidence. For the reasons discussed below, we reject each of these contentions and affirm the judgment of conviction.

Sufficiency of the Evidence

¶2 Cardenas first contends that the evidence was insufficient to support the sexual assault charge because the child did not directly testify that Cardenas had touched one of her "intimate parts," which are defined by statute as "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." WIS. STAT. § 939.22(19), (34) (2015-16).[1]

¶3 When reviewing the sufficiency of the evidence to support a conviction, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. In this context, "we consider all of the evidence produced at trial, including evidence that the defendant challenges as being improperly admitted." ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29.

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

¶4 Here, the child victim testified that, after falling asleep in a bed at her grandparents' house, she awoke to find Cardenas rubbing her back. She stated that Cardenas "worked his way down" to her "privates" and touched her "above" her vagina, under her underwear. The prosecutor asked the child to clarify "What part of your body is there where he was touching you?" She answered "My vagina." When the prosecutor asked the child to draw a circle on an anatomical diagram showing where Cardenas had touched her, the child drew a circle immediately above the juncture of the figure's thighs, in an area the child herself labeled as "private." The child then described where she had drawn the circle as being "above the vagina," where hair grew, and closer to her vagina than to her belly button.

¶5 We are satisfied that a jury could reasonably infer from the victim's testimony and the anatomical drawing that Cardenas had touched the child's pubic mound, without the child actually using the term pubic mound. The jury certainly was not required to draw the alternate, and far less likely, inference that Cardenas advances, that he merely touched the child on her stomach.

Juror Strike

¶6 Cardenas's second claim is that the prosecutor impermissibly used a peremptory challenge to strike the only Hispanic member of the jury panel.

¶7 Notwithstanding the general rule that peremptory strikes may be made for any reason, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986). To succeed on a ***Batson*** claim, a defendant first must make a prima facie case that the prosecutor's peremptory challenge was solely race-based. *See* ***State v. Lamon***, 2003 WI 78, ¶28, 262 Wis. 2d 747, 664 N.W.2d

607. If that showing is made, the burden shifts to the prosecutor to state a race-neutral explanation for the strike. ***Id.***, ¶29. Then, the circuit court must determine whether the defendant has proved purposeful discrimination. ***Id.***, ¶32. "[D]iscriminatory intent is a question of historical fact," subject to the clearly erroneous standard of review unless the circuit court did not have an opportunity to evaluate credibility. ***Id.***, ¶¶45-46.

¶8 Here, the prosecutor asserted that the reason for striking the Hispanic panel member was that the panel member had a friend who had been accused of inappropriate sexual contact. The circuit court, which was present during voir dire and had the parties before it during the challenge, accepted the prosecutor's asserted nondiscriminatory basis for the strike and concluded that there was no ***Batson*** violation.

¶9 The circuit court's finding that there was no purposeful discrimination is not clearly erroneous. During voir dire, the Hispanic panel member disclosed that he had a close high school friend who had been accused of inappropriately touching someone. The high school friend told the panel member that he had a relationship with a minor girl, and that her parents had found out, but they had worked out an agreement that he would stay away from her without involving the police. Based upon the panel member's responses, the prosecutor could reasonably have a non-racial concern that the panel member might be sympathetic to someone having a relationship with a minor or to resolving such matters outside of the justice system.

Rebuttal Evidence

¶10 Cardenas's third claim is that the circuit court erroneously admitted improper rebuttal evidence.

¶11 The sole defense witness, Madison Police Officer Kristin Elliott, testified that when she first interviewed the child about the incident, the child denied that any sexual contact with her vaginal area had occurred. Instead, the child said Cardenas had attempted to unfasten her bra and she had left the bed and gone to sleep on a couch.

¶12 In rebuttal, the State introduced the testimony of Dane County Human Services social worker Jennifer Anderson, who had interviewed the child at Safe Harbor. Anderson testified that, during the interview, the child stated that Cardenas had touched her underneath her underwear on what she called the "upper part" of "her private area." Anderson further testified that, based upon an anatomical drawing the child had labeled, Anderson understood the child to be referring to her pubic mound.

¶13 Assuming without deciding that the circuit court erroneously admitted Anderson's testimony, we conclude that the error was harmless. By Cardenas's own account, the State's rebuttal case "was mainly cumulative" because the child herself had already testified that she had told Anderson that Cardenas had touched her on her private area.

¶14 To the extent that Anderson may have provided inadmissible opinion testimony as to what the child meant by her private area, we conclude that any error in admission was harmless because there was more than sufficient evidence for the jury to draw that conclusion on its own.

By the Court.—Judgment affirmed.

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