COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP839-CR **Cir. Ct. No. 2012CF162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD L. FLEMING,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: LAMONT K. JACOBSON, Judge. *Affirmed.*

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

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

¶1 PER CURIAM. Edward Fleming appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault by sexual contact

with a child under the age of thirteen and causing a child under age thirteen to listen to or view a sexual act. Fleming argues the circuit court erred by admitting other acts evidence and by excluding evidence that the victim had made prior untruthful allegations of sexual assault. Fleming alternatively claims he is entitled to a new trial in the interest of justice. Even if the circuit court erred with respect to these evidentiary rulings, the errors were harmless beyond a reasonable doubt. We also conclude a new trial in the interest of justice is not warranted. Therefore, we affirm the judgment.

BACKGROUND

¶2 The charges against Fleming arose from allegations that, while alone with four-year-old Allison,[1] he performed oral sex on her, masturbated in front of her with his hand on his penis, and ejaculated. Relevant to this appeal, both the State and Fleming filed pretrial motions to admit evidence. The State moved to admit other acts evidence consisting of statements from Sally,[2] who lived with Fleming when Sally was five years old. Sally claimed that approximately thirteen years before the incident with Allison, Fleming exposed himself for a few minutes to Sally and her sister while the two children bathed and, on a second occasion, Fleming kissed Sally's pubic area over her underpants while the two were alone. The State offered Sally's statements as proof of plan, intent and absence of mistake. Over Fleming's objection, Sally's statements were admitted as proof of plan and the circuit court instructed the jury accordingly.

[1] Pursuant to WIS. STAT. RULE 809.86(4) (2015-16), we use a pseudonym instead of the victim's name. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] We again utilize a pseudonym pursuant to WIS. STAT. RULE 809.86(4).

¶3 Fleming moved to admit evidence of prior untruthful allegations of sexual assault purportedly made by Allison. Although Wisconsin's rape shield law, WIS. STAT. § 972.11, generally excludes evidence of a complainant's prior sexual conduct, Fleming argued the allegations fell under the statutory exception to the rape shield law as "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness." *See* WIS. STAT. § 972.11(2)(b)3. Fleming's motion included allegations of sexual assault committed by Allison's father in March 2013 and sometime between August and September 2013; an allegation of sexual assault committed by Allison's aunt on an unknown date; and an allegation of sexual assault committed by a boy with whom Allison attended daycare on an unknown date.[3] The circuit court denied the motion, noting the allegations regarding Allison's father and aunt were "unsubstantiated," not demonstrably false, and Allison and the boy at daycare had engaged in a "you show me yours, I'll show you mine situation." The court concluded Fleming failed to provide sufficient evidence from which a jury could reasonably find Allison had made prior "untruthful" allegations of sexual assault.

¶4 A jury found Fleming guilty of the crimes charged, and the circuit court imposed concurrent sentences resulting in a thirty-year term, consisting of fifteen years' initial confinement and fifteen years' extended supervision. This appeal follows.

[3] Fleming's request to admit an unsubstantiated allegation of sexual assault committed by Allison's father in late summer or early fall of 2009 was withdrawn, as the allegation did not originate with Allison.

DISCUSSION

¶5 Fleming argues the circuit court erroneously exercised its discretion by admitting other acts evidence and by excluding what Fleming deemed to be evidence that Allison had made prior untruthful allegations of sexual assault. The State contends that even if the circuit court erred with respect to these evidentiary rulings, the errors were harmless. We agree.

¶6 The circuit court's discretionary decision whether to admit evidence is subject to the harmless error rule. ***State v. Hunt***, 2014 WI 102, ¶21, 360 Wis. 2d 576, 851 N.W.2d 434. Whether an error is harmless presents a question of law this court reviews de novo. ***Id.*** Error is harmless if the reviewing court can determine beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Neder v. United States***, 527 U.S. 1, 18 (1999); ***State v. Harvey***, 2002 WI 93, ¶¶46-49, 254 Wis. 2d 442, 647 N.W.2d 189. Factors relevant to a harmless error analysis include, but are not limited to: "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." ***Hunt***, 360 Wis. 2d 576, ¶27.

¶7 Fleming submits the jury's guilty verdicts as "evidence that the [circuit] court's error was not harmless." This conclusory assertion is unpersuasive. The State's other acts evidence was brief and did not pervade the trial, as Sally's testimony took up only four transcript pages out of a three-day trial consisting of approximately 281 pages of witness testimony. The prosecutor did not unduly highlight the other acts evidence or improperly argue it in either his closing argument or rebuttal. With respect to the excluded evidence of prior

sexual assault allegations, that evidence would have provided Fleming with only a minimal, if any, basis upon which to challenge Allison's allegations in the present matter.

¶8 In contrast, the overall strength of the State's case—including physical evidence—sharply reduces the significance of both the admitted and excluded evidence. Allison claimed Fleming performed oral sex on her, masturbated in front of her, and ejaculated. The jury heard evidence that after spending the day with Fleming, Allison returned home in a dress stained with Fleming's semen and sperm, thus corroborating her claim that Fleming masturbated. The presence of a semen stain near the collar of Allison's dress was also consistent with her claim that Fleming's ejaculate struck her in the eye. Meanwhile, defense counsel's argument against the import of this evidence—that Fleming's semen somehow got on different locations of Allison's clothes only after Fleming masturbated, by himself, into a basement garbage—would have represented an extraordinary coincidence.

¶9 Additionally, the inside crotch area of Allison's underwear contained amylase, a component of saliva. DNA testing of the amylase revealed a mixture of DNA from Allison (the "major contributor") and at least one other individual (the "minor contributor"). The portion of the DNA mixture coming from the minor contributor contained a "male component." Because the DNA recovered from Allison's underwear fell below the threshold that would support attributing it to a particular person, the DNA analyst could not conclusively determine whether Fleming was the minor contributor. Defense counsel consequently argued to the jury that any man could have been the source of the amylase. Allison's mother, however, testified that the underwear was clean that morning. After spending the day with Fleming, the inside crotch area of the underwear contained amylase and

DNA with a male component, thereby corroborating Allison's claim that Fleming performed oral sex on her.

¶10 Finally, the jury heard evidence that, after he was charged in this case, Fleming fled to California. The jury received a proper instruction on use of a defendant's conduct after being accused of a crime as proof of consciousness of guilt. *See* ***State v. Quiroz***, 2009 WI App 120, ¶18, 320 Wis. 2d 706, 772 N.W.2d 710 (fact of accused's flight is generally admissible against accused as circumstantial evidence of consciousness of guilt). Based on the overwhelming evidence of Fleming's guilt, we conclude that any error in the circuit court's evidentiary rulings was harmless.

¶11 Fleming alternatively seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Fleming asserts that the circuit court's evidentiary rulings, addressed above, warrant a new trial in the interest of justice. Because we have already concluded that any error with respect to those rulings was harmless, a new trial under § 752.35 is not warranted.

By the Court.—Judgment affirmed.

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