COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2206-CR **Cir. Ct. No. 2015CF301**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. STEVENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: THOMAS J. WALSH, 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. Mark Stevens appeals a judgment convicting him of first-degree sexual assault of a child under the age of thirteen, contrary to WIS.

STAT. § 948.02(1)(e) (2015-16).[1] Stevens argues the circuit court erred by admitting the child victim's videotaped interview at the bench trial. We conclude that Stevens has not overcome the presumption that the error, if any, in admitting the video was harmless. Therefore, we affirm the judgment.

BACKGROUND

¶2 The charge in this case arose from allegations involving nearly four-year-old Opal.[2] During a trial to the court, the State's first witness was Amy Dingeldein, a child protection case manager who interviewed Opal two days after the assault. The State played a video of the interview, which included an exchange in which Dingeldein talked with Opal about the "rules" of their talk. Specifically, Dingeldein stated that if Opal did not know an answer, she should not guess; that if Opal heard Dingeldein say "something wrong," Opal should correct her; and that Opal needed to tell the truth. Each "rule" was followed with a question or questions to emphasize the point.

¶3 After their discussion of the "rules," defense counsel objected to the video's admission, arguing it did not appear that Opal appreciated what it meant to tell the truth—a prerequisite under WIS. STAT. § 908.08 for the admission of such evidence. After argument by the State, the circuit court overruled the objection.

¶4 When the video resumed, Dingeldein asked Opal to tell her "why you're here today," and Opal responded: "Because somebody shoved a wiener in

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

[2] Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

my mouth." Opal then identified the "somebody" as Stevens and added that he had been babysitting her and another three-year-old child, Lori.[3] When asked, Opal pointed between the legs of a drawing of a male figure to identify where the "wiener" was. After Dingeldein asked Opal what a wiener does, Opal said that "ladies don't have wieners" and that only boys do.

¶5 The court heard testimony that during an initial interview two days after the assault, Lori did not disclose that anything happened to Opal. The State then played a videotaped interview taken six months after the assault in which Lori recounted that when Stevens was babysitting her and Opal, she saw Stevens put "her pee pee in her" when she "peeked a little bit" while Opal and Stevens were in the bathroom together. At trial, Lori likewise testified that when Stevens was babysitting, "[s]omething happened to [Opal]." Lori continued: "[Stevens] went upstairs. I was waiting downstairs, and [Opal] had to go potty, and [Stevens] had to wipe her butt and he put it in her mouth." When asked what he put in her mouth, Lori responded: "Her pee pee."

¶6 The circuit court heard testimony that on the day after the assault, Opal was at her maternal grandparents' home and her grandmother observed that Opal seemed "very anxious, very unsettled." Opal told her grandmother she "needed to fight the bad monster," and when her grandmother asked her to explain, Opal initially stated "[i]t's really, really bad" and "I can't tell you," but then stated: "[Stevens] put his wiener in my mouth." Shortly thereafter, Opal repeated this claim to her grandfather, then to her mother, and to a deputy sheriff

[3] Because of the sensitive nature of this matter, we use a pseudonym instead of the minor child's name.

who responded to investigate the allegation that day. Opal also repeated the claim to Lori's father, who was dating Opal's mother.

¶7 A number of defense witnesses testified that Stevens did not have a reputation for being attracted to children, and they had never seen him wear a Green Bay Packers shirt and pants, as Opal claimed he wore when he assaulted her. Stevens testified in his own defense and denied Opal's claim. The circuit court found Stevens guilty of the crime charged and ultimately imposed a twenty-one-year sentence consisting of fourteen years' initial confinement and seven years' extended supervision. This appeal follows.

DISCUSSION

¶8 Stevens argues the circuit court erroneously exercised its discretion by admitting Opal's videotaped interview. The State contends that even if the circuit court erred with respect to this evidentiary ruling, the error was harmless. We agree.

¶9 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 that this court reviews de novo. ***Id.*** When, as here, there is a trial to the court, we presume that even if evidence is improperly admitted, the error is harmless unless it clearly appears that, but for the evidence, the court's decision would "probably" have been different. *See* ***Ray v. State***, 33 Wis. 2d 685, 689, 148 N.W.2d 31 (1967). Further, "what might be viewed as a prejudicial error in the receipt of evidence in a jury trial, is reviewed less critically on the question of its prejudicial effect when the trial is to the court." ***Boyles v. State***, 60 Wis. 2d 767, 768, 211 N.W.2d 512 (1973) (per curiam).

¶10 The State argues that because Opal's allegations in the video were, in effect, cumulative to other trial testimony—testimony to which Stevens did not object—admission of the video, even if in error, did not "probably" result in the court's finding Stevens guilty. Stevens counters that because admission of the video preceded the other evidence cited by the State, "we are left to question" whether defense counsel would have objected to what Stevens asserts was hearsay. Stevens, however, appears to acknowledge that, at a minimum, Opal's initial statement to her grandmother could potentially fall under the "excited utterance" exception to hearsay. *See* WIS. STAT. § 908.03(2). In any event, Stevens' speculation about whether his trial counsel would have objected to testimony and whether he would have prevailed on such objections is not sufficient to overcome the presumption that admission of the video at his bench trial was harmless.

By the Court.—Judgment affirmed.

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