COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0663-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DALE E. HERTZFELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dale Hertzfeld appeals from a judgment, entered upon a jury's verdict, convicting him of three counts of first-degree sexual assault of a child. Hertzfeld additionally appeals from the order denying his postconviction motion. Hertzfeld argues that the trial court erred by excluding

evidence of: (1) a witness's criminal conviction; (2) a specific instance of lying by a witness; and (3) a witness's auditory hallucinations. Hertzfeld also argues that the trial court erred by admitting what he claims was inadmissible hearsay by a social worker and a police officer, giving the supplemental jury instruction on agreement despite the jury's claimed deadlock and refusing to order a mistrial. Because we reject Hertzfeld's arguments in substantial part and conclude that any error was harmless, we affirm the judgment.

BACKGROUND

¶2 In January of 1997, Hertzfeld was charged with four counts of first-degree sexual assault of a child—two of the counts involving Emily N. (d.o.b. 07/11/90) and the other two counts involving Emily's sister, Jocelyn Z. (d.o.b. 11/21/88). At trial, the State presented testimony by Lewanne K., the girls' mother. It also presented the testimonies of a police officer and a social worker who had been involved in the investigation of the girls' allegations. In turn, the defense presented testimony to support its theory that Lewanne had encouraged the girls' allegations in retaliation for Hertzfeld's disinterest in pursuing a romantic relationship with her. After a three-day trial, the jury ultimately convicted Hertzfeld of three of the four counts. The trial court denied his postconviction motion and this appeal followed.

ANALYSIS

A. ADMISSIBILITY OF A WITNESS'S PRIOR CRIMINAL CONVICTION

¶3 Hertzfeld argues that the trial court erred by excluding evidence that Lewanne had a prior criminal conviction. Evidence that a witness has been convicted of a crime is admissible to attack the witness's credibility. *See* WIS.

STAT. § 906.09.[1] It is apparent from § 906.09's scheme that whether to allow prior conviction evidence for impeachment purposes is within the trial court's discretion. *See also* ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). We will sustain a trial court's discretionary decision if the court examined the relevant facts, applied the proper legal standard and used a rational process to reach a conclusion that a reasonable judge could reach. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). When deciding whether to admit evidence of prior convictions for impeachment purposes, a trial court "should consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement in the crime, … the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice." ***State v. Kuntz***, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991) (citing Judicial Council Committee Note, 59 Wis. 2d at R181, 207 N.W.2d 822 (1974)).

¶4 Here, Hertzfeld sought to impeach Lewanne's credibility by introducing evidence that Lewanne had a 1987 misdemeanor conviction for

---

[1] Wisconsin Stat. § 906.09 provides, in relevant part:

> (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
>
> (3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

All statutory references are to the 1999-2000 version unless otherwise noted.

"knowingly encouraging [a] female minor to become a delinquent" by permitting sexual conduct between the girl and an adult male. The court denied Hertzfeld's motion, stating:

> What I have here is one misdemeanor that's over a decade old. And if I look at the elements of that offense, there isn't anything in that offense that goes directly to the issue of truthfulness or untruthfulness such as obstructing an officer by giving false information where perjury would or false swearing would.
>
> So given the nature of the charge, the age of the conviction, and the fact that it's a misdemeanor, I am not going to allow that to be used for impeachment purposes.

The trial court considered the proper factors in assessing the admissibility of Lewanne's prior conviction. We therefore conclude that it reasonably exercised its discretion by denying Hertzfeld's motion to admit evidence of Lewanne's conviction for the purpose of impeaching her credibility.

B. EVIDENCE OF A SPECIFIC INSTANCE OF LYING

¶5 Hertzfeld also argues that the trial court erred by excluding evidence of an alleged instance of lying by Lewanne. Hertzfeld contends that in May of 1996, Lewanne put her children in foster care before undergoing inpatient mental health care. During the foster home placement process, Lewanne allegedly represented to social services that she did not know where the girls' fathers were, although Jocelyn's father lived in the house next door to her at the time. At trial, Hertzfeld sought to introduce evidence of this specific instance of lying to impeach Lewanne's credibility. The trial court denied Hertzfeld's motion indicating that there was no nexus between the purported lie and the relevant issues of the case.

¶6 Specific instances of lying by a witness may be inquired into during cross-examination of that witness. *See* WIS. STAT. § 906.08(2).[2] Further, it makes no difference whether a question about a specific instance is collateral to the main issues of the case. Our supreme court has held that:

> The proper standard for the test of relevancy on cross-examination is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony.

Rogers v. State, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). However, we need not decide whether the trial court erred by precluding cross-examination of Lewanne about her alleged lie because even if it was an error, it was harmless.

¶7 The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction." ***Sullivan***, 216 Wis. 2d at 792. "The conviction must be reversed unless the court is certain the error did not influence the jury." ***Id.*** We conclude that the proffered question, even if answered, would have had only minimal probative value in showing a tendency to

[2] WISCONSIN STAT. § 906.08(2) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

lie.[3] The impact of the alleged lie in this instance is diminished by consideration of the context in which it was made—the misrepresentation was made as Lewanne sought mental health care. A single question to Lewanne about whether she had lied about the whereabouts of Jocelyn's father could not reasonably have made a difference in the jury's verdicts, especially where, as here, Lewanne was not even an eyewitness to the sexual conduct. Thus, we conclude that any error in precluding cross-examination of Lewanne about her alleged lie was harmless.

C. EVIDENCE OF AUDITORY HALLUCINATIONS

¶8 Hertzfeld argues that the trial court erred by excluding evidence that Lewanne had auditory hallucinations. Prior to trial, Hertzfeld sought to examine Lewanne's mental health records. The trial court undertook an *in camera* review of Lewanne's mental health records and ultimately released one page of those records to the parties.[4] At trial, Hertzfeld sought to cross-examine Lewanne

[3] We note that if, on cross-examination, Lewanne had denied lying, Hertzfeld would have been unable to refute her answer with extrinsic evidence, such as other witnesses. He would have been bound to accept her answer. *See* ***McClelland v. State***, 84 Wis. 2d 145, 159-60, 267 N.W.2d 843 (1978).

[4] In conducting an *in camera* inspection of medical records, the circuit court must determine whether the records contain any relevant information that is "material to the defense of the accused." ***State v. Solberg***, 211 Wis. 2d 372, 386, 564 N.W.2d 775 (1997). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***State v. Mainiero***, 189 Wis. 2d 80, 88, 525 N.W.2d 304 (Ct. App. 1994). If the patient consents to disclosure, relevant information material to the defense should be disclosed. ***Solberg***, 211 Wis. 2d at 387. If the records do not contain relevant information material to the defense, "the circuit court must not disclose the records or any information therefrom to the defendant." ***Id.***

Both parties urge this court to independently undertake an *in camera* review of Lewanne's medical records. After conducting our own *in camera* review, we are unable to conclude that the trial court erroneously exercised its discretion when it decided to release only one page of the records. We conclude that the remaining records contain no additional relevant information material to the defense.

regarding an excerpt from that page. Outside the jury's presence, the trial court read the following into the record:

> [Lewanne] acknowledges hearing multiple voices, including her mother's voice, minister's voice, and a teenager's voice.
>
> She is a poor historian and states that time concepts are all jumbled up in her mind, and she has difficult knowing what she did, what with whom, particularly in regard to past-psychiatric treatment and counseling.
>
> The patient's memory, therefore, is sketchy, spotty, vague, and imprecise. The patient … appears to be motivated for treatment.

The court barred Hertzfeld from cross-examining Lewanne about her auditory hallucinations. On cross-examination, Lewanne did not dispute telling her doctor that "time concepts are all jumbled up in [her] mind" and that she has "difficulty knowing when [she] did what with whom."

¶9 Our supreme court has recognized that:

> Evidence of mental disorder or impairment may be relevant as affecting the credibility of a witness when it shows that his mental disorganization in some way impaired his capacity to observe the event at the time of its occurrence, to communicate his observations accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime.

Chapin v. State, 78 Wis. 2d 346, 355-56, 254 N.W.2d 286 (1977). Following an *in camera* review, a trial court's findings of fact as to whether a witness's mental health information is material or relevant are reviewed under the clearly erroneous standard. *See* ***State v. Mainiero***, 189 Wis. 2d 80, 88, 525 N.W.2d 304 (Ct. App. 1994).

¶10 Here, in denying Hertzfeld's request to cross-examine Lewanne about her auditory hallucinations, the trial court stated:

> I don't know that just because one hears voices means that they can't perceive the truth or accurately relay the truth. It simply means that they hear voices.
>
> …
>
> There is nothing in here to indicate that once [Lewanne] hears the voices she believes them or that they in any way influence her to act or they in any way impact her ability to perceive reality.

The court additionally noted: "the danger of unfair prejudice is vast if I allow cross-examination on the issue without there being any indication whatsoever that it impacts either the ability to perceive or recall." Because the trial court considered the proper factors in determining that Lewanne's auditory hallucinations were not relevant to her credibility, we conclude that the court did not err by precluding Hertzfeld from cross-examining Lewanne about them.

¶11 Even, however, were we to determine that the trial court erred, we conclude that any error was harmless. The jury had an adequate opportunity to otherwise assess Lewanne's credibility, as she acknowledged her difficulty with time concepts and knowing what she did with whom. Further, as noted above, given the collateral nature of Lewanne's testimony, we conclude that any minimal probative value of her auditory hallucinations could not reasonably have made a difference in the jury's verdicts.

D. HEARSAY STATEMENTS

¶12 Hertzfeld argues that the trial court erred by admitting what he claims was inadmissible hearsay by a social worker and a police officer. At trial, the State sought to introduce the testimonies of social worker Stephanie Reilly and

Wausau Detective Lisa Rennie regarding their interviews with Emily and Jocelyn. Hertzfeld objected on the grounds of hearsay, confrontation and cumulativeness. The trial court overruled Hertzfeld's objection and admitted the evidence as prior consistent statements pursuant to WIS. STAT. § 908.01(4)(a)2. Section 908.01(4)(a)2 provides that a prior consistent statement of a witness is not hearsay if: (1) the declarant testifies at trial and is subject to cross-examination; (2) the statement is consistent with the declarant's testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See also* ***State v. Ansani***, 223 Wis. 2d 39, 52, 588 N.W.2d 321 (Ct. App. 1998).

¶13 On January 20, 1997, the day Lewanne reported Emily's allegations of sexual abuse to social services, Reilly and Rennie interviewed Emily, and then Jocelyn, about the alleged abuse. At trial, both Reilly and Rennie recounted their interviews with the girls. It is undisputed that that the declarants, Emily and Jocelyn, testified and were subject to cross-examination at trial. Additionally, Hertzfeld cannot dispute that the bulk of the proffered statements were consistent with the declarants' testimonies. Hertzfeld argues, however, that the proffered statements were not offered to rebut a charge of *recent* fabrication and further, that parts of Reilly's and Rennie's testimony were inconsistent with the children's testimony. Specifically, Hertzfeld takes issue with the following statements, characterizing them as inadmissible hearsay: (1) that Jocelyn stated Hertzfeld would ask her "whether it hurt or whether she liked it,"; (2) that Jocelyn stated Hertzfeld asked her if it was okay if a friend watched them; (3) that Jocelyn stated the sexual contact was okay as long as it felt okay and did not hurt; and (4) that Emily stated "[t]ell Hertzfeld never to touch me again."

¶14 With regard to Hertzfeld's contention that the statements were not offered to rebut a charge of recent fabrication, we are not persuaded. Defense counsel indicated at trial that the defense's position was that the girls were coached and their testimony was fabricated. To that end, defense counsel conceded cross-examining Emily and Jocelyn about their recent contact with the prosecutor in an attempt to suggest that they had been coached during that meeting. We therefore conclude that the statements were offered to rebut a charge of recent fabrication. *See* ***State v. Mares***, 149 Wis. 2d 519, 527, 439 N.W.2d 146 (Ct. App. 1989) (defendant's cross-examination of victim witnesses regarding 'collaboration' with prosecutor implied recent fabrication and improper influence).

¶15 With respect to the claimed inconsistent statements, we conclude, without deciding, that the error, if any, in admitting these statements was harmless. As the State noted, the claimed inconsistent statements represent minute excerpts of the girls' accounts to Reilly and Rennie, while the bulk of Reilly's and Rennie's testimony were admissible as prior consistent statements. There is no reasonable possibility that exclusion of these particular statements would have affected the verdicts. *See* ***Sullivan***, 216 Wis. 2d at 792.

E. THE SUPPLEMENTAL JURY INSTRUCTION AND MISTRIAL

¶16 Hertzfeld contends that the trial court erred by giving the supplemental jury instruction on agreement, despite the jury's claimed deadlock. Hertzfeld additionally argues that the trial court erred by failing to declare a mistrial. We are not persuaded.

¶17 The case was submitted to the jury for deliberation, during which time the jury sent a number of notes to the court. First, they requested the exhibits. After consulting with the parties, the court rejected the jury's request for

exhibits. After a few hours, the jurors then sent a note to the court asking, "What if we cannot come to a unanimous decision?" The court sent a written reply stating, "You should continue to make a reasonable effort to reach an agreement." Later, the jurors sent another note, this time asking, "Must not guilty be a unanimously-agreed upon vote?" The court indicated it would answer the juror's question, though the record does not reflect its response. After approximately five hours of deliberation, the juror's sent a final note to the court stating, "Judge Grau, this is where we are, and no one is going to change their mind." The note listed each charge and what the current vote was; however, the court did not disclose the vote count to the parties.[5]

¶18 The court brought the jury back into the courtroom and gave them the following supplemental instruction on agreement:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues. You are not going to be made to agree, nor are you going to be kept out until you do agree.
>
> It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate, they should be open-minded, they should listen to the argument of others and talk matters over freely and fairly, and make

[5] At the hearing on Hertzfeld's postconviction motion, the court revealed the contents of the jury's note:

> Judge Grau,
>
> This is where we are and no one is going to change their mind.
>
> | | Guilty | Not Guilty |
> |---|---|---|
> | Charge 1: | 3 | 9 |
> | Charge 2: | 2 | 10 |
> | Charge 3: | 3 | 9 |
> | Charge 4: | 8 | 4 |
>
> [Foreperson]

> an honest effort to come to a conclusion on all of the issues presented to them.
>
> So you will please retire to the jury room to deliberate.

See WIS JI—CRIMINAL 520.[6] Hertzfeld now argues that the court's supplemental instruction coerced the jury to return a verdict. We disagree.

¶19 Our supreme court has consistently held that this supplemental instruction is not coercive on its face. *See* ***Quarles v. State***, 70 Wis. 2d 87, 89, 233 N.W.2d 401 (1975). Here, Hertzfeld nevertheless contends that the instruction was coercive in light of the jury's numerical division. The trial court, however, never solicited the vote count from the jury and never revealed the count in open court. Thus, the jury's note served only to inform the court that it had reached a deadlock. In ***Quarles***, our supreme court noted that a trial court can determine to give the supplemental instruction when a jury has deliberated for some time without reaching an agreement, even in the absence of the jury's notifying the court of a deadlock. ***Id.*** at 90-91. Here, the fact that the jury informed the trial court of the deadlock supports the court's decision to give the supplemental instruction on agreement.

¶20 Finally, Hertzfeld argues that because the jury disclosed their numerical vote, the trial court erred by failing to order a mistrial. We are not persuaded. This court has held that a trial court "has the authority to refuse a verdict and order further deliberations up to the point where the verdict is accepted." ***State v. Reid***, 166 Wis. 2d 139, 144, 479 N.W.2d 572 (Ct. App. 1991). Further, "[a] jury's verdict is not accepted until it is received in open court, the

[6] Defense counsel objected to the use of WIS JI—CRIMINAL 520, urging the use of an alternative instruction that it deemed to be non-coercive.

results announced, the jury polled, if requested, and the judgment entered." ***Id.*** Here, the jury's verdict was not accepted. Although the jury disclosed its numerical vote to the trial court, the court did not disclose the count in open court. Therefore, the trial court had the authority to order further deliberations and did not err by failing to order a mistrial.

By the Court.—Judgment and order affirmed.

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