COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP652-CR **Cir. Ct. No. 2007CF113**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JIM H. RINGER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Barron County: TIMOTHY M. DOYLE, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. The State of Wisconsin brings this interlocutory appeal challenging an order in limine ruling that Jim Ringer could introduce at trial evidence of the alleged victim's prior allegation of sexual assault against her biological father as "untruthful allegations of sexual assault," pursuant to WIS.

STAT. § 972.11(2)(b)3. (2007-08).[1] We conclude the court appropriately exercised its discretion and affirm the order.

FACTUAL BACKGROUND

¶2 Ringer was charged with repeatedly sexually assaulting his twelve-year-old adopted daughter between September 2006 and May 2007. The alleged assaults were at least weekly and consisted of Ringer: (1) touching the nipple area of the daughter's breast outside and underneath her clothing; (2) touching her vaginal area and putting a finger inside her vagina; (3) "humping" against her; (4) pushing her hand onto his penis; and (5) attempting to put his penis into her mouth.

¶3 During the preliminary hearing, the daughter disclosed that she made prior allegations of improper touching against her biological father, which was one of the reasons she was adopted by Ringer.[2] Ringer subsequently filed a motion in limine seeking, among other things, to admit evidence at trial of the allegations as prior untruthful allegations of sexual assault. The motion in limine included documents relating to the prior allegations, including Rusk County Sheriff's Department incident reports, statements, and a referral form to the Rusk County District Attorney. These documents alleged that for a period of about two weeks in April 2005, when his daughter was ten years old, the biological father touched her breasts, vagina and buttocks area under her clothes. The assaults allegedly

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] We note the daughter was cross-examined at the preliminary hearing without objection concerning the prior allegations.

occurred when her father lived with his brother.[3] The alleged sexual assaults by her father had been recorded in the daughter's journal.

¶4 Shortly after the allegations were made by the daughter against her biological father, he was questioned by the police and allegedly admitted: (1) they had been sleeping in the same bed; (2) he "cuddled up" next to her and began to rub her stomach as he commonly did; (3) the tips of his fingers "may have bumped the bottom portion of her breasts"; and (4) he "may" have placed his hand on her breast "as he was drifting off to sleep." He further stated, "I'm not saying it did happen and I'm not saying it didn't happen." In a written statement, the father stated he did not "recall" touching the complainant's breast or vagina "while rubbing her stomach," but "may have bumped the bottom of her bra." He also stated that "if" he did touch her breast it was "not in a sexual way."

¶5 Although charges concerning the biological father were referred to the district attorney, no charges were filed. The district attorney filed an affidavit averring that she had no reason to believe the child was lying, was unaware of any such finding, and that the allegations were believable. The district attorney declined to prosecute because there were no corroborating facts, circumstances, physical evidence or witnesses, which undermined the ability to rebut an allegation by the defense that the child was falsely accusing him. The affidavit also stated the trial would be a credibility battle between the child and the biological father, who was involved in a custody dispute with the mother

[3] The complainant's mother and father never married and, at this point in time, the mother had already married Ringer.

regarding the daughter. The district attorney concluded the assaults had happened but could not be proved.

¶6 During the evidentiary hearing on the motion in limine, the biological father's brother testified he never observed improper sexual contact between the daughter and his brother. He also testified he did not remember seeing them sleeping together in the spring of 2005. The brother further testified that although his "mental capacity" was "not too bad" after a disabling motorcycle accident, he did not clearly remember when the daughter resided at his home or her age at that time.

¶7 The biological father denied at the hearing the allegations of inappropriate sexual contact, but admitted "tickling, wrestling, and basically goofing around." He did not recall telling the officer "I did touch her breast. It was not in a sexual way," but added, "I'm sure it's something to that extent." The father also claimed to have said, "[I]f I did it, I had done it in my sleep and wasn't aware of it." He claimed that they would be in the same bed "[o]nly if she got scared … and climbed in while I was sleeping."

¶8 On cross-examination, the father was asked whether he told the investigating officer that he had "decided to crawl into bed next to her." The father testified, "I remember stating something to that effect." He also admitted telling the officer "something to [the] effect" that he "began to rub her stomach area" "for about ten to 15 minutes." He claimed not to recall telling the officer his "fingers may have bumped the bottom portion of her breasts," but admitted telling him he "may have touched her breast, but … did not remember it happening" and that "it would have been an accident." He also admitted saying "that if it happened it would have been in my sleep."

DISCUSSION

¶9 The admission of evidence is left to the discretion of the circuit court. ***State v. Dunlap***, 2002 WI 19, ¶31, 250 Wis. 2d 466, 640 N.W.2d 112. We will not find an erroneous exercise of discretion unless the circuit court has improperly applied the facts of record to the accepted legal standards. *See* ***id.*** We may search the record to determine whether it provides a rational basis for the court's discretionary determination. *See* ***State v. DeSantis***, 155 Wis. 2d 774, 777 n.1, 456 N.W.2d 600 (1990).

¶10 Before admitting evidence of prior untruthful allegations of sexual assault, the circuit court must determine whether the proffered evidence: (1) fits within WIS. STAT. § 972.11(2)(b)3.; (2) is material to a fact at issue in the case; and (3) is of sufficient probative value to outweigh its inflammatory and prejudicial nature. ***DeSantis***, 155 Wis. 2d at 785. We turn to an analysis of these considerations.

¶11 The first ***DeSantis*** consideration is whether the proffered evidence fits within WIS. STAT. § 972.11(2)(b)3. The burden is on the defendant to produce evidence upon which the court could conclude "that a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault." *See* ***DeSantis***, 155 Wis. 2d at 786-88. If the defendant fails to meet this burden, the circuit court must conclude that the evidence is inadmissible under the statute and the analysis ends. ***State v. Moats***, 156 Wis. 2d 74, 110, 457 N.W.2d 299 (1990).

¶12 Ringer argued before the circuit court that evidence of prior untruthful allegations was found in the biological father's denial of any improper actions, the corroboration by his brother, the lack of physical evidence, the

decision not to prosecute, and the evidence from shortly after the alleged assault indicating the daughter denied any sexual activity.[4]

¶13 The circuit court found that during the course of the police interview the biological father admitted "that he may have had incidental or accidental contact with his daughter's breast or bra." However, the court also found the father denied touching any other prohibited parts of her body, and he denied touching her breast or bra for any purpose of sexual gratification.

¶14 The court concluded there were competing inferences regarding the prior allegations, and that it could not "find that it was truthful or untruthful with any degree of certainty." However, the court concluded there was a reasonable inference that the prior allegations were untruthful. The court stated: "I will find that a reasonable person could infer the prior allegations concerning Christopher Hodges were untruthful, and I make that finding based on the record we've got, based on the testimony we've got." The court therefore ruled Ringer was entitled to introduce evidence concerning the prior allegations.

¶15 We cannot conclude that the circuit court erroneously exercised its discretion in allowing evidence of the prior allegations against the biological father. ***DeSantis*** required the court to determine whether a reasonable person could conclude that the prior allegations were untruthful. *See* ***DeSantis***, 155 Wis. 2d at 787-88. If the biological father's testimony is accepted as true, as the circuit court found for purposes of this analysis, there is a reasonable basis to infer the

[4] Ringer also argued at the circuit court that the daughter had accused foster children of "sex" with her. However, this claim was abandoned by Ringer and is not an issue in this appeal. (R41:29).

daughter falsely accused him of touching her vagina and buttocks and that the father did not intentionally touch his daughter's breasts for any improper purpose. *See* WIS. STAT. § 948.01(5).

¶16 The second consideration that must be made before admitting prior untruthful allegations is whether the evidence is material. *See* ***DeSantis***, 155 Wis. 2d at 785. Here, the record shows factual similarities between the prior and current allegations. *See* ***id.*** at 791. In addition, the prior and current allegations are close enough in time to avoid remoteness diminishing the material comparability of the two incidents. *See* ***id.*** We conclude the circuit court properly exercised its discretion in determining the evidence was material to Ringer's defense.

¶17 The third determination is whether the evidence of the prior untruthful allegations is of sufficient probative value to outweigh its inflammatory and prejudicial nature. ***Id.*** at 785. Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading or influencing the jury to decide the case upon an improper basis. ***Id.*** at 791-92. The State argues it would be "horribly confusing to the jury, not to mention a colossal waste of time," to have the jury sort through the prior allegations to determine who was more credible as to the disputed events. The State also insists the probative value of the evidence was diminished because the untruthfulness of the prior allegations was disputed.

¶18 We conclude the circuit court could reasonably determine the prior allegations were sufficiently probative. As the circuit court recognized, the jury could only convict Ringer if they believed the current allegations of the daughter. Prior untruthful accusations of a similar nature made a year and a half earlier

against her biological father could be a crucial factor in determining credibility and presenting a defense. We are not persuaded that the dispute over the truthfulness of the allegations would, as a matter of law, diminish the probative value below the threshold necessary for admissibility. Similarly, allowing evidence of untruthful allegations regarding the biological father would not necessarily be "horribly confusing" to the jury. On this record, we cannot say that the court erroneously exercised its discretion by concluding the evidence of the prior allegations was sufficiently probative to outweigh the danger that it may be highly inflammatory, unfairly prejudicial or misleading.

¶19 The State insists that, even if Ringer prevails on the three ***DeSantis*** determinations, "there is no justification in the record for allowing the use of extrinsic evidence, rather than simply cross-examination." The State argues extrinsic evidence is barred by ***State v. Rognrud***, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990), and WIS. STAT. § 906.08(2). The State contends that the evidence of the alleged prior untruthful statements was by definition collateral because the prior incident could not be admitted into evidence but for its status as an alleged "false allegation" within the meaning of WIS. STAT. § 972.11(2)(b)3. Therefore, the evidence was extrinsic and the court erred by not limiting the method by which the inquiry into the prior allegation may be made, i.e., by cross-examination of the daughter pursuant to ***Rognrud***. In addition, the State argues the circuit court had general authority under WIS. STAT. § 904.03 to exclude evidence if the probative value was substantially outweighed by the danger of confusion of the issues, or by consideration of waste of time. (Red at 20).

¶20 However, the State provides no citation to the record demonstrating these issues were preserved below. We do not generally consider issues raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140

(1980). The State's letter brief opposing the motion in limine stated, "The State agrees that ***State v. DeSantis*** … is the applicable law." We discern no indication in the briefs or the hearing transcripts that the State raised or discussed in the circuit court either WIS. STAT. §§ 906.08(2), 904.03, or our decision in ***Rognrud***. Circuit courts "need not divine issues on a party's behalf" and "we will not blindside [circuit] courts with reversals based on theories which did not originate in their forum." ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted). We conclude the State waived the argument that the court erred by not limiting the method by which the inquiry may be made into the prior allegations.[5]

By the Court.—Order affirmed.

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

[5] We note that in ***State v. DeSantis***, 155 Wis. 2d 774, 784 n.4, 456 N.W.2d 600 (1990), the court expressly stated that neither party raised or discussed WIS. STAT. § 906.08(2). The court did not further discuss the statute and proceeded to resolve the case on different grounds. We similarly decline to reach the issue here.