COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP118-CR **Cir. Ct. No. 2005CF49**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN KEITH BURNS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 VERGERONT, J. Alan Burns appeals the judgment convicting him of ten counts of second degree sexual assault of a child under sixteen years of age,

in violation of WIS. STAT. § 948.02 (2007-08),[1] and the order denying his postconviction motion for a new trial. He asks this court to exercise our discretionary power of reversal under WIS. STAT. § 752.35 because, he asserts, the real controversy was not fully tried. We conclude that the real controversy was fully tried and we therefore affirm.

BACKGROUND

¶2 Burns was charged with twelve counts of second degree sexual assault of a child, S.B., his niece. The complaint alleged that the incidents occurred in 2004, when S.B. was fourteen years old. Eleven of the counts were by reason of sexual contact and one by reason of sexual intercourse. After reporting these assaults by Burns, S.B. disclosed that she had been repeatedly sexually assaulted by her grandfather, Burns' father, since she was four years old, that her grandfather had been having sexual intercourse with her since she was eight years old, and that the most recent assault by her grandfather was in 2004. Before Burns' trial, his father was charged with three counts of repeated sexual assault of a child, S.B.

¶3 Burns filed a pre-trial motion seeking permission to cross-examine S.B. regarding her allegations against her grandfather in order to attack the credibility of certain statements she made during the investigation of her allegations against Burns. The specific statements were that she had been a virgin before Burns assaulted her, that she was worried about being pregnant, and that her grandfather had never bothered her. In addition, Burns wanted to question

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

S.B. on the evidence of hymenal tears that had healed and the relation of this evidence to her allegations against her grandfather. Burns asserted that the evidence of the hymenal tears came within the exception to the rape shield law in WIS. STAT. § 972.11(2)(b)3. because they "show[ed] the source of injury."[2] Burns acknowledged that the cross-examination regarding the relation between S.B.'s three prior statements and her allegations against her grandfather did not come within a statutory exception. However, he contended, under ***State v. Pulizzano***, 155 Wis. 2d 633, 645-47, 456 N.W.2d 325 (1990), he was nonetheless entitled to question her on this topic because it was essential to his constitutional right to present a defense.[3] At the hearing on the motion Burns clarified that what he

[2] WISCONSIN STAT. § 972.11(2)(b) provides:

> If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.051, 948.06, 948.085, or 948.095, or under s. 940.302(2), if the court finds that the crime was sexually motivated, as defined in s. 980.01(5), any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31(11):
>
> 1. Evidence of the complaining witness's past conduct with the defendant.
>
> 2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

[3] In ***State v. Pulizzano***, 155 Wis. 2d 633, 656-657, 456 N.W.2d 325 (1990), the court explained that, in order to establish a constitutional right to present evidence of a child's prior sexual contact for the limited purpose of proving an alternative source of sexual knowledge, the defendant prior to trial must make an offer of proof showing:

(continued)

wished to do with the requested cross-examination was to show that S.B. was being sexually assaulted by her grandfather during the time period she alleged Burns was assaulting her.

¶4 The court denied Burns' motion. Regarding S.B.'s statements, the court agreed with both parties that Burns' proposed cross-examination was prohibited by the rape shield statute and came within no statutory exception.[4] The court also ruled this proposed cross-examination was not warranted under ***Pulizzano***. It agreed with the State that a victim of sexual assaults by two different persons might report truthfully about the assailant under investigation but not want to disclose information about the other assailant, and therefore contradictions between S.B.'s statements made during the investigation concerning Burns and her allegations against her grandfather were not significant to her credibility regarding Burns. The court also reasoned that inquiring into S.B.'s allegations against her grandfather to attack the credibility of her statements would involve the jury in the case against her grandfather, which would be confusing, misleading, and irrelevant.

> (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. If the defendant makes that showing, the circuit court must then determine whether the State's interests in excluding the evidence are so compelling that they nonetheless overcome the defendant's right to present it. In making that determination, the state's interests are to be closely examined and weighed against the force of the defendant's right to present the evidence ….

[4] Burns' counsel made clear that he was not contending that S.B.'s allegations that her grandfather had assaulted her were false. Thus, the exception in WIS. STAT. § 972.11(2)(b)3. for "evidence of prior untruthful allegations of sexual assault made by the complaining witness" was not applicable.

¶5 With respect to the evidence of the hymenal tears, the State represented that it was not contending that Burns caused that and it would not present that evidence. The court concluded that, if the State did not offer evidence of the hymenal tears, then Burns did not have the right to introduce it on cross-examination under the exception in WIS. STAT. § 972.11(2)(b)3. However, if the State did offer it, then the exception would permit Burns to introduce the evidence of the allegations against his father as an alternative explanation for it. The State did not offer this evidence at trial.

¶6 Another pre-trial issue was the testimony of clinical psychologist Dr. Beth Huebner, whom the State wanted to call as an expert witness to testify on the behavior of sexual assault victims and to give her opinion that S.B.'s behavior was consistent with that. *See* ***State v. Jensen***, 147 Wis. 2d 240, 256-57, 432 N.W.2d 913 (1988) (Circuit courts may allow an expert witness to describe the behavior of other victims of the same type of crime and give an opinion about the consistency of the complainant's behavior with that of other victims of the same crime, if the testimony will assist the trier of fact to understand the evidence.). Burns objected on the ground that the testimony was speculative and that it was uncertain whether the information would assist the trier of fact. The court allowed the testimony, concluding that ***Jensen*** had approved just this type of testimony if it would assist the trier of fact and that it would assist the trier of fact in this case.

¶7 At trial, S.B. testified as follows. Near the end of June 2004, she went to visit her grandparents, Burns' parents, for about two weeks. During the visit, she often watched movies with Burns in his bedroom. On various occasions Burns touched her breasts and vagina, took off her clothes, and performed oral sex. S.B. testified that her grandparents started to suspect that "something was going on" and that her grandfather confronted Burns about his suspicions and

asked her about it several times. On the morning she was supposed to leave, S.B. testified, she awoke to find Burns in bed with her and her grandfather coming up the stairs and entering her room, at which point Burns quickly hid in the closet. Her grandfather shouted to Burns, "I know you're there. You might as well just come on out."

¶8 S.B. also testified that she first disclosed the assaults by Burns to a friend and told him, "I didn't think I was a virgin anymore …." The court concluded that this testimony was contrary to the court's earlier ruling excluding S.B.'s statement about her virginity, but that it was inadvertent and not premeditated. Burns' counsel moved for a mistrial or, in the alternative, for permission to challenge the credibility of the testimony on cross-examination, given her allegations against her grandfather. The court denied both requests. While recognizing that the testimony slightly benefited the State, the court decided it was not sufficiently prejudicial to warrant a mistrial. The court rejected the remedy of a curative instruction, concluding the best approach was simply to move on. The court denied the proposed cross-examination for the reasons it had denied Burns' earlier request: the materiality to S.B.'s credibility regarding her allegations against Burns was minimal and the court did not want this case to turn into a trial on the charges against Burns' father.

¶9 Dr. Huebner testified on studies showing that a large number of sexual assault victims do not report the assault for a significant period of time and on the reasons for this. She also testified that several behaviors, which S.B.'s immediate family members noticed after she returned from visiting her grandparents, "would be consistent with victims who have been sexually abused." These behaviors included S.B.'s withdrawal from family members, changes in her

personality, a significant drop in grades at school, irritability, and intentionally cutting herself.

¶10 Burns called his father as a witness to impeach S.B.'s credibility. Due to the court's pre-trial ruling, the jury was not aware that Burns' father had also been charged with sexually assaulting S.B. Burns' father testified that S.B. sometimes "stretched the truth," and in his opinion she was "untruthful." He denied having any suspicions that "anything was going on" between Burns and S.B., denied that he had ever confronted Burns about it, and denied that he had ever come up to S.B.'s room and found Burns hiding in her closet.

¶11 Burns also called his girlfriend, who testified that she slept with him on the December night that S.B. testified he had intercourse with her, and that there was nothing unusual about S.B.'s demeanor the next day.

¶12 The jury found Burns guilty on eleven counts, one of the sexual contact counts having been dismissed by the State during trial.

¶13 Burns filed a postconviction motion requesting an order of acquittal on the count involving sexual intercourse on the ground the evidence was insufficient. He also requested a new trial on the other counts on the ground of ineffective assistance of counsel, or, alternatively, in the interest of justice because the real controversy was not fully tried. The ineffective assistance claim was based on counsel's failure to either object to Dr. Huebner's testimony or to move for permission to cross-examine on the allegations against Burns' father and on counsel's failure to object to the prosecutor's closing argument on S.B.'s post-assault behaviors. The real controversy was not fully tried, Burns asserted, because of the court's allowance of Dr. Huebner's testimony without cross-examination on the allegations against S.B.'s grandfather, because of S.B.'s

testimony that she told her friend she didn't think she was a virgin anymore, and because of the prosecutor's improper closing argument.

¶14 The circuit court denied the motion for a new trial while granting the motion to vacate the conviction on the sexual intercourse charge for insufficient evidence. With respect to the ineffective assistance of counsel claim, the court ruled that defense counsel had attempted to get evidence of the allegations against S.B.'s grandfather admitted and to keep out Dr. Huebner's testimony, and, when these efforts did not succeed, counsel employed a reasonable defense strategy that used S.B.'s grandfather's testimony to undermine S.B.'s credibility. With respect to the interest of justice, the court concluded that the real controversy was whether S.B. was telling the truth about what Burns did and this issue was fully tried.

DISCUSSION

I. Introduction

¶15 On appeal, Burns does not pursue a claim of ineffective assistance of counsel and relies solely on his claim that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. He renews his arguments that the real controversy was not fully tried because: (1) Dr. Huebner testified but there was no cross-examination on the issue of whether S.B.'s grandfather's alleged assaults could have caused S.B.'s unusual behaviors; (2) S.B.'s testimony at her grandfather's trial shows she lied in her statement about being a virgin before her uncle assaulted her and may have lied in other ways; (3) the prosecutor's rebuttal closing argument on S.B.'s post-assault behaviors misled the jury into drawing inferences that he knew were untrue.

¶16 This court has the authority under WIS. STAT. § 752.35[5] to grant a new trial in the interest of justice when it appears that either: (1) the real controversy has not been fully tried; or (2) it is possible that justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Under the first prong, which is at issue in this case, the party seeking a new trial need not show a probable likelihood of a different result on retrial. ***Id.*** The power to grant a new trial when it appears the real controversy has not been fully tried "is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719 (citation omitted).

¶17 The claim of real controversy not fully tried arises in this case in an unusual context. S.B. alleged sexual assaults by both Burns and her grandfather. Burns is not contending that the allegations against her grandfather were false but that they are true and the jury should have heard about them. No evidence about S.B.'s allegations concerning her grandfather was presented to the jury, both because of the circuit court's specific ruling, which Burns does not contend is

[5] WISCONSIN STAT. § 752.35 provides:

> Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

erroneous, and because Burns did not seek to admit it for other purposes, which he now advances.

¶18 For the reasons we explain below, we decline to exercise our discretionary power of reversal in this case because we are satisfied the real controversy was fully tried.

II. Cross-examination of Dr. Huebner

¶19 Burns contends the real controversy was not fully tried because Dr. Huebner was permitted to testify that S.B.'s behaviors were consistent with that of sexual assault victims, but she was not asked on cross-examination whether these behaviors could have been caused by her grandfather's sexual assaults.[6]

¶20 With respect to evidentiary matters, courts have concluded the real controversy has not been fully tried "(1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted).

¶21 We view Burns' argument here as invoking the first situation—that the jury was erroneously not given the opportunity to hear about S.B.'s allegations against her grandfather in response to Dr. Huebner's testimony—rather than

[6] Burns' counsel did cross-examine Dr. Huebner to bring out that she had never spoken to S.B., that she was making assumptions based on generalized studies, and that inconsistencies might also occur when there is false reporting. He emphasized these themes in closing argument.

contending that Dr. Huebner's testimony was improperly admitted. Burns does not argue that her testimony was improper in itself.

¶22 We begin by observing that Burns did not ask the circuit court to permit cross-examination of Dr. Huebner on this topic and did not object to her testifying unless he was permitted this cross-examination. As noted above, his objections to Dr. Huebner's testimony in the circuit court had nothing to do with the allegations against S.B.'s grandfather. *See* ***supra***, ¶6. Burns' efforts in the circuit court to introduce evidence of S.B.'s allegations against her grandfather were limited to doing so on cross-examination of S.B. in order to impeach certain of her statements and to address the evidence of the hymenal tears. *See* ***supra***, ¶3. However, Burns does not argue on appeal—and did not argue in his postconviction motion—that the circuit court erred in denying his request to cross-examine S.B. on the allegations against her grandfather. Therefore, our analysis is limited to the absence of this evidence in the cross-examination of Dr. Huebner.

¶23 The real controversy in this case was whether Burns sexually assaulted S.B., and the resolution of the controversy depended upon S.B.'s credibility. Burns' defense was that S.B. was lying. To this end, Burns' counsel cross-examined S.B. extensively, obtaining concessions of inconsistencies and misstatements in her description of the events as given to others in the past and her acknowledgment that she had not disclosed some of her testimony to anyone before. Counsel also brought out vagueness and inconsistencies in her reports to others when cross-examining those witnesses.

¶24 However, the strongest impeachment evidence was from S.B.'s grandfather. Before he testified, S.B. testified about being "grandpa's girl" and about how her grandfather would take care of her ill grandmother and would

believe S.B. when she told him something. In contrast to this portrayal of their relationship, S.B.'s grandfather testified that S.B. has "at times … stretched the truth," and that she is "untruthful." Most significantly, he denied ever confronting Burns about his suspicions that something was going on between Burns and S.B., and denied that he ever came up the stairs to find Burns in S.B.'s room. Because the jury was unaware of the allegations against S.B.'s grandfather, it did not have reason to question his credibility. We agree with the circuit court that the defense presented a competent challenge to S.B.'s credibility.

¶25 Turning to the evidence upon which Burns asserts he is entitled to cross-examine Dr. Huebner, we agree with the State that cross-examination would have had minimal, if any, impact in undermining the credibility of S.B.'s account of what Burns did to her.[7] Had Dr. Huebner been asked if S.B.'s behaviors could have been caused by a sexual assault by someone other than Burns, she undoubtedly would have answered "yes." However, she undoubtedly also would have answered "yes" to the question whether S.B.'s behavior could have been caused by both Burns and another person. The point is that being assaulted by her

[7] The parties debate whether Burns would have been entitled, under ***Pulizzano***, to cross-examine Dr. Huebner by bringing out S.B.'s allegations against her grandfather. In particular, the State relies on ***State v. Dunlap***, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112, in which the court upheld the circuit court's decision to exclude testimony about a child's sexually precocious behavior that preceded the sexual assault; this testimony was offered to rebut the ***Jensen*** testimony on the behavior of sexual assault victims. In ***Dunlap*** the supreme court concluded that the evidence did not come under a statutory exception to the rape shield law nor under the judicial exception in ***Pulizzano***. ***Dunlap***, 250 Wis. 2d 466, ¶42. We do not decide whether the evidence of S.B.'s allegations against her grandfather could have been properly excluded from Burns' cross-examination of Dr. Huebner but instead assume for purposes of discussion that it would have been admissible, at least to some extent. Of course, if that evidence could have been properly excluded, its omission cannot form the basis for a claim that the real controversy was not fully tried. *See* ***State v. Joyner***, 2002 WI App. 250, ¶25, 258 Wis. 2d 249, 653 N.W.2d 290 (concluding the real controversy was fully tried because we had already determined the evidence was properly excluded).

grandfather does not mean that S.B. was not assaulted by Burns, in the absence of some evidence or theory that plausibly provides that link. Burns does not explain what that might be.

¶26 Thus, if Burns had cross-examined Dr. Huebner as he now contends he is entitled to do, he would still have had to provide to the jury a reason for S.B. saying she was sexually assaulted by Burns when it was only her grandfather who assaulted her. And, as the circuit court explained in its postconviction decision, in this alternative scenario Burns could not have used his father to impeach S.B. if he was also presenting evidence that his father had assaulted her.

¶27 Burns contends that the impeachment approach using S.B.'s grandfather was necessitated by the court's adverse ruling on cross-examining S.B., and he really wanted to impeach her by bringing in evidence of her allegations against her grandfather. However, as we have already noted, he does not develop an argument showing that particular ruling was in error. And, regardless of the reason the defense proceeded as it did after that ruling, the result is that the issue of S.B.'s credibility was fully tried.

¶28 In effect, after having a competent defense that took one approach to impeaching S.B.'s credibility at trial, Burns now seeks a new trial using a different approach. We are satisfied that the real controversy was fully tried and we decline to use our discretionary power of reversal to order a new trial so that Burns may take a different approach. *See* ***State v. Maloney***, 2006 WI 15, ¶37, 288 Wis. 2d 551, 709 N.W.2d 436 (declining to use the supreme court's discretionary power of

reversal to order a new trial to allow a defendant to present a different defense theory when the defense presented was competent).[8]

III. S.B.'s Testimony on her Virginity

¶29 The trial against S.B.'s grandfather occurred after Burns' trial.[9] At her grandfather's trial S.B. was asked questions about the truthfulness of her testimony at Burns' trial, and, in particular, her testimony that when she told her friend about Burns' assaults she said to him she "didn't think [she] was a virgin anymore.…" At her grandfather's trial, she testified that she told her friend about the assaults by both her uncle and her grandfather and it was in the context of telling him about both that she said she did not think she was a virgin any more. However, she testified, she referred only to her uncle at Burns' trial because she was "put under a motion by the court that I could not talk about my grandfather at all. Everything had to be in context to my uncle with not mentioning anything about my grandfather." On cross-examination at her grandfather's trial she answered "no" to the question whether she told the truth at her uncle's trial and, when asked to explain this answer on redirect, S.B. said:

> I said no because the reason why I said no is because of that motion that was put through. I couldn't actually tell the truth of well, yes, I'm not a virgin. I have had intercourse, because my grandfather could not be brought into that trial. I had to cover up for my grandfather during that trial and just make it sound like everything was based

[8] Our authority to order a discretionary reversal under WIS. STAT. § 752.35 is identical to the supreme court's discretionary authority under § 751.06, and therefore cases interpreting the supreme court's power to reverse under § 751.06 are applicable when interpreting this court's power to reverse under § 752.35. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

[9] The first trial against S.B.'s grandfather ended in an acquittal on one count of repeated sexual assault of a child and a mistrial on two counts. He was retried on the two counts and convicted on both.

> on my uncle without going into further context of anything with my grandfather.

¶30 Burns contends that the above testimony shows that S.B. was being untruthful when she led the jury at his trial to believe she was a virgin before (according to her testimony) he had intercourse with her. He also asserts the above testimony "calls into question her entire testimony [at his trial]." According to Burns, the above testimony shows that, at his trial, because of the court's ruling, S.B. felt she had to attribute to Burns what her grandfather had done to her, and this indicates she may have made other untruthful statements at his trial.

¶31 It is not reasonable to read S.B.'s testimony at her grandfather's trial as suggesting that S.B. falsely attributed to Burns at his trial acts of sexual assault that her grandfather in fact performed. Rather, the only reasonable reading of the testimony Burns relies on is that, in an effort to comply with what S.B. understood the court's order to be in Burns' trial, she omitted reference to her grandfather when it would have been more truthful in her view to also mention what her grandfather did to her. The only specific testimony that Burns refers to at his trial that was untruthful for this reason is S.B.'s testimony that, when she told her friend about Burns' assaults, she said she "didn't think [she] was a virgin anymore…." We therefore limit our analysis to this statement. The issue is whether the real controversy was not fully tried because the jury heard that S.B lost her virginity due to Burns having intercourse with her when, according to her testimony at her grandfather's trial and statements she had made before Burns' trial, her grandfather had had intercourse with her before Burns did.

¶32 We conclude S.B.'s testimony of what she told her friend about her virginity did not "so cloud[] a crucial issue that it may be fairly said that the real controversy was not fully tried." ***Hicks***, 202 Wis. 2d at 160. We acknowledge, as

did the circuit court, that S.B.'s virginity comment gave some support to her assertion that Burns had intercourse with her. The jury had before it no evidence suggesting that the then fourteen-year-old S.B. had intercourse with anyone else. Thus, there is little difference between the assertions that Burns had intercourse with her and that she lost her virginity because Burns had intercourse with her. The real controversy, with or without the virginity comment, was whether S.B. was being truthful in asserting that Burns had intercourse with her. S.B.'s truthfulness on this issue was fully tried.

IV. The Prosecutor's Closing Argument

¶33 The prosecutor's primary theme in closing argument was that the evidence did not show a motive for S.B. to lie, while the defense closing focused on the inconsistencies and vagueness in S.B.'s testimony, as well as the testimony of Burns' father and his girlfriend, to show that S.B. was lying. With respect to the evidence of S.B. cutting herself and Dr. Huebner's testimony on that, defense counsel stated he did not know why the cutting took place "but it may not derive from these accusations because these accusations themselves are in question."

¶34 On rebuttal, the prosecutor emphasized that defense counsel had not pointed to any evidence suggesting a motive for S.B. to lie. He continued with the following statements on the disturbing behaviors S.B. exhibited:

> No one can suggest a reason, again, as to why she was displaying the behaviors that she was that Dr. Huebner talked about as being consistent with that of someone who was sexually assaulted. There's no other thing that went on in her life at that period of time that would explain those behaviors. When her mother dies, there was testimony I think from her stepbrother that she was having problems for a couple months but those resolved and that was explicable.

> There is no explanation here for why she was acting the way she was and why it persisted for as long as it did….
>
> ….
>
> … Is there any evidence that the girl has taken acting classes so she needs to know how to break down and cry at the appropriate moment? And if there was an explanation for that would there be an explanation to why she was doing it in the first place? Well, there isn't. There isn't. The evidence in this case doesn't make any sense except one way, that during that period of time when her uncle had the opportunity to sexually assault her, he did ….

¶35 Burns contends this quoted portion is improper because it "misled the jury into drawing an inference not supported by the record and which the prosecutor knew was untrue"—that no one besides Burns had sexually assaulted S.B. He points out that in ***State v. Weiss***, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372, we used our discretionary powers of reversal after concluding that a prosecutor's improper comment caused the real controversy not to be fully tried, and, he asserts, we should do so here.[10]

¶36 The proper context for addressing this argument takes into account the ruling we have already made that the real controversy was fully tried even though Burns did not cross-examine Dr. Huebner on the possibility that the sexual

[10] Burns also cites ***State v. Neuser***, 191 Wis. 2d 131, 141, 528 N.W.2d 49 (1995). However, in ***Neuser*** it is not clear that we reversed based on the real controversy not having been fully tried. In ***Neuser*** the prosecutor suggested to the jury in closing that the court submitted the lesser included offense only because the defendant asked for it. After concluding this was improper, we turned to the absence of an objection. ***Id.*** at 137, 140. We mentioned three theories under which we could overlook waiver: plain error, real controversy not fully tried, and miscarriage of justice where there is a substantial degree of probability of a different result on retrial. ***Id.*** at 140. We concluded we should reverse notwithstanding the lack of an objection, explaining that "it is likely that the jury never gave meaningful consideration to the full verdict." ***Id.*** However, we did not explain whether our reversal was based on plain error or, if not, on which prong of WIS. STAT. § 752.35. Accordingly, we do not find ***Neuser*** helpful in discussing whether the prosecutor's argument here prevented the real controversy from being fully tried.

assaults by her grandfather caused S.B.'s behaviors. Thus, we examine the prosecutor's comments in the context of Dr. Huebner's testimony having been properly admitted and there having been no evidence at Burns' trial of sexual assaults by S.B.'s grandfather.

¶37 Counsel is generally allowed considerable latitude in closing argument and may "comment on the evidence, detail the evidence, [and] argue from it to a conclusion …." ***State v. Draise***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (citation omitted). Certainly the prosecutor could argue that Dr. Huebner's testimony shows that S.B.'s behaviors are consistent with those of a sexual assault victim and that the sexual assaults by Burns provide an explanation for them. Here the prosecutor said more than this: he stated that there was no other explanation for S.B.'s behaviors. Even though we construe the prosecutor's arguments to mean, as he on occasion makes explicit, that there is no other explanation *in the evidence before the jury* for her behaviors, the prosecutor is nonetheless asking the jury to draw an inference that, while supported by the evidence at trial, is not in fact true: that Burns' sexual assaults are the only explanation for S.B.'s behaviors.

¶38 We need not decide whether it was improper for the prosecutor to take this additional step—from arguing that Dr. Huebner's testimony and S.B.'s behaviors support the conclusion that Burns sexually assaulted S.B. to arguing that there is no other explanation for her behaviors. The reason is that we are satisfied that this additional step did not prevent the real controversy from being fully tried. Even if the prosecutor had not expressly said "there is no other explanation" for S.B.'s behaviors, the jury would no doubt have inferred this (assuming they credited Dr. Huebner's testimony), given the absence of testimony that anyone other than Burns had sexually assaulted S.B. As we have already explained, the

absence of testimony that S.B.'s grandfather sexually assaulted her did not prevent a full trial on the real controversy—whether Burns sexually assaulted S.B.

¶39 We do not agree with Burns that ***Weiss*** compels a different conclusion. In ***Weiss*** the prosecutor told the jury during closing argument and again during rebuttal that the first time the defendant denied committing the sexual assaults was at trial, even though the prosecutor had police reports before her that she knew included the defendant's express denials of guilt. ***Weiss***, 312 Wis. 2d 382, ¶¶5, 7. We were convinced that the prosecutor was asking the jury to disbelieve the defendant's testimony that he had verbally denied the sexual assaults to the police even though she knew this was not true, and we concluded this was improper. ***Id.***, ¶15. Although the defendant had not objected to the prosecutor's argument, we agreed with him that we should reverse because the real controversy was not fully tried. ***Id.***, ¶16. Our reasoning was: the police reports that disproved the prosecutor's statements were not in evidence; the prosecutor's statements likely surprised the defense because they were inconsistent with comments the State had previously made showing it recognized that the defendant had denied committing the sexual assaults; the crux of the case was a credibility battle between the defendant and the alleged victim; and the prosecutor's comments undermined the defendant's credibility and bolstered that of the alleged victim. ***Id.***, ¶¶16-17.

¶40 In contrast to ***Weiss***, in this case the prosecutor did not ask the jury to consider facts not in the trial evidence. In addition, the inconsistency between what the prosecutor here arguably asked the jury to infer from the trial evidence (that no one but Burns sexually assaulted S.B.) and the facts in the real world (that S.B. accused both Burns and her grandfather of assaulting her) is not significant in challenging the credibility of S.B.'s accusations against Burns.

CONCLUSION

¶41 We conclude the real controversy was fully tried. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.