COURT OF APPEALS
DECISION
DATED AND RELEASED

April 10, 1996

No. 95-0019-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT VARGAS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Robert Vargas was convicted of second-degree sexual assault as a repeat offender. He appeals from an order denying his postconviction motion. He argues that he was denied a fair trial when his cross-examination of the victim was limited, when evidence was admitted that he was a habitual offender, and when the prosecution was allowed to cross-examine him about a court order prohibiting him from having contact with children. We conclude that the trial court properly exercised its discretion regarding the presentation of the evidence. We affirm the order denying the motion for a new trial.

Vargas was convicted on December 2, 1988, for touching twelve-year-old Amie R. as she slept at Vargas's house on September 25, 1988.[1] Amie testified that on September 24 she got into trouble with her mother for soiling clean clothes and she went to stay at Vargas's home. Amie's mother was Vargas's niece. Vargas lived with his twenty-year-old daughter and her baby just a few houses away from Amie. Amie indicated that on the night of September 25, she awoke and found Vargas in bed with her. She said he had pulled up her bra, was feeling her breast, was kissing the back of her head, and had one leg between her legs. Amie left the bedroom to sleep the rest of the night with Vargas's daughter. The next morning she went to a friend's house and told her what had happened. The friend persuaded Amie to tell her mother.

Cross-examination revealed that Amie's mother had slapped Amie on the face when she discovered the soiled clothes. Amie indicated that her mother had punished her in that manner before but that it did not happen very often. Defense counsel then asked, "How many times has your mother hit you like that?" An objection to the question was sustained. Vargas argues that the trial court's ruling deprived him of the opportunity to confront the victim on a possible motive to fabricate the sexual assault.

"The scope of cross-examination allowed for impeachment purposes is within the trial court's discretion." ***State v. Echols***, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638, *cert. denied*, 114 S. Ct. 246 (1993). In the exercise of its discretion, the trial court may impose limits on cross-examination relating to a witness's bias. ***State v. Whiting***, 136 Wis.2d 400, 422, 402 N.W.2d 723, 732 (Ct. App. 1987). The trial court properly exercises its discretion in limiting cross-examination which is repetitive or only marginally relevant. ***Id.***

The trial court originally sustained the objection to the question on the stated grounds of relevancy. Outside the presence of the jury the trial court heard the defense's argument as to why the question and answer were relevant

[1] By an order of September 13, 1994, we granted Vargas's petition for a writ of habeas corpus on the grounds of ineffective assistance of appellate counsel. As a result, Vargas's appeal rights under RULE 809.30, STATS., were reinstated.

to provide a motive for Amie to fabricate the allegation of sexual contact.[2] The trial court found that the reasoning "doesn't make any sense." Upon further explanation from the defense, the court ruled that the possible defense theory of motive to falsify in order to gain sympathy from the mother could be made "known to the jury, such as it is, without this questioning."

Implicit in the trial court's ruling is a finding that the evidence was of minimal relevance. It also found that the evidence would be cumulative to other means of presenting the defense theory of motive to fabricate.[3] In her testimony, Amie admitted that she sought refuge at the Vargas house because her mother was mad at her. She indicated that she told her friend about the incident first because she was afraid that her mother might get mad at her. Cross-examination had already elicited Amie's acknowledgement that she was not happy that her mother had hit her and that she had been punished in that manner before. After the objection was sustained, Amie testified that she did not go home because she was afraid her mother was still angry. The trial court properly exercised its discretion in limiting the cross-examination to exclude the repetitive and only marginally relevant evidence about the number of times Amie had been struck by her mother.[4]

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[2] In his reply brief, Vargas argues that the evidence of the number of times Amie had been struck by her mother was relevant to impeach Amie's attempt to "minimize" the abuse by her mother and her fear about going home. Use of the evidence to directly impeach Amie's testimony that her mother did not strike her very often was not raised in the trial court. We said in ***State v. Michels***, 141 Wis.2d 81, 97-98, 414 N.W.2d 311, 317 (Ct. App. 1987), that a position on appeal which is inconsistent with that taken at trial is subject to judicial estoppel.

[3] We read the record to reflect that the trial court's decision to limit cross-examination about the number of times Amie had been hit by her mother was motivated in part by concerns for the witness. The trial court remarked that the witness was in distress. Continued questioning about past abuse was likely to upset the witness further. In order to spare the witness undue stress, the trial court was within its discretion to prohibit the question and permit the defense theory to be presented by other means.

[4] Vargas argues that a finding of cumulative evidence was not justified because Amie was the first witness at trial. We do not know whether the trial court anticipated the testimony of the other witnesses who presented the defense theory that Amie had a motive to falsify. The record reflects that the question was repetitive as to evidence elicited in Amie's own testimony. Even if there was error in ruling that the evidence was

Vargas next argues that he was denied a fair trial by the prosecution's improper reference to his status as a habitual criminal offender. ***Mulkovich v. State***, 73 Wis.2d 464, 468, 243 N.W.2d 198, 201 (1976), holds that it is prejudicial error when information about a defendant's status as a repeat offender is given to the jury. However, ***Mulkovich*** concerned error committed at the start of the trial by the reading of the information and repeater allegations to the jury. ***Mulkovich*** does not apply here where the normally offending information comes in fair response to the theory of defense.

During his direct examination, Vargas explained that a prior sexual assault conviction resulted from his willingness to be found guilty without a trial. Vargas indicated that he did not seek a trial in the prior incident because he wanted to spare the victim from having to testify. He further testified that he agreed to be found guilty without a trial because he knew he had committed the crime. His testimony concluded with a denial of the charge that he had sexual contact with Amie. Thus, the theory of defense was that when Vargas committed a sexual assault in the past he admitted it and took his punishment but that he did not make such an admission in this case because he did not do it.

On cross-examination the prosecutor questioned Vargas's motives for admitting guilt in the prior incident. Vargas admitted that in the previous case he faced potential imprisonment of ten years but under a plea bargain the prosecution agreed not to recommend more than a five-year sentence. Vargas was asked whether the "stakes" were much higher in this case because he faced the possibility of being sentenced to sixteen years of imprisonment because he was charged as a habitual criminal.

Vargas's direct examination had opened the door to exploring the difference between the two sexual assault cases. Vargas's status as a habitual criminal was referenced only in explanation of those differences. The theory of defense invited the potential error. Vargas cannot now complain about evidence that was in fair response to his theory of defense. *See* ***United States v.***

(..continued)
cumulative during the testimony of the first witness, it was harmless error. Other testimony demonstrated Amie's fear of her mother and the difficulties she experienced at home.

Robinson, 485 U.S. 25, 33-34 (1988) (prosecutor allowed a fair response to defense argument). *See also* ***Shawn B.N. v. State***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) (we will not review invited error).

We feel compelled, however, to comment on the impropriety of the prosecution's question to Vargas, "And this time there's no plea bargain involved, is there?"[5] The question steps too close to the line prohibiting evidence of offers to compromise and statements made during plea negotiations. *See* §§ 904.08 and 904.10, STATS. Yet we conclude that the error was not prejudicial given Vargas's theory of defense that in the past he freely admitted guilt when he was guilty and his admission that he had been convicted of a crime six times. Moreover, in his redirect testimony, Vargas explained that he had admitted guilt in the previous sexual assault case even before a plea bargain had been offered. He indicated that a plea agreement had been offered by the prosecution in this case and that he rejected the offer because he was not guilty. The jury's knowledge that a plea agreement had been offered fit into Vargas's theory of defense. Thus, while we admonish the prosecution for stepping so closely to the line of impermissible questioning in raising the possible plea agreement, under the circumstances Vargas was not deprived of a fair trial.

The final issue is whether Vargas was denied a fair trial because the prosecution was permitted to cross-examine him about being under a court order not to have contact with female children and his violations of that order. Vargas argues that the evidence was offered to suggest to the jury that he was a child molester and that it pandered to the jury's fear that the court was unable to control him. He contends that the evidence was unfairly prejudicial and barred by § 904.03, STATS.

Vargas mischaracterizes how the evidence about the court order was revealed. The prosecution did not directly elicit the information. Rather, Vargas offered the information in response to the prosecutor's question as to whether he had apologized to his prior sexual assault victim.[6] The questions

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[5] Vargas objected at trial on the ground that the prosecution was making a misrepresentation of the facts. However, he does not raise the potential error on appeal.

[6] At the beginning of cross-examination, the prosecutor asked Vargas if he had told the

which followed were to clarify the nature of the order and explore whether it truly served as the basis for Vargas's failure to apologize to the prior victim. These were matters within the scope of direct examination because Vargas attempted to use his concern for his victim as compelling him to admit guilt when guilt in fact existed.[7] The error, if any, was invited by Vargas's response to the prosecutor's question and by his theory of defense. We need not address the issue further. ***Shawn B.N.***, 173 Wis.2d at 372, 497 N.W.2d at 152.

By the Court.—Order affirmed.

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

(..continued)
prior victim that he was sorry. Vargas replied no and added, "I was told not to have contact with the family." The prosecutor asked follow-up questions including, "You were told not to have any contact with females under 18 years of age for ten years back in 1986, weren't you?"

[7] Therefore, we reject Vargas's contention that by asking him about apologizing to his victim, the prosecution was "intentionally attempting to trap" Vargas in order to introduce evidence of the no contact order.