COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2012AP51-CR
2012AP52-CR

Cir. Ct. Nos. 2010CF307
2010CF358

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MACAULAY T. KRUEGER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, Macaulay T. Krueger appeals from judgments of conviction and an order denying postconviction relief. Krueger contends that there was insufficient evidence to support his convictions of causing a child under thirteen to view sexually explicit

conduct. He further contends that the State violated his right to be free from double jeopardy. Finally, he contends that the circuit court erred in denying his postconviction motions based on ineffective assistance of counsel. We reject Krueger's arguments and affirm the judgments and order.[1]

¶2 Krueger was convicted following a jury trial of three counts of causing a child under thirteen to view sexually explicit conduct. The charges stemmed from two separate cases that were consolidated for trial.

¶3 In the first case, Krueger was accused of twice exposing himself to Tyler W. when Tyler was eleven years old. On the first occasion, Krueger put a condom on his own erect penis in front of Tyler. On the second occasion, Krueger masturbated in front of Tyler.

¶4 In the second case, Krueger was accused of exposing himself to Megan H. when Megan was eleven years old. The exposure in that case again involved Krueger putting a condom on his own penis in front of Megan.

¶5 The cases first went to trial on November 9, 2010. During direct examination in the State's case-in-chief, Tyler disclosed new details about his contact with Krueger that were not included in the discovery materials from the State. Accordingly, Krueger's counsel moved for a mistrial based upon the

[1] Krueger also challenges the severity of his sentences. However, we decline to address this argument it, as (1) Krueger failed to raise it in the circuit court, *see* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved at the circuit court generally will not be considered on appeal); and (2) it is inadequately developed, *see* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to address issues inadequately briefed).

prejudicial nature of the new details. The circuit court agreed with counsel and granted a mistrial on both cases.

¶6 After the State provided defense counsel with additional discovery materials concerning Tyler's disclosure, Krueger's counsel moved to dismiss both cases on double jeopardy grounds. The circuit court denied the motion in an oral ruling.

¶7 The cases proceeded to trial again on December 16 and 17, 2010, at which time the jury found Krueger guilty of all three counts. The circuit court subsequently imposed an aggregate sentence of eight years of initial confinement and twelve years of extended supervision.

¶8 Following sentencing, Krueger discharged his appointed attorney and filed several pro se motions for postconviction relief. He argued, among other things, that (1) the evidence was insufficient to support his convictions; (2) his double jeopardy rights were violated; and (3) he received ineffective assistance of counsel. The circuit court rejected Krueger's arguments. This appeal follows. Additional facts will be discussed below as necessary.

¶9 On appeal, Krueger first contends that there was insufficient evidence to support his convictions of causing a child under thirteen to view sexually explicit conduct. He complains that his act of putting on a condom in front of Tyler and Megan was not sexually explicit conduct. He further complains that the evidence offered against him was based on perjured testimony.

¶10 In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that of the jury unless the evidence, viewed most favorable to the State and the conviction, is so lacking in probative

value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

¶11 To convict a person of causing a child under thirteen to view sexually explicit conduct, the State is required to prove four elements beyond a reasonable doubt: (1) the defendant caused the child to view sexually explicit conduct; (2) that act was intentional; (3) the child was under thirteen years of age; and (4) the defendant acted with the purpose of sexually arousing or gratifying himself or herself. *See* WIS JI—CRIMINAL 2125; WIS. STAT. § 948.055 (2009-10).[2]

¶12 With respect to the charges involving Tyler, the evidence supports the jury's verdicts as to the first three elements discussed above. According to both Tyler and Krueger himself, Krueger exposed his erect penis to Tyler both in his room during the condom incident and at the YMCA during the masturbation incident. There is no dispute that the exposure was intentional, as Krueger admitted to purposefully showing Tyler the acts. Likewise, there is no dispute that Tyler was eleven years old at the time of both incidents.

¶13 The evidence also supports the jury's verdict as to the first three elements of the charge involving Megan. The jury heard evidence from Megan

[2] All references to the Wisconsin Statutes are to the 2009-10 version.

that Krueger exposed his penis while in his room alone with her and later told her to not tell anyone about it. According to Amanda Roden, who did a clinical interview with Megan shortly after the incident was reported, Megan had described Krueger's penis as "pointing straight at her." Again, there is no dispute that Megan was eleven years old at the time of the incident.

¶14 Finally, we conclude that the evidence supports the jury's verdicts as to the fourth element of the charges. As noted by the State, the jury heard significant evidence that Krueger had a preoccupation with his penis, which supports the inference that he committed the acts for sexual gratification.[3] Moreover, in both the condom incidents and the masturbation incident, Krueger either had an erection or touched himself to get to that point. Viewing this evidence in a light most favorable to the State and the convictions, we are satisfied that a jury, acting reasonably, could have found that Krueger acted with the purpose of sexually gratifying himself when performing all three acts.

¶15 Although Krueger complains that his act of putting on a condom in front of Tyler and Megan was not sexually explicit conduct, we disagree. WISCONSIN STAT. § 948.01(7)(e) defines "sexually explicit conduct" to include "[l]ewd exhibition" of a person's intimate parts. Here, the jury heard evidence from Tyler that Krueger touched his penis to make it erect and evidence from Megan's initial report that Krueger's penis was "pointing straight at her."

[3] For example, the jury heard testimony and saw evidence of an email Krueger had sent to a woman he was dating demonstrating a marked preoccupation with his penis and its sexual function. Furthermore, Tyler testified that Krueger consistently would point out to him when he had an erection and would bring up the topic of masturbation often.

Accordingly, it was entitled to make a commonsense finding of "lewdness" in Krueger's exhibition of his penis.

¶16 We also reject Krueger's argument that the verdicts cannot be supported because the evidence offered against him was based on perjured testimony. In addition to presenting no evidence of perjury, this argument fails because the jury, as fact finder, was charged with determining the credibility of witnesses and weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. As demonstrated by its verdicts, the jury believed the evidence offered by the State. We are satisfied that such evidence was not "inherently or patently incredible" and therefore could be reasonably relied upon. ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

¶17 Krueger next contends that the State violated his right to be free from double jeopardy. This claim arises from the State's decision to prosecute him after the circuit court had granted the mistrial.

¶18 As noted, Krueger's cases first went to trial on November 9, 2010. The State began its case-in-chief by calling Tyler's mother and father. It then called Tyler to the stand.

¶19 During his direct examination, Tyler disclosed new details about his contact with Krueger that were not included in the discovery materials from the State. Specifically, Tyler stated that Krueger gave him "this weird measuring thing," made Tyler measure his own penis, and also measured his penis with the device. The prosecutor followed up with questions about the details of where and how the measuring occurred.

¶20 Krueger's counsel moved for a mistrial based upon the prejudicial nature of the new details. In response, the prosecutor indicated that Tyler had "never disclosed this in interviews" and thus the information was not part of the discovery materials. The prosecutor also objected to the proposed mistrial, arguing that the problem could be addressed with a curative instruction to the jury. Ultimately, the circuit court agreed with defense counsel and granted a mistrial on both cases.

¶21 The next day, the prosecutor wrote a letter to the circuit court and defense counsel to further explain the circumstances that prompted the mistrial. In it, he explained that during trial preparation, Tyler had made a brief statement about Krueger telling him to measure his penis. The prosecutor explained that he "did not think much of this statement during our preparation" and did not do much, if any, follow-up on the topic. He stated that both he and the assigned detective expressed surprise that Tyler had made the additional statement because he had not done so during his earlier interviews. The prosecutor acknowledged that he should have instructed Tyler to not say anything about the measuring and that he should not have followed up on the topic after Tyler disclosed it at trial. Finally, he noted that he did not inform defense counsel of the late disclosure because he believed the evidence to be inculpatory and did not intend to use it at trial.

¶22 After the prosecutor provided defense counsel with this additional information, defense counsel moved to dismiss both cases on double jeopardy grounds based on prosecutorial overreaching. Counsel argued that the prosecutor had made multiple statements misrepresenting the fact that he first learned of Tyler's disclosure prior to trial. Counsel maintained that such behavior was

unethical and prejudiced Krueger's rights to successfully complete the criminal confrontation at the first trial.

¶23 The circuit court subsequently held a hearing on defense counsel's motion. At the conclusion of the hearing, the court did not make a determination as to whether the prosecutor had acted intentionally. However, it did find that Krueger failed to demonstrate that the prosecutor acted with intention or design to provoke a mistrial because his case-in-chief was going badly or because he sought to prejudice Krueger rights. Accordingly, it denied the motion.

¶24 Both the United States and Wisconsin Constitutions protect against subjecting any person "for the same offense to be twice put in jeopardy." ***State v. Hill***, 2000 WI App 259, ¶10, 240 Wis. 2d 1, 622 N.W.2d 34. As a general matter, retrial is not barred when a defendant successfully requests a mistrial because, in that situation, "the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal." ***State v. Jaimes***, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669. However, there is an exception to this general rule, which is in dispute in this case.

¶25 It is well established that "retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching." ***Hill***, 240 Wis. 2d 1, ¶11. To constitute prosecutorial overreaching, the conduct which induces the defendant to move for a mistrial must satisfy two elements:

> (1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; *and* (2) the prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another "kick at the cat" because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, i.e., to harass him by successive prosecutions.

State v. Copening, 100 Wis. 2d 700, 714-15, 303 N.W.2d 821 (1981).

¶26 "Determining the existence or absence of the prosecutor's intent involves a factual finding, which will not be reversed on appeal unless it is clearly erroneous." ***Jaimes***, 292 Wis. 2d 656, ¶10. However, whether the circuit court's findings of fact satisfy the constitutional standard is a question of law that this court reviews de novo. *See* ***State v. Badker***, 2001 WI App 27, ¶8, 240 Wis. 2d 460, 623 N.W.2d 142.

¶27 Here, Krueger appears to take issue with the circuit court's finding that there was no prosecutorial intent or design to provoke a mistrial or to prejudice his rights under the second prong of the analysis. We agree with the State that the record and circumstances support the court's determination. There are several reasons for this conclusion.

¶28 First, the prosecutor objected to the proposed mistrial, arguing that the problem could be addressed with a curative instruction to the jury. Given this fact, the circuit court could infer that had mistrial been the prosecutor's goal, he would not have opposed the motion. *See* ***Jaimes***, 292 Wis. 2d 656, ¶10 (stating that court may reasonably infer that prosecutor would not oppose mistrial motion if that was his goal).

¶29 Second, there is nothing to indicate that the State's case-in-chief was going badly at the point of the mistrial. A review of the testimony shows that all of the witnesses were cooperative with the prosecution and provided significant evidence favoring the State's case. Indeed, the prosecutor indicated in his response to defense counsel's motion that he believed the trial was going well. This is yet another reason why the circuit court could reach its conclusion. *See* ***State v. Quinn***, 169 Wis. 2d 620, 626, 486 N.W.2d 542 (Ct. App. 1992) (noting

that where the trial otherwise appeared to be going well for the State, that supported the inference of no intent to provoke a mistrial).

¶30 Finally, the circumstances simply do not suggest a situation where the prosecutor was attempting to prejudice Krueger's right to complete the criminal confrontation in the first trial by harassing him with a second trial. Again, the mistrial occurred relatively early in the state's case-in-chief. A second trial would have had little advantage for the prosecution, given the need to reschedule all of the witnesses and, in particular, having two child witnesses and their families testify (and in Tyler's case, re-testify).

¶31 In the end, the prosecutor admittedly made mistakes in how he handled Tyler's late disclosure. But the circuit court correctly concluded that the circumstances here did not add up to intent or design to provoke a mistrial or to prejudice Krueger's right to complete the first trial. Accordingly, Krueger is not entitled to relief on this claim.

¶32 Finally, Krueger contends that the circuit court erred in denying his postconviction motions based on ineffective assistance of counsel.

¶33 When raising a claim of ineffective assistance of counsel at trial, it is the responsibility of subsequent counsel to "require counsel's presence at the hearing in which [trial counsel's] conduct is challenged." ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). As this court has explained:

> We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel. We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case.

Id.

¶34 Thus, when a defendant seeks relief on the basis of ineffective assistance of counsel, a proper record must be made at the circuit court to avoid waiver. This requires a postconviction hearing at which trial counsel must testify and explain his or her conduct during the proceedings. ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998) (a defendant cannot prevail on a claim of ineffective assistance of counsel in the absence of testimony from challenged counsel).

¶35 Here, the circuit court denied Krueger's claim of ineffective assistance of counsel because he failed to subpoena his trial counsel to testify at the postconviction hearing. Given the absence of any information as to the performance of counsel, the circuit court declined to determine that counsel was deficient. There is no basis for us to reverse this decision. Accordingly, we conclude that Krueger is not entitled to relief on this final claim.

¶36 For the reasons stated, we affirm the judgments and order.[4]

By the Court.—Judgments and order affirmed.

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

[4] To the extent we have not addressed an argument raised by Krueger on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").