

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2012AP2185-CR

Cir. Ct. No. 2010CF320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. HUNT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Reversed and cause remanded.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. James Hunt appeals a judgment of conviction, following a jury trial, of causing a child younger than thirteen to view sexually explicit conduct, and an order denying his postconviction motion. Hunt contends

that: (1) the circuit court erred by excluding evidence highly relevant to the defense; and (2) Hunt's trial counsel provided ineffective assistance. We conclude that the circuit court erred by excluding the defense evidence, and that the error was not harmless. Accordingly, we reverse the judgment of conviction and remand to the circuit court for a new trial.¹

Background

¶2 The State charged Hunt with one count of causing a child to view sexually explicit conduct and one count of sexual assault of a child, both based on statements made by A.H. At trial, A.H. testified that, when she was eleven years old, Hunt had shown her three images on his cell phone, a video of a man and woman having sexual intercourse and two images that the court concluded at the preliminary hearing were not sexually explicit conduct. A.H. also testified that, when she was even younger, Hunt had placed her hand on his penis.

¶3 Hunt testified that he never showed A.H. a video of a man and woman having intercourse, and never placed her hand on his penis. He testified that the screen saver on his phone was a picture of a topless woman holding a deer rack, and that A.H. had seen that image; he denied ever possessing the cartoon image A.H. described. He testified that, on the day A.H. described as the day Hunt showed A.H. a video of intercourse on his cell phone, Hunt had received a text message with a picture of a herniated testicle from his friend Matthew Venske. Hunt testified that A.H. was standing next to him when he opened that image on his cell phone, and that she saw the image.

¹ Because we reverse on the evidentiary issue, we need not address Hunt's ineffective assistance of counsel argument.

¶4 Venske testified for the defense. He testified that he had, in the past, sent text messages to Hunt, including pictures. Venske testified that he sent Hunt a picture of a topless woman holding a deer head, and a picture of a herniated testicle. Defense counsel asked Venske whether he had sent Hunt a video of sexual intercourse, but the court disallowed the question. Outside the presence of the jury, the defense asserted that Venske would testify that he had never sent a video of sexual intercourse to Hunt. The court found that the source of the video was irrelevant.

¶5 The jury found Hunt not guilty of sexual assault, but guilty of exposing a child to sexually explicit conduct. Hunt filed a postconviction motion challenging his conviction. Hunt argued that he was denied his right to present a defense when the circuit court excluded proffered testimony by Venske that he had not sent Hunt a video of a man and woman engaging in sexual intercourse, and that Hunt was denied the effective assistance of counsel. The circuit court denied the motion. Hunt appeals.

Standard of Review

¶6 We review a circuit court decision to exclude evidence as irrelevant under an erroneous exercise of discretion standard. *Dalka v. Wisconsin Cent., Ltd.*, 2012 WI App 22, ¶51, 339 Wis. 2d 361, 811 N.W.2d 834. A circuit court has properly exercised its discretion if it has examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. *See id.*

Discussion

¶7 Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01 (2011-12).² To be relevant, evidence need not bear directly upon an element of the charged crime; it need only “bear upon any one of [the] countless ... factors which are of consequence to the determination of the action.” *Holmes v. State*, 76 Wis. 2d 259, 268, 251 N.W.2d 56 (1977). If a circuit court excludes relevant evidence, we next examine whether the exclusion of the evidence was harmless. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). An evidentiary error is not harmless when there is a reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis. 2d 525, 542–43, 370 N.W.2d 222 (1985).

¶8 Here, the circuit court determined that testimony by Venske that he did not send Hunt a text message with a video of sexual intercourse was irrelevant because the State had not introduced any evidence that Venske sent the video to Hunt. The court reasoned that the relevant inquiry was whether Hunt showed the image to A.H., and that the source of the video was irrelevant.

¶9 Hunt argues that the circuit court misapplied the law by excluding Venske’s testimony that he did not send Hunt a text message with a video of sexual intercourse. He argues that the circuit court erred in its determination that the evidence was not relevant under WIS. STAT. § 904.01. Hunt asserts that

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Venske's testimony was relevant to corroborate Hunt's testimony that Hunt opened a text message from Venske that contained a picture of a herniated testicle, and that A.H. saw that image, and that Hunt did not show A.H. a video of sexual intercourse.

¶10 The State does not dispute that the circuit court erred by excluding Venske's testimony. However, the State contends that any error in excluding that testimony was harmless. The State points to police officer testimony that, in investigating this case, the police had reason to believe that Venske sent Hunt the alleged video of sexual intercourse, but that Venske denied to police that he had sent Hunt a video of sexual intercourse. The State contends that this police officer testimony provided the same information Venske would have provided had he been allowed to testify that he did not send Hunt the video of sexual intercourse.

¶11 At the outset, we note that it is undisputed that the excluded testimony of Venske was relevant to Hunt's defense. The theory of defense Hunt presented at trial was that A.H. saw a text message Hunt received from Venske, which was a picture of a herniated testicle, and that A.H. embellished that event by saying that Hunt showed her a video of sexual intercourse. Venske corroborated Hunt's testimony as to the image of the herniated testicle, but was prevented from testifying that he never sent Hunt a video of sexual intercourse. The excluded testimony would have further corroborated Hunt's version of the events.

¶12 We turn, then, to whether the court's error in excluding the evidence was harmless. We conclude that the exclusion of Venske's testimony that he did not send Hunt a video of sexual intercourse was not harmless. This case clearly turned on the relative credibility of A.H. and Hunt. The jury had to decide who was telling the truth—either A.H. or Hunt. A.H. testified that Hunt showed her a

video of sexual intercourse on his cell phone. Hunt testified that, on the day A.H. described, Hunt had opened a text message from Venske with an image of a herniated testicle, which A.H. saw, but that Hunt never showed A.H. a video of sexual intercourse. Venske corroborated that he sent Hunt the image of the herniated testicle. Venske would have testified further that he never sent Hunt a video of sexual intercourse, which would have lent credibility to Hunt's version of the events. Because this case was essentially a matter of credibility, we cannot conclude that the exclusion of evidence bearing on credibility was harmless. That is, we cannot conclude that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Anderson*, 2006 WI 77, ¶115, 291 Wis. 2d 673, 717 N.W.2d 74 (quoting *State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted)), *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶28, ___ Wis. 2d ___, ___ N.W.2d ___.

¶13 We disagree with the State that the error in excluding Venske's testimony was harmless based on police testimony regarding statements Venske made to the police. Contrary to the State's argument, the police officer's testimony was not the equivalent of the testimony that Venske would have provided. This is because the court instructed the jury that the police testimony as to Venske's answers to police questioning was not to be considered for the truth of whether Venske did or did not send anything from his phone to Hunt, but rather was offered only for the purpose of understanding the conversation between the police and Venske. The court further explained to the jury that proof of what Venske did or did not do would have to be established through Venske's testimony, *only highlighting* the lack of that testimony from Venske. We conclude that the erroneously excluded evidence was significant for the defense on the

central issue of credibility, and thus excluding the evidence was not harmless. Accordingly, we reverse and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

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

