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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Case No. 2014AP2773-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVIS KEVIN LEWIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED
IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE DAVID BOROWSKI RESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Davis Kevin Lewis's statements of the case and facts are sufficient to frame the issues for review. As respondent, the State exercises its option not to present full statements of the case and facts, but will supplement them as needed in its argument. *See Wis. Stat. § (Rule) 809.19(3)(a)2.*

ARGUMENT

I. The evidence was sufficient for the jury to find that Lewis sexually assaulted KW.

A. Standard of review and relevant law.

“When a defendant challenges a verdict based on sufficiency of the evidence, [appellate courts] give deference to the jury’s determination and view the evidence in the light most favorable to the State.” *State v. Long*, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557 (citation omitted). “If more than one inference can be drawn from the evidence, [the appellate court] must adopt the inference that supports the conviction.” *Id.* An appellate court “will not substitute [its] judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty.” *Id.*

B. The jury reasonably concluded that Lewis was guilty based on the evidence presented.

In October 2012, Lewis was employed as a personal care worker to take care of cognitively disabled KW, who was twenty years old at that time (45:43, 75, 80). Part of Lewis’s job involved him helping KW get dressed (45:40). KW testified that on one day in October 2012, after KW got out of the shower, Lewis put a pornographic recording on the television in KW’s bedroom, told KW to think about his girlfriend, and Lewis touched KW’s penis (45:28-38). KW stated that Lewis rubbed KW’s legs and penis with lotion (45:33-34). KW testified that he told Lewis to stop, but that Lewis did not stop (45:36). KW also testified that Lewis put his mouth on KW’s penis (45:40). KW stated that Lewis stopped the assault when KW’s sister, Kirshna Thompson, came into the bedroom (45:41).

Thompson testified that one day in October 2012, she walked into KW's room, but a chair placed in front of the door prevented the door from being opened all the way (45:56-60). Thompson testified that she could see that KW was naked and that Lewis was seated in the chair (45:57-59).

Thompson testified that about a week after that incident, KW told her about the sexual assault (45:67, 69-70). KW's mother, Natalie W., testified that KW told her that Lewis had put his mouth on him, told him he loved him and told him "to think of this as it was his girlfriend" (45:82). Natalie testified that KW told her that Lewis had brought a pornographic recording into his room and KW gave the recording to her (45:85-87). Natalie stated that she called the police the day after KW told her about the assault (45:83).

Officer Gary Brown, of the Milwaukee Police Department, testified that he interviewed KW on October 18, 2012, regarding the assault (46:26, 33). The State played a recording of Brown's interview of KW for the jury (46:35). In the recording, KW told Brown that Lewis sucked on his penis (49:Ex. 9:08:05). KW said that the assault happened while he was standing up and Lewis was seated in a chair (49:Ex. 9:12:02-12:10). KW stated that the assault happened in his room, after he took a shower and that it stopped after his sister entered the room (49:Ex. 9:11:15, 16:03). KW told Brown that Lewis told him that he loved him and that he put a pornographic recording on the television in the bedroom (49:Ex. 9:09:59-10:31).

In order to find Lewis guilty of third-degree sexual assault, the State was required to prove that Lewis (1) had sexual intercourse with KW (2) without KW's consent. *See* Wis. Stat. § 940.225(3). "Sexual intercourse" is defined as, among other things, fellatio. *See* Wis. Stat. § 940.225(5)(c). Although

Lewis denied the assault (45:94), the evidence was sufficient for a reasonable jury to find Lewis guilty of the crime.

KW testified that Lewis put his mouth on his penis (45:40). KW testified that he told Lewis to stop (45:36). KW told consistent versions of the assault to Thompson, Natalie and Brown (45:70-71, 82; 49:Ex 9:08:05). KW reported the assault to his family soon after it happened and the police were notified soon after that (45:68-71, 83). Thompson remembered a day that she walked into KW's room and saw KW naked and Lewis sitting on a chair, which is consistent with KW's version of the day of the assault (45:56-59; 49:Ex. 9:12:02-12:10, 16:03). This evidence is more than sufficient for a reasonable jury to conclude that Lewis had sexual intercourse (fellatio) with KW without his consent and, therefore, to find Lewis guilty of third-degree sexual assault.

II. The court properly exercised its discretion in excluding Julie Bradley's testimony.

A. Standard of review.

Whether to admit evidence at trial is within the discretion of the circuit court. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 667. A decision to admit or exclude evidence will be reversed only when the circuit court has erroneously exercised its discretion. *Id.*

B. The circuit court properly exercised its discretion in excluding Bradley's testimony because its probative value was low and evidence that Lewis had previously been convicted of a sex crime would have been unduly prejudicial.

Before trial, the State alerted the court and Lewis to its intention to impeach Lewis's witness Julie Bradley (44:3).

Bradley was Lewis's supervisor in his employment as a personal care giver (44:3-4). Lewis intended to have Bradley testify regarding her observations of Lewis's work (44:4). The State responded that if Bradley testified, it would ask Bradley whether she had performed a background check on Lewis and whether she had learned that Lewis was on the sex offender registry (44:3). The State argued that this line of inquiry was relevant to demonstrate Bradley's bias because she may have motivation to paint Lewis in a favorable light in order to shield her employer from liability (44:3).

The court concluded that allowing evidence of Lewis's status as a sex offender into evidence would be "extremely prejudicial" (44:8). The court also found that any evidence that Bradley observed Lewis act in a positive way "at other times" has "very limited probative value" and that it would open the door to the "extremely prejudicial cross-examination which is also relevant" (44:9). Thus, the court decided that "the best course here is to simply exclude the witness" under Wis. Stat. § 904.03 (44:9).

On appeal, Lewis argues that the circuit court erred in excluding Bradley's testimony because it should have allowed in her observations of Lewis's work but forbidden the State from impeaching her credibility.¹ Lewis argues that "[t]he State would have an opportunity to impeach Mr. Lewis with prior criminal convictions upon his taking the stand in his own defense[.]"² Lewis's argument ignores that the State sought to impeach Bradley, not Lewis, with the information that she knew, or should have known, of Lewis's criminal history.

As stated, the State indicated that if Bradley testified, it would ask her whether she or someone at her place of

¹ Lewis's Br. at 13-16.

² Lewis's Br. at 16.

employment had performed a background check on Lewis and learned that he had previously been convicted of a sex crime and was registered as a sex offender (44:3). The State argued that the question was relevant because it shed light on Bradley's credibility (44:3). The State reasoned that if Bradley and her employer knew of, or should have known of, Lewis's prior conviction, they may shoulder some liability for his crime (44:3). Bradley may therefore be motivated to testify in favor of Lewis in order to mitigate her own liability (44:3).

The circuit court properly exercised its discretion in excluding Bradley's testimony under Wis. Stat. § 904.03. Section 904.03 permits a court to exclude relevant evidence when the evidence's value is "substantially outweighed by the danger of unfair prejudice." Here, that danger is apparent and Lewis does not argue otherwise. Instead, he argues that the court should have simply forbidden the State from impeaching Bradley. But the State is permitted to impeach the credibility of Lewis's witnesses. *See* Wis. Stat. § 906.07. And Lewis offers no reason why the State should not be permitted to do so. In addition, Bradley's testimony that she saw Lewis acting properly with KW at one or two moments does not contradict KW's testimony that Lewis assaulted him in October 2012. Thus, the probative value of Bradley's testimony was extremely low and any error in excluding her testimony was surely harmless. *See State v. Hunt*, 2014 WI 102, ¶26, 360 Wis. 2d 576, 851 N.W.2d 434 (stating that the "erroneous exclusion of testimony is subject to the harmless error rule").

III. The court properly exercised its discretion in granting the jury's request to view the recorded interview of KW a second time and applied the correct standard by playing the recording in open court.

A. Standard of review and relevant law.

Whether to allow a jury to see and hear a recording after it has begun to deliberate is left to the circuit court's discretion. *See State v. Anderson*, 2006 WI 77, ¶¶27-29, 291 Wis. 2d 673, 717 N.W. 2d 74 (overruled on other grounds by *State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W. 2d 126). In exercising its discretion to determine whether the jury should be permitted to view evidence during deliberations, a court should consider whether the evidence "will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the" evidence, and whether the evidence could be misused. *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988). "A circuit court erroneously exercises its discretion when it fails to exercise its discretion, when the facts do not support the circuit court's decision, when the circuit court applies the wrong legal standard, or when the circuit court fails to use a demonstrated rational process to reach a reasonable conclusion." *See Anderson*, 291 Wis. 2d 673 at ¶28.

If the court determines that the jury should be allowed to view the recording again, the "jury should return to the courtroom and the recording should be played for the jury in open court." *Id.* ¶30.

B. The record demonstrates that the court properly exercised its discretion in determining the jury's request to view the recording again was reasonable and it followed the proper procedure by playing the recording in open court.

As Lewis states in his brief³, it is not clear from the record when the jury asked to see the recording of Brown's interview of KW (47:3-11). But sometime after the jury began its deliberations, the State, Lewis and the court had a discussion about the jury's request to view the recording (47:3-11). Lewis objected to showing the jury the recording again, arguing that it would be prejudicial (47:5). Lewis worried that playing the recording for the jury a second time would overemphasize the interview (47:6). The court acknowledged that risk, but found that it was outweighed by at least two factors (47:7-8). One, the sound quality of the recording was so poor that it was difficult to hear KW; the jurors seemed to strain to hear it the first time (47:7-8). Two, KW's cognitive disability adversely affected his ability to communicate; the court thought the jury would benefit from hearing the recording "one more time so that they really understood what is said" (47:7-8). The court then had the jury return to the courtroom and the recording was played for them there (47:7-8).

On appeal, Lewis argues that the court's decision to play the recording in the courtroom was an erroneous exercise of its discretion.⁴ Lewis argues that replaying the recording emphasized the recording over in-court testimony and served to remind the jury of KW's disability, which may have led the jury to find Lewis guilty because they felt sympathy for KW's

³ Lewis's Br. at 17.

⁴ Lewis's Br. at 16-19.

limitations.⁵ Lewis's arguments ignore both the facts and the law.

First, Lewis argues that KW "denied that Mr. Lewis assaulted him when [KW] testified before the Jury."⁶ Thus, Lewis believes that hearing the recording twice would overemphasize KW's statement to Brown that Lewis assaulted him.⁷ But Lewis's argument misstates the record. At trial, the State asked KW, "Did [Lewis's] mouth ever go anywhere onto your body?" (45:35). And KW answered, "No" (45:35). Later, though, the State asked KW if anyone had ever put their mouth on his penis, and KW testified that Lewis had done so (45:40).

Second, the question is whether the circuit court erroneously exercised its discretion in permitting the jury to view the recording a second time in open court. Here, the record amply demonstrates that the circuit court employed a reasoned, rational process to conclude that the jury should be allowed to watch the recording again. The court found that the recording was difficult to hear both because of technical problems in the recording and because of KW's cognitive limitations (47:7-8). The court found that presenting the recording again would aid the jury in its consideration of the case (47:8). *See Anderson*, 291 Wis. 2d 673, ¶27 (stating that a court should consider whether showing the jury the evidence again would aid in its consideration of the case). The court acknowledged a risk of prejudice, but concluded that any risk was outweighed by the benefit to the jury of being able to hear the recording. *Id.* (stating that a court should assess whether a party will be prejudiced by a jury seeing evidence again). In sum, the court properly applied the law to the facts and reached a reasonable conclusion: the jury was allowed to re-

⁵ Lewis's Br. at 18-19.

⁶ Lewis's Br. at 18.

⁷ Lewis's Br. at 18.

view the recording. And then the court followed the supreme court's instructions in *Anderson* and had the jury view the recording in open court (47:9-11). *See Anderson*, 291 Wis. 2d 673, ¶30. The court properly exercised its discretion and correctly applied the law.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 1st day of July, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,374 words.

Katherine D. Lloyd
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of July, 2015.

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Assistant Attorney General