COURT OF APPEALS
DECISION
DATED AND RELEASED

February 12, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0690-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. SHAW,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded*.

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. David L. Shaw appeals from a judgment of conviction of three counts of sexual assault of a child under the age of thirteen. He argues that he was denied his due process right to present a defense by the trial court's denial of his motion for continuance and the exclusion of opinion testimony about the victim's truthfulness. He also claims that he was prejudiced by improper comments in the prosecutor's closing argument. We conclude that errors occurred and that as a result the real controversy was not fully tried. We reverse the judgment and grant a new trial in the interests of justice.

The criminal complaint alleges that Shaw had sexual contact with ten-year-old Carly C. The contact allegedly occurred while Carly was on a camping trip and staying in a trailer with Shaw in June 1993. Carly testified that the contact occurred. Shaw testified that it did not. Carly testified that Shaw wrote messages related to her in a wood shelter. Shaw testified that he did not.

Carly did not report the assault until the end of August 1993. She first revealed the assault to the aunt she was then living with. At trial a social worker testified that a child victim of sexual assault does not often report the assault right away and may not confide in a parent if that parent has a close relationship with the perpetrator. She explained that children often wait to disclose such incidents when they feel they are in a safe environment. Eleven days before trial, Shaw asked for a continuance in order to permit Dr. Robert Shapiro to appear and give testimony to rebut the social worker's testimony. The request was denied.

Shaw argues that denial of the continuance to obtain the attendance of Shapiro deprived him of his due process right to present a defense. A motion for continuance is committed to the discretion of the trial court. *See* ***State v. Fink***, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). Where a continuance is sought to obtain attendance of a witness, the trial court is charged to consider "whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located. Where a satisfactory showing is made with respect to these elements, the moving party is ordinarily entitled to a continuance ...." ***Elam v. State***, 50 Wis.2d 383, 390, 184 N.W.2d 176, 180 (1971) (citation omitted). Where a defendant's right to due process of law is implicated, we must balance the defendant's right against the public interest in the prompt and efficient administration of justice. *See* ***Fink***, 195 Wis.2d at 338, 536 N.W.2d at 404.

At a hearing on April 4, 1995, it was explained that the prosecution would have a social worker testify as an expert on how child abuse victims act. Shaw attempted to have the testimony excluded. The trial court ruled that the testimony would be admitted upon a proper foundation. On June 1, 1995, Shaw requested a continuance of the trial scheduled to commence June 12. The

request indicated that on May 20, 1995, a commitment had been obtained from Shapiro to testify in rebuttal to the social worker's testimony but that Shapiro would be unavailable during the week of June 12 due to a planned vacation. Shapiro's affidavit confirmed that he would be unavailable until after June 26, 1995, and that he was prepared to testify that the child accommodation theory is, to a reasonable degree of psychological certainty, inapplicable to the facts of this case. At the motion hearing on June 7, Shaw's counsel explained that it had taken forty-five days to find a qualified rebuttal expert who was willing to testify upon very short notice.

The trial court found that Shaw's request was not a "good faith effort to preserve the testimony of a rebuttal witness but a dilatory request for continuance." The trial court noted that Shapiro had not been subpoenaed, that it had not been demonstrated that any local person could not offer a similar opinion, and that the defense had not offered to take Shapiro's videotape deposition.

We conclude that the request for a continuance satisfied the elements set forth in ***Elam***. Shapiro's testimony was material to rebut the social worker's explanation of Carly's behavior. This case involved a credibility battle between Carly and Shaw. The unrebutted expert evidence served to bolster Carly's credibility. The request was not merely a dilatory tactic. The defense explained the difficulty it had in procuring an expert who was willing to testify in rebuttal. Shapiro's testimony was evidence that could not be provided by another available witness. The witness had been located and was willing to testify. The defense could not be expected to subpoena Shapiro as it would alienate a witness who agreed to provide defense evidence.

Also, it is questionable whether a videotaped deposition of Shapiro would have been admissible. In ***State v. Temby***, 108 Wis.2d 521, 525, 322 N.W.2d 522, 525 (Ct. App. 1982), the court held that to satisfy requirements of the confrontation clause, a witness must be in fact unavailable in order to permit the use of a deposition. Temporary unavailability is not sufficient. *See* ***id.*** at 526, 322 N.W.2d at 525. In any event, there exists a constitutional preference for live testimony at a criminal trial. *See* ***State v. Thomas***, 144 Wis.2d 876, 888, 425 N.W.2d 641, 645 (1988).

The requested continuance was short. Counsel sought an additional two weeks at the motion hearing. When the trial commenced, Shaw's counsel indicated that Shapiro was willing to cut his vacation short and appear on Friday of that week. Only a two-day continuance was needed. The case was not that old as to outweigh Shaw's interest in presenting a defense. The criminal complaint had not been filed until April 1994. Previous delay in the case in February 1995 was occasioned by lead defense counsel's illness. In light of the short amount of time needed to procure the expert's testimony and the materiality of that testimony, denial of a continuance was an erroneous exercise of discretion.[1]

We turn to the ruling on opinion evidence as to Carly's truthfulness. The defense wanted to present the testimony of Thomas and Ronald Waters who had frequent contact with Carly and her family between January and May 1993. When Thomas was asked about his opinion of Carly's truthfulness, the trial court sustained the prosecutor's objection based on remoteness in time. The trial court ruled that only Carly's character for truthfulness at the time of trial was at issue.

Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court misused its discretion. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. *See* ***id.*** at 367, 497 N.W.2d at 149.

We conclude that an error of law occurred. Section 906.08(1), STATS.[2] is not limited to truthfulness at the time of trial. It is not necessary that

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[1] Shaw also argues that he should have been granted a continuance in order to procure a handwriting expert to examine wood boards containing messages Shaw allegedly wrote about Carly. Shaw was not informed that the boards had been obtained by the sheriff until a few weeks before trial. At the hearing on the request for a continuance, Shaw relied on trial counsel's experience as an offer of proof that handwriting analysis could be performed on the boards. This was insufficient as an offer of proof. However, because we reverse and remand for a new trial, we need not address this issue.

[2] Section 906.08(1), STATS., provides:

the witness giving the opinion testimony have a long acquaintance with the person or have recent information. *See* ***State v. Cuyler***, 110 Wis.2d 133, 139, 327 N.W.2d 662, 665-66 (1983); *see also* ***State v. Hilleshiem***, 172 Wis.2d 1, 20, 492 N.W.2d 381, 389 (Ct. App. 1992) (witness should have been allowed to give opinion of undercover agent's character for truthfulness during the period the witness worked with the agent). Remoteness in time bore only on the weight to be given the evidence. That function is exclusively for the jury. *See* ***State v. Wachsmuth,*** 166 Wis.2d 1014, 1023, 480 N.W.2d 842, 846 (Ct. App. 1992). Finally, the witnesses' knowledge and contact with Carly was within months of the time she reported the alleged sexual assault. Their familiarity with Carly was not so remote to the events as to negate probative value.

The State argues that the evidence was cumulative to the testimony of two other witnesses that Carly tended to lie about things.[3] However, those two witnesses, a mother and her daughter, were equivocal about Carly's truthfulness. The mother indicated that Carly had lied about things but did not know if Carly would lie about "something this big." The young daughter testified that Carly would lie to get someone into trouble but that she would sometimes tell the truth. Credibility was the crucial issue. Testimony from Thomas and Ronald Waters would have attacked Carly's credibility. It may have been enough to change the outcome of the case.

(..continued)

Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: a) the evidence may refer only to character for truthfulness or untruthfulness, and b), except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

This section was renumbered § 906.08(1) (intro.) and amended by 1995 Wis. Act 225, § 519. The changes do not affect our analysis.

[3] The State suggests that Shaw failed to make an offer of proof regarding what Thomas and Ronald Waters' opinion of Carly's truthfulness would have been. The claim of error is preserved because the substance of their opinion is apparent from the context in which the questions were asked. *See* § 901.03(1)(b), STATS.

Shaw's final claim arises from closing argument. The prosecutor concluded his closing argument with the following:

> I submit in closing that this little girl was victimized by this man when he molested her in that trailer. She had a traumatic experience, which she testified, which is his right to have her do because we have the burden of proof, but she was still traumatized, victimized again. I'm asking you not to victimize her again.

When Shaw's objection was sustained, the prosecutor further stated: "To return a verdict now saying the defendant is not guilty is to return a verdict victimizing that child a third time, telling her you don't believe her. Please don't do that."

Generally, counsel is allowed considerable latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. *See* ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury arrive at a verdict by considering factors other than the evidence. *See* ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). Without a doubt the prosecutor's argument was improper.[4] It appealed to the jury's emotions and sought a verdict based not on the evidence, but on a desire not to further victimize the child. It was also offensive for the prosecutor to suggest that the child had been victimized by having to testify at trial and Shaw was at fault for that form of victimization.

Upon concluding that a prosecutor's argument was improper, we examine the remarks in the context of the entire trial to determine if the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See* ***id.*** (quoted source omitted). We need not engage in that

[4] Upon Shaw's objection, the trial court failed to exercise its discretion at all. It merely responded by noting that the comments were argument only.

exercise here. We determine that the cumulative effects of the errors in Shaw's trial require a new trial in the interests of justice.[5] *See* § 752.35, STATS. Here the jury was not given an opportunity to hear important testimony bearing on Carly's credibility, and improper remarks during the prosecutor's closing argument obscured the issues. It is a case where the real controversy has not been fully tried and we may reverse without a finding that there is a substantial probability of a different result on retrial. *See* ***State v. Smith***, 153 Wis.2d 739, 742, 451 N.W.2d 794, 796 (Ct. App. 1989).

By the Court.—Judgment reversed and cause remanded.

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

[5] For this reason, we do not address the State's claim that Shaw waived the objection to the prosecutor's improper closing argument by failing to move for a mistrial. Our discretionary power of reversal pursuant to § 752.35, STATS., extends to situations of waiver where the exercise of our discretionary power is necessary to achieve justice in the individual case. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).