

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1301-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS E. KAMINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Anderson and Wilk,¹ JJ.

¹ Circuit Judge S. Michael Wilk is sitting by special assignment pursuant to the Judicial Exchange Program.

PER CURIAM. Douglas E. Kaminski has appealed from a judgment of conviction of one count of first-degree sexual assault of a child in violation of § 948.02(1), STATS., and two counts of second-degree sexual assault of a child in violation of § 948.02(2), STATS. These convictions represented counts one, three and five of the original six-count information filed against him.² Kaminski has also appealed from the portion of the trial court order which denied his motion for postconviction relief. We reverse the judgment of conviction and the order and remand the matter for a new trial.

Kaminski raises five issues on appeal: (1) whether he was erroneously deprived of his full complement of peremptory challenges when the trial court failed to discharge a prospective juror for cause and his trial counsel failed to perfect challenges for cause to two prospective jurors; (2) whether the trial court erred in excluding expert testimony concerning Kaminski's character; (3) whether Kaminski's constitutional rights were violated when his trial counsel failed to object to improper prosecutorial argument; (4) whether Kaminski's constitutional rights were violated by his counsel's failure to object to duplicitous jury instruction and verdict forms related to counts one, three and five; and (5) whether a new trial is warranted in the interests of justice pursuant to § 752.35, STATS. We address only the second issue, which is controlled by *State v. Richard A.P.*, 223 Wis.2d 777, 589 N.W.2d 674 (Ct. App. 1998). Based upon *Richard*

² Count four of the information also alleged second-degree sexual assault of a child but was dismissed at trial for insufficient evidence. Count two of the information charged Kaminski with repeated sexual assault of the same child in violation of § 948.025(1), STATS. Count two was dismissed by the trial court in postconviction proceedings, as was count six, which also charged second-degree sexual assault of a child.

A.P., we reverse the judgment of conviction and the order denying postconviction relief and remand the matter for a new trial.³

Kaminski presented expert testimony from Dr. Itzhak Matusiak in an offer of proof. Matusiak testified that he is a psychologist with professional experience and education in the areas of forensic psychology and child sexual assault. He testified that he examined Kaminski before trial for a period of approximately fifteen hours, using interviews and diagnostic tests. He testified that he believed his findings were reliable. Matusiak's findings were that Kaminski's "clinical profile" was "normal" and "quite unremarkable," without significant pathology or significant concerns about lack of control, poor judgment, an inability to manage impulses, or obsessive/compulsive behaviors or tendencies. He specifically stated that Kaminski's sexual orientation was "unremarkable."

Matusiak rendered his opinion that, to a reasonable degree of certainty in the field of psychology, a person who has a normal profile would be "far less likely" or "unlikely" to sexually assault a ten- to fifteen-year-old girl, as compared to a person with pathologies in this area. Matusiak testified that he could not, however, conclusively exclude the possibility that a person with this profile would sexually assault a child. Because he could not conclusively testify that a person with a normal profile would not sexually assault a child, the trial court excluded his testimony.

³ Because we reverse and remand for a new trial on other grounds, we do not directly address the manner in which this case was charged or Kaminski's claim that his convictions on counts one, three and five were duplicitous and deprived him of a unanimous jury verdict. However, the duplicity and unanimity arguments raised by Kaminski require careful consideration, as recognized by the trial court and the State in postconviction proceedings. On remand we urge that these issues be considered carefully and cautiously so as to obviate problems with charging on retrial.

To be admissible, expert testimony must be relevant and assist the trier of fact in understanding the evidence or deciding a fact in issue. *See id.* at 791, 589 N.W.2d at 680. Whether proffered testimony is relevant and of assistance to the trier of fact presents a discretionary determination for the trial court. *See id.* The trial court's decision will be upheld if it is supported by a logical rationale, is based on facts of record and involves no error of law. *See id.* at 791, 589 N.W.2d at 680-81.

Matusiak's testimony would have assisted the jury in determining the likelihood that Kaminski committed the charged offenses. A clear conflict existed between the testimony of Kaminski and the alleged victim, J.W., as to whether the assaults occurred. In addition, both incriminating and innocent inferences could be drawn from the testimony of J.W.'s mother concerning an incident observed by her. Matusiak was prepared to testify that psychological evaluations indicated that Kaminski's clinical profile was "normal." His testimony also indicated that it was unlikely that a person with such a profile would commit a sexual assault of a girl the age of J.W. Matusiak's testimony thus was relevant and could have assisted the jury in determining whether Kaminski committed the charged offenses. *See id.* at 792, 589 N.W.2d at 681. Because the testimony indicated that Kaminski did not exhibit character traits consistent with those of a person with a sexual disorder involving minors, it was relevant and admissible under § 907.02, STATS., the statute governing expert testimony, and § 904.04(1)(a), STATS., the statute governing character evidence. *See Richard A.P.*, 223 Wis.2d at 795, 589 N.W.2d at 682. The trial court therefore erroneously exercised its discretion by excluding the testimony.

The State contends that even if exclusion of the evidence was error, it was harmless. We disagree. The harmless error test is whether there is a

reasonable possibility that the error contributed to the conviction. *See id.* The issues in this case largely involved weighing the credibility of Kaminski and J.W. It is reasonably possible that Kaminski's inability to present Matusiak's testimony had an effect on the jury's determinations regarding credibility and its decision to convict him. Consequently, the error cannot be deemed harmless,⁴ and the judgment of conviction and the portion of the order denying postconviction relief must be reversed. The matter is remanded for a new trial.

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

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

⁴ The State contends that the error is harmless because it will be able to present rebuttal expert testimony indicating that many sex offenders have no pathology discernible by psychological testing and that there is no reliable nonsex offender profile. While this may be true, such rebuttal testimony is a matter for trial and does not render harmless the erroneous exclusion of testimony helpful to Kaminski.

