COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3317-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. TANKSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. James Tanksley appeals judgments convicting him of sexually assaulting Josh F., and falsely imprisoning and twice sexually assaulting Ryan J. He also appeals an order denying his postconviction motion. He argues that the court erroneously admitted into evidence two irrelevant and highly prejudicial statements that Tanksley made to Officer Robert Novy at the

time of his arrest. He also argues that the court erroneously admitted Josh's mother's hearsay testimony as well as hearsay testimony from a therapist, Bonnie Davis, whose testimony impermissibly vouched for Ryan's credibility.[1] The State concedes that Tanksley's statements to Novy were inadmissible, but argues that the error was harmless. Because we cannot conclude that the error was harmless, we reverse the convictions and remand the cause for a new trial. In addition, although we do not predicate the reversal on these issues, we conclude that the court erred by allowing Josh's mother's hearsay testimony and that Davis's testimony was not admissible for the purposes identified by the prosecutor.

The State concedes that Tanksley's statements to Novy stating, that he is a homosexual and suggesting that he knows the penalty for similar crimes in another state, are inadmissible under § 904.03, STATS. These statements have little or no probative value and are highly prejudicial. The question on appeal is whether admitting these statements constituted harmless error. The test of harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis.2d 525, 541-42, 370 N.W.2d 222, 230-31 (1985). We conclude there is a reasonable possibility that admitting these irrelevant and prejudicial statements contributed to the convictions.

[1] Tanksley also argues that his counsel was ineffective for failing to request a limiting instruction regarding ***Whitty*** evidence. *See* ***Whitty v. State***, 34 Wis.2d 278, 149 N.W.2d 557 (1967). We need not respond to this argument because we are excluding the evidence on other grounds. Tanksley also filed a *pro se* letter attempting to argue additional issues. A party represented by an attorney has no constitutional or statutory right to raise issues his counsel has decided not to pursue or that counsel challenges on a different theory. *See* ***Jones v. Barnes***, 463 U.S. 745, 750-52 (1983); ***Hayes v. Hawes***, 921 F.2d 100, 102 (7th Cir. 1990). We see no reason for allowing a supplemental brief in this case. In addition, the supplemental brief challenges the admissibility of statements Tanksley made to Novy, some of which we are excluding on other grounds.

The State argues that other evidence it presented was so strong that there is no reasonable probability that the jury would have acquitted Tanksley. It relies on "Ryan's palpable discomfort" when recounting the sexual assaults, the credibility of the children's testimony, and corroborating evidence that Ryan insisted on taking a bath after one of the incidents. This evidence is not so strong that it renders harmless the admissibility of highly prejudicial irrelevant evidence. The jury might reasonably have viewed Ryan's discomfort as evidence that he was not credible. His testimony and his prior statements were not entirely consistent. There were no independent eyewitnesses and no physical evidence. The other witnesses derived their information from the children. We cannot say that there is no reasonable possibility that the improperly admitted evidence contributed to the verdicts.

The court also erred when it allowed hearsay testimony from Josh's mother. The State concedes that none of the grounds offered by the prosecutor (excited utterance, prior consistent statement or statement to a mother) constitute grounds for admitting Josh's statements to his mother. The State argues that her testimony was admissible for a nonhearsay purpose, to explain how the allegations concerning Josh came to light and why she contacted the police. On the facts of this case, how the allegations came to light is not relevant. It does not impact Josh's truthfulness. Tanksley admitted touching Josh's genitals, but claimed that he did so to check for jock itch and not for sexual gratification. Josh's mother's testimony shed no light on that critical issue. Furthermore, if her testimony were admissible for a purpose other than the truth of the matter asserted, the trial court should have given a limiting instruction. While we do not predicate the reversal on this error because it is unlikely this evidence contributed to the verdicts, the error should not be repeated when the case is retried.

We also have serious reservations regarding the admissibility of Bonnie Davis's testimony, although it is possible that the evidence presented at the next trial will render her testimony admissible. In response to a defense objection to Davis reciting hearsay statements about Ryan's behavior, the court responded "expert can give opinion evidence and an expert can use hearsay as the basis for that opinion evidence.... It's part of her diagnosis." The "opinion" or "diagnosis" in question appears to be whether Ryan was sexually assaulted.

Davis's testimony relied on hearsay that is not automatically admitted into evidence to prove the truth of the matter asserted unless it is otherwise admissible under a recognized hearsay exception. *See* ***State v. Weber***, 174 Wis.2d 98, 107, 496 N.W.2d 762, 766 (Ct. App. 1993). Davis recited facts of which she had no firsthand knowledge and then informed the jury that these behaviors were consistent with the behaviors of sexual assault victims. If the underlying facts are admissible as a basis for her expert opinion or diagnosis, that opinion or diagnosis must be admissible. It must be within the scope of her expertise and must not impermissibly vouch for Ryan's credibility. In addition to violating hearsay rules, Davis's testimony impermissibly disabused the jury of preconceptions that it did not have and refuted defenses that were not offered. This the State cannot do.

A witness is not allowed to offer an opinion that another witness testified truthfully. *See* ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). An expert witness can testify on postassault behavior to help explain the meaning of that behavior. *See* ***State v. Jensen***, 147 Wis.2d 240, 250, 432 N.W.2d 913, 918 (1988). That testimony would be admissible if it disabuses the jury of commonly held inaccurate beliefs that are frequently exploited by the defense in cases involving sexual assault of children. *See* ***State v. Robinson***, 146

Wis.2d 315, 335, 431 N.W.2d 165, 172 (1988). In ***Jensen***, for example, defense counsel attempted to exploit the child's delay in telling family members about the assault, denied the assault occurred when asked by other family members, and did not appear to be traumatized. The court then allowed a school guidance counselor to testify that the victim's behavior was consistent with behavior evinced by victims of sexual assault. In this case, Davis's testimony disclosed to the jury for the first time aspects of Ryan's behavior that Davis contends are consistent with sexual assault. Davis's testimony was not offered to establish a context for Ryan's allegations or to explain or rebut defense suggestions that Ryan's behavior was inconsistent with that of a sexual assault victim. The testimony disabused the jury of inaccurate assumptions it would make about evidence that it had not heard before.

On remand, the trial court should carefully consider the testimony actually presented on retrial to determine whether Davis's testimony relies on inadmissible hearsay and whether it is relevant to help the jury avoid making decisions based on misconceptions of victim behavior. *See* ***Jensen***, 147 Wis.2d at 252, 432 N.W.2d at 918.

By the Court.—Judgment reversed and cause remanded.

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