

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 99-0774-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTHONY H.,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County:
LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Anthony H. appeals from two judgments convicting him of three counts of first-degree sexual assault of a child and sentencing him to consecutive twenty and forty-year terms in prison to be followed by forty years on probation. He claims that evidentiary rulings by the trial court deprived him of his state and federal constitutional rights to

confrontation and compulsory due process by denying him the opportunity to fully cross-examine witnesses and present testimony in his defense. We conclude that Anthony was allowed to present sufficient evidence of his defense theory to satisfy constitutional standards, and therefore affirm the judgments of the circuit court.

BACKGROUND

¶2 When eleven-year-old Jessica R. began acting out in school and twice attempted suicide, her mother took her to a counselor. Jessica told her mother in the counselor's office that she thought she was pregnant and that her mother's long-time live-in boyfriend, Anthony, was the father. Anthony had previously been convicted of fourth-degree sexual assault of Jessica and another girl, but Jessica's mother had never believed the accusations and had accused both girls of lying. Although DNA testing excluded Anthony as the father of Jessica's baby, the State proceeded to trial on three first-degree sexual assault counts based upon Jessica's assertions.

¶3 At trial Jessica testified that Anthony came into her bedroom at night about a dozen times when she was in fifth grade and fondled her breasts and vagina, sucked on her breasts, and inserted his penis into her vagina. She said he gave her gifts and special treatment so that she would not tell. Jessica testified that she took a home pregnancy test which a friend of Anthony's niece, TaShea, had given to her. Jessica said that, after obtaining the positive test result, she told TaShea that the father was her brother's thirteen-year-old friend Randy because she did not want TaShea to know that she thought TaShea's uncle Anthony was the father. She said she did not know Randy's last name. She admitted that she never told the police or her mother that she had had sex with Randy until after the DNA results excluded Anthony as the father, but claimed that she really believed

Anthony was the father because she had sex so many times with him and had only had sex with Randy once.

¶4 Anthony sought to impeach Jessica's testimony by presenting evidence that would show, among other things, that: (1) Jessica had stolen the home pregnancy kit, rather than having had it given to her; (2) Jessica did know Randy's last name, but was lying to protect him; (3) Anthony's sister Trina (TaShea's mother) had threatened to tell Jessica's mother that Jessica was pregnant if Jessica did not tell her mother within five days; and (4) contrary to Jessica's testimony that no one ever asked her whether she was having sex with Randy and that she had had sex with him only once, Trina and TaShea had both questioned Jessica about the possibility that Randy was the father before the DNA test results were back, and Jessica had told TaShea and Trina that she had had sex with Randy four or five times, attempting suicide again directly after that conversation.

¶5 After hearing Anthony's offer of proof, the trial court ruled that TaShea could testify only whether Jessica knew the result of the pregnancy test, and whether there had been a conversation in which Jessica had indicated that Randy was the father; Trina could not testify at all, the court ruled. This ruling prevented the defense from presenting one of the two witnesses it had intended to call and limited the lines of inquiry which it could pursue. However, in response to a question why TaShea had asked Jessica whether Randy was the father, the defense was able to elicit TaShea's testimony that she had seen Jessica and Randy have sex on two occasions and that Jessica used to tell [her] sometimes that they had sex.

STANDARD OF REVIEW

¶6 Whether an evidentiary decision deprives a defendant of the right to present a defense is a constitutional question, which we review de novo. *See State v. Heft*, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

ANALYSIS

¶7 The right to present a defense through the testimony of favorable witnesses and the effective cross-examination of adverse witnesses is grounded in the Confrontation and Compulsory Process Clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *See State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). A defendant's right to present a defense may in some cases require the admission of testimony which would otherwise be excluded under applicable evidentiary rules. *See id.* at 648; *see also State v. Jackson*, 216 Wis. 2d 646, 663, 575 N.W.2d 475 (1998). The right to present a defense is not absolute, but rather is limited to the presentation of relevant evidence whose probative value is not substantially outweighed by its potential prejudicial effect. *See Pulizzano*, 155 Wis. 2d at 646. Additionally, in order to warrant a new trial, a defendant must show that a violation of the Confrontation Clause or Compulsory Due Process Clause "completely" prohibited him from exposing a witness's bias or motive for testifying falsely, or deprived him of material evidence so favorable to his defense as to "necessarily" prevent him from having a fair trial. *United States v. Manske*, 186 F.3d 770, 778-79 (7th Cir. 1999); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

¶8 Because the State does not argue that the testimony Anthony sought to introduce would have been prejudicial to its case, our initial inquiry is limited to

whether the testimony would have been relevant. *See State v. Stutesman*, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998). Relevance has two components: first, whether the evidence relates to a fact or proposition that is of consequence to the determination of the action; and second, whether the evidence has probative value—that is, whether it has a tendency to make the consequential fact or proposition more or less probable than it would be without the evidence. *See State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). Assuming that the testimony Anthony sought to elicit was relevant, we must evaluate whether its absence completely deprived him of the ability to establish witness bias or necessarily precluded him from having a fair trial, or, alternately, whether its omission was harmless error, taking into account the importance of the witness's testimony, whether the testimony would have been cumulative, the presence or absence of corroborating or contradictory evidence, the extent of cross-examination allowed, and the overall strength of the case. *See Manske* at 779; *Olden v. Kentucky*, 488 U.S. 227, 233 (1988).

The Shoplifting Allegation

¶9 Jessica testified that another girl had bought a pregnancy test kit and given it to her. The defense was precluded from presenting testimony from TaShea that Jessica had actually shoplifted the test kit. The parties appear to disagree on whether the defense was also precluded from asking Jessica directly whether she had shoplifted the test kit. We need not resolve this dispute, however, because we agree with the trial court's determination that the shoplifting allegation was not relevant. While evidence that Jessica had stolen the test kit might have shown that she feared she was pregnant and did not want to ask her mother for money to find out, it would not have been probative as to the material question whether she feared she was pregnant by Anthony or by Randy.

Randy's Last Name

¶10 Jessica testified that she did not know Randy's last name. TaShea was precluded from testifying that Jessica did know Randy's last name. Such testimony would have been relevant to the extent that it could demonstrate that Jessica was willing to lie to protect Randy. However, the defense was able to elicit testimony that Randy lived in the neighborhood and had spent a substantial amount of time in Jessica's house for years. From this, the defense was able to argue to the jury the inherent implausibility of Jessica's claim that she did not know Randy's last name. Therefore, we cannot conclude that the defense was necessarily denied a fair trial by the absence of direct testimony on this point.

Trina's Ultimatum

¶11 The State presented expert testimony that child victims of intra-familial sexual assault commonly delay reporting the abuse, especially when prior allegations have been disbelieved. The State relied on this expert testimony to argue that Jessica's allegations against Anthony in the counselor's office were consistent with patterns of truthful disclosure. On cross-examination the State's expert admitted that protecting another person and avoiding moral responsibility or discipline for a pregnancy could be factors which would motivate a false accusation of abuse. The defense sought to show that Jessica and Randy faced imminent exposure to blame for the pregnancy at the time Jessica made her allegations of abuse, because Anthony's sister, Trina, had threatened to tell Jessica's mother that Jessica was pregnant. Therefore, Trina's testimony on this point would have been relevant to whatever inference of truthfulness the jury might have drawn from the timing of Jessica's accusations.

¶12 The defense was not, however, completely precluded from presenting its theory that Jessica's accusations were motivated by a desire to minimize the negative consequences of her pregnancy, both for herself and Randy. Anthony presented testimony that Jessica told TaShea Randy was the father immediately upon obtaining a positive pregnancy test result, but when she later made the allegations of sexual abuse against Anthony, she falsely informed her mother and the police that Anthony was the only possible father, not mentioning she had also had consensual sex with Randy. Nor was the defense precluded from arguing that Jessica faced time pressure in disclosing her pregnancy, since it was apparent that the pregnancy could not be hidden forever, and at least one person already knew about it. We therefore conclude that testimony about Trina's ultimatum that she would tell Jessica's mother about the pregnancy was not necessary for a fair trial.

Trina and TaShea's Confrontation of Jessica

¶13 Jessica testified she told her mother and the police that Anthony was the father of her baby, without mentioning Randy, because she had had sex with Anthony many times and only had sex with Randy once. Therefore, testimony from Trina and TaShea that Jessica had admitted to them she had had sex with Randy multiple times would have been relevant to the extent that it would undermine Jessica's asserted reason for naming Anthony as the father and would strengthen the defense claim that Jessica named Anthony as the father to protect Randy and minimize her responsibility for her own consensual sexual activities. If believed by the jury, this testimony would also have directly impeached Jessica's credibility by showing that she had lied on the stand. However, because TaShea was allowed to testify that she had seen Jessica and Randy having sex on more than one occasion and that Jessica would tell her sometimes that she had had sex

with Randy, the exclusion of testimony by Trina and TaShea about a specific conversation in which Jessica had admitted having sex with Randy multiple times did not completely preclude the defense from presenting its theory on this point. In addition the jury was presented with Jessica's own admission that she told TaShea that Randy was the father immediately after taking the home pregnancy test.

¶14 In sum, we are satisfied that any errors the trial court made in its evidentiary decisions were harmless.

By the Court.—Judgments affirmed.

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

