COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP1458-CR **Cir. Ct. No. 2012CF781**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZEFERINO A. MARTINEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Zeferino Martinez appeals from a judgment convicting him of incest with a child and sexual assault of a child under sixteen. He contends the trial court erred when it admitted opinion evidence from a

detective without proper ***Daubert***[1] qualification, excluded evidence of the victim's prior sexual assault, admitted evidence of his telephone call to a third party without proper authentication and consent, and imposed two DNA surcharges. We reject Martinez's contentions in regard to the evidentiary rulings but agree that the court erred in regard to the surcharges. Accordingly, we affirm in part and reverse in part and remand for the trial court to apply the DNA-surcharge statute that was in effect when Martinez committed his crimes.

¶2 A fourteen-year-old close blood relative of Martinez's alleged that he plied her with alcohol and she later woke up to find him having penis-to-vagina intercourse with her. Martinez at first denied involvement but later gave an inculpatory statement to police. A jury found him guilty. He appeals. We will supply other facts as necessary to address the issues on appeal.

¶3 Martinez challenges three evidentiary rulings.[2] He first contends the trial court erred by allowing City of Kenosha Detective David May to testify as an expert in violation of WIS. STAT. § 907.02 (2013-14),[3] which incorporates the ***Daubert*** reliability test. We disagree.

¶4 May testified that, although Martinez initially denied having sexual contact with his relative, May told him that the investigation "isn't going to go away" simply because Martinez "made one or two denials." May testified that his

[1] *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

[2] Martinez certifies that his brief conforms to WIS. STAT. RULE 809.19(8)(b)3.c., but the body is written in 11-point, rather than 13-point as the Rule requires. We do not take false certifications lightly. Future transgressions may result in penalties. *See* WIS. STAT. RULE 809.83(2).

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

sixteen years' experience has taught him that people who commit sexual assaults often deny at the outset having done so but later acknowledge their guilt. Martinez argues that May's opinion should have been excluded because it was uncorroborated by facts or evidence beyond his personal experience.

¶5 We review a trial court's decision to admit or exclude evidence for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Martinez did not raise a ***Daubert*** objection at trial, thereby forfeiting his right to do so on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727.

¶6 Beyond that, May's opinions were not expert testimony. They were lay opinion within his scope of expertise, i.e., his many years' experience in investigating sensitive crimes. "Opinion evidence of lay witnesses regarding matters within their field of experience is generally held to be competent, and the probative force of such testimony is for the trier of fact." ***State v. Sarabia***, 118 Wis. 2d 655, 667, 348 N.W.2d 527 (1984). "Such opinions are valid even though they are not based upon technical or academic knowledge but on expertise gained from experience." ***Id.***

¶7 Even were it error, it was harmless. Evidence of Martinez's guilt was overwhelming. Besides his admissions to police, Martinez's friend, "Holly," testified about a telephone call in which he told her he "fucked up" and "messed up" and sexually assaulted the girl, and now had to "face the consequences." Martinez made the call from a police station desk phone within a few feet of May. Consistent with Holly's testimony, May testified that he heard Martinez's side of the conversation and heard him say at least twice that he "fucked up," sexually assaulted the girl, and "has to pay the consequences." Martinez's substantial

rights were not affected. *See* WIS. STAT. § 805.18; *see also* ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500.

¶8 Martinez next asserts that the trial court erred in excluding evidence of a prior sexual assault of the victim by her stepfather when she was five years old. Martinez's defense theory was that the girl gained sexual knowledge from the former assault and, while dreaming about that assault, confused the dream with reality.

> [T]o establish a constitutional right to present otherwise excluded evidence of a child complainant's prior sexual conduct for the limited purpose of proving an alternative source for sexual knowledge, prior to trial the defendant must make an offer of proof showing: (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.

State v. Pulizzano, 155 Wis. 2d 633, 656-57, 456 N.W.2d 325 (1990).

¶9 The earlier assault undisputedly occurred. The trial court held, however, that Martinez's offer of proof failed the remaining four ***Pulizzano*** factors. In the prior assault, for example, the stepfather touched the five-year-old's vagina and buttocks with his finger and penis but did not penetrate her, and the current assault involved penis-to-vagina intercourse with an almost fifteen-year-old. Irrelevant, prejudicial, and confusing evidence of a dissimilar event was not evidence that Martinez had a constitutional right to present.

¶10 Martinez also complains that the trial court erred in admitting evidence of his incriminating telephone call to Holly. He argues that he did not know that the call, made from a telephone on a police officer's desk, was being

recorded, that neither he nor Holly consented to its recording, and that he had an expectation of privacy in the call.

¶11 May testified that all phone lines, incoming and outgoing, at the Kenosha Police Department are taped "24/7" as a normal part of its business. Thus, whether the recording device was viewed as being used by the Kenosha Police Department in the ordinary course of its business, *see* WIS. STAT. § 968.27(7)(a)1., or by a law enforcement officer in the ordinary course of his or her duties, § 968.27(7)(a)2., the device fell outside the definition of an "electronic, mechanical or other device" essential to finding an illegal interception. If Martinez held an expectation of privacy in his conversation, as he claims, by making the call within May's earshot his expectation either was not a reasonable one, *see* ***State v. Rhodes***, 149 Wis. 2d 722, 724-25, 439 N.W.2d 630 (Ct. App. 1989), or he waived it.

¶12 Martinez also complains that the recording was not properly authenticated. He asserts that May could not verify the accuracy of the conversation with Holly because May heard only Martinez's side of it.

¶13 May requested that a disk be made of the conversation recorded on the phone Martinez used and confirmed that the resultant disk contained a true and accurate copy of the phone call Martinez made. "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. "Testimony of a witness with knowledge that a matter is what it is claimed to be" is a means of accomplishing authentication. WIS. STAT. § 909.015(1).

¶14 As noted, we agree with Martinez's final argument. At the September 30, 2014 sentencing, the trial court imposed a $250 DNA analysis surcharge for each of Martinez's felony convictions. *See* WIS. STAT. § 973.046(1r)(a). Martinez committed his crimes in 2012 before the legislature amended the surcharge statute, however. *See* WIS. STAT. § 973.046(1g), (1r) (2011-12). The new DNA surcharge statute ostensibly applies to all defendants sentenced on or after the effective date of the new statute even if they committed their crimes before that date. *See* 2013 Wis. Act 20, §§ 2355, 9426(1)(am); *see also* ***State v. Radaj***, 2015 WI App 50, ¶4, 363 Wis. 2d 633, 866 N.W.2d 758.

¶15 The new DNA surcharge statute, WIS. STAT. § 973.046, is an unconstitutional ex post facto law as applied to Martinez and his two felony convictions. *See* ***Radaj***, 363 Wis. 2d 633, ¶37. We therefore reverse the part of the judgment imposing the DNA surcharges and remand for the trial court to apply the DNA surcharge statute that was in effect when Martinez committed his crimes. *See* ***id.***, ¶39.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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