COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP389-CR **Cir. Ct. No. 2001CF26**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK R. NORLANDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mark Norlander appeals a judgment convicting him of child enticement, contrary to WIS. STAT. § 948.07(1).[1] He argues the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

circuit court erroneously admitted testimony on "grooming techniques" used by sexual predators. He also challenges the constitutionality of the child enticement statute. We conclude the circuit court properly exercised its discretion by admitting testimony on grooming techniques. We also conclude Norlander has failed to adequately articulate his constitutional challenge. Therefore, we affirm the judgment.

BACKGROUND

¶2 This case arises from an internet sting operation initiated by the Wisconsin Department of Justice. Shortly before 6 p.m. on December 18, 2000, agent Eric Szatkowski entered "Minneapolis M For M," an internet chat room for men wanting to meet other men, including meeting for sex. Szatkowski used the screen name BackdoorboyLOL and was posing as a fictitious fourteen-year-old boy named Andre who lived in Portage. Shortly after 6 p.m., Norlander, using the screen name Group4fun, sent Andre an instant message. Norlander and Andre had a sexually explicit discussion and made plans to meet in a fast-food restaurant in Eau Claire to arrange a sexual encounter.

¶3 On the day of the meeting, another agent, Loreen Glaman, posed as Andre. She sat at a table in a heavy winter coat and stocking cap, hunched over, face down, reading a *Harry Potter* book. Norlander saw Glaman, but did not approach her. Norlander ordered food and was arrested ten to fifteen minutes later. Norlander told the officers he had changed his mind about having sex with Andre.

¶4 Norlander was charged with child enticement and attempted second-degree sexual assault of a child. He filed several motions to dismiss on a variety

of grounds, including that the child enticement statute was unconstitutional. The circuit court denied Norlander's motions.

¶5 On the first day of his jury trial, Norlander filed a "Motion in Limine to Exclude Irrelevant Profile Evidence." The motion sought to exclude testimony by Szatkowski on a number of topics, including grooming techniques used by sexual predators to break down their child victims' inhibitions, making them more receptive to sexual advances. Norlander argued the evidence was profiling evidence and therefore irrelevant and unfairly prejudicial. The circuit court concluded:

> [T]he state can put into evidence their opinions about grooming techniques in the sense that this is something that a layperson would not know or understand, what is grooming, what constitutes grooming, how is it done, what does it mean, and what evidence of it there is here. I think it assists the trier of fact in understanding the evidence and it assists them to some extent in determining a fact in issue. The State certainly cannot have someone render an opinion that because they see grooming techniques here they believe that the defendant intended to or was going to sexually assault this young Andre, this young man, but I think they can put in evidence about the grooming techniques.

¶6 At trial, Szatkowski's testimony began with his training and experience in the field of internet crimes against children. He then defined grooming:

> Grooming is a technique used by a predator to sort of ease into a relationship with a child that that predator is intending to victimize. It could involve the discussion of different aspects of that child's life which would make that child feel special or desirable, wanted. That grooming can include everything from words of encouragement, words of praise, telling the child that he or she is attractive, desirable, wanted. It can also include promises of gifts ranging from anything from money to stuffed animals to trips, vacations, things like that.

Szatkowski testified about the techniques he uses to portray a teen on the internet, such as the language he chooses, the time of day he logs onto the internet and referring to parents and siblings.

¶7 Szatkowski then went line by line through a transcript of the internet chat he had with Norlander on December 18, 2000. He explained the meaning of various terms, for example that "lol" means "laugh out loud." He also explained how parts of the conversation involved grooming techniques. For example, the prosecutor asked Szatkowski, "Now this seems initially, Officer, to be a somewhat commiserating with a teen. Does that cause you any professional concern considering the chat room?" Szatkowski indicated that it did, explaining, "That is an example of a grooming technique that I spoke of earlier in that Group4fun is trying to get on the good side of Backdoorboy, trying to let Backdoorboy know that he is sympathetic to the feelings that he has about being a gay teenager in Portage." Szatkowski identified several instances where he believed Norlander was using grooming techniques, including comparing his early sexual experiences with those Andre experienced and sending a sexually suggestive photograph of himself.

¶8 The jury found Norlander guilty of the child enticement charge and not guilty of the attempted assault charge.

DISCUSSION

Evidence of Grooming

¶9 Norlander argues the circuit court erred by admitting Szatkowski's testimony on grooming techniques. The court has broad discretion in determining the admissibility of evidence. ***State v. Oberlander***, 149 Wis. 2d 132, 140, 438

N.W.2d 580 (1989). Accordingly, our review is limited to determining whether the court erroneously exercised its discretion.[2] ***State v. Larsen***, 165 Wis. 2d 316, 320 n.1, 477 N.W.2d 87 (Ct. App. 1991). We will not reverse the court's decision to admit evidence unless there is no reasonable basis for the decision. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶10 Norlander's primary argument is that Szatkowski's testimony was profile evidence and profile evidence is always inadmissible. Norlander's argument is unpersuasive. To begin with, labeling testimony as profile evidence is not helpful in determining its admissibility.[3] *See* ***United States v. Long***, 328 F.3d 655, 666 (D.C. Cir. 2003). Even if the testimony can be labeled as profile evidence, no Wisconsin court has adopted a per se rule that profile evidence is inadmissible.[4] Rather, whether profile evidence is admissible is committed to the circuit court's discretion to decide on a case-by-case basis under the applicable rules of evidence governing expert testimony, character evidence and relevance.

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[2] Norlander argues our review should be independent where "the circuit court plainly ignores an evidentiary rule." However, he does not explain what rule the court ignored. We conclude this case properly falls under the erroneous exercise of discretion standard of review.

[3] The State correctly notes that Wisconsin courts have examined the admissibility of profile evidence in the context of psychological, not behavioral, profiles. *See, e.g.,* ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988); ***State v. Richard A.P.***, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998). In those cases, the courts analyzed testimony offered by psychologists on character and personality profiles of certain classes of offenders and the likelihood that a defendant met the profile or acted in conformity with the profile.

[4] Norlander relies exclusively on cases from other jurisdictions to support his argument that "it is almost universally accepted that profile evidence—that is, evidence of the character of others—is inherently prejudicial and not at all relevant to the determination of a defendant's guilt." Norlander cites: ***United States v. Simpson***, 910 F.2d 154 (4th Cir. 1990); ***Brunson v. State***, 79 S.W.3d 304 (Ark. 2002); ***Hall v. State***, 692 S.W.2d 769 (Ark. 1985); ***People v. Bradley***, 526 N.E.2d 916 (Ill. App. 1988); ***State v. Clements***, 770 P.2d 447 (Kan. 1989); ***Duley v. State***, 467 A.2d 776 (Md. 1983); ***Commonwealth v. Day***, 569 N.E.2d 397 (Mass. 1991); ***State v. Hansen***, 743 P.2d 157 (Or. 1987); and ***State v. Percy***, 507 A.2d 955 (Vt. 1986).

State v. Walters, 2004 WI 18, ¶¶23, 25, 269 Wis. 2d 142, 675 N.W.2d 778. *See also* ***State v. Hamm***, 146 Wis. 2d 130, 143-44, 430 N.W.2d 584 (Ct. App. 1988) ("For the court of appeals to attempt to develop a per se rule regarding the admissibility of [expert testimony on eyewitness identification] would be inconsistent with … the general rule in this state regarding the admission of expert testimony."). Accordingly, we reject Norlander's argument that Szatkowski's testimony was per se inadmissible profile evidence.

¶11 Norlander also argues that Szatkowski's grooming techniques evidence was character evidence that should have been excluded under WIS. STAT. § 904.04(1).[5] A party challenging the admissibility of evidence must make a timely objection to preserve the issue for appellate review, including the specific grounds upon which the objection is based. ***State v. Kutz***, 2003 WI App 205, ¶27, 267 Wis. 2d 531, 671 N.W.2d 660. "The purpose of requiring an adequate objection to preserve an issue for appeal is to give the parties and the court notice of the disputed issue, as well as a fair opportunity to prepare and address it in a way that most efficiently uses judicial resources." ***Id.*** Whether an objection adequately preserved an issue for appeal is a question of law we review independently. ***Id.***

¶12 Here, Norlander repeatedly objected to Szatskowski's testimony, in his motion in limine, in the pretrial conference, and during trial. However, the grounds of Norlander's objection were relevancy and prejudice, not that it was inadmissible character evidence. Because he did not object on the specific

[5] WISCONSIN STAT. § 904.04(1) provides, in relevant part, "Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion …."

grounds of impermissible character evidence under WIS. STAT. § 904.04(1) in the circuit court, he has not preserved that objection for appellate review. *See* ***State v. Schultz***, 148 Wis. 2d 370, 372 n.1, 435 N.W.2d 305 (Ct. App. 1988), *aff'd*, 152 Wis. 2d 408, 448 N.W.2d 424 (1989). Accordingly, we decline to address the argument.

¶13 We turn, then, to Norlander's properly preserved objection that Szatskowski's testimony was irrelevant and unfairly prejudicial because it undermined his credibility by associating him with sexual predators without any relevant purpose. *See* WIS. STAT. §§ 904.02 and 904.03. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Because Norlander was charged with violating WIS. STAT. § 948.07(1),[6] the State had the burden to show that Norlander intended to have sex with fourteen-year-old Andre. Norlander's defense was that he was not sexually interested in minors, did not believe Andre was a minor and met Andre believing he was meeting an adult to have sex. Accordingly, Norlander's intent was relevant and Szatkowski's testimony was relevant circumstantial evidence of Norlander's intent.

[6] WISCONSIN STAT. § 948.07(1) provides:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:
>
> (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02 or 948.095.

¶14 Norlander nonetheless argues that the testimony was irrelevant because only he can testify regarding his own intentions. He cites no authority for such a sweeping proposition. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.") If he were correct, no defendant could be convicted of a crime for which intent is an element unless the defendant admitted to having the intent.

¶15 Norlander also argues Szatkowski's testimony was unfairly prejudicial. *See* WIS. STAT. § 904.03. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Sullivan***, 216 Wis. 2d 768, 789-90, 576 N.W.2d 30 (1998). Norlander does not explain how Szatkowski's testimony is unfairly prejudicial or how unfair prejudice substantially outweighs the testimony's probative value as circumstantial evidence of his intent. Instead, his argument hinges on his contention that the testimony had no relevance. Because we have concluded that Szatkowski's testimony was relevant, Norlander's argument that Szatkowski's testimony was unfairly prejudicial fails.

Constitutional Challenge

¶16 Norlander asserts that WIS. STAT. § 948.07 is "facially unconstitutional when applied to internet cases." However, his constitutional challenge is inadequately briefed. *See* ***Cemetery Servs. v. Wisconsin Dept. of Regulation & Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998)

(We need not consider inadequately briefed claims of constitutional error.). A statute's constitutionality can be challenged in one of two ways: facially or as-applied. However, Norlander's argument blurs this distinction by contending the statute is unconstitutional on its face as applied. He argues the statute violates due process, but fails to articulate whether he attacks the statute on substantive or procedural due process grounds. "For us to address undeveloped constitutional claims, we would have to analyze them, develop them, and then decide them. We cannot serve as both advocate and court." ***Id.*** Accordingly, we decline to address Norlander's arguments on the constitutionality of WIS. STAT. § 948.07.

By the Court.—Judgment affirmed.

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