COURT OF APPEALS
DECISION
DATED AND RELEASED

July 9, 1997

NOTICE

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.

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

No. 96-2079-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROCKY J. SHAW,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Rocky J. Shaw has appealed from judgments convicting him of three counts of second-degree sexual assault of a child in violation of § 948.02(2), STATS.[1] He contends that: (1) the trial court erroneously

[1] This subsection was amended by 1995 Wis. Act 69, § 12. The change does not affect our analysis.

admitted evidence in violation of the husband-wife privilege set forth in § 905.05, STATS.; and (2) the trial court erroneously exercised its discretion when it permitted the victim's aunt to testify that, in her opinion, the victim was a truthful person. We affirm the judgments.

Shaw's first arguments pertain to the husband-wife privilege set forth in § 905.05, STATS. He contends that the trial court permitted testimony concerning statements made by him to his wife, Patricia, in two separate conversations. He contends that the trial court erroneously admitted testimony concerning both conversations on the ground that they were not private because the couple's children were present. He contends that there was no evidence that the children were present during the first conversation and no evidence that they heard or were capable of understanding the second conversation.

A husband has a privilege to prevent his wife from testifying against him as to any private communication made by him to her during their marriage. *See* § 905.05(1), STATS. However, the presence or hearing of a third person destroys the privileged nature of an otherwise privileged private communication between a husband and wife. *See* ***State v. Sabin***, 79 Wis.2d 302, 306, 255 N.W.2d 320, 322 (1977).

Shaw contends that the trial court applied this exception to permit his wife to testify that he told her, "I think I might have done something wrong." Shaw purportedly made this statement to his wife after he talked to the victim's mother on July 7, 1994, and before he and his family went out to dinner (the first conversation).

We need not decide whether this statement was admissible because the jury never heard anything about it. Patricia testified concerning the statement

only in an offer of proof. In her testimony before the jury, she referred not to this statement, but to a statement made to her by Shaw in their car on the return home from dinner (the second conversation). While Deputy Sheriff Robert Carter also testified concerning a statement allegedly made by Shaw to Patricia, his testimony was similarly limited to the second conversation.

We also reject Shaw's contention that the trial court erred in admitting evidence concerning the second conversation. As already noted, a communication by one spouse to another loses its privileged nature if it is made in the presence or hearing of another person. *See* ***id.*** The evidence here indicated that the second conversation took place in the family car while Shaw's ten-year-old son and five-year-old daughter were in the back seat.

Shaw cites 7 DANIEL D. BLINKA, WISCONSIN PRACTICE, EVIDENCE 219 (1991), for the proposition that conversations between spouses in the presence of children may nonetheless be deemed private depending upon the nature of the conversation and the ages of the children.[2] He contends that the privilege could not be deemed waived in this case because nothing in the record indicated that the children heard the second conversation or were capable of comprehending what was said.

When reviewing a question as to the admissibility of evidence, this court must determine whether the trial court exercised its discretion in accordance

[2] Shaw also cites ***State v. Dalton***, 98 Wis.2d 725, 298 N.W.2d 398 (Ct. App. 1980), pointing out that the reviewing court did not overrule a trial court ruling that a statement was privileged when made by the defendant to his wife in front of four children, ranging in age from three to five. His reliance on this case is misplaced since the reviewing court expressly held that it need not determine whether such a statement in the presence of small children was a private communication because the privilege, if it did exist, had been waived by other conduct of the defendant. *See* ***id.*** at 732, 298 N.W.2d at 401.

with accepted legal standards and the facts of record. *See* ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988). A trial court erroneously exercises its discretion if it misapplies the law or relies upon an erroneous view of the law. *See* ***State v. Anderson***, 163 Wis.2d 342, 347, 471 N.W.2d 279, 280 (Ct. App. 1991).

Discretion was properly exercised in this case. Patricia acknowledged during the offer of proof that the children were in the car during the second conversation. When asked whether the children heard what Shaw said, she replied, "I would imagine they did."

Based on this testimony and the age of the oldest child, the trial court properly admitted testimony concerning the second conversation. While the record does not indicate whether the children actually heard Shaw's statements, it establishes that Shaw made the statements under circumstances where they could be heard by someone other than Patricia. The communication was thus not "private." Moreover, even if a statement could retain its private and privileged nature if made in the presence of children of tender years, this case does not present such facts, since a ten-year-old was clearly old enough to understand Shaw's words. The trial court therefore properly determined that the privilege set forth in § 905.05, STATS., did not apply.

We also conclude that the trial court properly permitted the victim's aunt to testify that, in her opinion, the victim was a truthful person. The trial court admitted the testimony pursuant to § 906.08(1), STATS.

Pursuant to § 906.08(1), STATS., opinion testimony as to a witness's character for truthfulness may be admitted only after the character of the witness for truthfulness has been attacked. The determination of whether a witness's character for truthfulness has been sufficiently attacked to allow rehabilitating

character evidence involves the exercise of discretion. *See* ***Anderson***, 163 Wis.2d at 347, 471 N.W.2d at 280-81.

The mere fact that a witness is contradicted does not constitute an attack on his or her character. *See* ***id.*** at 348, 471 N.W.2d at 281. However, if the trial court reasonably concludes that the nature of the evidence and the tone of the examinations, when considered as a whole, are tantamount to an accusation that the witness is lying, it may permit the introduction of supportive character evidence. *See* ***id.*** at 349, 471 N.W.2d at 281.

In this case, the trial court explained its ruling allowing the admission of the aunt's testimony on the record after the evidence was admitted. It concluded that the defense had attacked the victim's character for truthfulness when it questioned her about whether she had been advised that she was going to lose her job babysitting for Shaw's children because she had violated babysitting rules. The trial court stated that before admitting the aunt's testimony, it confirmed with the defense that it was going to present additional evidence that the victim had violated babysitting rules and had been told that she might not be allowed to babysit anymore. The trial court concluded that this evidence implied that the victim had a motive for lying and was in fact lying when she accused Shaw of sexual assault.

The record and trial court analysis establish that the aunt's testimony was properly admitted. Before the aunt testified, the defense had established through cross-examination of the victim that she liked babysitting for Shaw's children. In addition, defense counsel asked the victim on cross-examination whether the Shaws had given her any babysitting restrictions and whether they were going to fire her from her babysitting job because she allowed other people

to come over while babysitting. As confirmed by defense counsel during the argument on the admissibility of the aunt's testimony, the defense also subsequently introduced evidence that shortly before the victim made her allegations of sexual assault, Shaw talked to the victim and her mother about firing her because she allowed other people in the house while babysitting.

The defense testimony and cross-examination thus were more than an attempt to establish contradictions in testimony which could be explained by good faith error, differing vantage points from which an event is perceived, or an honest difference in recollection. *See* ***id.*** at 348, 471 N.W.2d at 281. As concluded by the trial court, the defense was in fact implying that the victim had a motive for lying and was lying when she alleged that Shaw sexually assaulted her. The trial court therefore acted within the scope of its discretion in admitting the aunt's testimony. *See* ***id.*** at 349, 471 N.W.2d at 281-82.

By the Court.—Judgments affirmed.

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