COURT OF APPEALS
DECISION
DATED AND RELEASED

February 18, 1997

No. 96-2405-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM D. SHAW,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. William D. Shaw appeals a judgment of conviction of interfering with child custody contrary to § 948.31(1)(b), STATS. Shaw contends that the court erred by excluding certain evidence Shaw sought to introduce in support of his theory of defense that his daughter, Danielle, was in physical danger. Shaw further contends that the court erred by excluding other evidence offered to support Shaw's claim that Danielle was also subject to mental harm because the court concluded that the fear of mental harm was not a defense to interference with child custody. Because we conclude that the proffered evidence was not relevant to the claim that there was a fear of

physical harm or sexual abuse of Danielle and because Shaw waived the issue whether the threat of mental harm is an affirmative defense, the judgment is affirmed.

William and Janet Shaw were involved in a divorce action during 1994 and 1995. Under the initial temporary order Janet was awarded primary physical placement of the parties' two children, Jeremy, then age sixteen and Danielle, thirteen. The temporary order was subsequently modified so that the primary physical placement of Jeremy was transferred to Shaw, while Janet retained primary physical placement of Danielle. Both parents had joint legal custody of both children. Shaw was granted physical placement every other weekend of Danielle, which permitted physical placement from Friday evening until Sunday evening.

Shaw picked up Danielle for a period of physical placement on Wednesday, August 9, with the announced intention of returning the child on the evening of Sunday, August 13. Shaw indicated that during this extended period of visitation he and his children were going to go camping. He, in fact, drove to Kansas for the purpose of visiting his mother. He then drove to Florida, where they arrived on August 18. Shaw looked for and obtained permanent employment and remained in Florida until he was apprehended on August 24 by a Florida law enforcement officer.

At trial, Shaw asserted the affirmative defense of a reasonable fear of physical harm or sexual abuse to Danielle. In support of Shaw's theory of a reasonable belief there was a threat of physical harm or sexual abuse of Danielle, he sought to introduce certain evidence which he claimed to be relevant to his theory of defense. Among the contentions offered and rejected by the trial court were: (1) a claim that Janet, Shaw's former wife, was molested as a child; (2) that Janet would take Danielle when she dated and that she would sleep over night at the home of her date with Danielle present; (3) that one of the men she was dating had a history of violence and alcohol abuse, and that the individual would arrive at Janet's home once or twice a week and "make out" with Janet on the couch; and (4) that another individual whom Janet dated was essentially living with her and was the type of individual Shaw claimed would be a threat to any female. The trial court excluded this evidence as irrelevant to the asserted offense.

The admissibility of evidence is submitted to the trial court's exercise of discretion. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). In reviewing a claimed evidentiary error, the reviewing court will examine the reasons stated by the court for the denial of the evidence and if the trial court's explanation does not adequately explain its exercise of discretion, the reviewing court will independently examine the record to determine whether a reasonable basis exists to sustain the ruling. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). Because Shaw does not assert that the exclusion of these items of evidence rises to the constitutional level of prohibiting him from presenting a defense, this court does not examine the constitutional implications in excluding these items of evidence.

The trial court concluded that there was no reasonable relationship between the claim that Janet was subject to molestation as a child and the conclusion sought to be proved by this evidence: that Danielle was in danger of physical harm or sexual abuse. The court concluded that unless an expert would express the opinion that Janet's molestation endangered Danielle the evidence would not be admissible. We agree with the trial court's analysis.

Evidence is relevant if it has "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." Section 904.01, STATS. There must be a reasonable relationship between the evidence offered for admission and the proposition sought to be proved. ***Nowatske v. Osterloh***, 201 Wis.2d 497, 505, 549 N.W.2d 256, 259 (Ct. App. 1996).

In this case, there must be some logical relationship between Janet's abuse and Shaw's reasonable belief that Danielle was threatened by physical harm or sexual abuse. Without evidence linking the two, the trial court correctly determined that the claim that Janet was molested as a child is irrelevant to the claim that Danielle was in danger of physical harm or sexual abuse.

The court also found that the claim relating to the two men Shaw claims Janet had been dating and the circumstances of their dating were not relevant to the issue sought to be proved. The claim that the two individuals

with whom Janet dated were alcoholics or had an unsavory reputation in Shaw's view does little to demonstrate that Danielle was in danger of physical harm or sexual abuse from either of the individuals. Shaw made no claim that there was ever an overt act or attempt to harm or have sexual contact with Danielle. Without such evidence, Shaw's perception of the men's reputations and addiction to alcohol have no logical relationship to the fact sought to be proven. We therefore agree with the trial court that this portion of the claim is irrelevant.

On appeal, Shaw claims that the circumstances of Janet's dating these men are sufficient to demonstrate a danger of mental harm to Danielle and that under § 948.31(4)(a)(4), STATS., a reasonable belief that a child is in danger of mental harm is sufficient to constitute an affirmative defense to the charge of interfering with a child's custody. Shaw, however, never advanced such a theory for the trial court's consideration. The record is devoid of any claim at the trial level that the evidence was sought to be introduced to prove the danger of a mental harm. Claims advanced for the first time on appeal will be deemed to have been waived. ***State v. Rogers***, 196 Wis.2d 817, 825-26, 539 N.W.2d 897, 900-01 (Ct. App. 1995). The requirement that the trial court have an opportunity to hear the theory upon which the evidence is offered and rule upon that theory is essential if we are to review the trial court's exercise of discretion. *See* ***id.***; *see also* ***State v. Holt***, 128 Wis.2d 110, 122-23, 382 N.W.2d 679, 686 (Ct. App. 1985). The failure to identify the theory before the trial court precludes it from being raised for the first time on appeal and constitutes a waiver of that claim. ***Rogers***, 196 Wis.2d at 825-26, 539 N.W.2d at 900. Because the claim of mental harm has been waived, we need not address this claim further on appeal.

Because no logical link existed between the evidence Shaw sought to introduce and whether Danielle was in danger of physical harm or sexual assault, the trial court correctly exercised its discretion by denying the admission of the proffered evidence. Further, Shaw waived his argument that protecting Danielle from mental harm was a defense available under the statute. We affirm.

By the Court.—Judgment affirmed.

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