COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2830-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRADLEY ALAN ST. GEORGE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

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

¶1 PETERSON, J. Bradley Alan St. George appeals his judgment of conviction for first-degree sexual assault of a child, contrary to WIS. STAT.

§ 948.02(1),[1] and an order denying him postconviction relief. St. George argues he was denied due process and his right to present a defense when the trial court excluded: (1) evidence of prior sexual contact involving the child victim and another child; and (2) his expert witness' testimony. We disagree and affirm the judgment of conviction and the order.

BACKGROUND

¶2 St. George was charged with one count of sexually assaulting his girlfriend's five-year-old daughter, Kayla. Kayla stated that St. George touched her "private parts" with his hand and "wiggled and jiggled" his fingers. Kayla later recanted and at trial testified that St. George had not touched her.

¶3 Before trial, the State filed a motion in limine seeking to exclude evidence that two other children previously had sexual contact with Kayla.[2] The trial court granted the motion.

¶4 At trial, Ty Juoni, a child protection investigator, testified that when he interviewed Kayla, he employed a "cognitive graphic interview" technique. He testified that the technique is a "nationally accepted process that obtains accurate information from children," using non-leading questions. Juoni stated that Kayla told him that St. George touched her private parts and that no one else ever had.

¶5 Maureen Rappley, a clinical social worker experienced in counseling child sexual abuse victims, testified about Kayla's recantation. Rappley stated that

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Prior to October 1998, two other children had allegedly touched Kayla on her "private parts."

approximately twenty to twenty-four percent of child sexual abuse victims recant their reports of abuse, but ninety-two percent of them later reaffirm the original report.

¶6 St. George sought to introduce the expert testimony of Dr. Donald Stonefeld, a psychiatrist, to address Juoni's representations concerning the reliability of the cognitive graphic interview technique and Rappley's statements regarding Kayla's recantation. The State moved to exclude Stonefeld's testimony because he was not sufficiently qualified to testify concerning these issues. The trial court granted the motion.

¶7 The jury found St. George guilty. He moved for postconviction relief and argued that the trial court improperly excluded: (1) evidence of prior sexual contact between Kayla and another child; and (2) Stonefeld's expert testimony. The trial court denied the motion. This appeal followed.

DISCUSSION

I. Prior Sexual Contact

¶8 St. George argues that he was denied due process and his right to present a defense because the trial court excluded evidence of prior sexual contact between Kayla and another child. He contends that the evidence was offered to demonstrate an alternative source of knowledge for Kayla's accusation against St. George.

¶9 Few rights are more fundamental than that of the defendant to present witnesses in his or her own defense. ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973). "The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Article I, Section 7 of the

Wisconsin Constitution and the Sixth Amendment of the United States Constitution." ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990).

¶10 There must be a compelling state interest to overcome the fundamental constitutional rights of confrontation and compulsory process. ***Id.*** at 654. Ultimately, whether the exclusion of defense evidence deprived the accused of his or her right to present a defense is a question of constitutional fact subject to independent appellate review. ***In re Michael R.B.***, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993).

¶11 Evidence of a victim's prior sexual conduct is generally inadmissible under Wisconsin's Rape Shield Law. WIS. STAT. § 972.11(2). However, under some circumstances, the rape shield law must give way to the defendant's right to introduce evidence indicating an alleged child sexual assault victim had previously been the victim of sexual contact. ***Pulizzano***, 155 Wis. 2d at 647-48. Evidence indicating a child was previously subjected to sexual contact is relevant to demonstrate an alternative source for the sexual knowledge underlying the child's accusations. ***Id.*** at 652. In ***Pulizzano***, our supreme court explained:

> Evidence of the prior sexual assault is probative of a material issue, to show an alternative source for sexual knowledge, and is necessary to rebut the logical and weighty inference that M.D. could not have gained the sexual knowledge he possessed unless the sexual assaults [defendant] is alleged to have committed occurred.

Id.

¶12 To determine whether WIS. STAT. § 972.11(2), as applied, deprives St. George of his constitutional rights, the ***Pulizzano*** court established a two-part process. First, St. George must establish his constitutional rights to present the

proposed evidence through a sufficient offer of proof. ***Id.*** at 648-49. A sufficient offer of proof must meet five tests: "(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 [St. George's] case; and (5) that the probative value of the evidence outweighs its prejudicial effect." *See* ***id.*** at 656.

¶13 Second, if St. George meets the five-part showing in his offer of proof to establish a constitutional right to present evidence, the court must determine whether his right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence. *See* ***id.*** at 653. The court must closely examine and weigh the State's interests against St. George's constitutional rights to present the evidence, as measured by the five factors listed above. *See* ***id.*** at 654-55.

¶14 Here, St. George offered evidence that two other children had sexually touched Kayla. The purpose was to show that Kayla could have acquired sexual knowledge from the prior touchings, rather than from the charged crime. In applying the ***Pulizzano*** test, the trial court determined that the first two tests had been met. However, the court determined that the third, fourth, and fifth tests were not satisfied.

¶15 As for the third test, the issue is whether the prior act was clearly relevant to a material issue. "[R]elevance is not an inherent characteristic of any item of evidence; rather, it involves the relationship between an item of evidence and the proposition it is offered to prove." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE, § 401.1 at 81 (2001). Unless there is a demonstrable link between the proffered evidence and the proposition to be proved, the evidence is

not relevant and not admissible. ***Id.*** Evidence is relevant only if it makes a fact of consequence more or less probable than it would be without the evidence. *See* WIS. STAT. § 904.01.

¶16 We conclude that there is not a demonstrable link. A child's source of sexual knowledge is only a fact of consequence if the jurors assume young children in general are sexually naïve and that Kayla could only have acquired her sexual knowledge if she had been assaulted by St. George. The jury could only make that inference if Kayla had demonstrated sexual precociousness or knowledge beyond her years.

¶17 In its well-reasoned analysis, the trial court determined that:

> Often times evidence of a prior sexual assault is probative of a material issue to show an alternative source for sexual knowledge and I think the defense is attempting to contend that evidence of a prior sexual assault is always probative on a material issue to show [an] alternative source for sexual knowledge.
>
> ….
>
> What is the extent of [Kayla's] source of knowledge? She knows she has a private area and she knows that that private area was touched. So, what does she need to have? Well, the elementary education of any other five, six, seven, eight year old, however old the child might be. One, you have a private area and since it's on the child, she knows it's there. Two, that it was touched. Well, she doesn't have to be touched by a third person to know what a hand or a finger is touching.
>
> Now, if she started talking about, "I saw a penis and it was this long or it did this" during the sexual encounter, you know then [we've] got prior knowledge or source of knowledge testimony.
>
> But here it really isn't a source of knowledge case. There is nothing unusual about Kayla's statements where we would have to allow the testimony in that some third party perpetrated an offense against her or even touched her, setting aside whatever intent the other girls might have had.

¶18 We agree with the trial court's analysis. There was no reason to allow testimony of other touching because Kayla's testimony did not exhibit any precocious sexual knowledge. Kayla's testimony did not show that she was somehow far advanced beyond her years and knew things that no child would know unless she had been sexually assaulted by the defendant or by some third party.

¶19 In addition, there is nothing to establish why the prior sexual contact with the two children would be relevant to show an alternate source of Kayla's sexual knowledge. While both instances involved sexual touching, the prior sexual contact involved children who were playing. The charged conduct involved an adult who had sexual contact with Kayla for the purposes of sexual gratification.

¶20 We next address the fourth test—whether the evidence of Kayla's prior sexual contact was necessary to St. George's case. In ***Pulizzano***, our supreme court linked necessity with materiality. ***Id.*** at 652. Evidence of a prior sexual assault is necessary to rebut the logical and weighty inference that the child victim could not have gained the sexual knowledge unless the sexual assault allegedly committed by the defendant occurred. ***Id.***

¶21 Here, there is no inference that Kayla's basic, age-appropriate knowledge of her private parts could have been a by-product of the charged crime. The trial court reasoned:

> There is no logical and weighty inference that the child would not have known that she had a private part at that particular age, and it was on her body and where it was on her body. And that somehow the jury would conclude she could have only have come by this knowledge by her having a private part because the defendant must have

> touched her. They would not have been able to make that conclusion based upon the evidence. There was no way that that is something that they could have concluded. So, the evidence wasn't necessary to the defendant's case.

¶22 Once again, we agree with the trial court's analysis. Evidence that other children touched Kayla cannot reasonably be considered necessary to St. George's defense. The proffered evidence was not the type that, if believed, would have completely exculpated St. George. *See* ***Chambers***, 410 U.S. 284. The contact with the other children and the alleged contact with St. George do not closely resemble each other. Even if the jury believed the proffered testimony, the evidence would only have established that Kayla had been victimized once or twice before.

¶23 Last, we address the fifth test—whether the probative value of the evidence outweighs its prejudicial effect. As stated earlier, evidence of prior sexual contact had limited probative value. The trial court concluded that Kayla did not exhibit any extraordinary sexual knowledge. It properly determined that allowing the evidence of prior sexual contact could have created a trial within the trial or at the very least it might have led to confusion of the issues and potentially delay.

¶24 The circuit court appropriately exercised its evidentiary discretion in accordance with accepted legal standards and the facts of the record. Therefore, we conclude that the rape shield statute did not deprive St. George of his right to due process and his right to present a defense, because he failed to satisfy all of the ***Pulizzano*** criteria.

II. Expert Testimony

¶25 Next, St. George argues that he was denied due process and his right to present a defense because the trial court excluded Stonefeld's expert testimony. He contends that Stonefeld possessed sufficient specialized knowledge regarding interviewing child sexual assault victims. As a result of the trial court's exclusion, the jury was not permitted to consider Stonefeld's opinion on the limitations of the cognitive graphic interview technique and recantation.

¶26 Admissibility of expert opinion testimony is discretionary. ***In re Michael R.B.***, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). "We must affirm a discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law." ***Shawn B.N. v. State***, 173 Wis. 2d 343, 366-67, 497 N.W.2d 141 (Ct. App. 1992). The determination of whether a witness is qualified as an expert is also discretionary and will not be reversed on appeal absent an erroneous exercise of discretion. ***Tanner v. Shoupe***, 228 Wis. 2d 357, 369-70, 596 N.W.2d 805 (Ct. App. 1999).

¶27 "Whether an expert witness is qualified to give an opinion depends upon whether he or she has superior knowledge in the area in which the precise question lies." ***Tanner***, 228 Wis. 2d at 369-70. Expert witnesses who do not have a specialized knowledge should not be allowed to take the stand and offer expert opinions regarding that issue.

¶28 Under Wisconsin law, scientific testimony is admissible if it is "an aid to the jury" or "reliable enough to be probative." ***State v. Walstad***, 119 Wis. 2d 483, 516, 519, 351 N.W.2d 469 (1984) (quoted source omitted); *see also*

WIS. STAT. § 907.02. [3] An opinion for which the witness has no "scientific, technical, or other specialized knowledge," is not reliable enough to be probative. WIS. STAT. § 907.02. The witness must be first qualified as an expert before he or she can give any opinion within the asserted area of expertise. ***Walstad***, 119 Wis. 2d at 518-19.

¶29 Here, St. George attempted to use Stonefeld's proffered testimony to show that the cognitive graphic interview technique generates unreliable results. Stonefeld stated that, in this case, there were problems with the interview's duration and the manner in which the interview was conducted. Stonefeld further concluded that it was not possible to assign a specific level of scientific probability to the truthfulness of Kayla's allegation of sexual assault and her subsequent recantation.

¶30 Stonefeld is a licensed physician trained in both neurology and psychiatry. He stated his background and qualifications:

> I'm a recognized specialist in post traumatic stress disorder identification and treatment. I am dual-trained in neurology and psychiatry. I did a fellowship at the University – at the National Hospital for Neurological Diseases in London, England. I was on the editorial board of the Journal of Stress Medicine for four … years. I was on the executive council of the Academy of Psychosomatic Medicine for eight or so years.

¶31 The trial court rejected Stonefeld's proffered testimony. Relying on WIS. STAT. § 907.02, the court stated that the testimony was not admissible for

[3] WISCONSIN STAT. § 907.02 reads as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

two reasons: (1) the evidence was not likely to assist the jury; and (2) Stonefeld did not show that he has specialized knowledge, skill, experience, training or education on this particular topic. The court further concluded that Stonefeld could not testify authoritatively on the procedures and techniques employed by the cognitive graphic interview technique and lacked an adequate professional or experiential background to address recantation.

¶32 St. George argues that an expert witness should be allowed to testify despite a lack of specialized knowledge, leaving it to the State to bring out the weaknesses in the expert's knowledge and experience on cross-examination. We disagree.

¶33 The trial court specifically found that Stonefeld's limited clinical experience with child sexual assault cases did not equip him to testify authoritatively on these topics. It further found that Stonefeld had not attended programs or classes regarding recantation in child sexual assault cases, and he had attended only one seminar in ten years on the mechanics of interviewing a child sexual assault victim. Stonefeld has treated and counseled numerous patients. However, in the course of his career, he has only counseled child sexual assault victims two or three times.

¶34 Stonefeld does have a lengthy professional career and may be qualified to testify as an expert in post-traumatic stress disorder identification and treatment. However, there is nothing in the record to suggest that he has specialized knowledge in the cognitive graphic interview techniques of children and recantation.

¶35 Defendants do not posses the constitutional right to present any and all evidence in support of a claim. ***Chambers***, 410 U.S. at 302. While the State

does have the ability to raise doubt about an expert's knowledge and experience on cross-examination, a trial court has significant discretion in the admission of testimony and evidence and may serve as a gatekeeper to exclude evidence of questionable reliability. ***State v. Peters***, 192 Wis. 2d 674, 689-90, 534 N.W.2d 867 (Ct. App. 1995); *see also* ***Grube v. Daun***, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997).

¶36 We conclude that the trial court used logical reasoning and based its decision on the facts in the record. Therefore the trial court properly exercised its discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶37 CANE, C.J. *(dissenting).* I respectfully dissent. I would conclude that Bradley Alan St. George was denied his due process right to present a defense when the trial court excluded the proffered testimony from defense expert Dr. Donald Stonefeld.

¶38 Although whether a proffered witness is qualified to testify as an expert is a discretionary determination for the trial court, a court's ruling excluding defense evidence must also be evaluated to determine whether it adequately accommodated the accused's constitutional right to present a defense. *See* ***State v. Johnson***, 118 Wis. 2d 472, 479, 348 N.W.2d 196 (Ct. App. 1984). As we explained in ***Johnson***:

> Thus a trial court's decision on a procedural issue at trial may nominally be labeled discretionary, but the court's authority may not be exercised until it accommodates the accused's due process rights to present a defense. Without a compelling state interest, the court's ruling may not interfere with the accused's opportunity to present crucial evidence to the jury.

Id.

¶39 As St. George observes correctly, the exclusion of relevant defense evidence is subject to strict scrutiny. Whether the exclusion of defense evidence deprived the accused of his right to present a defense is a question of constitutional fact subject to independent review. *See* ***In re Michael R.B.***, 175 Wis. 2d 713, 720, 499 N.W.2d 641 (1993). Consequently, we appear to have a mixed standard when reviewing a determination to exclude an accused's expert. On the one hand, it is a discretionary decision for the trial court whether to admit the expert testimony.

But because the ruling excludes defense evidence, that ruling must be evaluated additionally under the strict scrutiny test to determine whether it adequately accommodated the accused's constitutional right to present a defense.

¶40 Here, the defense sought to present Stonefeld's testimony in an attempt to refute the assertions made by prosecution witnesses who testified concerning recantations by children and the reliability of cognitive graphic interviews. He would have testified about the reliability problems inherent in the child interview process, including questions concerning the duration and manner in which the interview was conducted in this case. Additionally, in response to the prosecution witness's discussion of recantation by children suggesting that 92% of those children that recanted subsequently reaffirmed their original accusation, he would have clarified that there is no scientific basis upon which one can conclude whether a recanted accusation is truthful in a particular case. In short, Stonefeld was going to testify as to the scientific limitations on the inferences that could be fairly drawn from the use of a cognitive graphic interview or the fact that a child has recanted a prior claim of sexual abuse.

¶41 The trial court ruled that Stonefeld did not possess sufficient specialized knowledge, skill, experience, training or education to offer expert testimony in this case. I disagree.

¶42 Under WIS. STAT. § 907.02,[4] the qualifications necessary to testify as an expert are not contingent upon satisfaction of an established set of rigid standards. Importantly, the evidence code provides a degree of flexibility when it provides that a witness may be qualified as an expert "by knowledge, skill, experience, training or education." This provision permits witnesses with any form of specialized knowledge, however obtained, to assist the trier of fact. ***State v. Hollingsworth***, 160 Wis. 2d 883, 896, 467 N.W.2d 555 (Ct. App. 1991).

¶43 At trial, Stonefeld explained that he is a licensed physician trained in both neurology and psychiatry. The majority correctly quotes Stonefeld when he briefly summarized his credentials. *See infra* at ¶29.

¶44 Stonefeld also testified that interviewing constituted the core of his work as a physician and psychiatrist. As he explained, "interview techniques are 90 percent of what I do and what I was trained to do." He has also testified as an expert witness in the range of thirty to forty times. He has counseled victims of child abuse, is familiar with various literature regarding sexual assault cases and attended a program on the dynamics of interviewing child victims of sexual assault at an American Psychiatric Association seminar, although it was admittedly ten years earlier.

¶45 The fact that he did not specialize in child sexual abuse cases and did not review particular study or studies by the State's expert does not render him

[4] WISCONSIN STAT. § 907.02 provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

unqualified. These shortcomings, if they are in fact shortcomings, merely go to the weight the jury will give to his testimony. However, these alleged shortcomings are insufficient to deny St. George the right to present this testimony to assist the jury in assessing the significance of the prosecution witnesses who testified regarding a child's recantation and the interview process of the children. Thus, I would conclude that the trial court's refusal to allow the defense expert's testimony interfered with St. George's constitutional right to present crucial relevant evidence to the jury.

¶46 Finally, the trial court's refusal to permit Stonefeld to testify cannot be dismissed as harmless error. The trial in this case became a matter of credibility. The prosecution emphasized that the interview techniques with the children presented a process that obtained accurate information from children. Additionally, during closing arguments the prosecution took advantage of Stonefeld not testifying by asserting to the jury that the accuracy of the techniques and process used in this case to interview the children, as well as the testimony regarding a child's recantation, was unrebutted. Consequently, I am satisfied that the trial court erred by excluding Stonefeld's testimony and there is a reasonable probability that a retrial with his testimony could produce a different result. *See* ***State v. Dyess***, 124 Wis. 2d 525, 544, 370 N.W.2d 222 (1985). Therefore, I would grant a new trial permitting Stonefeld's testimony.