COURT OF APPEALS
DECISION
DATED AND RELEASED

August 7, 1996

No. 95-1353-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO M. PERKINS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

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

SNYDER, J. Antonio M. Perkins appeals from a judgment of conviction finding him guilty of one count of third-degree sexual assault contrary to § 940.225(3), STATS., and two counts of fourth-degree sexual assault contrary to § 940.225(3m).[1] He argues that the trial court erred by: (1) denying

[1] Perkins was also charged with one count of second-degree sexual assault contrary to § 940.225(2)(d), STATS. He was acquitted on that charge.

his motion to dismiss based on a claim of multiplicitous charging, (2) allowing an unqualified witness to testify as an expert, (3) allowing the expert witness to testify to unreliable scientific evidence which was inadmissible and to give an improper opinion as to the victim's credibility, (4) misstating the law when it modified the standard jury instruction definition of consent, and (5) violating his right to a unanimous verdict by the failure to give special verdict forms. Because we conclude that the claimed errors are without foundation, we affirm.

The events which led to the sexual assault charges are largely undisputed. Perkins, a student at the University of Wisconsin-Whitewater, came to the dorm room of an acquaintance, Lief C. Deanna T. and Elizabeth B. were there with Lief, as well as several other friends.[2] Deanna, who was also a Whitewater student, had never met Perkins. After a period of time, she left the room with Perkins when he asked her to help him study for a test. They moved to a student lounge and Deanna began to quiz Perkins from study cards.

At approximately 2:00 a.m., several people came to the lounge where Deanna and Perkins were studying and began to play cards. The group included Lief and Elizabeth. Deanna joined the card game and Perkins watched. After playing for awhile, Deanna went over and lay down on a couch that was in the lounge. She testified that she fell asleep almost immediately, lying on her stomach.[3] When the card playing concluded, Elizabeth called

[2] At the time of the incident, Deanna was a freshman at the university. Prior to her enrollment, she had lived with Elizabeth's family in Beloit. Elizabeth was in high school and was visiting Deanna on campus.

[3] Deanna testified that she had not slept the night before because she was up writing an English paper. She also testified that she consumed one wine cooler earlier in the evening.

Deanna's name, but she did not respond. Perkins then said that he would awaken her so they could study some more, and Elizabeth and the others left.

Deanna testified that she was awakened by the sensation of a man on her back and simultaneously became aware that both her pants and underwear had been pulled down to her thighs and her bra was unhooked.[4] She could feel the man's penis against her buttocks. She pushed him off, stood up and saw that his pants and shorts were pulled down. She recognized Perkins, and after asking him "what the hell are you doing?" she left the room.[5]

While not disputing the fact that the sexual contact occurred, Perkins portrayed the encounter as consensual. He testified that he believed Deanna was awake and aware of what was happening throughout the encounter.[6] In the statement he gave to the police after his arrest, Perkins stated that prior to Deanna pushing him off, he had lain prone on top of her back, repeatedly "grinding" his penis against her buttocks. He claimed that her body was responsive to his, although he stated she never said anything to him.

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[4] Both Elizabeth and her mother, Jean B., testified that Deanna was a very sound sleeper. Jean stated that "all three of [my daughters] have piled on [Deanna], have had her fall off the couch and this girl, you know, has never woken up and I always was amazed at that."

[5] Deanna testified that the door to the lounge was locked when she tried to open it. Perkins admitted that he had locked the door so no one would walk in on them.

[6] In the statement that he gave to the police when he was arrested, Perkins acknowledged that prior to his initiating the sexual contact, "Dee was sleeping on her stomach near where I was sitting." In his statement he also maintained that this situation with Deanna was no different from other situations he had been in where "[women] pretend to be asleep. ... I guess it's a trick to get guys to do foreplay. After this had happened I thought nothing of it ...."

He further stated that during the encounter he unhooked her bra and touched her breasts. When he asked her to roll over and she did not respond, he reached under her and unzipped her pants. He then had digital contact with her vagina and pulled her pants and underwear down below her buttocks. Perkins then exposed his penis and resumed his hip gyrations. He testified that at this point Deanna pushed him off and asked him what he was doing.

Deanna immediately left the lounge and went to Lief's room looking for Elizabeth. After she told Elizabeth what had happened, Elizabeth called campus security. Officer Jerome VanNatta responded and spoke to Deanna in the first floor lobby of the dorm. VanNatta testified that Deanna "was very shaky, seemed very upset. ... Her face appeared red and puffy as if she'd been crying ...." After relating the episode to VanNatta, Deanna was taken to a hospital for a medical examination.

Marilyn Kile, a member of the Whitewater Sexual Assault Team, had been called and met Deanna at the hospital. Kile testified at trial that she spent approximately three hours with Deanna. She testified that Deanna was "stunned. Very quiet. Had kind of a blank look on her face. Looking down most of the time. The only physical movement was this trembling all over." Kile also testified as an expert witness that Deanna's behavior and demeanor were "consistent with the initial reaction or first stage of sexual assault in adult victims."

The principal issue at trial was whether the encounter was consensual. There was also an issue as to whether Deanna was unconscious during the episode. The jury found Perkins not guilty of second-degree sexual assault. *See* § 940.225(2)(d), STATS. (having sexual contact with a person the defendant knows to be unconscious). Perkins was found guilty of the remaining three counts and now appeals his conviction.

Multiplicity in Charging

Perkins' first claim of error is based on his belief that the charges were multiplicitous.[7] Perkins argues that because the separate charges arose from a single incident, that the victim became aware of all the factors of the assault simultaneously and that she was not threatened, the multiple charges were violative of his double jeopardy protections.

Multiple convictions for the same offense violate the double jeopardy protections of the state and federal constitutions. ***State v. Selmon,*** 175 Wis.2d 155, 161, 498 N.W.2d 876, 878 (Ct. App. 1993). This is a question of law which is reviewed de novo. ***Id.***

Multiplicity is defined as the charging of a single offense in more than one count. ***Harrell v. State,*** 88 Wis.2d 546, 555, 277 N.W.2d 462, 464-65 (Ct. App. 1979). A two-pronged test is used to analyze questions of multiplicity. ***Selmon***, 175 Wis.2d at 161, 498 N.W.2d at 878. The first step is to apply the

[7] The charge of third-degree sexual assault was based on the digital intercourse. The two fourth-degree charges were based on touching the victim's breasts and the penile contact with the victim's buttocks.

"elements only" test as outlined in ***Blockburger v. United States,*** 284 U.S. 299 (1932). ***State v. Sauceda***, 168 Wis.2d 486, 493, 485 N.W.2d 1, 4 (1992). If each charged offense is not considered a lesser-included offense of the other, the court shall presume the legislature intended to permit cumulative punishments. ***Id.*** at 495, 485 N.W.2d at 4. Under this test, an offense is a lesser-included one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense. ***Id.*** at 494, 485 N.W.2d at 4.

The second component of the multiplicity test involves an inquiry into whether the legislature has evinced a contrary intent to the charging of separate offenses. *See* ***id.*** at 495, 485 N.W.2d at 5. It is multiplicitous to charge two offenses separately if other factors clearly indicate that the legislature intended a single unit of prosecution. ***State v. Kuntz,*** 160 Wis.2d 722, 755, 467 N.W.2d 531, 544 (1991).

We begin our analysis with a comparison of the one charge of third-degree sexual assault and the two charges of fourth-degree sexual assault. Third-degree sexual assault requires that the defendant have "*sexual intercourse* with a person without the consent of that person." *See* § 940.225(3), STATS. (emphasis added). Fourth-degree sexual assault is committed whenever an individual has "*sexual contact* with a person without the consent of that person." *See* § 940.225(3m) (emphasis added).

Sexual intercourse is defined as "[vulvar penetration] ... or any other intrusion ... of any part of a person's body or of any object into the genital

or anal opening." *See* §§ 939.22(36) and 940.225(5)(c), STATS. By comparison, the definition of sexual contact requires "any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading ... the complainant or sexually arousing or gratifying the defendant." Section 940.225(5)(b).

An examination of the definitions of sexual intercourse and sexual contact leads to the conclusion that these two offenses are different in law. Fourth-degree sexual assault is not a lesser-included offense of third-degree sexual assault.

Perkins, however, argues that because it is not possible to commit third-degree sexual assault without also having sexual contact, the charges are multiplicitous. This claim ignores the clear differences in the definitions of sexual contact and sexual intercourse. Multiple punishments are permissible if each offense requires proof of an additional element. ***Sauceda,*** 168 Wis.2d at 493 n.8, 485 N.W.2d at 4. The elements necessary to prove sexual intercourse are different from those which prove violative sexual contact.

The analysis then shifts to whether the legislature has evidenced a contrary intent. This requires an examination of the language of the statutes, legislative history and the appropriateness of multiple punishments. ***Id.*** at 497, 485 N.W.2d at 5.

Section 939.65, STATS., is instructive. That section states in pertinent part:

> [I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.

The provisions under § 940.225, STATS., are directed at protecting one's freedom from sexual assault. *See* ***Sauceda,*** 168 Wis.2d at 497, 485 N.W.2d at 5. The various subsections define different methods of sexual assault. ***Id.*** There is no suggestion that the violation of one subsection immunizes a defendant from violating the same or other subsections during the course of sexual misconduct. ***Id.*** at 497, 485 N.W.2d at 5-6.

We conclude that the charges of both third-degree and fourth-degree sexual assault are not multiplicitous, and therefore not violative of Perkins' double jeopardy protections.[8] We next turn to an analysis of whether the two counts of fourth-degree sexual assault violate the constitutional protections against double jeopardy.

The two counts of fourth-degree sexual assault are identical in law. One count was based on Perkins touching the victim's breast, and the second count was based on the penile contact with the victim's buttocks. The

[8] The State also notes that under the lesser-included statute, § 939.66, STATS., only one conviction is allowed for certain actions even though the other crimes would not be lesser-included offenses under the ***Blockburger*** test. The State then reasons that if the legislature had intended to preclude cumulative punishment for varying degrees of sexual assault, it would have done so here. This argument, however, fails to address the supreme court's clear mandate that a court must consider the nature of the proscribed conduct and the appropriateness of multiple punishments, as well as the statutory language. *See* ***State v. Sauceda,*** 168 Wis.2d 486, 497, 485 N.W.2d 1, 5 (1992). We reject the argument that § 939.66 alone may be considered determinative.

question of whether the charges allege one offense or two offenses will be determined by whether they are identical in fact. *See* ***State v. Bergeron,*** 162 Wis.2d 521, 534, 470 N.W.2d 322, 327 (Ct. App. 1991).

In ***State v. Eisch,*** 96 Wis.2d 25, 291 N.W.2d 800 (1980), the supreme court concluded that when multiple counts are brought under the same charge, the question is whether the elements are sufficiently different in fact to demonstrate that a separate crime has been committed. ***Id.*** at 31, 291 N.W.2d at 803. "[B]y embarking on a course of a different type of intrusion on the body of a victim, a different legislatively protected interest is invaded." ***Id.*** at 36, 291 N.W.2d at 806.

The two counts in this case were based upon discrete acts which represented separate intrusions on the victim's person, integrity and safety. Each involved a different area of the victim's body. *See* ***id.*** at 37, 291 N.W.2d at 806. We conclude that the two charges were different in fact.

We next address the second prong of the test, whether the legislature has evinced a contrary intent. The court in ***Eisch*** considered this same question with regard to acts falling within a single chargeable category. The court there concluded that "as a matter of common sense, the legislative history reasonably demonstrates that these offenses may be separately charged and that to do so is not unfair or prejudicial to an offender." ***Id.*** at 38-39, 291 N.W.2d at 807. The court went on to note that this conclusion furthers society's interest in protecting individuals from multiple assaults which impose distinct dangers to a victim. ***Id.*** at 39, 291 N.W.2d at 807.

We agree that the legislative intent is to protect individuals from multiple invasions of their bodily integrity. We therefore conclude that there was no multiplicity in the two charges of fourth-degree sexual assault.

Testimony of Expert Witness

Perkins' next two claims of error concern the testimony of Kile, a social worker who testified as an expert witness. Perkins contends that the trial court misused its discretion in qualifying her as an expert witness, and even if she were qualified, her testimony was based on unreliable scientific evidence and was, in effect, an improper opinion of the victim's credibility. We will address each of these arguments in turn.

A trial court exercises its broad discretion when it determines whether a witness has sufficient knowledge, skill, experience or training to qualify as an expert. ***State v. Jensen,*** 141 Wis.2d 333, 336-37, 415 N.W.2d 519, 521 (Ct. App. 1987), *aff'd*, 147 Wis.2d 240, 432 N.W.2d 913 (1988). This court will uphold the trial court's determination of a witness' qualifications unless the circumstances demonstrate that it was manifestly wrong. ***Id.*** at 337, 415 N.W.2d at 521.

In ***Jensen***, we held that the trial court's determination that a school guidance counselor who had undergone specialized training in the sexual abuse of children and had investigated one or two suspected cases of sexual abuse each year for the past four years could reasonably be permitted to testify as an expert. ***Id.*** In the present case, Kile holds undergraduate and master's degrees in social work, has approximately forty hours of continuing education in the

area of sexual assault and was a member of the university's sexual assault response team. Kile also testified that approximately twenty to twenty-five percent of her counseling case load included adults who were self-reported victims of sexual assault at some time in the past.

Perkins responds that Kile's testimony was, in essence, a medical diagnosis of posttraumatic stress disorder when she testified that Deanna exhibited behavior consistent with that of other rape victims. Perkins cites to ***State v. Willis,*** 888 P.2d 839 (Kan. 1995), in which the Kansas Supreme Court held that a social worker was not qualified to make a medical diagnosis of posttraumatic stress disorder. ***Id.*** at 845. However, in that case the social worker had testified that she had *diagnosed* the victim as suffering from posttraumatic stress disorder (a mental condition). ***Id.*** at 840. She further testified that the victim exhibited behavior consistent with rape trauma syndrome. ***Id.***

Our review of the record fails to disclose any mention by Kile of posttraumatic stress disorder, nor did she make any diagnosis of Deanna's condition.[9] Kile's testimony was limited to a description of Deanna's demeanor

[9] The only mention made was to "post-traumatic stress reaction" and this was used by defense counsel during the cross-examination of Kile.

and behavior in the immediate aftermath of the incident and included her opinion that this was consistent with the reaction of other adult sexual assault victims.

We conclude that the trial court properly exercised its discretion in determining that Kile was qualified to testify as an expert witness in this case. Her qualifications are not dissimilar to those of the guidance counselor in ***Jensen***, and the trial court's decision to allow her to testify as an expert was not unreasonable.

We turn then to the second issue presented by Perkins, that even if Kile were qualified as an expert, the substance of her testimony was "'unreliable' scientific evidence inadmissible under Daubert and ... was in effect an improper opinion as to the complainant's credibility." Perkins contends that Kile's testimony that the victim's behavior and demeanor were consistent with "the initial reaction or first stage of sexual assault in adult victims" amounted to an unqualified expert witness testifying to "rape trauma syndrome" evidence. Perkins further maintains that such syndrome evidence is inherently unreliable and under ***Daubert*** would be excluded. Perkins also argues that Kile's statement bolstered Deanna's credibility and was therefore improper.

Before addressing these arguments, we note that neither of these objections was made to the trial court. However, it is within the bounds of discretion for this court to take up a question of law, and we will address the arguments on the merits. *See* ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

Perkins contends that under the ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579 (1993), requirement of scientific reliability, syndrome evidence should be excluded.[10] In that case, the Supreme Court held that reliability is a necessary condition to the admission of scientific evidence. ***Id.*** at 579; *see also* ***State v. Peters,*** 192 Wis.2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995). Perkins also cites to a Louisiana Supreme Court case where that court held that the admission of a psychologist's testimony on the subject of child sexual abuse accommodation syndrome was reversible error. ***State v. Foret,*** 628 So.2d 1116 (La. 1993). The Louisiana court held that this type of evidence "is of highly questionable scientific validity, and fails to unequivocally pass the *Daubert* threshold test of scientific reliability." ***Foret,*** 628 So.2d at 1127.

The Wisconsin Supreme Court, however, has adopted a test for the admissibility of scientific evidence that is unrelated to the test used by the federal courts. ***Peters***, 192 Wis.2d at 687, 534 N.W.2d at 872. Therefore, our standard for the admissibility of scientific evidence is unaffected by ***Daubert***. ***Peters***, 192 Wis.2d at 687, 534 N.W.2d at 872.

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[10] Perkins concedes that in presenting this argument he is asking the court to revisit the issue of the admissibility of expert testimony regarding syndrome evidence in cases of child abuse, child sexual assault and adult sexual assault prosecutions. He requests that this court reconsider the holdings of ***State v. Haseltine,*** 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Jensen,*** 147 Wis.2d 240, 432 N.W.2d 913 (1987). The court of appeals serves the primary error-correcting function in our two-tiered appellate system. ***State v. Mosley,*** 102 Wis.2d 636, 665-66, 307 N.W.2d 200, 216-17 (1981). Furthermore, we are bound by the published decisions of any appellate panel, ***In re Court of Appeals***, 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-50 (1978), and by the precedent of our supreme court, ***Livesey v. Copps Corp.,*** 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979). Under the principle of stare decisis, we must apply the law as it has evolved.

In Wisconsin, the scientific principle that underlies the evidence is not the determining factor. ***Id.*** at 688, 534 N.W.2d at 872. Evidence, if given by a qualified expert, is admissible irrespective of the underlying theory on which the testimony is based. ***State v. Walstad***, 119 Wis.2d 483, 518, 351 N.W.2d 469, 487 (1984). Our supreme court's holding in ***Walstad*** preceded ***Daubert***; we addressed the question of the admissibility of expert testimony in light of the ***Daubert*** decision in ***Peters***. There we concluded:

> The fundamental determination of admissibility comes at the time the witness is "qualified" as an expert. ... Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.

Peters, 192 Wis.2d at 688, 534 N.W.2d at 872.

The rule in Wisconsin remains that the admissibility of scientific evidence is not conditioned on its reliability. ***Id.*** at 687, 534 N.W.2d at 872. Scientific evidence is admissible if (1) it is relevant, (2) the witness is qualified as an expert and (3) the evidence will assist the trier of fact in determining an issue of fact. ***Id.*** at 687-88, 534 N.W.2d at 872. Based on the foregoing, we conclude that Perkins' argument that Kile's testimony was unreliable and therefore inadmissible is without foundation.

Perkins also maintains that Kile's testimony improperly bolstered the victim's credibility and should have been excluded on that basis. An opinion that the complainant was sexually assaulted or is telling the truth is impermissible. ***Jensen,*** 141 Wis.2d at 338, 415 N.W.2d at 521. However, as we noted in ***Jensen,*** testimony that an individual's responses mirrored expected

behavioral patterns of such victims is admissible if its purpose is to explain otherwise "ambiguous or contradictory conduct" by a victim. ***Id.*** In such a case, the expert's testimony is limited to explaining that certain conduct may be the natural product of an individual's psychological condition. ***Id.*** at 339, 415 N.W.2d at 521.

In this case, the trial court ruled that Kile was qualified to testify as an expert in the area of the reactive behavior of adult sexual assault victims. Her testimony was that Deanna's demeanor and behavior were consistent with the initial reactions of adult victims. We conclude that as defined by ***Jensen,*** Kile's statements about Deanna's reactions were properly admitted.

Jury Instructions

Perkins claims that the trial court's modification of the standard jury instruction definition of consent misstated the law. He argues that the trial court's definition of consent—"'Without consent' means there was no consent in fact"—is so vague that the jury was compelled to guess what "consent" or "without consent" actually meant.

This issue is governed by judicial estoppel. During the conference regarding jury instructions, a modification including the aforementioned phrase was read aloud to counsel. The following exchange took place:

> THE COURT: With regard to the first sentence in those paragraphs, and I quote, "without consent means there's no consent in fact," do you object to that particular phrase, [defense counsel]?
>
> DEFENSE COUNSEL: That I believe accurately states the law and I don't think it overly emphasizes.

A party is judicially estopped from raising an issue that is directly contrary to what it has argued to the trial court. *See* ***State v. Michels,*** 141 Wis.2d 81, 98, 414 N.W.2d 311, 317 (Ct. App. 1987). Perkins is therefore estopped from now arguing that this modification was in error.

We choose, however, to address the issue on the merits. The language that was added to the jury instructions was taken from the consent definition found in § 939.22(48), STATS. While Perkins argues, and the State concedes, that this definition does not apply to sexual assault cases because § 940.225(4), STATS., contains its own definition of consent,[11] that contention alone does not convince us that Perkins' due process rights were irreparably damaged.

A trial court has wide discretion in developing the specific language used in jury instructions. ***State v. Herriges,*** 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990). The trial court's instructions do not have to conform to the standard jury instructions. ***State v. Camacho,*** 176 Wis.2d 860, 883, 501 N.W.2d 380, 389 (1993).

The jury instructions on consent were extensive, and the challenged phrase represented only a small portion of the instructions read to the jury. Furthermore, the jury requested clarification during deliberations and

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[11] The definition of consent in § 940.225(4), STATS., reads in pertinent part:

> "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.

asked, "Does lack of verbal or physical response constitute consent?" This inquiry did not reflect confusion over the challenged phrase. The trial court responded to this by sending the jury the definition of consent found in § 940.225(4), STATS. We conclude that there was no error in either the modified jury instructions as first read or in the subsequent clarification. The jury instructions represented a proper exercise of the trial court's discretion.

Special Verdict Forms

Perkins' final contention is that the trial court erred by failing to submit special verdict forms which would have required the jury to state which act formed the basis of each conviction and thereby denied his right to a unanimous verdict. In a case charging multiple acts, the jury must be presented with verdict forms that adequately distinguish each separately charged crime. ***State v. Marcum,*** 166 Wis.2d 908, 923, 480 N.W.2d 545, 553 (Ct. App. 1992).

A review of the record shows that defense counsel did request a special verdict for count one, which was the second-degree sexual assault charge (having sexual contact or sexual intercourse with a person the defendant knows to be unconscious). That request was denied. However, unanimity of verdict as to that count is not at issue as Perkins was subsequently acquitted of that charge.

As to the other three charges, defense counsel did not request special verdict forms and the issue is waived. *See* ***State v. Schumacher,*** 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). Nonetheless, we conclude that the verdict forms submitted for the remaining three counts did not violate Perkins'

right to a unanimous verdict. The verdicts for the two counts of fourth-degree sexual assault each specified the underlying sexual contact that formed the basis for that count. The remaining count (sexual intercourse) was based on the evidence of a single act of digital/vaginal penetration. As to that count, unanimity is assured by the guilty verdict because evidence was presented of only one act of sexual intercourse.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.