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DISTRICT II

April 24, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP400-CR

State of Wisconsin v. Shane J. Chivers (L.C. #2011CF711)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Shane Chivers appeals from a judgment of conviction entered after a second jury found him guilty of three counts of first-degree sexual assault of a child under thirteen and from an order denying his motion for postconviction relief. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

In 2012, a jury found Chivers guilty of three counts of first-degree sexual assault of a child under thirteen, his daughter “Myra.”² On appeal, this court concluded that his custodial statements should have been suppressed, reversed his conviction, and remanded the case for a new trial. *See State v. Chivers*, No. 2013AP945-CR, unpublished slip op., ¶1 (WI App Aug. 6, 2014). A second jury also found him guilty on all three counts. Chivers filed a postconviction motion arguing that the trial court violated his right to present a defense by limiting his examination of Myra’s therapist, Jill Bibler. The court denied his motion. Chivers appeals.³

At trial, Chivers sought to present Bibler’s testimony that he brought Myra to counseling sessions so as to convince the jury that a father abusing his daughter likely would not take her to therapy. Granting Chivers’ request, the trial court limited Bibler’s testimony to telling the jury that Chivers brought Myra to see her, that she detected no signs that Myra had been sexually abused, and that Myra disclosed no abuse to her. Chivers now contends, however, that the court deprived him of his right to present a defense because it precluded him from offering additional testimony through Bibler that Myra had suffered ongoing physical and verbal abuse by her mother.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² We use the same pseudonym for the victim that the State uses in its brief.

³ Chivers abandons on appeal his additional postconviction claim that his waiver of his right to testify was unknowing.

A criminal defendant has the fundamental right to present testimony in defense of a criminal charge. *State v. Maday*, 179 Wis. 2d 346, 354, 507 N.W.2d 365 (Ct. App. 1993). Bibler testified outside the presence of the jury that Chivers told her that Myra's mom was abusive toward Myra. Chivers acknowledged that he did not file a motion to admit other-acts evidence and expressly denied that he had any intent to present evidence of such allegations, explaining, "I just think as a fundamental matter that's hearsay, so I don't know why I would even go into that." The court limited Bibler's testimony to the very parameters Chivers sought.

Beyond Chivers' manifest position that he did not intend to introduce evidence that mom physically or emotionally abused Myra, the court opined that such evidence was not relevant to whether Chivers had sexually abused Myra. To be relevant, evidence must be consequential—that is, it must have some "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; *State v. Martinez*, 2011 WI 12, ¶33, 331 Wis. 2d 568, 797 N.W.2d 399. The right to present a defense is subject to the requirement that the evidence is relevant. *Maday*, 179 Wis. 2d at 354. Chivers does not explain how mom's alleged mistreatment of Myra is relevant to his alleged sexual abuse of the girl.

Also, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or that it will confuse the issues or mislead the jury. WIS. STAT. § 904.03; *State v. Payano*, 2009 WI 86, ¶57, 320 Wis. 2d 348, 768 N.W.2d 832. Myra testified that she did not recall if Bibler asked her whether mom had abused her. Allowing Bibler to testify that Chivers said mom physically or emotionally abused Myra would have injected evidence unrelated to the trial issue. Chivers fails to connect the dots between the mom evidence and the allegation that he sexually assaulted Myra. As the evidence could have led to a

distracting, marginally beneficial “trial within a trial” without notice to the State, the court concluded that the “mom evidence” would only confuse the jury and unfairly prejudice the State. It was within the court’s discretion to make that determination. *See State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals