COURT OF APPEALS
DECISION
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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0797-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE RIVERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Bruce Rivers appeals from the judgment of conviction for three counts of first-degree sexual assault of a child, contrary to

WIS. STAT. § 948.02(1) (1997-98),[1] entered following a jury trial. On appeal, Rivers raises four arguments; he claims that the trial court: (1) erroneously expanded the hearsay exceptions when it admitted the testimony of the victim's counselor; (2) erroneously exercised its discretion by allowing an expert witness to testify regarding matters that were not beyond the general knowledge or experience of the average juror and, in doing so, impermissibly vouched for the witnesses' credibility; (3) erred when it denied his request for a psychological examination of the victims; and (4) denied his right to confrontation when it refused to order an evidentiary hearing to determine the victims' alternative sources of sexual knowledge. We reject all of Rivers' arguments and we affirm.

I. BACKGROUND.

¶2 On November 24, 1997, Rivers was charged with three counts of first-degree sexual assault of a child. The facts leading to the charges began when three eleven-year-old boys ran away from St. Aemelian's Residential Treatment Center where they resided. According to the boys, after running away from the center, they encountered a woman at a beauty salon in Milwaukee. The woman, who the boys later learned was actually a man, let them in to watch television. The boys stated that the man introduced himself as "Renee," and that he gave them something to drink, which they believed contained alcohol. The boys maintained that shortly thereafter, Renee began to perform fellatio on one of the boys, and later engaged in similar acts with the other two boys. The boys claimed that, after one of them discovered that Renee was actually a man, the three boys fled the salon and crossed the street to a grocery store where they called the police.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

¶3 When the police arrived, the three boys told the officers that they had run away from St. Aemelian's, but they did not tell the police about the sexual assaults. The officers returned the boys to St. Aemelian's. Later, they revealed the sexual assaults by "Renee" to Melissa Hart, a counselor at St. Aemelian's. At Hart's urging, the boys then reported the incident to the police. Renee was described to the police as a white man who "acts like a woman," and that when Renee pulled off his wig, he had graying hair and a bald spot on top of his head. On the strength of the boys' statements, three police officers went to the beauty salon to investigate. They observed that the beauty salon matched the boys' description and that a person who identified himself as Renee Ellen Rivers was present. Rivers informed the officers that he was also known as Bruce Rivers, and that he had changed his name to Renee, as he was a transsexual in the process of undergoing a sex change.

¶4 Rivers was charged with three counts of first-degree sexual assault of a child. Rivers filed numerous pretrial motions, including a motion for an evidentiary hearing to determine whether the boys had alternative sources for their sexual knowledge, a motion in limine opposing the testimony of the State's expert witness, Liz Ghilardi, and a motion seeking psychological examinations of the boys. Rivers also moved to exclude the counselor's testimony regarding the boys' statements to her about the sexual assault, claiming that the statements were inadmissible hearsay. After the trial court denied the motions, a jury found Rivers guilty of all three counts. The trial court sentenced Rivers to twenty-five years' imprisonment on counts one and two to run concurrently. On count three, the trial court ordered a forty-year prison term, but stayed it and imposed twenty years of probation. Rivers appeals from the judgment of conviction.

II. ANALYSIS.

¶5 Rivers first argues that the trial court erroneously expanded the excited utterance and residual hearsay exceptions, as codified in WIS. STAT. §§ 908.03(2) and 908.03(24) respectively, when it admitted Hart's testimony. A trial court's ruling admitting out-of-court statements under an exception to the hearsay rule is a discretionary decision which we will not upset on appeal if we can discern a reasonable basis for it. *See* ***State v. Huntington***, 216 Wis. 2d 671, 680-81, 575 N.W.2d 268 (1998) ("[T]he circuit court is better able to weigh the reliability of circumstances surrounding out-of-court statements.").

¶6 Rivers first contends that the counselor's testimony regarding the boys' statements about the sexual assaults failed to meet any of the three factors for determining the applicability of the excited utterance hearsay exception, as set forth in ***State v. Gerald L.C.***, 194 Wis. 2d 548, 535 N.W.2d 777 (Ct. App. 1995). In ***Gerald L.C.***, this court noted that, generally,

> [A] survey of Wisconsin cases that have applied the excited utterance exception to child sexual assault victims' statements reveals three common factors: (1) the child is young – under the age of ten, (2) the time between the incident and the child's report is less than a week and (3) the child first reports the incident to his or her mother.

Id. at 557 (citations omitted). Rivers argues that in the instant case the boys clearly do not meet either the first or the third factor – the boys were eleven years old and they reported the story to a person other than their mothers. Regarding the second factor, Rivers argues that the sixteen hours between the incident and the boys' report was a significant amount of time. He argues that the sixteen-hour delay gave the boys sufficient time to consider the incident, converse with each

other, and formulate a story to tell their counselor to avoid being punished for running away. We disagree with Rivers' analysis.

¶7 Rivers is correct in asserting that two of the three ***Gerald L.C.*** factors guiding the applicability of the excited utterance hearsay exception are clearly not met in this case – the boys are not under ten and none of the boys first reported the incident to his mother. However, this court has stated that the key factor in allowing hearsay under the excited utterance exception is whether the victim is still under the stress of the event. *See* ***id.*** at 558-59 ("[T]hese factors by themselves are not dispositive, and the statement may be admissible if the declarant was still under the stress or excitement caused by the event at the time he or she made the statement."). Further, the supreme court has refused to apply the three factors as a bright-line rule. *See* ***Huntington***, 216 Wis. 2d at 684. Statements not falling within the ***Gerald L.C.*** factors still may "demonstrate sufficient trustworthiness to be admitted under the excited utterance exception." ***Id.***

¶8 Like the court in ***Huntington***, we are satisfied that "the facts [of this case] suggest [that the children were] 'still under the stress or excitement caused by the event at the time [they] made the statement[s].'" ***Id.*** at 685 (quoting ***Gerald L.C.***, 194 Wis. 2d at 558-59.). The counselor testified that the boys exhibited unusual behavior while relating their story – two of the boys did backwards and frontwards flips, cussed, and bragged, while the third boy was withdrawn and quiet. The trial court found that even though the boys did not react by crying, sobbing or engaging in any kind of hysterics, their behavior did demonstrate a form of excitement or emotional reaction commensurate with excitement and stress caused by the incident. The trial court's finding is supported by the evidence.

¶9 Further, we note that the facts here are significantly different from those in ***Gerald L.C.***. In that case, this court concluded that the complainant's statements were inadmissible because, *inter alia*, she was fourteen years old, she waited two weeks before reporting it, and she first reported the assault to her boyfriend. Here, however, the boys were relatively young at the time of the incident, each was only eleven years old; they reported the incident shortly after it occurred, between fourteen and sixteen hours after they returned to St. Aemelian's; and the boys reported the incident to a counselor with whom each of the boys had a trusting relationship. Therefore, we conclude that the trial court properly exercised its discretion when it admitted the counselor's testimony about the incident under the excited utterance exception to the hearsay rule.[2]

¶10 Next, Rivers argues that the trial court erred by allowing the State to introduce the testimony of Liz Ghilardi, an expert in the area of child sexual abuse, who testified generally about children's memories, intellects, emotional levels, ability to recall and relate historical events, and possible reactions to sexual assault. Rivers contends that Ghilardi's testimony should not have been permitted because the subject matter of her testimony was not beyond the general knowledge and experience of the average juror and, therefore, her expert testimony was unnecessary. *See* ***State v. Owen***, 202 Wis. 2d 620, 551 N.W.2d 50 (Ct. App. 1995) ("Expert testimony … is required only if the issue to be decided by the trier

[2] The trial court also found that the statements were admissible under the residual hearsay exception contained in WIS STAT. § 908.03(24). On appeal, the State argues that the statements were properly admissible under either the excited utterance exception or the residual hearsay exception. Because we have determined that the statements were properly admitted under the excited utterance exception, we need not consider the State's alternative argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (appellate court need only address dispositive issues).

of fact is beyond the general knowledge and experience of the average juror."). We reject Rivers' argument.

¶11 The trial court's decision to admit expert testimony is discretionary. *See* ***State v. Friedrich***, 135 Wis. 2d 1, 15, 398 N.W.2d 763 (1987). "Whether opinion testimony of expert witnesses is properly received depends upon whether the members of the jury, having the knowledge and general experience common to every member of the community, would be aided in consideration of the issues by the testimony offered." ***Id.*** To be admissible, "[t]he expert testimony must assist the trier of fact." ***Id.***

¶12 We are satisfied that the trial court properly exercised its discretion in admitting Ghilardi's expert testimony. Ghilardi testified regarding general issues related to child sexual abuse. She did not interview or examine the boys and, therefore, she did not testify regarding the specifics of the instant case or whether the boys' reactions were consistent with that of other sexual abuse victims. Rather, she informed the jury of the general effects that sexual abuse can have on a child's emotions, mental processes and behavior, and provided the jury with general information regarding a child's cognitive and recall abilities. In permitting the testimony, the trial court found that some persons may not be familiar with the emotional and psychological differences between children and adults, and "[a]n expert can help the jury understand the reason why they testified as they did." Therefore, the trial court reached the conclusion that Ghilardi's testimony was outside the knowledge and general experience common to members of the community, and that the testimony would aid the jury. We agree.

¶13 Wisconsin courts have generally permitted expert testimony regarding children's behavior in reaction to sexual abuse. *See, e.g.,* ***Huntington***,

216 Wis. 2d at 696 (expert witness testified regarding child victim's delay in reporting the abuse and conflicting assertions regarding the actual number of instances of abuse); ***State v. DeSantis***, 155 Wis. 2d 774, 795, 456 N.W.2d 600 (1990) (counselor from rape shelter testified generally regarding the behavior of sexual assault victims); ***State v. Jensen***, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988) (expert witness compared child's behavior with behavior generally exhibited by sexual assault victims); ***State v. Robinson***, 146 Wis. 2d 315, 335, 431 N.W.2d 165 (1988) (expert witness testified regarding general behavior of sexually abused children); ***State v. Vinson***, 183 Wis. 2d 297, 309-10, 515 N.W.2d 314 (Ct. App. 1994) (child's therapist compared child's behavior with behavior consistently exhibited by victims of sexual abuse). This court finds ***Robinson*** and ***Jensen*** to be particularly informative.

¶14 In ***Robinson***, the expert witness provided general testimony regarding her observations of the complainant and the post-assaultive behavior of sexual assault victims. *See* ***Robinson***, 146 Wis. 2d at 333. However, like Ghilardi's testimony in the instant case, the expert witness did not draw inferences or comparisons between the general information being testified to and the behavior of the victims in that particular case. There, the court concluded that the expert's testimony was admissible because it "serve[d] a particularly useful role by disabusing the jury of some widely held misconceptions about sexual assault victims." ***Id.*** at 335. In ***Jensen***, the expert witness went one step further, comparing the alleged victim's behavior with behavior common to child victims of sexual abuse. There, the defendant argued that the jury must be allowed to draw its own comparison to determine whether the alleged victim's behavior was consistent with behavior common among victims of sexual abuse. *See* ***Jensen***, 147 Wis. 2d at 252-53. In approving the expert witness's testimony, the court

stated that it "[did] not find that difference to be legally significant." ***Id.*** at 253. Rather the court noted that, "[e]xpert testimony on the post-assaultive behavior of a sexual assault victim is admissible in certain cases to help explain the meaning of that behavior." ***Id.*** at 250. We are satisfied that here the expert witness also assisted the jury by explaining matters concerning sexual assault victims not commonly known by the average person. Thus, Ghilardi's testimony was admissible and the trial court properly exercised its discretion in allowing the testimony.

¶15 Rivers also maintains that,

> by introducing this 'expert' testimony that 'children don't explain things like adults' and 'children don't remember things like adults' the court is improperly buttressing the credibility of these child witnesses and introducing so called expert testimony to justify and explain away the numerous inconsistencies in the testimony of the three juvenile witnesses.

Rivers concludes that, by allowing the testimony, the trial court violated the holding in ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), because this expert testimony "vouch[ed] for the credibility of a child witness." ***Id.*** at 96 ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."). When determining whether a ***Haseltine*** violation has occurred we review the matter *de novo*. *See* ***Huntington***, 216 Wis. 2d at 697 ("The question of whether a witness has improperly testified as to the credibility of another witness is a question of law which we review independently."). We disagree with Rivers' characterization of the expert's testimony and with his conclusion.

¶16 Ghilardi's testimony did not constitute improper buttressing of the boys' credibility. As noted, Ghilardi provided general testimony regarding the post-assaultive behavior of child sexual assault victims without drawing comparisons between the generally observed behavior of sexual assault victims and the behavior exhibited by the boys in this case. At no point during her testimony did Ghilardi offer an opinion that the boys were telling the truth; indeed, she did not even offer a comparison between the general behavior of sexual assault victims and the boys' behavior. Thus, Ghilardi's expert testimony cannot be construed as testimony providing "an opinion that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96.

¶17 Moreover, Rivers' argument was rejected by the supreme court in ***Jensen***, a case where the expert witness compared the complainant's behavior with that of sexual assault victims. There, the court noted that, despite the behavioral comparisons drawn by the expert witness, ultimately the jury was free to draw its own inferences from the expert's testimony and was free to accept or reject that testimony as it saw fit. *See* ***Jensen***, 147 Wis. 2d at 255. The court concluded that "the expert testimony in this case was not tantamount to an opinion that the complainant ... was telling the truth." ***Id.*** at 255-56. Here, unlike ***Jensen***, Ghilardi's testimony did not even go so far as to compare the boys' behavior with that of sexual assault victims. Thus, in the instant case, the jury was no less free to draw its own inferences from the expert testimony and was no less able to accept or reject that testimony as it saw fit than the jury in ***Jensen***. Consequently, we are satisfied that the trial court properly admitted Ghilardi's testimony.

¶18 Rivers next argues that the trial court erred when it denied his request to conduct psychological examinations of the boys. Relying on ***State v. Maday***, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993), Rivers argues that in

the interests of fundamental fairness he should have been afforded the opportunity to present psychological examination evidence to counter Ghilardi's testimony. Rivers asserts that "[t]he State opened the door to psychological examinations by the Defendant by introducing Ghilardi's testimony which implicitly vouches for the credibility of these witnesses." We have already concluded that Ghilardi's testimony did not vouch for the credibility of the witnesses. Further, we also conclude that ***Maday*** does not support Rivers' position and, therefore, we are satisfied that the trial court did not err in denying Rivers' request to submit the boys to psychological examinations.

¶19 In ***Maday***, this court held that a defendant charged with sexual assault is entitled to a psychological examination of the victim when the State's expert witnesses conduct psychological examinations and the State intends to rely on evidence produced by those examinations. *See* ***id.*** at 349. This court remarked that "[a] defendant who is prevented from presenting testimony from an examining expert when the state is able to present such testimony is deprived of a level playing field." ***Id.*** at 357. Thus, had the State presented testimony from an expert witness who had conducted psychological examinations of the boys, Rivers, under ***Maday***, would have been entitled to conduct his own psychological examinations. However, the State's expert witness never examined the boys and never presented any psychological testing results. Consequently, ***Maday*** does not support Rivers' position; thus, the trial court did not err by denying Rivers' request.

¶20 Finally, Rivers argues that the trial court denied his right of confrontation by refusing to order an evidentiary hearing to determine whether the boys' had any alternative sources for their sexual knowledge. Through discovery, Rivers obtained information that one of the boys had allegedly engaged in anal

intercourse with his brother and that this boy had told police that he had previously watched pornographic movies. Rivers also asserts that the boys' statements regarding other types of sexual conduct "appear[] to have been based on sources of knowledge that they had before the occurrence here." Rivers requested an evidentiary hearing to explore these alternative sources of information. The trial court, citing the ages of the boys and their life experiences, denied the request, reasoning that "a jury would not conclude that these children were at such a tender point in their lives that it's a reasonable inference that the source of knowledge for the sexual conduct that they've described would be exclusively from the conduct with the defendant and would be likely to convict based on that reason." Rivers now argues that the trial court denied him his right of confrontation when it refused to conduct an evidentiary hearing to explore the boys' alternative sources of sexual knowledge. Rivers is mistaken.

¶21 The right of confrontation is not absolute and "only grant[s] defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect." ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). "[G]enerally evidence of a complainant's prior sexual conduct is irrelevant or substantially outweighed by its prejudicial effect." ***Id.*** Despite this general prohibition, "evidence of a complainant's prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected." ***Id.*** at 647. In order to establish the right to present evidence of prior sexual conduct, a defendant is required to make an offer of proof sufficient to satisfy the requirements set forth in ***Pulizzano***.

¶22 ***Pulizzano*** requires the defendant to show that: (1) "the prior acts clearly occurred"; (2) "the acts closely resembled those of the present case"; (3) "the prior act is clearly relevant to a material issue"; (4) "the evidence is

necessary to the defendant's case"; and (5) "the probative value of the evidence outweighs its prejudicial effect." ***Id.*** at 651. Applying this holding to the instant case, we conclude that the trial court properly denied Rivers' request to conduct a hearing under ***Pulizzano***. Rivers failed to satisfy the ***Pulizzano*** underpinnings. He failed to establish that any prior acts ever clearly occurred, or that those acts resembled the ones Rivers was charged with committing. Nor did he show that any prior acts were necessary to this case or relevant to his defense or that the "probative value of the evidence outweighs its prejudicial effect." Nothing in ***Pulizzano*** requires the trial court to conduct an evidentiary hearing so that the defendant may explore possible alternative sources of sexual knowledge. Nor does Rivers provide this court with any other authority to support his position. Therefore, the trial court properly refused to conduct such a hearing and we conclude that the trial court did not deny Rivers' his right of confrontation by refusing to order an evidentiary hearing to explore alternative sources of the boys' sexual knowledge.

¶23 For the reasons stated, the trial court's judgment is affirmed.

By the Court.—Judgment affirmed.

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