COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2628 **Cir. Ct. No. 1999CF1444**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALBERT L. BLACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Albert Black appeals the judgment of conviction of two counts of first-degree sexual assault of a child in violation of WIS. STAT.

§ 948.02(1) (1999-2000).[1] The sole issue on appeal is whether the circuit court erred in admitting DNA[2] profile evidence obtained through polymerase chain reaction (PCR) testing. Black contends the court erred because WIS. STAT. § 972.11(5) bars the admissibility of all DNA profile evidence except that produced by restriction fragment length polymorphism (RFLP) testing. We conclude that § 972.11(5) does not establish the exclusive procedure for the admission of DNA profile evidence and, thus, does not prohibit the admission of DNA profile evidence produced by PCR testing. The circuit court in this case correctly construed the statute, and we therefore affirm.

BACKGROUND

¶2 Black was charged with two counts of first-degree sexual assault of a child based on an amended information alleging that he had sexual contact, finger to vagina, and sexual contact, penis to vagina, with a child who had not attained the age of thirteen. Before trial, the State moved for the admission of DNA profile evidence that was obtained through PCR testing. Black opposed the motion on the ground that WIS. STAT. § 972.11(5)(a) defines a "[DNA] profile" as "an analysis that uses the [RFLP] analysis" and therefore DNA evidence resulting from any other type of testing, such as PCR, is inadmissible.

¶3 The circuit court granted the motion. It concluded that the legislature did not intend by enacting WIS. STAT. § 972.11(5) to prevent the admissibility of all DNA profile evidence except that produced by RFLP analysis,

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

[2] DNA stands for deoxyribonucleic acid.

even if profile evidence produced by another method was admissible under the rules of evidence and the case law regarding scientific expert opinions. The court concluded that DNA profile evidence produced by PCR testing was admissible under the rules of evidence and the case law.

¶4 At trial the State's forensic scientist testified that, based on PCR testing of a semen stain on the child's underpants, it was her scientific conclusion that Black was the source of the semen. The expert presented by Black testified that in his opinion the semen sample from the underpants was Black's, but there were some irregularities in some of the data and he therefore recommended that some of the results be disregarded because they were unreliable. There were a number of non-expert witnesses for both parties, including the child, whom the State called, and Black, who testified in his defense. The jury returned a verdict of guilty on both charges.

DISCUSSION

¶5 The statute at issue, WIS. STAT. § 972.11(5), provides:

> **(5)**(a) In this subsection, "deoxyribonucleic acid profile" means an analysis that uses the restriction fragment length polymorphism analysis of deoxyribonucleic acid resulting in the identification of an individual's patterned chemical structure of genetic information.
>
> (b) In any criminal action or proceeding, the evidence of a deoxyribonucleic acid profile is admissible to prove or disprove the identity of any person if the party seeking to introduce evidence of the profile complies with all of the following:
>
> 1. Notifies the other party in writing by mail at least 45 days before the date set for trial, or at any time if a date has not been set for trial, of the intent to introduce the evidence.
>
> 2. If the other party so requests at least 30 days before the date set for trial, or at any time if a date has not been set

> for trial, provides the other party within 15 days after receiving the request with all of the following:
>
> a. Duplicates of actual autoradiographs generated.
>
> b. The laboratory protocols and procedures followed.
>
> c. The identification of each probe used.
>
> d. A statement describing the methodology of measuring fragment size and match criteria.
>
> e. A statement setting forth the allele frequency and genotype data for the appropriate database used.
>
> (c) Notwithstanding par. (b), the court may grant a continuance regarding the time limit under par. (b)2. to allow a party to provide the required information.

¶6 On appeal Black renews his argument that the DNA profile evidence produced by PCR testing is inadmissible because of the definition of DNA profile in § 972.11(5)(a). The State responds that, while § 972.11(5) provides a method for automatic admissibility of DNA evidence if the procedures prescribed there are followed, it does not prohibit the admissibility of all other DNA profile evidence even if it is admissible under Wisconsin's rules of evidence and common law.

¶7 A resolution of this issue requires a construction of the statute, thus presenting a question of law, which we review de novo. ***State v. Tremaine Y.***, 2005 WI App 56, ¶9, 279 Wis. 2d 448, 694 N.W.2d 462. When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. ***Id.***, ¶46. We

also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. ***Id.***, ¶48. If this process of analysis yields a plain meaning, then there is no ambiguity and we apply that plain meaning. ***Id***., ¶46. However, if the statutory language is capable of being understood by reasonably well-informed persons in two or more senses, it is ambiguous and we may employ sources extrinsic to the statutory text. ***Id.***, ¶¶47, 50. These extrinsic sources are typically items of legislative history. ***Id.***, ¶50.

¶8 Black first argues that the plain language of WIS. STAT. § 972.11(5)(a) defines a DNA profile as "an analysis that uses the [RFLP] analysis of [DNA] …" and thereby plainly excludes a DNA profile produced by PCR or any other analysis. In the alternative, Black argues that, even if one assumes that it is also reasonable to read this statute as not prohibiting the admission of DNA profile evidence produced by analyses other than RFLP, extrinsic aids demonstrate that the legislature intended that § 972.11(5) be the exclusive means of admitting any DNA profile evidence.

¶9 The State's position is that the language of the statute plainly does not prohibit the admissibility of DNA evidence produced by analyses other than RFLP; such a reading is unreasonable, the State contends, because it requires adding language to the statute that is not there.

¶10 We conclude that WIS. STAT. § 972.11(5) is ambiguous: it is reasonable to read it both as establishing the exclusive procedure for the admission of all DNA profile evidence and as establishing a procedure for the automatic admissibility of RFLP DNA profile evidence, leaving all other DNA profile evidence to be admissible or not according to the rules of evidence and the common law. As the State points out, there is no language in § 972.11(5)

suggesting that this is the exclusive procedure for admitting all DNA profile evidence. We note in addition that another subsection—§ 972.11(3)—does expressly state that another type of evidence (the patient's or client's medical history in certain cases) "is not admissible except if [certain procedures are followed]." This is an indication that, when the legislature intends to establish the exclusive procedure for the admission of evidence, it does so in express terms. However, we cannot agree with the State that its reading of § 972.11(5) is the only reasonable one. The legislature's silence on DNA profile evidence produced by analyses other than RFLP could be reasonably understood as intending that only this type be admissible.

¶11 We resolve this ambiguity by looking at the legal framework for the admission of scientific evidence in Wisconsin in 1993, when the legislature enacted WIS. STAT. § 972.11(5). *See* 1993 Wis. Act 16, § 3846. Then, as now, WIS. STAT. § 907.02 provided:

> **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.

By 1993 Wisconsin case law had clearly established that, if scientific evidence was relevant and not excluded for some special reason such as prejudice or jury confusion, it was admissible if it met the standard for expert testimony in § 907.02. *See, e.g.,* ***State v. Walstad***, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984). We presume the legislature was aware both of the rules of evidence and the case law on the admission of expert testimony at the time it enacted § 972.11(5). *See* ***Roberta Jo W. v. Leroy W.***, 218 Wis. 2d 225, 233, 578 N.W.2d 185 (1998). Thus, we presume the legislature understood that, even without

enacting the statute, DNA profile evidence produced by RFLP testing would be admissible if it was relevant, met the standard in § 907.02, and was not excluded for some special reason. We also presume that the legislature understood that the existing rules of evidence and case law would determine the admissibility of all types of DNA profile evidence not mentioned in the new legislation, unless the new legislation provided otherwise.[3]

¶12 With this background, we turn our attention back to the statute. The statute establishes specific procedures for advance notice to the other party and, upon request, for providing certain information to the other party. WIS. STAT. § 972.11(5)(b). If these procedures are followed, the RFLP DNA profile evidence "is admissible" in a criminal proceeding "to prove or disprove the identity of any person." ***Id.*** In other words, the party wishing to have this evidence admitted need not establish to the satisfaction of the court that the standards of WIS. STAT. § 907.02 are met, which is a discretionary decision for the circuit court. *See* ***State v. Pittman***, 174 Wis. 2d 255, 267-68, 496 N.W.2d 74 (1993). Instead, the evidence is automatically admissible for the specified purpose if the specified procedures are followed. Because we presume that the legislature understood that these procedures were not necessary to make RFLP DNA profile evidence admissible, we conclude the legislature intended to establish a procedure to facilitate the admission of RFLP DNA profile evidence for the specified purpose in criminal proceedings. Because the legislature did not include language making this the exclusive procedure for admitting all DNA profile evidence and because we presume the legislature understood that, without such language other types of

[3] Neither party has brought to our attention any legislative materials relating to the enactment of WIS. STAT. § 972.11(5) that shed light on the legislature's intent at the time.

DNA profile evidence would be admissible under the existing rules of evidence and existing case law, we conclude the more reasonable construction is that the legislature did not intend § 972.11(5) to be the exclusive procedure for the admission of all DNA profile evidence.

¶13 Black asserts, based on treatises and case law from other states, that, although in 1993 DNA testing of any kind was relatively new and admissibility issues centered largely on RFLP testing, PCR testing did exist at the time. From that premise, Black argues that the legislature was therefore "on notice" that "DNA profiles from PCR testing were likely to be at issue at some point," and its choice to address only RFLP DNA profiles shows it intended that DNA profiles from PCR testing be inadmissible. Accepting Black's premise of the state of DNA testing in 1993, we do not agree that it necessarily leads to his conclusion. The legislature could have decided that, because RFLP was the most widely used method of obtaining DNA profiles at the time, it wanted to facilitate the admission of that type of DNA profile evidence; it does not necessarily follow that the legislature wanted to prevent all other types from being admitted. Indeed, it would hardly be reasonable to assume the legislature intended this if, as Black argues, the legislature understood that there was another method of testing that would likely become more common in the future.

¶14 Black also argues that the repeal of WIS. STAT. § 972.11(5) by 2001 Wis. Act 16, § 4003t supports his position that it was the exclusive means of admitting DNA profile evidence. Black asserts, again relying on case law from other states, that toward the end of the 1990s the use of PCR testing to produce DNA profiles became more popular. According to Black, if the statute did not prohibit admission of DNA profile evidence produced by PCR testing, there would have been no need to repeal the statute. The parties have directed us to no

legislative materials that shed light on the legislature's intent in repealing § 972.11(5). We do not view the repeal of § 972.11(5), in itself, as indicative of legislative intent in enacting that statute. For one thing, the views of a subsequent legislature are not necessarily a sound basis for inferring the intent of an earlier legislature. *See* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶34, 274 Wis. 2d 220, 682 N.W.2d 405. In addition, the repeal could just as likely mean that the legislature decided in 2001 that DNA science was developing so quickly that it was better to have all types of DNA profile evidence subject to the rules of evidence and common law, rather than to have special procedures for the admission of one particular type. The point is that we have no basis for anything other than speculation on how the significance of the repeal of § 972.11(5) in 2001 bears on the legislature's intent in enacting it in 1993.

¶15 In summary, we conclude that WIS. STAT. § 972.11(5) does not prohibit the admission of DNA profile evidence produced by PCR testing. The circuit court in this case correctly construed that statute and correctly decided that the admission of the PCR DNA profile evidence in this case should be determined according to the rules of evidence and common law. Black did not contend in the circuit court, and does not contend on appeal, that the PCR DNA profile evidence was inadmissible under the rules of evidence and the common law: his only contention was and is that § 972.11(5) precluded its admission. Therefore, the circuit court correctly granted the State's motion to admit the PCR DNA profile evidence. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.