

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2007

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 2006AP250-CR

Cir. Ct. No. 2001CF837

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT L. VON HADEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert Von Haden, Jr., appeals an order denying a motion to compel his accuser to undergo an independent psychological examination. In Von Haden's earlier appeal No. 2003AP3104-CR, we granted the State's request to remand the matter to the trial court to apply the criteria set out in

State v. Maday, 179 Wis. 2d 346, 359-60, 507 N.W.2d 365 (Ct. App. 1993), to give Von Haden an opportunity to establish a compelling need or reason for the psychological examination. On remand, after considering the testimony of Von Haden’s expert witness, Dr. Stephen Emiley, the trial court concluded that Von Haden failed to establish a compelling need or reason for the examination. We affirm that decision.

¶2 Von Haden was charged with causing mental harm to a ten-year-old child, Kelsey B. The complaint alleged that he harmed her by sexually assaulting her. Kelsey alleged that Von Haden “French-kissed” her, touched her buttocks over her clothing and rubbed her abdomen. Kelsey’s psychotherapist, Beth Young-Verkuilen, testified that Von Haden’s relationship with Kelsey was “extremely harmful” to Kelsey psychologically and emotionally. Von Haden seeks to counter Young-Verkuilen’s testimony with Emiley’s testimony that would criticize Young-Verkuilen’s evaluation methods and diagnosis and, depending on the outcome of his evaluation, might attribute Kelsey’s psychological condition to something other than Von Haden’s relationship with her.

¶3 When reviewing the trial court’s decision, we independently review the findings of constitutional fact because the issue concerns constitutional principles and protections. *Id.* at 353. The trial court’s findings of evidentiary fact, however, are entitled to deference unless they are clearly erroneous. *Id.* Our task is to balance Von Haden’s constitutional right to a full and fair explication of the evidence against the consequential invasion of Kelsey’s privacy and the potential harm to her. *Id.* at 358. Although Von Haden was not charged with sexual assault, the psychological harm inflicted on Kelsey was due to a sexual assault. We must attempt to protect her privacy interest to ensure that she is not

“re-victimized” by subjecting her to a psychological examination for which no compelling need is shown. *See State v. Rizzo*, 2002 WI 20, ¶39, 250 Wis. 2d 407, 640 N.W.2d 93.

¶4 *Maday* recognizes seven factors to consider when deciding a defendant’s motion to subject the victim to a psychological examination: (1) the nature of the examination and its intrusiveness; (2) the victim’s age; (3) any resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to issues before the court; (5) remoteness in time from the examination to the alleged criminal act; (6) evidence already available for the defendant’s use; and (7) whether a personal interview with the victim is essential for the expert to form an opinion to a reasonable degree of psychological or psychiatric certainty. *Maday*, 179 Wis. 2d at 360. The trial court correctly concluded that Von Haden did not establish a compelling need or reason for the psychological examination based on these factors.

¶5 Emiley acknowledged that a psychological examination could adversely affect a victim, particularly a young girl who would not assert her option of not responding if the examiner’s questions caused her pain. The incident occurred over four years ago, and Kelsey has undergone therapy in the interim. The trial court reasonably questioned whether Kelsey’s clinical condition has changed substantially over time such that an examination would not disclose her psychological condition immediately following the crime. Emiley’s criticisms of Young-Verkuilen’s methodology could have been raised without any examination of Kelsey. Emiley had access to extensive information about Kelsey, including reports from her therapist, the trial transcript and therapy progress notes that had been sealed during the trial. Under these circumstances, Von Haden has not

established that a psychological examination at this time would be sufficiently likely to produce exculpatory evidence to justify the risk of re-victimizing Kelsey.

¶6 Von Haden notes that Emiley was the only witness to testify at the *Maday* hearing. The State's cross-examination of Emiley adequately established a factual basis for the trial court's findings. The court was not bound by Emiley's opinions, even if they were uncontradicted. *See State v. Wenk*, 2001 WI App, 268 ¶9, 248 Wis. 2d 714, 637 N.W.2d 417. Von Haden notes that there was no evidence that the safeguards Emiley proposed would be any less effective than what a psychologist for the State would use. The State did not subject Kelsey to a psychological examination for the purpose of producing testimony. Young-Verkuilen was Kelsey's therapist, and her examination was for the purpose of providing therapy. Her examination occurred shortly after the crime occurred. Subjecting Kelsey to a forensic psychologist's examination four years after the initial trauma is not comparable.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

