COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2524-CR **Cir. Ct. No. 2002CF636**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TED L. DAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: PATRICK BRADY, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ted Day appeals a judgment of conviction for one count of first-degree sexual assault of a child. He argues the court erroneously exercised its discretion in excluding expert testimony, an exculpatory photo, and

evidence of the alleged victim's reputation for truthfulness. He also argues the court should have declared a mistrial, and asks us to exercise our supervisory power to reverse the judgment because the circuit court did not record sidebar conferences. We conclude the court erroneously exercised its discretion in excluding Day's expert testimony and the exculpatory photo, and those errors were not harmless. We therefore reverse the judgment and remand for further proceedings.[1]

BACKGROUND

¶2 In November 2002, Day was charged with five counts of first-degree sexual assault of a child. Two of the counts were dismissed prior to trial, and the three remaining counts were tried to a jury in December 2005.[2] All counts alleged sexual contact with Elise R., a foster child living in Day's home, while she was between eight and ten years old.

¶3 At trial, Elise testified Day had touched her vagina on three occasions. One incident occurred in the master bathroom of Day's house and the other two took place in her bedroom. Elise testified that during one of the incidents in her bedroom, Day touched her vagina with his penis and ejaculated on her. The state crime lab identified three stains on Elise's comforter that contained semen and Day's DNA.

[1] Because the two evidentiary issues require reversal, we need not address the remaining issues Day raises. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

[2] An amended Information with the three remaining counts was filed on the first day of trial.

¶4 Sheryl Day,[3] who was married to Day at the time of the alleged assaults, testified Elise told her about the incidents and said Day "had a lot of hair down there and it was gray." Sheryl said Day's pubic hair was in fact gray at the time. A doctor who had performed a sexual assault examination on Elise said Elise also told him Day had gray pubic hair.

¶5 Day's defense was that Elise had made up the allegations in response to leading questions from Sheryl and one of Sheryl's daughters, and his semen had ended up on Elise's comforter when he and Sheryl had sex on it in the family room. To that end, Day offered, among other things, photos of his pubic hair taken by the defense investigator. The photos had been taken the day before, in response to the witness testimony that Day's pubic hair was gray, and depicted brown pubic hair. The State objected, arguing the photos had not been provided as discovery and were not relevant. The court sustained the objection:

> First of all, I think that this evidence should have been disclosed, but I'm also aware that hair color can easily be changed in this day and age, and … the color of his pubic hair today is not the issue, it's what it was at the time of the alleged offenses, so while this evidence may be relevant, I am excluding it because I find that its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues and misleading the jury.

¶6 Day also offered expert testimony on his psychological profile, commonly referred to as ***Richard A.P.***[4] testimony. Day's expert, Dr. Christopher Tyre, was a psychologist specializing in sex offender risk employed by the Department of Corrections. Tyre supervised the Chapter 980 Forensic Evaluation

[3] By the time of the trial, Sheryl Day had changed her last name to Wojnowiak.

[4] *See* ***State v. Richard A.P.***, 223 Wis. 2d 777, 790-91, 589 N.W.2d 674 (Ct. App. 1998).

Unit, which advises the Department of Justice on which sex offenders should be committed as sexually violent.[5] Tyre offered to testify that he had tested Day using two psychometric tests and a variety of other instruments. Tyre said he found no evidence that Day was sexually attracted to children. He also said Day did not "show any personality disorder traits, behaviors, cognitions, [or] paraphilic behaviors consistent with deviant offending."

¶7 The court excluded this evidence as well:

> [T]his court concludes that Dr. Tyre is qualified as an expert, that his area of testing is suitable for expert opinion and that his opinion is relevant to the issue of guilt or innocence of the defendant.
>
> But I also find quite significant that [Tyre] did not know about or consider the DNA results, that the defendant was not forthcoming as to the reasons for dissolution of his marriage,[6] and that the scores on the tests were very open for manipulation because they rely on self-reporting. And it is my determination that although the testimony in this case would be relevant, it is to be excluded because its probative value is substantially outweighed by the danger of unfair prejudice and the clear danger of misleading the jury, and I am not going to permit his testimony.

¶8 Day was convicted on count two—the count supported by the evidence of semen and Day's DNA on Elise's comforter—and acquitted on the other two charges.

DISCUSSION

[5] *See* WIS. STAT. ch. 980. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[6] This statement referred to Day's first marriage, not his marriage to Sheryl.

¶9 A circuit court's decision to exclude evidence is discretionary and will be upheld unless the court erroneously exercised its discretion. ***State v. Ford***, 2007 WI 138, ¶30, 742 N.W.2d 61. A court properly exercises its discretion when it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. The court erroneously exercises its discretion if its "factual findings are unsupported by the evidence or if the court applied an erroneous view of the law." ***State v. Martinez***, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989).

¶10 Under WIS. STAT. § 904.03:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice exists to the extent that a piece of evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Davidson***, 2000 WI 91, ¶73, 236 Wis. 2d 537, 613 N.W.2d 606 (citations and quotations omitted).

¶11 In this case, the court concluded the photos of Day's pubic hair were relevant. However, the court excluded the photos under WIS. STAT. § 904.03 because "hair color can easily be changed in this day and age," and therefore the

photos did not necessarily indicate the color of Day's pubic hair at the time of the assaults.[7]

¶12 This analysis reflects a misapplication of WIS. STAT. § 904.03. While the possibility that Day had colored his pubic hair goes to the probative value of the evidence, it does not present a "danger of unfair prejudice, confusion of the issues, or misleading the jury…." *See* ***id.*** The court did not identify any risk that the photos would have inflamed the jury's sympathies, the jury would have used the photos for any improper purpose, or the jury would have been confused about the photos' significance. *See* ***id.***; *see also* ***Davidson***, 236 Wis. 2d 537, ¶73. Instead, it appears the court excluded the photos because they did not conclusively prove the proposition they were offered for—in other words, because the court believed the jury would not give them much weight. By confusing weight with unfair prejudice or jury confusion, the court misapplied § 904.03, and erroneously exercised its discretion. *See* ***Martinez***, 150 Wis. 2d at 71.

¶13 The State argues the photos had "no probative value" because they were taken at the time of trial rather than close to the time the assaults took place. However, the court found the photos were relevant, and we agree with its assessment. As Day points out, the jury would have viewed the photos in the context of life experience that brown hair turns gray over time, not the other way around. The photos therefore were relevant to the color of Day's pubic hair at the time of the assaults, even though they were taken well after the assaults took place. While the State could have undercut this inference by pointing out the possibility

[7] The court also noted that the photos had not been turned over earlier in discovery. The State does not argue the photos were properly excluded based on a discovery violation.

that Day had colored his pubic hair, this goes to the weight the jury would have given the photos. It does not mean the photos lacked "any tendency" to show Day's pubic hair was brown in 2002. *See* WIS. STAT. § 904.01.

¶14 The court's decision to exclude Day's ***Richard A.P.*** testimony suffers from a similar flaw. In his offer of proof, Day's expert, Dr. Tyre, testified he had not been aware of the DNA results and would have found the results to be "very significant," although he did not indicate precisely how he would have used that information. Tyre also said when he asked Day about his first marriage, Day became emotional and said he did not want to discuss it further. Tyre acknowledged that only two of the tests he administered had built-in mechanisms designed to determine whether the test-taker was attempting to manipulate the test, and that the others were susceptible to manipulation by a person with "normal to high" intelligence.[8] The court concluded Tyre's testimony was relevant but excluded it under WIS. STAT. § 904.03 because Tyre "did not know about or consider the DNA results," Day "was not forthcoming as to the reasons for dissolution of his marriage" and "the scores on the tests were very open for manipulation because they rely on self-reporting."

¶15 As with the photos of Day's pubic hair, all of the reasons given by the court go to the weight of the testimony, not the risk that the testimony would result in unfair prejudice or confusion. First, while Tyre indicated he would have found the DNA results important, he did not explain why, and a jury could easily

[8] In its brief, the State appears to argue Tyre admitted that all of the tests were susceptible to manipulation, relying on Tyre's statement that "every one of these answers could easily be manipulated" by a person like Day. However, Tyre was referring to a specific test that did not have any built-in safeguards against manipulation, not every question on every test.

have weighed the DNA evidence against Tyre's conclusion that Day did not appear to suffer from a personality disorder or give any other indication he was likely to sexually assault children. The court did not conclude the jury would be confused by weighing this evidence, and we likewise fail to see any risk of unfair prejudice or jury confusion resulting because Tyre did not consider the DNA evidence.

¶16 Similarly, at the circuit court the State suggested Day's reluctance to discuss his first marriage may have been because of sexual issues between Day and his first wife, and this would undermine Tyre's opinion. However, as Day points out in his brief, there are any number of innocent explanations for his reluctance to discuss his first marriage, and the State would have had the opportunity to explore guilty ones on cross-examination. While Day's reluctance to discuss his first marriage might have had an effect on the weight a jury might give Tyre's testimony, the court did not explain why his request would have confused the jury or unfairly prejudiced the State, and we see no reason.

¶17 Finally, Day's ability to manipulate the tests was also an issue of weight, not unfair prejudice or jury confusion. Tyre testified the MMPI-2 and PCL-R,[9] two of the tests he administered, were designed to determine whether the test-taker was attempting to manipulate the test, and they did not indicate Day had attempted to manipulate the results. Tyre admitted a reasonably intelligent defendant would know better than to agree with statements in other instruments, which included statements like "I believe that sex with children can make the child

[9] The full name of the MMPI-2 is the Minnesota Multiphasic Personal Inventory, second edition. The full name of the PCL-R is the Hare Psychopathy Checklist.

feel closer to adults." The court did not explain how inquiry into Day's ability to manipulate the tests would have confused the jury or unfairly prejudiced the State. Indeed, as Day points out in his brief, expert testimony based on these testing instruments—in particular the PCL-R—is commonly part of the State's case in WIS. STAT. ch. 980 commitment trials. *See, e.g.*, ***State v. Fowler***, 2005 WI App 41, ¶5, 279 Wis. 2d 459, 694 N.W.2d 446; ***State v. Lalor***, 2003 WI App 68, ¶¶4-5, 261 Wis. 2d 614, 661 N.W.2d 898.

¶18 The State argues Tyre's testimony was properly excluded under ***State v. Walters***, 2004 WI 18, 269 Wis. 2d 142, 675 N.W.2d 778. In ***Walters***, the supreme court upheld the circuit court's decision to exclude ***Richard A.P.*** evidence under WIS. STAT. § 904.03. ***Walters***, 269 Wis. 2d 142, ¶¶1, 9. In ***Walters***, the circuit court first reached a determination that the expert testimony was of minimal probative value. ***Id.***, ¶38. The circuit court then found the "lengthy" and "wandering" nature of the testimony would likely mislead the jury, and this concern outweighed its probative value. ***Id.***, ¶39. The supreme court held the circuit court's conclusions as to the probative value and danger of misleading the jury were reasonable. ***Id.***, ¶¶38-40. The court noted there had been a significant change in the defendant's circumstances between the time of the assaults and the time of the testing, making the testing less relevant. ***Id.***, ¶38.[10] As for confusion, the court noted that the expert portion of the trial was slated to

[10] The supreme court criticized the circuit court's statements that the expert testimony was "unreliable" and that a battle of experts would be confusing. ***State v. Walters***, 2004 WI 18, ¶¶34-35, 269 Wis. 2d 142, 675 N.W.2d 778. Overall, however, the circuit court reached a reasonable conclusion when it concluded the proffered testimony was of limited probative value. ***Id.***, ¶38.

take three times as long as the rest of the testimony combined, potentially taking the jury's focus off the direct evidence of the crime. ***Id.***, ¶40.

¶19 It is well settled law that when we review a court's exercise of discretion, our focus is on the court's reasoning process, not the ultimate result. ***Johnson v. Johnson***, 225 Wis. 2d 513, 516, 593 N.W.2d 827 (Ct. App. 1999); *see also* ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). In ***Walters***, the circuit court correctly applied the balancing test found in WIS. STAT. § 904.03. It identified the correct standard and reached reasonable conclusions on the probative value of the evidence and the potential for unfair prejudice or jury confusion. *See* ***Walters***, 269 Wis. 2d 142, ¶¶38-40. In this case, the court identified the proper standard in § 904.03. However, the court analyzed only the probative value of the evidence, and effectively excluded the evidence based on its weight rather than the risk of unfair prejudice or jury confusion.

¶20 The State does not argue either of these errors was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (error is not harmless where there is a "reasonable possibility the error contributed to the conviction"). Day's trial was primarily a credibility contest between Elise, to some extent Sheryl, and Day. The jury convicted only on the count that was supported by physical evidence. Competing physical evidence, such as the photos of Day's pubic hair, might have made the jury more willing to accept Day's explanation for the semen and DNA found on Elise's comforter.[11] Tyre's

[11] The State's DNA expert was not asked whether the semen and DNA sample could have been created by intercourse between Day and Sheryl.

testimony might have had a similar effect. There is a reasonable possibility that exclusion of these two pieces of evidence contributed to the conviction. *See* ***id.***

By the Court.—Judgment reversed and cause remanded for further proceedings.

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