

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 24, 2002

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. 01-0270-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-2108

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. H.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DI MOTTO, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. David A.H. appeals a judgment convicting him of repeated sexual assault of the same child and attempted second-degree assault of a child. He also appeals an order denying his motion for postconviction relief. The sole issue is the exclusion of a defense expert witness from trial. We conclude that

the trial court properly exercised its discretion when precluding the witness from testifying and affirm.

¶2 The charges in this case arose from allegations by David's then fourteen-year-old daughter Nicole that David had been physically and sexually abusing her since she was about nine years old. The State sought to introduce expert testimony regarding why a victim of sexual abuse, and particularly incest, would delay reporting. The defense, in turn, sought to introduce expert testimony that, given the multi-generational dysfunctional family dynamics involved (including alcohol and drug addictions, domestic violence, a past false accusation of sexual abuse by Nicole against her brother, and a past false accusation of sexual abuse made by Nicole's mother), Nicole's behavior and that of her mother were more consistent with false allegations than bona fide allegations of sexual abuse. After several hearings and an offer of proof, the trial court admitted the State's expert but excluded the defense expert.

¶3 We review evidentiary determinations under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶4 WISCONSIN STAT. § 907.02 (1999-2000)¹ permits expert testimony which “will assist the trier of fact to understand the evidence or to determine a fact in issue.” As with all other proffered evidence, expert testimony is subject to the

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

standard evaluation of whether “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.” WIS. STAT. § 904.03.

¶5 The record shows that the trial court cited the proper statutes and thoroughly discussed a number of relevant cases. It acknowledged that the defense expert was well qualified and that his proffered testimony met the relevancy threshold. However, it considered that the probative value of the expert’s testimony was substantially outweighed by the danger of unfair prejudice or confusing the issues. The trial court gave a reasoned explanation for its conclusion.

¶6 The trial court first noted that the probative value of the proffered testimony regarding the significance of Nicole’s childhood and her past false allegation was low because “[t]he jury can use its own common sense and its long experiences in life to figure out the impact of an abnormal childhood” on Nicole’s credibility. It then noted that the proffered testimony regarding the childhood of Nicole’s mother and the mother’s prior false allegation, even if marginally relevant to the extent that Nicole might model her behavior after that of her mother, related more to the mother’s credibility than Nicole’s and was thus likely to lead the jury “off on a tangent.”

¶7 The trial court was particularly concerned that the proffered testimony regarding what constitutes a true versus a fabricated allegation would invade the province of the jury. That is, in the trial court’s view, the testimony went beyond describing the “reactive behavior” of an assault victim as permitted

in *State v. Jensen*, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988), to the giving of an expert opinion on Nicole’s credibility.

¶8 The trial court also mentioned that the proffered testimony included “too many variables for the jury to have to sort through.” We understand the trial court to have meant by this that there was a danger of confusing the jury because several of the facts surrounding the prior false allegations upon which the expert opinion would be based were themselves the subject of dispute.

¶9 Finally, the trial court observed that allowing the testimony “almost would get the jury in a position where they would say like mother like daughter.” This was a proper consideration under an unfair prejudice analysis.

¶10 In sum, all of the trial court’s comments show that it was applying the relevant law to the facts of record. We see no misuse of discretion.

By the Court.—Judgment and order affirmed.

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

