COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting 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. 2010AP2515-CR **Cir. Ct. No. 2004CF452**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD L. RANDALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Ronald R. Randall has appealed from a judgment convicting him of one count of the repeated sexual assault of the same child in

violation of WIS. STAT. § 948.025(1)(a) (2003-04).[1] He challenges certain evidentiary rulings by the trial court. Because the trial court did not erroneously exercise its discretion or deprive Randall of his right to present a defense when it refused to admit the evidence proffered by Randall, we affirm the judgment of conviction.

¶2 Randall was charged with repeatedly sexually assaulting B.K., the eight-year-old daughter of Diane L., between January 1, 2004 and April 18, 2004. Randall, Diane, and B.K. resided together, along with Randall and Diane's two younger children. The evidence at trial indicated that B.K. disclosed the sexual assaults after Diane walked into the living room on the night of April 18, 2004, and observed Randall standing above B.K., who was on the couch with her head in the area of his crotch. According to Diane, Randall was positioned "like he was peeing." Diane testified that when he saw her, Randall sat down on the couch and put his hands over his crotch. She testified that she then grabbed B.K. and Randall stood up, turning to the wall. Diane testified that although she did not see Randall's penis, he made hand movements by his pants like he was zipping himself up, and she heard the sound of a zipper. Diane contacted the police the next day. In her trial testimony and a videotaped interview shown at trial, B.K. recounted numerous acts of sexual assault by Randall.

¶3 At trial, Diane was questioned about whether at times she had attempted to assist Randall's prior defense counsel, Attorney Michael Cicchini, with Randall's defense, a fact she admitted. Diane also testified that at some point

[1] All references to the statutes under which Randall was convicted are to the 2003-04 version of the Wisconsin Statutes. All other references are to the 2009-10 version of the statutes.

during Cicchini's representation of Randall, he suggested that Diane hire a lawyer. She testified that Cicchini told her that the district attorney's office had a habit of taking people's children from them. The prosecutor then asked Diane whether she had ever threatened to take Diane's children from her, and Diane responded: "No, ma'am, but that fear was put into me and that's all I thought about was me losing my kids. So I hired a lawyer." In her trial testimony, Diane also acknowledged that at the preliminary hearing, she testified that she was worried that she could lose all of her children because of the sexual assault allegations.[2]

¶4 In response to this testimony, Randall sought to present Attorney Cicchini as a witness.[3] Randall's trial counsel made an offer of proof, stating that Cicchini would testify that Diane came to him and indicated that the prosecutor was making threats about a CHIPS petition to take her children away. According to the offer of proof, Cicchini would also have testified that at a meeting with the prosecutor in June 2004, the prosecutor flipped through the file and showed Cicchini something, stating that it was a CHIPS petition which the prosecutor would use to take Diane's children away.[4]

¶5 Randall contended that he was offering Cicchini's testimony to rebut Diane's testimony that the prosecutor never threatened her with the removal of her children. The trial court prohibited the testimony, expressing concern that the

[2] Diane acknowledged that at the preliminary hearing, she stated that if B.K. or one of her other children told someone that sexual abuse had occurred in the family, "DCFS would come in in a heartbeat and take my children to investigate it."

[3] Attorney Cicchini had previously withdrawn as Randall's counsel for other reasons.

[4] In response to the offer of proof, the prosecutor denied ever making such statement, and denied that a CHIPS petition was ever prepared in this case.

prosecutor would have to become a witness in the case, which was already in the second day of trial.[5] The trial court also questioned the relevance of the evidence in light of Diane's testimony that she was concerned about her children being taken away. It concluded that, assuming arguendo that the evidence was relevant, its relevance was outweighed by its prejudicial effect.

¶6 On appeal, Randall contends that the trial court denied him his right to present a defense when it excluded Cicchini's proffered testimony. However, a defendant's right to present a defense is not violated when the defendant is precluded from presenting evidence that is irrelevant. *See* ***Milenkovic v. State***, 86 Wis. 2d 272, 286-87, 272 N.W.2d 320 (Ct. App. 1978). Even though a defendant's right to present witnesses in his or her own defense is a fundamental constitutional right, that evidence must be relevant to the issues being tried. ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984).

¶7 The trial court has broad discretion in determining the relevance and admissibility of evidence and its decision will not be reversed absent an erroneous exercise of discretion. ***State v. Weed***, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485. This court will uphold a trial court's decision excluding evidence if the court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a rational process. ***Id.*** Moreover, even if a trial court fails to set forth adequate reasons for its ruling, this court will uphold the trial court's decision if the record contains facts which would support its decision. ***State v. Mainiero***, 189 Wis. 2d 80, 95-96, 525 N.W.2d 304 (Ct. App. 1994).

[5] The trial court and counsel also discussed whether a release from the juvenile court would be required. However, as contended by Randall, it appears that no release would have been required if, as stated by the prosecutor, no CHIPS petition was ever prepared.

¶8 The trial court's decision to exclude Cicchini's testimony was not an erroneous exercise of discretion. Randall argued that Cicchini's testimony was necessary to rebut Diane's testimony that the prosecutor never threatened to take her children away. In addition, he argues on appeal that the testimony was necessary to show "prototypical bias" on the part of Diane. However, his arguments are not supported by the record.

¶9 The offer of proof regarding Cicchini's testimony did not indicate that the prosecutor directly threatened Diane. Since the record did not indicate that Diane was present when the prosecutor showed Cicchini what purportedly was a CHIPS petition, Cicchini's testimony that the prosecutor showed him such a document did not substantiate that the prosecutor made a similar threat to Diane. In addition, Diane testified that Cicchini told her the prosecutor had a habit of taking children and that she feared that this would happen. Because evidence of Diane's fears and concerns about the prosecutor's potential actions was already before the jury pursuant to her own testimony, Cicchini's testimony would have added nothing of significance to the issue of whether Diane was biased as a result of her fears or concerns, and was unnecessary for the jury's assessment of her credibility. Because Cicchini's testimony would not have made a fact of consequence to the action more or less probable, the proffered testimony was properly excluded as irrelevant and inadmissible under WIS. STAT. §§ 904.01 and 904.02. Based on its lack of meaningful probative value, the trial court could also reasonably conclude that its admission would be unfairly prejudicial and would confuse the issues before the jury. *See* WIS. STAT. § 904.03.

¶10 In upholding the trial court's ruling, we also reject Randall's contention that excluding Cicchini's testimony violated his right to present a defense. The test for whether the exclusion of evidence violates a defendant's

right to present a defense inquires whether the proffered testimony was essential to the defense, and whether without the proffered evidence, the defendant had no reasonable means of defending his case. ***State v. Williams***, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919. Because Cicchini's proffered testimony was lacking in probative value and unnecessary to Randall's defense, it clearly cannot be said that excluding it left Randall with no other reasonable means of defending his case.

¶11 Randall's remaining argument on appeal is that the trial court denied his right to present a defense when it prohibited him from questioning B.K. as to whether she lied when she reported that, on May 11, 2004, her mother intentionally scratched her neck, and whether she lied to her mother about shoplifting lipstick and a nail polish kit from Wal-Mart on two occasions in February 2004. Randall contends that he should have been permitted to cross-examine B.K. on these subjects in order to show her propensity for lying. He contends that this would have supported his claim that she lied when she alleged that he sexually assaulted her, and that she did so to retaliate because he disciplined her.

¶12 In addressing this issue, the State concedes that the trial court erred when it initially determined that WIS. STAT. § 906.08(2) precluded questioning

B.K. about any collateral matter on cross-examination.[6] However, on reconsideration, the trial court also reiterated its prior determination that the evidence lacked any probative value. In addition, it determined that even if the evidence had any probative value, it was outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03.

¶13 The trial court acted within the scope of its discretion in making these determinations. Probative value depends upon relevance and an assessment of what the evidence would likely add to the case. ***State v. Walters***, 2004 WI 18, ¶31, 269 Wis. 2d 142, 675 N.W.2d 778. Even if relevant, evidence may be excluded if it is of minimal probative value and its value is outweighed by the danger that issues would be confused and the jury misled. *See* ***id.***, ¶36.

¶14 Here, Randall alleged that there was evidence showing that B.K. received a scratch on her neck and, because she was angry with her mother, she falsely claimed that her mother intentionally scratched her. However, even if B.K. lied when she indicated that the scratch was intentional rather than inadvertent, the issue was completely tangential. The trial court reasonably concluded that it was not probative on the issue of whether B.K. lied when she alleged that Randall sexually assaulted her. Similarly, evidence that B.K. initially denied shoplifting some small items from Wal-Mart before admitting the conduct to her mother cannot be deemed probative of the credibility of the sexual assault allegations.

[6] With some exceptions that are inapplicable here, WIS. STAT. § 906.08(2) prohibits the use of extrinsic evidence to impeach a witness's credibility on a collateral matter. ***State v. Rognrud***, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990). Extrinsic evidence is evidence admitted other than through examination of the witness whose impeachment is sought. ***State v. Sonnenberg***, 117 Wis. 2d 159, 168, 344 N.W.2d 95 (1984). In contrast, Randall sought to cross-examine B.K. on collateral matters that he alleged demonstrated her propensity for lying.

Moreover, even if evidence of these instances of lying could be deemed to have any minimal probative value concerning B.K.'s credibility, the trial court reasonably concluded that its value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. The trial court therefore acted within the scope of its discretion in excluding the evidence.

By the Court.—Judgment affirmed.

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