COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

No. 95-2532-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ODELL WILLIAMS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Odell Williams appeals from a judgment of conviction of physical abuse of a child. He claims that the testimony of the former prosecutor in this case amounted to opinion testimony on the credibility of the victim and that he was denied due process by the prosecution's comment in closing argument that the jury was not permitted to hear other relevant evidence. We conclude that the prohibition against opining on another witness's credibility was not violated and that no prejudicial error occurred during closing arguments. We affirm the judgment.

Williams was charged with allegedly punching his fourteen-year-old son, Narada, in the mouth and throwing him out the back door during an argument at their home. The case was first handled by Assistant District Attorney Shelly Rusch. Before trial, a special prosecutor was appointed to handle the case because it became apparent that Rusch was a potential witness in the case.

At trial, Narada denied that his father hit him on the evening of the reported incident. Rather, he indicated that other than a struggle over a baseball bat, he had no physical contact with his father that evening. He testified that he tripped and fell out the back door. He could not recall how he cut his lip that night. He admitted that he lied to police because he was mad at his father.

Rusch was called to testify about an interview she conducted with Narada approximately two weeks after the incident. She indicated that because he seemed withdrawn and reluctant, she went over Narada's statement to the police with him line by line. When asked what Narada's reaction was, Rusch testified, "Throughout the statement he nodded and he indicated yes. Now, the way in which he did this was a resigned, sad yes; it's too bad it's true but, yes, it's true sort of indication ...." At this point, Williams objected and moved for a mistrial on the grounds that Rusch had rendered an opinion about Narada's credibility.

The motion for a mistrial was denied, although the trial court acknowledged that the testimony was becoming increasingly close to improper comment on the credibility of another witness. Rusch's testimony continued. She related how she, Narada and Narada's mother had met with Williams and his attorney. She testified that in a quiet manner and while refusing to look her in the eye, Narada changed his story and for the first time admitted that he had the baseball bat before Williams struck him. Rusch's comment that Narada's mother looked "satisfied" upon Narada's admission drew another objection.

As Rusch's testimony continued, the trial court ruled that Rusch was qualified to give an opinion about the behavioral reactions of victims of child abuse. Rusch testified that it was not "uncommon" for an alleged child victim to withdraw the original report. She further indicated that if the non-

offending parent sides with the allegedly offending parent, "I almost predict recantations where children are not removed from that home environment." She testified that based on her training and experience, Narada's recantation was consistent with the behavior of alleged child victims of interfamilial abuse.

Williams complains that "[b]eneath a veneer of scientific credibility" Rusch's testimony implied that she believed Narada to have been truthful in his story to the police and that he recanted only under pressure from the family. He argues that her testimony unfairly bolstered the credibility of Narada's prior statements and unfairly undermined the credibility of Narada's trial testimony.

The denial of a motion for a mistrial will be reversed only upon a clear showing of a misuse of discretion by the trial court. ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.***

It is well settled that a witness, expert or otherwise, may not testify that another physically and mentally competent witness is telling the truth. ***State v. Romero***, 147 Wis.2d 264, 278, 432 N.W.2d 899, 905 (1988); ***State v. Smith***, 170 Wis.2d 701, 718, 490 N.W.2d 40, 48 (Ct. App. 1992), *cert. denied*, 113 S. Ct. 1860 (1993); ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984). Whether the testimony constituted improper comment on the credibility of another witness is a question of law which we decide independently of the trial court. ***State v. Davis***, 199 Wis.2d 513, 519, 545 N.W.2d 244, 246 (Ct. App. 1996).

It is appropriate to make clear that Rusch wore two different hats when testifying. During the first part of her testimony she was a historian—reporting what she observed in her initial contact with Narada. While Rusch's expression of her observations came close to commentary on Narada's credibility, it did not cross the line. There was never a direct comment regarding Narada's veracity. The jury was free to draw inferences about credibility from Rusch's description of Narada's physical demeanor during the interview. The explanation of the course of events during the interview and the

subsequent meeting with Williams and his attorney did not violate the ***Haseltine*** and ***Romero*** rules. *See* ***Smith***, 170 Wis.2d at 718, 490 N.W.2d at 48.

Upon a shift in her testimony, Rusch put on the hat of an expert witness. Williams does not challenge Rusch's qualifications to give expert opinions about the usual behavior of alleged child victims of sexual or physical abuse. To be admissible, expert testimony must assist the trier of fact in a way other than conveying to the jury the expert's own beliefs as to the veracity of the victim. ***State v. Pittman***, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79, *cert. denied*, 114 S. Ct. 137 (1993). The purpose and effect of an expert's testimony must be examined to determine whether it improperly usurps the jury's role in determining credibility. ***Id.*** at 268, 496 N.W.2d at 79.

State v. Jensen, 147 Wis.2d 240, 257, 432 N.W.2d 913, 920 (1988), sets the parameters of expert opinion testimony in the circumstances presented here. The expert may describe the behavior of victims of the same type of crime, the expert may be asked to describe the behavior of the victim, and the expert may be asked if the victim's behavior is consistent with the behavior of other victims. ***Id.***

Rusch's testimony in this area was kept within these parameters. Her testimony was for the purpose of explaining that child victims remaining in the family home with the alleged abuser often recant. At no point did she give the prohibited testimony that Narada recanted *because* he was unduly influenced by his parents. *See* ***State v. Bednarz***, 179 Wis.2d 460, 465, 507 N.W.2d 168, 171 (Ct. App. 1993) (***Haseltine*** would have been violated had the expert testified that the victim recanted because she suffered from battered women's syndrome). Nor did she express her own opinion as to whether Narada's statement to the police or his trial testimony was the truth. Rusch's testimony neither had the purpose nor effect of usurping the jury's duty to assess credibility.

We have some concerns about the tactic used by the prosecution in proving up the victim's prior inconsistent statement. It is always a risky proposition to remove a prosecutor from that role and place him or her on the witness stand. Here, the use of a special prosecutor reduced those risks. However, we question whether it was necessary for Rusch to testify in light of

the written statement, Narada's admission to his neighbor and emergency room nurse, and the testimony of the police officer who took the statement. Despite our concern and for the reasons stated, we conclude that the use of Rusch's testimony does not compel a reversal.

Williams argues that in closing argument the prosecutor improperly suggested that there was relevant evidence that the jury was not permitted to hear. The prosecutor initially addressed the jury:

> I want to thank you for your patience and attention here. I've tried to move this alone [sic], our part of the case. Nevertheless, I suspect that it's in addition to being grueling walking up and down those steps, it's been somewhat frustrating here. I suspect that this frustration comes from a number of things probably or mainly not hearing certain evidence.
>
> In my county, jurors can ask questions so that we attorneys know what's going through your mind. For whatever reasons, and its perfectly appropriate, that practice isn't followed here. I assume, though, that some of the reasons for not hearing evidence is the judge decides that the evidence isn't admissible or relevant. Another reason is that I just may have forgotten, you know. I just may have forgotten to put it in. And that's part of being human is to forget.

Williams objected at this point in the prosecutor's closing argument and moved for a mistrial. A motion for a mistrial based on prosecutorial misconduct is addressed to the trial court's discretion. ***State v. Bembenek***, 111 Wis.2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983). The trial court's determination will not be reversed unless it erroneously exercised its discretion and the defendant was prejudiced by the remarks. ***Id.***

The trial court acknowledged that the prosecutor had improperly implied to the jury that certain evidence had been excluded. It found that the prosecutor's comment did not go so far as to suggest that there was excluded

evidence which convinced the prosecution of guilt. *See* ***Embry v. State***, 46 Wis.2d 151, 160-61, 174 N.W.2d 521, 526 (1970) (improper for the prosecutor to give an opinion on guilt because it gives the jury the idea that the prosecution has information not disclosed). The trial court found that any potential prejudice was cut off by the timely objection and the instructions to the jury that the arguments of counsel are not evidence. "It is the general rule that improper remarks by a prosecutor are not necessarily prejudicial where objections are promptly made and sustained and where curative instructions and admonitions are given by the court." ***Bembenek***, 111 Wis.2d at 634, 331 N.W.2d at 625. The trial court appropriately relied on the general rule in determining that Williams was not prejudiced. It properly exercised its discretion in denying the motion for a mistrial.

Williams claims that the improper remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992) (quoted source omitted). The prosecutor's comments are to be viewed in context and not standing alone. ***Id.*** at 168, 491 N.W.2d at 501. The prosecutor's comment came at the very beginning of his argument. He was attempting to introduce the trial process to the jury and apologize for what may have been viewed as interruptions and delay in the process. There was no explicit reference to the type of evidence that was excluded or missing. While the argument was technically improper, in context it did not prejudice Williams.

By the Court.—Judgment affirmed.

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