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DISTRICT II

December 11, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP65-CR State of Wisconsin v. William A. Johnson (L.C. #2011CF823)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

William Johnson appeals from a judgment of conviction of second-degree sexual assault. He argues that the jury should not have heard the sexual assault nurse examiner (SANE) testify that an injury to the victim's vagina was likely not the result of consensual sex because the standard for admissibility of that testimony under WIS. STAT. § 907.02(1) (2011-12)[1] was not satisfied. Based upon our review of the briefs and record, we conclude at conference that this

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the judgment.

Johnson was charged under WIS. STAT. § 940.225(2)(cm) for engaging in sexual intercourse with the victim at a time when the victim was under the influence of an intoxicant to a degree that the victim was incapable of giving consent. The SANE testified about her physical examination of the victim and her observation that the victim had a red mark, like an abrasion about a quarter in size, on the right side of her labia majora. On recross-examination, defense asked the SANE whether the red mark injury could be caused by many things. The SANE answered that it could be. The defense then asked, "[I]t could be caused by consensual sex, couldn't it?" The SANE acknowledged anything is possible. On redirect examination the prosecutor asked whether the injury is "likely to be caused by consensual sex?" After hearing the defense objection and additional foundation questions as to the SANE's experience and training on what injuries could be caused by nonconsensual sex, the SANE was allowed to answer; she answered no.[2] On appeal, Johnson challenges the admission of this evidence.

The parties disagree as to our standard of review on the admission of expert testimony. Johnson contends that Wisconsin's adoption in WIS. STAT. § 907.02(1) of the reliability standard for expert testimony set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579

[2] When next asked, "[W]hy not?" the SANE explained, "[B]ecause with consensual sex there would be probably more lubrication, and this is a friction injury." After further foundation questions and objections by the defense, the SANE was asked why she believed the injury was unlikely to be caused be consensual sex. She replied, "I believe it because this type of injury is a friction injury. Most abrasions are caused by friction usually when—in an unlubricated patient."

(1993), requires modification of the age-old erroneous exercise of discretion standard of review[3] and adoption of the mixed standard of review set forth in ***Gayton v. McCoy***, 593 F.3d 610, 616 (7th Cir. 2010). Although Johnson may be correct that the standard of review issue is one of first impression, we conclude this is not an appropriate case to resolve whether the standard of review should change due to changes to § 907.02(1).

First and foremost, because Johnson opened the door to the SANE's opinion on whether the injury could have been caused by consensual sex, he forfeited his right to claim error on the prosecution's further exploration along the same line of inquiry. "A party who opens the door on a subject cannot complain if the opposing party offers evidence on the same subject to explain, counteract, or disprove the evidence." ***State v. Harvey***, 2006 WI App 26, ¶40, 289 Wis. 2d 222, 710 N.W.2d 482.

Even addressing Johnson's claim that admission of the SANE's testimony was error and an erroneous exercise of discretion, we affirm the ruling under either standard of review. WISCONSIN STAT. § 907.02(1) permits testimony from a witness qualified as an expert by knowledge, skill, experience, training or education if the testimony "is based upon sufficient facts or data, … is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." Under the statute, circuit courts must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." ***Daubert***, 509 U.S. at 597.

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[3] *See* ***State v. Shomberg***, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370 ("We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard.").

The SANE testified as to her specialized training, knowledge, and experience, as well as her examination of the victim. The circuit court's determination that the SANE was qualified to give the testimony she did is supported by the record. The circuit court also indicated it would require laying a proper foundation that "the opinion that the expert is about to present is one that is scientifically reliable enough for the court to act as a gatekeeper in which to allow it in or out." Implicit in the circuit court's admission of the testimony was the conclusion that the proper foundation of reliability had been laid. We will not require magic words contemporaneous with the ruling.

Johnson's contention that the SANE's testimony could only be shown to be reliable by reference to scientific methodology, studies, or empirical data is misplaced. Personal medical observations and experience of certified medical experts is sufficient to establish reliability. *See* ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 141, 148-49 (1999) (the test of reliability is "flexible"; experts tie observations to conclusions through the use of general truths derived from specialized experience and an expert's testimony often will rest upon experience foreign in kind to the jury's own); ***Drexler v. All Am. Life & Cas. Co.***, 72 Wis. 2d 420, 432, 241 N.W.2d 401 (1976) ("No particular words of art are necessary to express the degree of medical certainty required to remove an expert opinion from the realm of mere possibility or conjecture."). In short, the record demonstrates the circuit court performed its function under WIS. STAT. § 907.02, and properly exercised discretion in admitting the SANE's testimony that the injury was not likely caused by consensual sex.

Johnson argues that the evidence was not relevant because the victim's consent was irrelevant to the crime. Johnson's theory of defense was that the victim was capable of giving consent, and in his opening argument he suggested the victim "in fact[] did give consent by what

she did and by what she knows." The jury was to determine whether Johnson had actual knowledge that the victim was incapable of giving consent. WIS JI—CRIMINAL 1212. The jury could consider whether the sexual intercourse was nonconsensual in evaluating Johnson's interpretation of the victim's conduct and, consequently, his knowledge of the victim's inability to give consent.

We summarily reject Johnson's additional claim that the SANE's testimony that the injury was not likely caused by consensual sex related to matters of common knowledge of jurors and usurped the jury's function. The testimony related that the injury was an abrasion injury, that such injuries occur with inadequate lubrication, and that lubrication may be lacking in nonconsensual sex. Johnson has not established that these are simply matters of common knowledge.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals