COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1301-CR **Cir. Ct. No. 01CF000005**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS D. ADER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK, Judge. *Affirmed.*

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

¶1 BROWN, J. Curtis D. Ader appeals from a judgment of conviction for second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(a) (2001-

02).[1] Ader argues that the trial court erroneously excluded the opinion testimony of two of the victim's siblings concerning the victim's character for untruthfulness. We conclude that the trial court did not erroneously exercise its discretion in excluding the testimony because its probative value was substantially outweighed by considerations of undue confusion and unfair prejudice. We affirm.

¶2 In October 2000, the State charged Ader with a single count of second-degree sexual assault for allegedly sexually assaulting his former wife, Donna Ader. At trial, Donna testified that Ader had sexual intercourse with her without her consent. Ader, however, claimed the intercourse was consensual, testifying that Donna actively participated in the intercourse and she never asked him to stop.

¶3 To bolster his argument that the jury should not credit Donna's account, Ader proferred the opinion testimony of two of her siblings, Robert Platek and Deborah Navarrette, regarding her character for untruthfulness. Prior to the witnesses testifying, the trial court granted the State's request to voir dire them outside the jury's presence on their knowledge of the victim's reputation in the community.

¶4 On direct examination, Platek, Donna's older brother, testified that he and Donna had grown up together and had seen each other regularly throughout their lives, but that he had not had contact with Donna for the previous three years because of "an incident that we're not going to talk about." On cross-examination,

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the prosecutor established that Platek and Donna lived in different towns and did not have friends in common or go to church together and that Platek did not know Donna's reputation for untruthfulness in the community where she then lived. Rather, he could only testify regarding his personal opinion of her truthfulness. Upon further questioning by the prosecutor, Platek admitted that he had sexual contact with Donna when they were children and that his father had beaten him for it. Platek further testified that his opinion of her truthfulness was not colored by that incident.

¶5 Donna's older sister, Navarrette, also testified that although she and Donna had not seen each other in about three years, they had grown up together and had seen each other on a regular basis before then. She testified that Donna had lived with her at some point. When asked her opinion of Donna's character for truthfulness, she testified that Donna "has a tendency to lie in her favor." On cross-examination, Navarrette testified that like her brother, she had no knowledge of Donna's current community and could only testify regarding her personal assessment of Donna's untruthful character. When asked about the basis for her opinion of Donna's untruthfulness, Navarette responded that, up until three years earlier, Donna had been at her house often and that the two had been close "all the way through Donna's life." Navarrette further testified that her "whole life" she had "caught [Donna] in lies." When the prosecutor asked her for an example, Navarrette answered that "[Donna] said my husband went after her." When asked how she knew that was not true, Navarrette said "I don't know." The prosecutor then asked Navarrette for another example of a lie. Navarrette described a confrontation between Donna and their father as he lay (they thought) near death in a hospital. The court, however, interrupted the testimony and told Navarrette that her story showed Donna's "bad judgment," not a lie, and that "what we're

really interested in right now is lies." Navarrette then stated that Donna accused Navarrette of having known all along about their brother having sexually assaulted Donna, an accusation Navarrette denied: "[S]he told me I knew, and that was a lie because I didn't know. And she said I knew all along; I didn't. I did not live at home when that happened."

¶6 Following the voir dire, the trial court determined that the proferred opinion testimony was inadmissible. The court stated:

> I guess this is my take on it…. This is obviously a highly dysfunctional family, highly dysfunctional. And there are all of these grudges that apparently are rampant within the group. They have with good cause, I might add from what I've heard, ample reason to dislike [Donna] here. To hate her, for that matter; I think the second witness does. The first witness, I guess [Donna's] got ample cause to hate him. And all of this dirty laundry from the Platek family could play out for days, I guess.
>
> [B]ased upon … relevancy grounds, I'm going to exclude [the testimony]; that is, its prejudicial effect would outweigh the probative value and would open up areas of inquiry that would result in the case being lost in a maze of undue confusion for the jury as they attempt to sort out who in the Platek family they're going to believe.

Following the trial, the jury returned a guilty verdict. This appeal follows.

¶7 Ader maintains that by establishing that Platek and Navarrette were Donna's siblings and had spent considerable time with Donna throughout their lives and that each had an opinion concerning her truthfulness, he had laid the proper foundation for their opinion testimony pursuant to WIS. STAT. § 906.08(1) and, therefore, the testimony of both witnesses should have been admitted. The admissibility of evidence lies within the sound discretion of the trial court. *See* ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When we review a discretionary decision of the trial court, we examine the record to

determine whether the trial court logically interpreted the facts and applied the proper legal standard. ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995). We will not overturn a trial court's discretionary rulings absent a misuse of discretion. ***State v. Givens***, 217 Wis. 2d 180, 194, 580 N.W.2d 340 (Ct. App. 1998).

¶8 WISCONSIN STAT. § 906.08(1) provides, in relevant part,

> **906.08 Evidence of character and conduct of witness. (1)** OPINION AND REPUTATION EVIDENCE OF CHARACTER…. [T]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
>
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> **(2)** SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Section 906.08 is an "exception[] to the general rule proscribing inferences of conduct from a person's character (the so-called propensity inference)." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE, § 608.1 (2d ed. 2001). The rule permits character witnesses to offer their own personal opinion about the subject witness's character for truthfulness or describe the

subject's reputation for truthfulness in the community. *See* ***State v. Cuyler***, 110 Wis. 2d 133, 138-39, 327 N.W.2d 662 (1983).

¶9 The foundational requirements for opinion testimony are well established. The character witness simply must demonstrate that he or she knows the subject witness well enough to express a personal opinion about the latter's character for truthfulness. *See* BLINKA, *supra*, § 608.1. The acquaintance may be based on personal friendship business dealings, work experience, or even past criminal association. ***Id.*** Opinion evidence is not geographically limited and does not require a foundation that the witness giving the opinion testimony is familiar with the community or the person about whom he or she is testifying. ***Cuyler***, 110 Wis. 2d at 139. WISCONSIN STAT. § 906.08(1) imposes no requirement that the witness giving the opinion testimony have a long acquaintance with the person or have recent information, since cross-examination can expose the witness's lack of

familiarity with the person about whom he or she is testifying.[2] ***Cuyler***, 110 Wis. 2d at 139.

¶10 While we agree with Ader that he clearly laid the minimal foundation required for the opinion testimony of Platek and Navarrette, opinion evidence, like other evidence, is not automatically admissible. The trial court may, for example, preclude a witness from giving opinion evidence as to truthfulness or untruthfulness if the witness lacks personal knowledge or if the probative value of the opinion evidence is substantially outweighed by considerations of unfair prejudice, confusion of issues, undue delay, etc. ***Id.*** This is precisely what happened here. The trial court clearly stated that it was excluding both Platek's and Navarrette's testimony because "its prejudicial effect would outweigh the probative value and would open up areas of inquiry that would result in the case being lost in a maze of undue confusion for the jury." A

[2] Relying on our supreme court's decision in ***State v. Eugenio***, 219 Wis. 2d 391, 404, 579 N.W.2d 642 (1998), the State posits that the foundation for opinion testimony requires a showing that the character witness has knowledge of several instances of the subject witness's untruthfulness before it is admissible under WIS. STAT. § 906.08(1) and that Ader failed to lay this foundation. The State contends that this was the reason the trial court excluded Platek's and Navarrette's testimony. We reject the State's argument for two reasons. First, ***Eugenio*** must be read in context. As Ader points out, the issue in ***Eugenio*** was "whether it is enough to assert that a witness is lying in a specific instance, or whether the witness must be attacked as a 'liar' generally" for rehabilitative testimony to be admissible under § 906.08(1). ***Eugenio***, 219 Wis. 2d at 403. ***Eugenio*** did not speak to the foundational requirements for defense character evidence regarding the untruthful character of a prosecution witness. As indicated in the above text, the basic foundation required for opinion testimony is well settled and only requires that the character witness knew the subject witness for some period of time on some personal, business, or professional basis. Second, contrary to the State's assertion, the trial court did not exclude the testimony because Ader did not lay the proper foundation. Rather, as is evident from a plain reading of the trial court's oral ruling, the trial court precluded the witnesses' testimonies because it determined that the probative value of their testimonies would be substantially outweighed by the unfair prejudice and undue confusion.

careful reading of the voir dire transcript reveals that the trial court did not misuse its discretion in so concluding.

¶11 In fact, the transcript shows that a cross-examination of the witnesses about the bases for their opinions would delve into a nest of family dysfunction that has no bearing on Donna's character for untruthfulness. Platek stated that he could offer a personal opinion about Donna's character for untruthfulness, but he never stated what opinion he held, much less his reasons for holding it. Further, on cross-examination, Platek admitted that he had sexually assaulted Donna during their childhood. The trial court reasonably concluded that any reference to his opinion about Donna's truthfulness before the jury would necessarily open the door for an inquiry into this incident, thereby shifting the focus of the testimony from Donna's truthfulness to the family's dysfunction and substantially diminishing its probative value.

¶12 Navarrette's testimony does not fare any better. Although Navarrette did testify that she had "caught [Donna] in lies" and offered one instance of falsehood, her cross-examination testimony demonstrates that her opinion was the product of her venomous animosity towards Donna and was without any basis in fact. Thus, the trial court reasonably concluded that her testimony, like Platek's, would be of little probative value concerning Donna's character for untruthfulness and would only unnecessarily introduce the jury to the Platek family's confusing and twisted dynamics.

¶13 We emphasize that our conclusion in this case is driven by our deferential standard of review. We will not overturn a trial court's discretionary rulings absent an erroneous exercise of discretion and will generally look for reasons to sustain such determinations. ***Givens***, 217 Wis. 2d at 194; ***Steinbach v.***

Gustafson, 177 Wis. 2d 178, 185-86, 502 N.W.2d 156 (Ct. App. 1993). Given these standards, we hold that the trial court properly exercised its discretion in excluding the testimony of both Platek and Navarrette.

¶14 Finally, Ader maintains that the exclusion of the character testimony violated his constitutional right to due process and to present a defense. A defendant has a fundamental right to present testimony in support of his or her defense to a criminal charge. ***Milenkovic v. State***, 86 Wis. 2d 272, 286, 272 N.W.2d 320 (Ct. App. 1978). That right does not, however, include the right to present inadmissible evidence. *See* ***id.*** We have already concluded that the trial court did not erroneously exercise its discretion in holding that the opinion testimony of both Platek and Navarrette was inadmissible. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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