COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2743-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY J. CRAPP,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Green County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Gregory J. Crapp appeals from a judgment of conviction resulting from a jury trial in which he was found guilty of first-degree sexual assault of a child, contrary to § 948.02(1), STATS., and intentional child abuse, contrary to § 948.03(2)(b), STATS. For the reasons set forth below, we affirm.

On Friday, March 12, 1993, R.M.K., then age three, indicated to her mother that she did not want to go to the day care facility, which Crapp's girlfriend operated, because she "hate[d] Greg." In the course of further conversation over the weekend, R.M.K. told her mother that Greg hurt her "butt." On Monday, March 15, R.M.K. was examined by pediatrician Dr. Amy Johnson, who found her hymen missing, along with other physical indicia of sexual abuse, including reddening, a tear and enlargement. On the basis of the missing hymen, Johnson concluded that R.M.K. had been serially sexually abused.

Further consultations with a social worker and a psychologist confirmed R.M.K.'s belief that the defendant sexually abused her. However, unlike Dr. Johnson's conclusion of serial sexual abuse, R.M.K. indicated to the social worker and psychologist that she had been abused once.

In order to clear up any confusion, this court granted defendant's motion for another physical examination. ***State v. Crapp***, No. 94-0922-CR (Wis. Ct. App. Aug. 31, 1994). In that examination, another expert witness, Dr. Barbara O'Connell, found a crescentic hymen—that is, R.M.K.'s hymen existed, but had a crescent-shaped opening in it.

Crapp next argues that the circuit court erred when it denied his motion to exclude Dr. Johnson's testimony as incredible and irrelevant. We disagree.

Generally, the admissibility of evidence is submitted to the sound discretion of the trial court, and its rulings will not be overturned unless there was an erroneous exercise of discretion. ***Vonch v. American Standard Ins. Co.***, 151 Wis.2d 138, 150, 442 N.W.2d 598, 602 (Ct. App. 1989). If there was a "reasoned and reasonable" rationale for the trial court's decision, we will uphold it on appeal. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

The court here held that although the expert testimony was not the same, it was a matter open to "interpretation" as to whether there was "disagreement." Thus, the court decided to leave to the jury the issue of which doctor to believe. Dr. Johnson was subjected to extensive cross-examination at

trial, and Crapp was permitted to examine his own experts out of turn, immediately after Dr. Johnson's testimony. Crapp also elicited from Dr. Johnson that on her own re-examination, she, too, found a rim of hymenal tissue.

The court did not err in permitting Dr. Johnson to testify. First, the court correctly exercised its discretion in determining that Crapp had not shown an irreconcilable "disagreement." As the State points out, the testimony of the two experts is not as contradictory as Crapp posits. A crescentic hymen is not "intact," and Dr. Johnson testified that her own later examination also revealed a rim of tissue. The court put its "reasoned and reasonable" rationale on record, and we must defer to that rationale. ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20.

Second, the court did not err in permitting Dr. Johnson's testimony because credibility of the witnesses and the inferences to be drawn from their testimony is a matter for the fact finder, which here was the jury. ***Martin v. State***, 87 Wis.2d 155, 163, 274 N.W.2d 609, 612 (1979). A jury's findings of fact must be treated with deference by a reviewing court. ***Vonch,*** 151 Wis.2d at 151, 442 at 603. The jury could reasonably rely upon the testimony it found most credible and disregard any contradictory testimony. Based on the evidence presented, the jury could have found, beyond a reasonable doubt, that the defendant assaulted and abused R.M.K.

Crapp also argues that it was error to permit the social worker and the psychologist to testify.[1] However, Crapp waived all objection and affirmatively withdrew his motion to exclude the social worker and psychologist testimony. Having invited the error, if it is error, he is estopped from now complaining that it occurred. ***Soo Line R.R. Co. v. Office of the Comm'r of Transp.***, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).

[1] He also argues that it was plain error to permit Dr. Johnson to testify. In light of our previous analysis, we do not readdress that issue.

Crapp's next argument, that the evidence was insufficient to convict, is based on his contention that the testimony of Dr. Johnson, the social worker and the psychologist was inadmissible. We reject that contention.

Further, even if Dr. Johnson was wrong regarding the absence of R.M.K.'s hymen, she was not contradicted regarding the other physical indicia of sexual abuse, such as reddening, enlargement and tearing. And the social worker's and the psychologist's testimony was corroborated by R.M.K.'s mother's testimony about R.M.K.'s behavior, her fear of Crapp and her allegations of his harming her.

The circuit court scheduled an evidentiary hearing on Crapp's postconviction motion regarding jury improprieties. However, at the time set for hearing, the court determined that Crapp had not met the threshold requirement of showing that extraneous information had come before the jury. RULE 906.06(2), STATS.[2] The court did not permit the hearing to go forth.

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[2] Section 906.06, STATS., reads:

> (1) A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> (2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether *extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror*. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

Defendant assails this change of heart as "absolutely unjust." However, he cites no legal precedent, nor does he discuss the applicable statute (not even in his reply brief after the State had noted this deficiency). We will not consider arguments unsupported by legal authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980); *see also* ***In re Estate of Balkus***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).

By the Court.—Judgment affirmed.

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

(..continued)

(Emphasis supplied.)