COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0476-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. SCHWARTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Edward Schwartz appeals a judgment convicting him of one count of repeated sexual assault of a child, contrary to § 948.025(1), STATS., and a second count of first-degree sexual assault of a child, contrary to § 948.02(1), STATS. He was sentenced to fifteen years in prison on the first count,

and on the second count, sentence was stayed and fifteen years probation ordered to be served consecutively to his prison sentence. Schwartz argues that the trial court made several erroneous evidentiary rulings when it: (1) limited cross-examination of the victim; (2) permitted the victim's friend to testify that she believed Schwartz molested the victim; (3) excluded the school psychologist's testimony; and (4) barred a social worker's testimony about the victim's untruthful behavior. Schwartz also argues that he is entitled to a new trial in the interests of justice. We reject these arguments and affirm the judgment.

¶2 Schwartz was charged with sexually assaulting his adopted daughter, K.M.S., who, at the time of trial, was thirteen years old and in seventh grade classes for learning disabled and emotionally disturbed students. Schwartz first argues that the trial court erroneously limited the cross-examination of his daughter when it sustained the State's objection to the question whether she sometimes lied to her teachers.

¶3 The record, however, discloses that the trial court did not sustain the State's objection. During cross-examination, defense counsel asked: "[D]id you ever get into trouble at Franklin School for not telling the truth?" K.M.S. replied, "Um, yes." Defense counsel next asked, "And did you sometimes lie to teachers?" The State objected and the court heard argument outside the jury's presence.

¶4 After argument, the trial court read aloud § 906.08, STATS.,[1] and ruled: "I think the question can be asked under that." Following additional discussion, defense counsel asked if she could take up another question she intended to ask on cross-examination. The discussion in chambers continued regarding a different question, to which the court sustained the State's objection.[2] Because the record discloses that the court permitted the question about lying to teachers to be asked on cross-examination, the record does not support Schwartz's claim of error.

¶5 Next, Schwartz argues that the trial court erred when it permitted K.M.S.'s friend, Alicia, to testify she suspected that Schwartz had assaulted K.M.S. Schwartz argues that Alicia's testimony violates the rule in ***State v. Haseltine***, 120 Wis.2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984), prohibiting a

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[1] Section 906.08, STATS., entitled "**Evidence of character and conduct of witness**" provides:

> **(1)** OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11 (2), the 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.

[2] No issue is raised on appeal concerning the court's ruling on the second issue.

witness from testifying that another mentally and physically competent witness is telling the truth. The record fails to support his claim of error. A trial court possesses wide discretion in determining whether to admit or exclude evidence, and we will reverse such determinations only upon an erroneous exercise of that discretion. *See* ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). The trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts of record. ***Id***. We review the record to determine whether a rational basis supports the trial court's exercise of discretion. *See* ***State v. Pharr,*** 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

¶6 The record before us reveals a rational basis for the trial court's decision. On direct examination, defense counsel asked Alicia several questions to the effect, "Did [K.M.S.] at any time tell you anything about her Dad sexually abusing her?" Alicia consistently answered "No." She testified that K.M.S. did tell her "[a]bout her getting hit but that's just about it."

¶7 On cross-examination, the State asked Alicia about a statement she made to officers investigating the sexual assault allegations. The State asked: "Whatever it was that [K.M.S.] said to you, you told Sergeant Josephson that you could tell that she was talking about her vagina and her breasts?" Defense counsel objected on the ground that it was leading. The court ruled that it was proper cross-examination and impeachment. The questioning continued:

> [Prosecutor]: Isn't it a fact, Alicia, that in your statement—
>
> [Witness]: That the way she was saying it, that's what I suspected but not that she come out and say it [sic]. It's just what I suspected.

> [Prosecutor]: So, in other words, when you were having some conversation with [K.M.S.], you thought that's what she was saying to you; is that right?
>
> [Witness]: Sort of; yeah.

Defense counsel objected on the ground that the question sought opinion testimony and the court overruled the objection.

> [Prosecutor]: As a matter of fact, you told Sergeant Josephson that she actually used the word "breasts"; isn't that right? She said that word.
>
> [Witness]: Yeah, she said it before but not in any sentence like that.

¶8 Alicia further testified that she told Josephson that K.M.S. would get serious, pale, and her eyes would go red when she talked about the hitting. On re-direct, she testified that K.M.S. said that her Dad probably hit her breasts by accident.

¶9 The record demonstrates that the trial court permitted the prosecutor to cross-examine Alicia concerning an earlier statement she made to Josephson that was not entirely consistent with her testimony. *See* § 908.01(4)(a), STATS. While Alicia's statement to Josephson may have encompassed her understanding of an earlier conversation with K.M.S., Alicia was not asked for opinion testimony regarding K.M.S.'s truthfulness. As a result, Alicia's testimony did not constitute a prohibited opinion that K.M.S. was telling the truth. *See* ***Haseltine***, 120 Wis.2d at 96, 352 N.W.2d at 676.

¶10 Next, Schwartz argues that the trial court erred when it ruled that K.M.S.'s school psychologist could not testify. Schwartz offered the school psychologist's testimony concerning K.M.S.'s diagnosis of histrionic personality

disorder, oppositional defiant disorder and anxiety, and that these diagnoses were made to determine K.M.S.'s individual educational program.

¶11 Defense counsel argued that the testimony was offered to rebut the inferences of Alicia's testimony that K.M.S.'s red eyes, pale face and serious expression were consistent with being sexually assaulted. Defense counsel acknowledged that a psychologist's opinion that the child is lying would be inadmissible. Nonetheless, she stated that the school psychologist "has observed this child's attention-seeking behavior, manipulative behavior, which would include being untruthful" and "has personal knowledge that not only does this child lie, but she talks about sexual matters, that she talks about wanting to have sex, that she talks about wanting to do it."

¶12 We conclude that the trial court rationally refused the proposed testimony. Section 907.02, STATS., provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Expert testimony on the post-assault behavior of a sexual assault victim is admissible in certain cases to help explain the meaning of that behavior." ***State v. Jensen***, 147 Wis.2d 240, 250, 432 N.W.2d 913, 918 (1988). Nonetheless, "a witness may not testify that another mentally and physically competent witness is telling the truth." ***Id***. at 249, 432 N.W.2d at 917 (citation omitted).

¶13 The record demonstrates several rational bases supporting the court's decision. First, the court essentially ruled that the probative value of the

evidence, if any, was outweighed by its prejudicial effect. *See* § 904.03, STATS.[3] The court stated that while the testimony was relevant to K.M.S.'s behavior in a school setting, it was not relevant in the setting in which the alleged offenses occurred, and "I think it's potentially very misleading to the jury if it's admitted at all for that reason." We note that there is no suggestion that the school psychologist's evaluation was performed after the assaults allegedly occurred. As a result, there is no indication that the testimony would have aided the jury in understanding post assault behavior, as permitted by ***Jensen***. Therefore, the trial court could reasonably conclude that the school psychologist's testimony of K.M.S.'s diagnoses for the purpose of school programming would be of marginal value in evaluating her testimony and potentially mislead the jury into applying an assessment for academic purposes to evaluate her credibility.

¶14 Additionally, the court explained: "I'm also satisfied it really goes to her truthfulness and that's why it's being offered as well." Schwartz acknowledges that opinion testimony on the issue of a witness's credibility is not permitted. Nevertheless, based upon the offer of proof, in which defense counsel stated that the evidence demonstrated that the child was untruthful and lied, the court could reasonably conclude that the testimony was not admissible under ***Haseltine***. *See* ***id***. at 96, 352 N.W.2d at 676. The record supports the court's exercise of discretion.

[3] Section 903.04, STATS., provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

¶15 Finally, the court noted the psychologist's testimony, ostensibly being offered to rebut Alicia's testimony that her friend "got teary-eyed and her mouth turned down" a little, did not rebut it at all. The court pointed out that the rebuttal testimony would, in any event, be of little value because Alicia gave an opinion that K.M.S. was upset, "a common lay opinion that people give all the time." The court explained that the jury does not need the assistance of a school psychologist to interpret a simple description by a twelve-year-old of her friend's demeanor. We conclude that the trial court reasonably concluded that specialized knowledge was unnecessary to assist the jury in understanding Alicia's testimony to the effect that her friend appeared upset. *See* § 907.02, STATS. Because the record supports the trial court's ruling, we do not overturn it on appeal.[4]

¶16 Next, Schwartz contends that the trial court erred when it ruled that a social worker's testimony regarding K.M.S.'s move from a foster home for lying was not relevant. On direct examination, K.M.S.'s social worker testified as follows:

> Q. … Do you have an opinion as to whether [K.M.S.] has a character trait for truthfulness or untruthfulness?
> A. [K.M.S.] has many behavioral issues and emotional issues. Lying is one of them.
>
> Q. Okay. So the answer is she has a character trait for being untruthful; is that correct?
> A. I'm not a psychologist, and I think that would be a term a psychologist would use.
>
> Q. Okay. Now, [K.M.S.] was recently moved from the Whitehall foster home because of her lying behavior. That's one of the reasons?
> [Prosecutor]: Objection to relevance.
> THE COURT: Sustained.

[4] The trial court offered other reasons as well for not admitting the school psychologist's testimony. We need not address every reason if others are dispositive. ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

> Q. Did [K.M.S.] have a, to your knowledge, did [K.M.S.] lie to her foster parents?
> [Prosecutor]: Objection. Relevance.
> THE COURT: Sustained.

Defense counsel responded, "Your Honor, general credibility issues are always relevant." The trial court sustained the State's objection to this question, citing § 904.04, STATS.[5]

¶17 The record supports the trial court's decision. Credibility may be attacked by evidence in the form of reputation or opinion, but the evidence "may refer only to character for truthfulness or untruthfulness." Section 906.08(1)(a), STATS. Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness's credibility, may "be inquired into on cross-examination of the witness." Section 906.08(2), STATS.[6] Here, the witness testified on direct

[5] Section 904.04, STATS., entitled "**Character evidence not admissible to prove conduct; exceptions; other crimes**" reads:

> **(1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
> (b) *Character of victim.* Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
> (c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.
> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[6] *See,* note 1, *supra,* for the text of § 906.08(2).

examination as to her opinion of K.M.S.'s character for truthfulness. Next, defense counsel asked about a specific instance of lying. The trial court properly sustained the State's objection because, under § 906.08(2), specific instances of conduct are not admissible on direct examination to prove untruthful reputation.

¶18 Our supreme court has explained: "Character is evinced by a pattern of behavior or method of conduct demonstrated by an individual over the course of time." ***State v. Eugenio***, 219 Wis.2d 391, 404, 579 N.W.2d 642, 648 (1998). As a result, "allegations of a single instance of falsehood cannot imply a character for untruthfulness just as demonstration of a single instance of truthfulness cannot imply the character trait of veracity." ***Id***.

¶19 Schwartz contends "credibility issues are always relevant." Schwartz's argument confuses the character trait in issue and the method used to prove it. Because the victim's character for truthfulness was relevant, the social worker was able to testify without objection to the victim's reputation for untruthfulness. However, as ***Eugenio*** explained, an isolated incident, such as lying to a foster parent, is not admissible. *See* ***id***.

¶20 Schwartz's argument implies that a single instance of conduct is admissible under §§ 904.04(1)(b) and 904.05(2), STATS., because K.M.S.'s untruthfulness is an essential element of his defense. This argument was rejected in ***Evans***, which involved the prosecution of a sexual assault of a child, Alicia. Discussing §§ 904.04 and 904.05, we held:

> [W]hile Alicia's character for truthfulness might be relevant to Evans's defense, it was not an essential element of his defense. It is akin to the Committee Note's example of using evidence of honesty to disprove a theft. Use of Alicia's alleged character for untruthfulness to disprove her allegation of sexual assault is merely a circumstantial

> inference and in no way reaches the level of an essential element of Evans's defense. Therefore, under § 904.04(1)(b), STATS., Evans could attempt on direct examination to prove Alicia's character for untruthfulness only through the use of opinion or reputation evidence, not specific instances of conduct.

Id. at 82, 522 N.W.2d at 559-60. Consequently, under § 904.04(1)(b), Schwartz was entitled to prove on direct exam K.M.S.'s character for untruthfulness only through use of opinion or reputation evidence, not specific instances of conduct.

¶21 Schwartz further claims that he was entitled to show that K.M.S. had a motive to falsify a charge of sexual assault and the court's ruling deprived him of doing so. *See* ***State v. Vonesh***, 135 Wis.2d 477, 492, 401 N.W.2d 170, 177 (Ct. App. 1986) (Gartzke, J., concurring). He argues that evidence that K.M.S. knew she would be moved to a different foster home because of lying to her foster parents would tend to prove that she knew that she could be removed from her own home by lying about Schwartz. Schwartz maintains that because K.M.S. resented her father's rules and discipline, she falsified the charges in order to be removed from her home.

¶22 Section 904.04(2), STATS., permits evidence of other acts to prove motive. However, the record reveals that Schwartz did not preserve a claim of error on this ground. Section 901.03(1)(b), STATS.[7] The State's objection

[7] Section 901.03(1)(b), STATS., provides:

> **(1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> ....
>
> (b) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

followed Schwartz's attempt to prove character for untruthfulness by reputation evidence. From the context of the question, the State's relevancy objection and defense counsel's response, it is evident that the court believed that the question was asked to prove the character trait of untruthfulness. The record fails to reveal that defense counsel explained that the question was asked to prove motive to falsify the charges.

¶23 Here, after the objection was made, defense counsel did not make an offer of proof or give her theory of admissibility other than "general credibility." As a result, Schwartz's claim of error based on his contention that the evidence was offered to prove a motive to falsify was not preserved. *See* ***id***.[8]

¶24 Next, Schwartz argues that we should exercise our discretionary power of reversal on the ground that the real issue in controversy was not fully tried. *See* § 752.35, STATS. In this argument, Schwartz reiterates his previous claims of error. We have concluded that the court's evidentiary rulings were not erroneous and are satisfied the rulings did not prevent the real issue in controversy from being fully tried.

¶25 Schwartz further argues that the trial court's correct application of ***State v. Pulizzano***, 155 Wis.2d 633, 456 N.W.2d 325 (1990), prevented the jury from learning about a previous sexual assault suffered by K.M.S. In a hearing outside the jury's presence, K.M.S. testified that on one occasion when she was three or four years old, her biological father and her maternal grandfather touched

[8] Absent from the record are any postconviction proceedings in the trial court. For issues on appeal to be considered as a matter of right, postconviction motions must be made except in challenges to the sufficiency of the evidence under § 974.02(2), STATS. *See* ***State v. Monje***, 109 Wis.2d 138, 151-52, 325 N.W.2d 695, 702 (1982).

her vagina with their hands while they were babysitting. K.M.S. testified that she told the babysitter and her friend Alicia. When the babysitter informed her mother, her grandfather and biological father were not permitted to babysit for her again. Schwartz contends that while the evidence was properly excluded under ***Pulizzano***, it was relevant and admissible because "it tended to complete the picture in this case."

¶26 Schwartz claims that the evidence was an integral part of his defense because K.M.S. and Alicia testified that K.M.S. never discussed the alleged sexual abuse by Schwartz, permitting the inference that she was too shy to discuss it. Yet, K.M.S. also testified that she had in fact confided in Alicia about the earlier assault. Schwartz contends that the evidence of the earlier assault would negate the inference that K.M.S. was too shy to talk about the abuse by Schwartz.

¶27 Schwartz also contends that the evidence of the earlier incident would show that K.M.S. understood that the consequences of abuse allegations are to prohibit contact between the abuser and the victim, thus bolstering his theory of defense that K.M.S. had a motive to falsify the charges. In addition, Schwartz argues that the challenged evidentiary rulings denied him his rights to confrontation and compulsory process. He claims that he was denied the right to a fair opportunity to defend against the State's accusations and, as a result, was denied due process.

¶28 Schwartz essentially argues that properly applying the evidentiary rules governing character evidence prevented him from presenting his defense that apparently revolved in large part around the theory that K.M.S. is a troubled, disturbed, manipulative and dishonest child. We conclude that Schwartz was afforded his right to a fair opportunity to defend himself and that the real issue in

controversy was fully tried. "The due process rights of a criminal defendant are 'in essence, the right to a fair opportunity to defend against the State's accusations.'" ***Evans***, 187 Wis.2d at 82, 522 N.W.2d at 560 (citation omitted).

> The right to present evidence is rooted in the Confrontation and Compulsory Process Clauses of the United States and Wisconsin Constitutions. That right, however, is not absolute. While we recognize the trial court may not "deny a defendant a fair trial or the right to present a defense by the mechanistic application of the rules of evidence," confrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.

Id. at 82-83, 522 N.W.2d at 560 (internal citations omitted).

¶29 Schwartz's assertion, that K.M.S. is a disturbed and dishonest child, is essentially character evidence. Schwartz was afforded the opportunity to submit evidence of K.M.S.'s character within the rules designed to prevent potentially prejudicial evidence of little probative value from reaching the jury. K.M.S. testified that she sometimes got into trouble at school for not telling the truth. Also, the social worker testified that K.M.S. "has many behavioral issues and emotional issues" and "[l]ying is one of them." As Schwartz acknowledges in his reply brief, "The jury knew that K.M.S. had some problems, and that she was learning and emotionally disabled." The record shows that the issue of K.M.S.'s credibility was before the jury. Because Schwartz has no constitutional right to present evidence that is outweighed by its prejudicial effect, his constitutional claims are without merit. *See* ***id***. at 85, 522 N.W.2d at 561.

By the Court.—Judgment affirmed.

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