COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1923-CR **Cir. Ct. No. 2013CF1398**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM M. ZAMORA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 NEUBAUER, C.J. Adam M. Zamora appeals from a judgment of conviction for first-degree sexual assault of a child on grounds that an expert witness should not have been allowed to testify about the common reporting behaviors of child victims of sexual assault. Because the circuit court properly

exercised its discretion in determining that the witness met the ***Daubert***[1] reliability standard, we affirm.

BACKGROUND

¶2 At the time of the assault, Zamora was staying at the home of his fiancée and her four children, including the ten-year-old female victim, STS. STS testified to the following. After falling asleep in her room, she awoke to find Zamora lying next to her. He pulled up her shirt, placed his mouth on her breast, put his hand down her pants, and tried to pull her hand toward his groin. She ran into the bathroom and locked the door. Zamora later told her that his life depended on her not telling anyone.

¶3 STS told no one for about two months. She then wrote a note about the assault to a school friend, and the two of them told the school counselor. Upon the counselor's recommendation, STS told her mother and aunt. They questioned her at first, and subsequently STS recanted and changed her statement. She later affirmed that the assault did happen and that her delayed reporting and recanting were due to her being afraid.

¶4 In order to help explain STS's delayed reporting and recanting, the State sought to call Julianne McGuire as an expert witness. McGuire was expected to testify about the common reporting behaviors of child victims of sexual abuse, including delayed reporting and recanting. Because Zamora objected, the circuit court set a ***Daubert*** hearing.

[1] ***Daubert v. Merrell Dow Pharm. Inc.***, 509 U.S. 579, 596-97 (1993) (requiring courts to act as gatekeepers, admitting into evidence only expert opinions that are reliable and relevant).

¶5 At the hearing, Zamora asserted that, although McGuire had been qualified as an expert under ***Daubert*** in other cases, she had not been peer reviewed with respect to how often a child is being truthful when, as here, the child recants and later reaffirms her story. In response, the State claimed that McGuire is the "preeminent authority" in the county on the topics for which she was being called, has testified in court many times, and has never, to the State's knowledge, failed to meet the ***Daubert*** standard.

¶6 In addition to McGuire's summary of expected testimony and her curriculum vitae (CV), the State submitted transcripts of decisions by two Kenosha County circuit courts holding that McGuire qualified as an expert under the ***Daubert*** standard.[2] Both cases involved the common reporting behaviors of child victims of sexual assault. In one case,[3] the circuit court noted that it had held a lengthy evidentiary hearing, which included the testimony of McGuire upon questioning by both parties and the court. From that testimony, the court pointed out the following: McGuire has interviewed over 2000 children and has testified at least fifty times in the area of delayed disclosures; she is involved with monthly peer reviews at the national level with the National Children's Alliance and at the state level with the Child Advocacy Center in Wisconsin; she participates in weekly system-wide peer reviews through her employment, by which her work is reviewed and she in turn reviews the work of others; and, at the hearing, she

[2] ***State v. Morales-Pedrosa***, Kenosha County case No. 2012CF532 (Sept. 20, 2013) and ***State v. Beyer***, Kenosha County case No. 2011CF744 (Feb. 18, 2013).

[3] ***Morales-Pedrosa***, No. 2012CF532.

explained why delayed disclosure is common in these cases and also discussed her "recantation research."[4]

¶7 The circuit court held that McGuire would be permitted to testify. The court pointed out that it had, itself, ruled in a prior case that McGuire qualified as an expert. It also took judicial notice of the decisions of the other courts. The court acknowledged that McGuire may not have been peer reviewed specifically with respect to how often children are truthful and how often they recant, but noted that the lack of peer review on a particular issue is only one factor to consider. Concluding that McGuire's testimony was the product of reliable principles and methods, the court ruled that McGuire was qualified as an expert under ***Daubert***.

¶8 After trial, the jury found Zamora guilty on all three counts of first-degree sexual assault of a child. Zamora appeals.

DISCUSSION

The *Daubert* Standard

¶9 WISCONSIN STAT. § 907.02(1) (2015-16)[5] governs the admissibility of expert testimony. It provides in relevant part as follows:

> 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

[4] At the trial of the present case, McGuire updated the number of interviews she has conducted to about 3000.

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Id. This section codified the ***Daubert*** reliability standard in 2011 and is modeled after FED. R. EVID. 702. ***State v. Chitwood***, 2016 WI App 36, ¶28, 369 Wis. 2d 132, 879 N.W.2d 786; ***State v. Giese***, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687.

¶10 Under the statute, the circuit court serves as a "gatekeeper" so as "to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Chitwood***, 369 Wis. 2d 132, ¶29 (citation omitted). "'The court is to focus on the principles and methodology the expert relies upon, not the conclusion generated,' to ensure that those principles and methods have a reliable foundation in the expert's discipline." ***State v. Smith***, 2016 WI App 8, ¶5, 366 Wis. 2d 613, 874 N.W.2d 610 (2015) (citation omitted). The "goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Chitwood***, 369 Wis. 2d 132, ¶29 (citation omitted). The ***Daubert*** standard is flexible and the court may consider a number of factors. ***Giese***, 356 Wis. 2d 796, ¶¶18-19. It is impossible to impose hard and fast rules on the inquiry because "[t]oo much depends upon the particular circumstances of the particular case."[6] ***Seifert v. Balink***, 2017 WI 2, ¶64, 372 Wis. 2d 525, 888 N.W.2d 816 (citation omitted).

[6] One commentator suggested that the ***Daubert***-created reliability standard is less of a "bright-line rule" and more of an "evidentiary porridge." ***Seifert v. Balink***, 2017 WI 2, ¶54, 372 Wis. 2d 525, 888 N.W.2d 816 (quoting Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, WIS. LAWYER, Mar. 2011, at 19).

¶11 We review the decision whether to admit expert testimony under the erroneous exercise of discretion standard. ***Giese***, 356 Wis. 2d 796, ¶16. A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards. ***Id.***; ***Chitwood***, 369 Wis. 2d 132, ¶30. If the record supports the court's decision, an appellate court "will not reverse even if the trial court gave the wrong reason or no reason at all." ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). We are "highly deferential" to the court's determination. ***Martindale v. Ripp***, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698.

Evidence of McGuire's Qualifications

¶12 Zamora argues that "there was utterly no evidence presented as to McGuire's qualifications." Zamora is plainly incorrect.

¶13 We first note that forensic interviews of child victims of sexual abuse and victims' common and uncommon reporting behavior have been, in general, admitted by courts as the proper subjects of expert testimony when the witness has the requisite qualifications. *See, e.g.*, ***State v. Jensen***, 147 Wis. 2d 240, 246, 432 N.W.2d 913 (1988) (a pre-***Daubert*** case, admitting the testimony of a school counselor regarding the "acting out" behavior of child victims); ***State v. Robinson***, 146 Wis. 2d 315, 333-34, 431 N.W.2d 165 (1988) (a pre-***Daubert*** case, admitting the testimony of a sexual assault counselor regarding child victims becoming "emotionally flat" after an assault); and ***Smith***, 366 Wis. 2d 613, ¶¶1-2 (a post-***Daubert*** case admitting the testimony of a social worker regarding the reactive behaviors common among victims).

¶14 In this case, before the ***Daubert*** hearing, the State had provided the circuit court and counsel with McGuire's summary of expected testimony and CV.

There was and is no dispute as to the CV's veracity. It shows that McGuire attained a master's degree in social work, has been certified by the State of Wisconsin as an Advanced Practice Social Worker, and has worked for fifteen years as a forensic interviewer for the Child Advocacy Center, Children's Hospital of Wisconsin-Kenosha. The CV also lists over seventy training sessions and conferences generally pertaining to social work, abuse of children, and forensic interviewing. She has affiliations with the American Professional Society on the Abuse of Children and the Wisconsin Professional Society on the Abuse of Children.

¶15 In addition, the State represented to the court that McGuire was the "preeminent authority" in the county regarding the common behaviors of child victims of sexual abuse and that, in the many times that she has testified, the State was unaware of any court rejecting her as an expert under ***Daubert***. Zamora did not challenge any of these representations at the hearing, nor does he challenge them on appeal.[7]

¶16 The summary of expected testimony, the undisputed and detailed CV, and the State's uncontested representations regarding McGuire's specialized and extensive knowledge, experience, training, and education provided sufficient facts for the circuit court to properly exercise its discretion in determining that McGuire was qualified as an expert on the reactive behaviors of child sexual assault victims. In ***Smith***, 366 Wis. 2d 613, ¶10, the State sought to introduce an expert to testify as to the reactive behaviors common among child abuse victims,

[7] Indeed, at the hearing, Zamora acknowledged that McGuire "has testified previously as to ***Daubert***, and has been qualified as an expert in different areas under ***Daubert***," and that she has been peer-reviewed in other areas.

including delayed disclosure and recantation. Rejecting the defendant's argument that the State did not sufficiently establish the expert's qualifications, the court concluded that the qualifications were established based on her CV (showing a bachelor's degree in social work, twenty-five years of working for child protective services and the Child Advocacy Center, and extensive training in child maltreatment) and the State's representations at the hearing that the witness had developed specialized knowledge over the years by working with children and with other professionals in the field. ***Id.*** As the ***Smith*** court aptly noted, reliability may be based on the expert's own observations from his or her "extensive and specialized experience." ***Id.***, ¶7 (quoting ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 156 (1999)).

¶17 ***Smith*** is strikingly similar to this case. As in ***Smith***, the record contained McGuire's summary of expected testimony, her CV, and the State's undisputed representations regarding her specialized and extensive knowledge, experience, training, and education. Thus, the circuit court had sufficient facts to determine that McGuire was qualified as an expert.

¶18 At the hearing, Zamora's precise attack on McGuire's credentials was extremely narrow. As noted above, Zamora asserted that there was no evidence that she has been peer reviewed with regard to how often children are truthful and how often they recant. Implicitly acknowledging the breadth of McGuire's qualifications, Zamora characterized his argument as being limited to "this particular tight little area" and "this small little area."[8]

[8] Zamora has not developed any argument as to McGuire's qualifications as an expert to testify to the other identified areas where she did, in fact, offer testimony—child forensic interviewing techniques and delayed reporting.

¶19 We agree with the circuit court that the lack of peer review on one specific issue is only one factor. Not every area of expert opinion will be conducive to peer review. This is particularly true for testimony involving the social sciences. *See, e.g.*, ***Smith***, 366 Wis. 2d 613, ¶9 (social worker's testimony regarding common reporting behaviors of child victims did not "neatly fit" the ***Daubert*** factors; but other factors established the reliability of the testimony, particularly the extensive experience of the witness). The test is flexible. Courts can rely on other factors to determine the reliability of the testimony. Here, the lack of peer review on a narrow issue (if peer review was even possible) does not outweigh the impressive credentials and experience of the witness. *See also* ***Seifert***, 372 Wis. 2d 525, ¶67 (emphasizing that experience-based expert evidence may help pass muster as a reliable method under the ***Daubert*** standard).

Taking Judicial Notice of Other Courts' Decisions

¶20 On appeal, Zamora now argues that the circuit court erred by taking judicial notice of the transcribed decisions from the other circuit courts. Without these transcripts, Zamora asserts, the court lacked sufficient facts to properly exercise its discretion. This argument is unavailing.

¶21 If Zamora believed that it was error for the circuit court to consider the transcribed decisions, he should have said so at the time. Failing to timely object to the admissibility of evidence waives the alleged error. ***State v. Hansbrough***, 2011 WI App 79, ¶25, 334 Wis. 2d 237, 799 N.W.2d 887; WIS. STAT. § 901.03(1)(a) (a party may not claim that the admission of evidence is error unless "a timely objection or motion to strike appears of record."). Even errors based on a constitutional right violation may be waived absent an objection. ***Hansbrough***, 334 Wis. 2d 237, ¶25.

¶22 Zamora had several opportunities to object. He could have lodged an objection at the time the State provided him with advance copies of the transcripts, or at the time of oral argument when the State referenced the transcripts, or even after the court advised counsel at the hearing that it was taking judicial notice. No objection was made to the form, accuracy, or relevancy of the transcripts and no argument was advanced criticizing the propriety of taking judicial notice.

¶23 This case points up the necessity of timely objections. The transcripts provided additional factual details of McGuire's extensive training and experience (e.g., over 2000 interviews, peer reviews at the national and state levels, testimony as an expert in approximately fifty cases, etc.). If Zamora had objected to the transcripts, the State would have had the opportunity to call McGuire as a witness and establish those same details through testimony. Clearly, she would be permitted to identify the court cases in which she had been qualified to testify as an expert witness on child sexual assault victim's reporting behaviors, as it would undoubtedly also be acceptable to list those cases on her CV. Thus, any potential error in taking judicial notice based on the transcripts could have been avoided or corrected, which is the underlying reason for timely objections. "The purpose of objecting in the trial court is to give that court an opportunity to correct its own errors and thus avoid the raising of issues on appeal for the first time." ***Bavarian Soccer Club, Inc. v. Pierson***, 36 Wis. 2d 8, 15, 153 N.W.2d 1 (1967).

¶24 Moreover, we need not wade into the judicial notice issue because any alleged error was harmless. As discussed above, the summary of expected testimony, CV, and representations by the State regarding McGuire's experience

provided sufficient facts. The decisions of the other courts were unnecessary for the court to properly exercise its discretion on this issue.

¶25 Also for the first time on appeal, Zamora suggests that the admission of McGuire's testimony was error on the grounds that her testimony was focused almost entirely on the credibility of STS, arguing only, however, that the admission of her general testimony about common behaviors was not harmless. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (witnesses should not be permitted to give an opinion that another witness is telling the truth). To the extent that Zamora is raising a ***Haseltine*** challenge, this argument, too, was waived. Zamora never raised this concern during the hearing, nor did he object during McGuire's trial testimony. In any event, McGuire testified only as to common behaviors, never offering any testimony as to the specifics of this case.

CONCLUSION

¶26 The record contained sufficient facts for the circuit court to properly exercise its discretion, which it did, in determining that McGuire qualified as an expert witness under WIS. STAT. § 907.02 with respect to the common reporting behaviors of child victims of sexual assault. Zamora waived any challenge to the court's consideration of the transcripts of other courts' decisions, and in any event, any alleged error was harmless. We therefore affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.