

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2017AP1642-CR

Cir. Ct. No. 2015CF454

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. MICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
THOMAS B. EAGON, Judge. *Affirmed.*

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. A jury found Daniel Mick guilty of one count of first-degree sexual assault of a child and two counts of causing a child under

thirteen to view sexual activity. Mick argues that the circuit court erred in granting the State's pretrial motion in limine to exclude Mick's expert witness from testifying at trial, for two reasons: (1) the exclusion of Mick's expert witness was an erroneous exercise of discretion; and (2) the exclusion of Mick's expert witness violated his constitutional right to present a defense. Mick also argues that he is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35 (2015-16) because the real controversy was not fully tried.¹

¶2 We conclude that the circuit court did not erroneously exercise its discretion in granting the State's motion in limine to exclude Mick's expert witness, and that the exclusion did not violate Mick's constitutional right to present a defense. Further, we conclude that Mick fails to show that he is entitled to a new trial in the interest of justice. Accordingly, we affirm.

BACKGROUND

¶3 In December 2015, the State charged Mick with two counts of first-degree sexual assault of a child and two counts of causing a child under thirteen to view sexual activity. The Dane County Department of Health and Human Services received information of sexual abuse involving Mick and J.S., who was then six years old. After receiving that information, a Village of Plover police officer spoke with Christina Mick, J.S.'s mother, who told the police officer that J.S. had told her about multiple incidents of sexual abuse by Mick, who was J.S.'s stepfather. The day after Christina spoke with the police officer, J.S. was taken to

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Safe Harbor in Madison for a video-recorded interview conducted by Detective Cheryl Patty.

¶4 During that interview, J.S. said Mick “showed her pictures of naked women on his cell phone, as well as videos on how to ‘make babies.’” J.S. also “described one incident where [Mick] took her on a daddy/daughter date. [J.S.] said they went to get ice cream and after they were driving around and [Mick] was watching ‘bad stuff’ on his phone. [J.S.] said [Mick] parked the van and continued to watch the video. [J.S.] said [Mick] pulled down his pants and asked her if she would put her mouth on his private part.”

¶5 Police officers questioned Mick in an interview and Mick recalled the occasion when he took J.S. for ice cream, but denied the allegations of sexual abuse. Mick told officers that he once watched porn when J.S. was in the same room, but that he thought J.S. was asleep.

¶6 Mick pled not guilty to all charges. Prior to trial, Mick declared his intent to call Dr. David Thompson as an expert witness and attached a letter from Thompson dated December 1, 2016, to “supplement the previous report(s)” by Thompson submitted in support of a different motion and to “clarify the scope to which we would expect Dr. Thompson to testify.” The “previous report(s)” by Thompson comprised a letter and affidavit in which Thompson stated that he had reviewed the file documents in the case and would “describe a variety of factors present in this case that extensive research has shown affects the reliability of a child’s statements.” Thompson listed six factors that may “have either strengthened or weakened the reliability of the statements made by the victim.”

¶7 The State filed a motion in limine, asking the circuit court to exclude Thompson from testifying at trial. After a hearing, the court granted the State’s

motion in limine to exclude Thompson from testifying at trial. Mick moved the circuit court to reconsider its ruling to exclude Thompson, and the circuit court denied the motion.

¶8 During the three-day jury trial, the State introduced testimony by a social worker and several police officers. The State then played the entire video-recorded Safe Harbor interview of J.S. conducted by Detective Patty. Detective Patty testified and was subjected to cross-examination about the interview techniques used and circumstances surrounding the interview with J.S. The State's last witnesses were J.S.'s mother Christina and J.S. J.S. testified that she could not remember anything that happened with Mick nor could she remember the Safe Harbor interview.

¶9 Mick testified in his own defense and denied having any kind of sexual contact with J.S. or causing her to watch pornography.

¶10 The jury found Mick guilty of one count of first-degree sexual assault of a child under thirteen, and two counts of intentionally causing a child under thirteen to listen to and view sexually explicit conduct. Mick now appeals.

¶11 We will relate additional facts, particularly as to the reports submitted by Thompson, in the discussion that follows.

DISCUSSION

¶12 Mick raises two issues on appeal: (1) whether the circuit court erred in granting the State's motion in limine to exclude Mick's expert witness from testifying at trial; and (2) whether we should exercise our power of discretionary reversal under WIS. STAT. § 752.35 and order a new trial in the interest of justice. We address each issue in turn.

I. Whether the Circuit Court Erred in Granting the State’s Motion in Limine to Exclude Mick’s Expert Witness From Testifying at Trial

¶13 Mick argues that the circuit court erred in granting the State’s motion in limine to exclude Mick’s expert witness, Dr. Thompson, from testifying at trial for two reasons: (1) the exclusion of Thompson’s testimony was an erroneous exercise of discretion; and (2) the exclusion of Thompson’s testimony violated Mick’s constitutional right to present a defense. We reject each of Mick’s arguments challenging the circuit court’s granting of the State’s motion in limine to exclude Thompson from testifying at trial.

A. Whether the Circuit Court’s Exclusion of Mick’s Expert Witness was an Erroneous Exercise of Discretion

¶14 Mick argues that the circuit court erroneously exercised its discretion in excluding Thompson from testifying at trial. We proceed first to state the applicable standard of review, the governing law, and the scope of our analysis. We next summarize Thompson’s submissions to the court, the parties’ pertinent arguments below, and the court’s decision. We then address and reject Mick’s arguments that the court misused its discretion.

1. Standard of Review and Applicable Law

¶15 “Appellate courts review a circuit court’s decision to admit or exclude expert testimony under an erroneous exercise of discretion standard.” *State v. Giese*, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. We are “highly deferential” to the circuit court’s discretionary decisions and “[t]he question on appeal is ... whether the [circuit] court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.” *State v. Shomberg*, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370 (quoted source omitted).

¶16 All evidence offered must be relevant and admissible. WIS. STAT. § 904.01; WIS. STAT. § 904.02. Relevant expert testimony is admissible if it satisfies WIS. STAT. § 907.02(1). See *Bayer v. Dobbins*, 2016 WI App 65, ¶20, 371 Wis. 2d 428, 885 N.W.2d 173 (under WIS. STAT. § 907.02, courts must determine whether: (1) the witness is qualified; (2) the witness’s methodology is scientifically reliable; and (3) the testimony will assist the trier of fact to determine a fact in issue). A circuit court may nonetheless exclude relevant and otherwise admissible expert testimony that satisfies the criteria in WIS. STAT. § 907.02, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” WIS. STAT. § 904.03.

¶17 Here, we assume, without deciding, that Thompson’s testimony is admissible under WIS. STAT. § 907.02. However, as we explain, we conclude that the circuit court properly excluded Thompson’s testimony under WIS. STAT. § 904.03. See *Barrows v. American Family Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) (“An appellate court need not address every issue raised by the parties when one issue is dispositive.”); *State v. Schmidt*, 2016 WI App 45, ¶¶75-86, 370 Wis. 2d 139, 884 N.W.2d 510 (assuming, without deciding, that the expert testimony satisfied WIS. STAT. § 907.02, and concluding that the testimony was properly excluded under other statutes including WIS. STAT. § 904.03). Accordingly, in the sections that follow we will focus on those parts of the record and Mick’s appellate arguments that pertain to whether the circuit court properly exercised its discretion when it excluded Thompson’s testimony under WIS. STAT. § 904.03 because the testimony would “simply cause confusion of the issues or mislead the jury.”

2. *Thompson's Submissions*

¶18 We now summarize the testimony by Thompson that Mick sought to introduce. Thompson provided defense counsel with a written report containing his “professional expert opinion of ways in which the interviews of the alleged victim and other associated factors may have either strengthened or weakened the reliability of the statements made by the victim in the above matter.” Thompson’s report enumerated six interview-related factors as follows.

¶19 Thompson’s first factor was “repeated interviewing,” which, according to Thompson, either “can result in additional accurate information” or can result in inaccurate information if the interviewer is biased or uses “inappropriate interviewing techniques.” Considering both J.S.’s conversations with her mother and the Safe Harbor interview to be “interviews,” Thompson stated that, “[i]t will be important for the jury in this matter to be aware of the potential impact of those multiple interviews on JS’s recollection and statements.”

¶20 Thompson’s second factor was “external influences” such as “simply over-hearing other people talk in a negative manner about an individual [which] can lead to the child making reports consistent with the negative characteristics attributed to the person in question.” Thompson noted known hostility between J.S.’s mother and grandmother toward Mick, but acknowledged there was no specific information that J.S.’s “mother used leading or suggestive questions with her daughter” or that J.S. overheard conversations between J.S.’s mother and grandparents that “included negative comments concerning Mr. Mick.” Thompson stated that it “will be important for the jury in this matter to understand the ease with which children of JS’s age can be influenced by negative stereotypes, overheard conversations, and comments made by parents.”

¶21 Thompson's third factor was "inappropriate interviewing techniques" that have been shown to produce inaccurate reports. Thompson opined that here, the Safe Harbor interviewer "generally followed acceptable child interview guidelines."

¶22 Thompson's fourth factor was "confirmatory bias," which occurs when an interviewer has a preconceived notion of what may have occurred and proceeds "to pay attention to or assign greater weight to information or statements that confirm the interviewer's preconceived ideas." Thompson stated that "bias can be inferred from interviews where the interviewer misses opportunities to test alternative hypotheses." Thompson stated that the interviewer here followed up with alternative questions at some points but not at other points, but Thompson did not specify any confirmatory bias that may have influenced J.S.'s statements.

¶23 Thompson's fifth factor was the use of certain "psychotherapeutic techniques ... to treat children that have experienced trauma ... [which] can affect the child's recollections and reports." Although Thompson acknowledged that he had no information "concerning the nature of the treatment services provided to JS," he stated that, "it will be important for the jury to understand the ease with which a child's memory and statements can be affected by participation in treatment services."

¶24 Thompson's sixth factor was the existence of "source misattribution errors," due to the influence of others, leading questions or other inappropriate interviewing techniques, or mistake. Thompson opined that in light of her mother's hostility toward Mick, J.S.'s conversations with her mother about Mick and her overhearing any negative comments about Mick "may serve as the basis for a source misattribution error."

¶25 Thompson also wrote a letter that referenced his report and reiterated that “[w]hen interview guidelines are ignored or improperly applied ... the resulting information obtained during the interview ... is of questionable reliability.” Thompson also sought to testify regarding scientific studies described in the article, “Do Jurors ‘Know’ What Isn’t So About Child Witnesses?”

3. *The Parties’ Arguments and the Circuit Court’s Decision*

¶26 The State filed a motion in limine seeking an order to prohibit Thompson from testifying under WIS. STAT. § 904.03 because “the witness’ testimony will simply cause confusion of the issues or mislead the jury.”

¶27 At a hearing on the State’s motion,² Mick’s defense counsel argued that the jury would benefit from Thompson’s testimony, which would explain “how these interviews are conducted and that it’s extremely important they are done proper ... and if any one or multiple parts of that are not properly done, how it can affect the statements of the child being interviewed.” Although defense counsel acknowledged that Thompson stated that Detective Patty did “a fairly good job,” counsel asserted that Thompson’s testimony would nonetheless aid the jury because the testimony would “point out places where there may have been shortcomings in this or ways in which if not led through to answers, which sometimes is the case, but – but I am not going to speculate that it is here.”

¶28 The circuit court granted the State’s motion in limine to exclude Thompson’s testimony because it determined that Thompson’s testimony would be no more than a general critique that would not “help the trier of fact in

² Mick did not file a brief in response to the State’s motion in limine.

determining whether to believe the memory or credibility of [J.S.] other than what just as effectively can be done by cross” and would “simply confuse the issues about whether some questions are better than others.”

¶29 Mick filed a motion for reconsideration, arguing that “Thompson’s testimony will not simply cause confusion of the issues or mislead the jury Instead Dr. Thompson’s testimony will help clarify misconceptions the jury may have regarding forensic interviews and testimony of child witnesses.” The court, denied Mick’s motion under WIS. STAT. § 907.02 and for “reasons previously stated on the record.”

4. *Mick’s Arguments on Appeal*

¶30 On appeal, we understand Mick to argue that the circuit court erred in determining that Thompson’s testimony would cause confusion because “the court should have been able to point to some more specific concerns if the risk of confusion truly outweighed the probative value of Thompson’s testimony.”³

¶31 We reject Mick’s argument because the record provides a reasonable basis for the circuit court’s ruling. *See State v. Hammer*, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629 (“If there was a reasonable basis for the court’s determination, then we will not find an erroneous exercise of discretion.”). The proffered testimony by Thompson here is remarkably similar to that which we

³ Mick argues that admission of Thompson’s testimony would not unduly prejudice the State. We reject Mick’s prejudice-related argument as irrelevant. The danger of unfair prejudice is only one of three separate grounds enumerated in WIS. STAT. § 904.03 for excluding otherwise admissible evidence, and the circuit court did not rely on that ground in deciding the State’s motion in limine. Rather, the court excluded Thompson’s testimony based on two other grounds stated in the statute, the dangers of confusing the issues and misleading the jury.

held was properly excluded in *Schmidt*, 370 Wis. 2d 139, ¶86. In *Schmidt*, Schmidt sought to offer testimony by Thompson regarding the reliability of statements by a child witness. *Id.*, ¶54. Thompson submitted a report that detailed many of the same factors described above which the jury should consider when evaluating the accuracy of the child witness's statements. *Id.*, ¶56. However, "Thompson acknowledged he could not offer an opinion that [the child witness's] testimony or memory was in fact tainted by any of the suggestive interview techniques generally expounded upon in his report." *Id.*, ¶66. Although we affirmed the exclusion of Thompson's testimony on relevancy grounds, we concluded that "[e]ven if Dr. Thompson's testimony had a razor-thin degree of relevancy," "the evidence would have been properly excluded under WIS. STAT. § 904.03" because "[w]hat minimal probative value Thompson's testimony may have had regarding [the child's] credibility was easily outweighed by the very real potential that Thompson's testimony would mislead or confuse the jury." *Id.*, ¶86.

¶32 As in *Schmidt*, so here Thompson offered only broad speculative statements about how, "it will be important for the jury to understand" that each of the factors he described, in theory, "could," "may," or have "the potential" to affect J.S.'s statements. As in *Schmidt*, so here Thompson offered no testimony that J.S.'s forensic interview was *in fact* conducted improperly, that J.S.'s interview statements were *in fact* the product of the phenomena Thompson discussed in his report, or that any suggestive interview techniques had *in fact* occurred. See *Id.*, ¶¶66, 80. Indeed, here, Thompson reported that "[o]verall, the interviewer did a reasonable job of avoiding leading, suggestive, or other inappropriate questions." In *Schmidt*, we concluded that the circuit court properly excluded Thompson's testimony under WIS. STAT. § 904.03 because "if Thompson's testimony were admitted into evidence, it is entirely probable the jury

would conclude, based solely on the fact he *was* testifying, that suggestive interview techniques had been used with [the child] despite the absence of any evidence to that effect.” 370 Wis. 2d 139, ¶86. The same conclusion applies here.

B. Whether the Circuit Court’s Exclusion of Mick’s Expert Witness Violated his Constitutional Right to Present a Defense

¶33 Mick argues that, “[t]he circuit court’s exclusion of Thompson violated Mick’s constitutional right to present a defense.” “We have recognized ... that the confrontation and compulsory process clauses of the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution ‘grant defendants a constitutional right to present evidence.’” *State v. St. George*, 2002 WI 50, ¶14, 252 Wis. 2d 499, 643 N.W.2d 777 (quoted source and footnotes omitted). In some cases, a defendant’s right to present a defense may require the admission of testimony that would otherwise be excluded under applicable evidentiary rules. *See State v. Pulizzano*, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325 (1990). This determination is a question of constitutional fact that we determine independently of a circuit court. *St. George*, 252 Wis. 2d 499, ¶16.

¶34 Mick argues that the analysis in *St. George* should be used in this context and we follow that lead. To raise a successful constitutional challenge to the exclusion of evidence, a defendant must show four factors, the final one of which reads: “The probative value of the testimony of the defendant’s expert witness outweighed its prejudicial effect.” *Id.*, ¶54. In this context, prejudicial effect is reasonably read as including misleading a jury or confusing the issues. *See id.*, ¶68 (addressing misleading the jury as one source of a prejudicial effect). Here, as was already discussed, we have agreed with the circuit court’s decision that the probative value of Thompson’s testimony was substantially outweighed by the dangers of confusion of the issues and misleading the jury. It necessarily

follows that the probative value of the testimony of Mick’s expert is outweighed by its prejudicial effect and, as a result, Mick cannot meet the requirement of the fourth *St. George* factor.

¶35 For these reasons, Mick’s constitutional argument fails.

III. Whether we Should Exercise our Power of Discretionary Reversal Under WIS. STAT. § 752.35

¶36 Mick argues that we should exercise our discretion under WIS. STAT. § 752.35 and order a new trial in the interest of justice. WISCONSIN STAT. § 752.35 permits this court to order a new trial “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” “Reversals in the interest of justice should be granted only in exceptional cases.” *State v. Kucharski*, 2015 WI 64, ¶23, 363 Wis. 2d 658, 866 N.W.2d 697.

¶37 Mick argues that “[t]he real controversy in this case was whether J.S.’s recorded statement in and of itself was reliable evidence of Mick’s guilt” and a new trial is warranted to fully try that controversy because: (1) the circuit court denied his *Shiffra/Green*⁴ motion that sought *in camera* review of J.S.’s counseling records, “preventing Mick from learning whether J.S.’s counseling records contained exculpatory evidence”; (2) “the court frustrated Mick’s attempt to present expert testimony”; and (3) “the State committed multiple *Haseltine*⁵ violations, which went unchecked by the court and unobjected to by [counsel].”

⁴ See *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

⁵ See *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

¶38 Mick fails to demonstrate that this is an exceptional case. First, beyond stating the bald fact that the circuit court denied his *Shiffra* motion, Mick does not argue that the denial was in error. Second, as discussed above, Mick has failed to show that the circuit court erroneously exercised its discretion in excluding Thompson’s testimony concerning statements made by J.S. during the Safe Harbor interview. “Where the [circuit] court did not err, and where the record establishes that the case was fully tried, a new trial is not appropriate.” *State v. Brown*, 2002 WI App 260, ¶7, 258 Wis. 2d 237, 655 N.W.2d 157. Third, we do not address Mick’s argument relating to failure of counsel to object to any *Haseltine* violations because the absence of any objection forfeits direct review of that alleged error, which must instead be analyzed as an ineffective assistance of counsel claim that Mick does not assert here. *See State v. Carprue*, 2004 WI 111, ¶¶46-47, 274 Wis. 2d 656, 683 N.W.2d 31.

¶39 In sum, Mick fails to show that a new trial is warranted in the interest of justice because the real controversy was not fully tried. Accordingly, we decline to exercise our discretionary reversal power.

CONCLUSION

¶40 For the reasons stated we affirm.

By the Court.—Judgment affirmed.

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

