STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2013AP0065-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

WILLIAM A. JOHNSON,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON FEBRUARY 29, 2012, THE HONORABLE JASON A. ROSSELL, PRESIDING, IN THE KENOSHA COUNTY CIRCUIT COURT. KENOSHA COUNTY CASE NO. 2011CF823

DEFENDANT-APPELLANT'S REPLY BRIEF

Respectfully submitted:

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I. THIS COURT CAN AND SHOULD ADOPT THE STANDARD OF REVIEW PROPOSED BY JOHNSON.

While it is true that this Court is prohibited from "overrul[ing], modify[ing] or withdraw[ing] language from a previous supreme court case," it is not prohibited from deciding an issue in the absence of controlling precedent. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256 (1997). This Court "under some circumstances" necessarily must function as a "law defining and law develop[ing] [court], as it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides." *Id.* at 188, 560 N.W.2d at 255.

The supreme court's prior decisions governing the standard for deciding the admissibility of expert witness testimony are no longer controlling in light of the legislature's sea change to Wis. Stat. § 907.02. *See State v. Fischer*, 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629 (Wisconsin's evidentiary rules previously did not conform to the *Daubert*[1] standard, which is now the law pursuant to legislative edict, 2011 Wis. Act 2). Deciding what standard of review should apply to the new

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Section 907.02 requires this Court to "adapt[] the common law and interpret[] the statutes" to accommodate a previously non-existent rule. *See Cook*, 208 Wis. 2d at 188, 560 N.W.2d at 255. The legislature, by its remaking of Section 907.02, has thus given this Court carte blanche to determine the standard of review. *See* Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, Wisconsin Lawyer 14, March 2011 (explaining adoption of Fed. R. Evid. 702 standard into Wisconsin law). This Court therefore has the authority to adopt the standard that Johnson has proposed. *See Cook*, 208 Wis. 2d at 188, 560 N.W.2d at 255.

While the State is correct that Johnson supports his claim with precedent that is merely persuasive, St.'s Br. 18-20, reliance on persuasive authority is unavoidable in this case because the issue of *Daubert*'s application in Wisconsin is one of first impression. Even the State's own argument is based on foreign authority. *See id.* 19-20 (citing cases from other states and other federal circuits than relied on by Johnson). The fact that Johnson develops his standard from the reasoning of a foreign jurisdiction should be no detriment to his argument.

Likewise, the fact that the standard Johnson proposes differs from that used in other jurisdictions should not be

determinative. This Court should adopt the standard of review proposed by Johnson because it is a good fit for the new Section 907.02.

A two-part standard of review would mirror the questions put to the circuit court when deciding the admissibility of expert witness testimony under *Daubert*. The first question—whether proposed expert witness testimony satisfies the legal test for the admissibility of evidence—is a question of law. Such questions are reviewed without deference to the circuit court. *Ball v. Dist. No. 4 Area Bd. of Vocational, Tech. & Adult Ed.*, 117 Wis. 2d 529, 537, 345 N.W.2d 389, 394 (1984). The second question—whether to admit evidence that satisfies the legal requirements of Section 907.02—is one addressed to a court's discretion. *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370. Thus, the two-part standard that Johnson proposes is a nice fit.

The State says that Johnson's standard "is questionable in light of *General Electric Company v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Company, Limited v. Carmichael*, 526 U.S. 137 (1999)." St.'s Br. 18. The two-part standard of review that Johnson advances was developed in response to *Daubert* and has endured for twenty years since. *See Porter v. Whitehall Labs, Inc.*, 9

F.3d 607, 614, 616 (7th Cir. 1993) (Seventh Circuit's first decision considering *Daubert*). It has weathered both *Joiner* and *Kumho*, and as recently as 2011 the United States Supreme Court has denied review of a case involving it. *See United States v. Lupton*, 620 F.3d 790, 798-99 (7th Cir. 2010), cert. denied *Lupton v. United States*, 131 S. Ct. 1544 (2011). Neither *Joiner* nor *Kumho Tire* invalidated the standard of review that Johnson proposes herein, and neither decision impedes this Court's adoption of it in Wisconsin.

The State also argues that a different standard of review for expert witness testimony is neither necessary nor advisable. Johnson disagrees.

Daubert's advent into the realm of Wisconsin evidence law necessitates Johnson's standard because the old abuse of discretion standard does not deal with the ancillary question of law that *Daubert* requires answered. The State suggests that Johnson's standard is ill-advised because it "adds needless complexity." St.'s Br. at 21. The application of a two-part test is neither needlessly complex nor unfamiliar to appellate litigation. There are several two-part tests that accompany review of the most routine issues asserted in criminal appeals. *See, e.g., State v. McDowell*, 2004 WI 70, ¶ 30, 272 Wis. 2d 488, 681 N.W.2d 500

(ineffective assistance reviewed for both the deficiency and prejudice). Simply adding a prong to the expert witness standard asking whether the circuit court made a proper conclusion of law about satisfaction of the *Daubert* test will not render unworkably complex the standard of review. Wisconsin's appellate courts can easily accommodate a two-part test for the admissibility of evidence under the new Section 907.02.

II. JOHNSON'S *DAUBERT* CLAIM IS PROPERLY BEFORE THIS COURT.

A. Johnson Preserved his *Daubert* Claim.

"[A] specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490. "Specific and timely objections are required to allow the circuit court and/or opposing counsel to correct their own errors and avoid the raising of issues on appeal for the first time." *State v. Agnello*, 226 Wis. 2d 164, 191, 593 N.W.2d 427, 438 (1999). "[A]n objection is sufficiently specific if it reasonably advises the court of the basis for the objection." *Id.* at 192, 593 N.W.2d at 438.

As the State rightly points out, the original objection that led to a discussion of Cohn's testimony was Johnson's hearsay objection. St.'s Br. at 3, (R.63:258, A. Ap. at 258). However, when the prosecutor raised the additional issue of whether

Cohn would be allowed to draw a conclusion regarding the cause of Kalena P.'s injury, the discussion transitioned from the hearsay issue to a discussion of the admissibility of her testimony under *Daubert*. (R.63:269-75, A. Ap. 116-22.)

The record shows that Johnson asserted the *Daubert* issue with sufficient specificity to draw the circuit court's attention to it, allow the State to respond, and then elicit a ruling from the court. The circuit court noted that it was Johnson's counsel that "opened yet another can of worms" regarding whether the State had established a "foundation for the basis of [Cohn's] opinion for . . . why she believes [Kalena P.'s injury is] either consistent or inconsistent." (R.63:277-78; A. Ap. 124-25.) The court expressly stated that it viewed that contention as raising "the *Daubert* test" for admissibility of expert testimony. (R.63:278-79, A. Ap. 125-26.) Later, when the State sought to elicit Cohn's testimony regarding the likely cause of the injury, defense counsel objected on the basis of insufficient foundation. (R.64:26-27.) The State responded by arguing Cohn's qualifications as an expert. (*Id.*)

Johnson's objections were therefore sufficient to "allow the circuit court and/or opposing counsel to correct their own errors and avoid the raising of issues on appeal for the first

time." *Agnello*, 226 Wis. 2d at 191, 593 N.W.2d at 438. His objections preserved the issues he asserts on appeal. *Id.*

B. The Strategic Waiver Doctrine Does not Foreclose This Court's Consideration of the Merits of Johnson's Claim.

The State contends that Johnson invited the error caused by Cohn's testifying about the cause of Kalena P.'s injury, and thus that he cannot complain about it on appeal. St.'s Br. at 23-24. Johnson has two responses.

First, Johnson did not ask Cohn to opine as an expert regarding the likely cause of the injury to Kalena P.'s vagina. (R.64:18.) He questioned Cohn about whether it was possible for an injury of the type that Kalena P. suffered to have been caused by consensual sex. (*Id.*) He did not follow that question with a request for Cohn's expert opinion regarding the likely cause of Kalena P.'s injury. As is discussed below, *infra* 9-11, those two questions are markedly different, and it was the latter to which Johnson objected not the former. (R.64:25; A. Ap. 132.) The State elected to ask Cohn about the likely cause of Kalena P.'s injury, all the while holding her out as an expert capable of so testifying. (R.64:26-27; A. Ap. 133-34.) Johnson's limited inquiry regarding possible causes of an injury thus did not cause the error about which he complains on appeal.

Second, Johnson's questioning was done defensively to avoid the evidence that the State eventually elicited from Cohn regarding the cause of Kalena P.'s injury.

"Under the doctrine of strategic waiver, also known as invited error, [a] defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." *State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (quoted authority omitted). However, "there is a distinction between a party's use of objected to evidence for his own benefit and the use of such evidence purely for defensive purposes." *Id.* "[A] party who does object to the use of inadmissible evidence by his opponent does not forgo his right to claim error on appeal merely because he makes an effort to use the same or similar evidence in a defensive fashion after he has failed in his effort to exclude the evidence." *Id.* (quoted authority omitted).

Like the defendant in *Gary M.B.*, Johnson objected to the State's questioning Cohn as an expert about whether Kalena P.'s injury was consistent or inconsistent with certain conduct. (R.63:269-70, 275; A. Ap. 116-17, 122.) Despite his objection, the court did not prevent the State from eliciting that testimony. (R.63:282; A. Ap. 129.) Johnson then defensively questioned

Cohn about whether it was possible for the injury to have been caused by consensual sex. (R.64:18.) He did not ask Cohn to opine as an expert whether the injury was likely caused by consensual sex. (*Id.*) On the other hand, the State did ask Cohn to reach a conclusion as an expert regarding the likely cause of the injury. (R.64:25-27; A. Ap. 132-34.) At that time, Johnson renewed his earlier objection that Cohn was not qualified as an expert to testify regarding the likely cause of Kalena P.'s injury. (*Id.*) Johnson's defensive use of evidence he earlier tried to exclude thus "does not forgo his right to claim error on appeal," and it rebuts the State's strategic waiver argument. *Gary M.B.*, 2004 WI 33, ¶ 11.

III. COHN'S CHALLENGED TESTIMONY SHOULD HAVE BEEN EXCLUDED.

A. Cohn may Have Been Qualified to Testify that Kalena P. Suffered an Injury, but she was not Qualified to Offer an Opinion Regarding the Cause of that Injury.

Johnson has no qualms with Cohn's qualifications as a SANE nurse. Surely, the State established that she was trained and experienced as such. It is undeniable that Cohn's testimony regarding her training and experience as a SANE nurse qualified her to answer as an expert questions regarding the commonality of finding injuries during a SANE exam and the commonality

of patients refusing parts of an SANE exam. (R.64:9, 15.) However, Cohn's general qualifications as a SANE nurse do not allow her later testimony regarding the specific question of whether Kalena P's injury was likely to have been caused by consensual sex.

When questioning an expert's qualifications, "[t]he question [to] ask is not whether an expert witness is qualified in general, but whether [the expert's] 'qualifications provide a foundation . . . to answer a specific question." *Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010) (quoted authority omitted). In the instant case, the proper question regarding Cohn's qualifications is not whether she was generally qualified as a SANE nurse. Instead, it is whether they provided a sufficient foundation to answer the specific question regarding the cause of Kalena P.'s injury.

Johnson takes exception to the suggestion that simply because Cohn was qualified as a SANE nurse she was likewise qualified to offer an opinion regarding the cause of Kalena P.'s injury. Qualification as an expert in SANE nursing does not mean, automatically, qualification to offer an expert opinion regarding the cause of an injury, and Cohn's description of her role as a SANE nurse proves it.

Cohn described her role as "basically an object[ive] collector of evidence." (R.63:297.) She did not detail what her training entailed, but, given how she described her role as a SANE nurse, it is fair to conclude that she was trained simply in evidence collection. Cohn never once testified that her training or experience as a SANE nurse—or any other nurse for that matter—involved discerning the cause of the injuries she encounters during her examinations.

As the proponent of Cohn's testimony, the State had the burden of proving that her training and experience qualified her to assert the likely or unlikely cause of Kalena P.'s injuries. The record shows that the State did not satisfy that burden. To be sure, Cohn could opine that what she saw was an injury, but her qualifications did not allow the next step: asserting what was likely or unlikely to cause the injury. Johnson detailed in his main brief how the State failed to show that Cohn was specifically qualified. Johnson's 1st Br. at 34-42.

The State argues that Cohn's opinion should be admissible because "[t]he reliability and relevance of personal observations by certified medical professionals such as doctors and nurses during physical examination and diagnosis cannot be seriously questioned given its widespread acceptance in the

medical community." St.'s Br. at 29. That argument conflates issue. As noted above, Johnson does not question Cohn's qualification to testify about the evidence that she collected during her exam, *viz.* her personal observations. It is, instead, the conclusion derived from those personal observations that he disputes. The State failed to prove at trial that Cohn was qualified to transition from her personal observations—made as an objective collector of evidence—to the conclusion about what may have caused any injury observed. Her testimony thus should have been excluded pursuant to Section 907.02 and *Daubert*.

B. Cohn's Opinion was Neither Relevant nor Appropriate.

The State contends that Johnson "'made an issue'" out of consent in his opening statement and cross-examination of Cohn, and thus made relevant Cohn's opinion regarding the likely cause of Kalena P.'s injury. St.'s Br. at 32 (quoting *State v. Alsteen*, 108 Wis. 2d 723, 729-30, 324 N.W.2d 426 (1982)). Johnson disagrees.

First of all, the comments of counsel are not evidence and do not determine the ultimate issues before the jury. *See* WIS JI-CRIMINAL 157 ("Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence,

disregard the suggestion"), WIS JI-CRIMINAL 50 ("Your duty is to decide the case based only on *the evidence presented* at trial and the *law given to you by the court*." (emphasis added)); *see also* (R.62:113, 120 (court reading aforementioned instructions jurors)).

Second, while it is true that Johnson discussed consent in his opening statement, his discussion was limited to the issue at hand:

> Now, we don't dispute in this case that there was a sexual relationship. These are two adults, two single adults; and it's our position that *they were consenting adults*. I understand what Mr. Kraus has told you this morning and this afternoon in his opening statement. That she was *incapable of giving consent* because she was so intoxicated. But I think that when you -- what you have to do in this case as members of the jury is to take a look at what the facts and circumstances and details are in determining *whether or not she is capable or incapable of giving consent*.
>
> And there will be certain facts we believe which will be brought out which demonstrate rather clearly that she *was capable of giving consent* and, in fact, did give consent by what she did and by what she knows and what she told the officers and what she told the medical personnel and what was recorded at the various medical records that will come into evidence.

(*Id.* (emphasis added).) Johnson's opening was thus focused on the issue of Kalena P.'s consent vis-à-vis her level of intoxication and ability to consent—the ultimate issue of consequence in this case. Johnson's opening statement thus did not make an issue of whether Kalena P.'s injury was likely caused by consensual sex. It was irrelevant.

Finally, Johnson's questioning of Cohn was consistent with the defense's overall position that Kalena P. was not too intoxicated to consent. Nothing about his cross-examination made an issue of whether Kalena P. actually consented. He thus did not make relevant the opinion about which he complains on appeal.

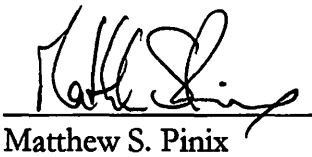
Cohn's testimony also should have been excluded because it was directed to matters within the jurors' common sense. The State argues that "conducting physical exams for medical purposes" and the "significance of observations made" during such exams renders Cohn's testimony outside the realm of common knowledge. St.'s Br. at 33.

Again, Johnson does not complain about Cohn's expert knowledge of how to conduct a SANE exam and to collect evidence. It is the opinion regarding what injuries are caused during consensual sex that he protests, which is information commonly known to lay persons. It should have been excluded.

CONCLUSION

For the aforementioned reasons and those stated in his first brief, Johnson asks this Court to hold that he is entitled to a new trial.

Dated this 26th day of July, 2013.



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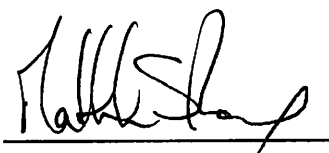
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,977 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 26th day of July, 2013.



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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Reply Brief will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on July 26, 2013. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 26th day of July, 2013.

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