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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP0065-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE JASON A. ROSSELL, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument or publication is warranted in this case. The briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side.

STATEMENT OF THE CASE

William A. Johnson appeals the Kenosha County Circuit Court's judgment of conviction after a jury found him guilty of second-degree sexual assault of an intoxicated victim (40). He advances several claims of error based on the circuit court's admission of the expert testimony of Terri Cohn (63:246-313; 64:7-33).

On November 23, 2011, the State gave notice it intended to call Terri Cohn, "a registered nurse with specialized training in the area of sexual assault examinations" (21). Pre-trial, Johnson did not challenge Cohn's qualifications as an expert, the sufficiency of the facts, the reliability of her principles or methods or her application of her principles and methods to the facts of the case. *See* Wis. Stat. § 907.02(1).

At trial, the State called Terri Cohn as a witness (63:246). Cohn testified she worked as a registered nurse in an operating room during the week (63:246). She received training and a diploma in nursing (63:248). She held a certification as a psychiatric nurse and had twenty-eight years of experience prior to her current position (63:248). She had also received specialized training as a Sexual Assault Nurse Examiner (SANE), a nurse trained to evaluate persons reporting an alleged sexual assault (63:246-47). She also held a special certification as a SANE-A (63:247). For SANE certification, Cohn did a one week training for adult and adolescent and an additional week for child sexual assaults (63:248). She also did forty clinical hours of training for each (63:248-49). She had performed over fifty sexual assault exams (63:249). She worked as an on-call SANE nurse (63:247).

Cohn performed a sexual assault examination of the victim in this case (63:249). On direct examination, the State elicited her procedure for obtaining consents for the exam (63:248-56). She explained her observations of the victim during the exam (63:256-58). When asked about the victim's report of what happened, defense counsel objected on hearsay grounds (63:258). Thereafter, the court excused the jury and entertained a lengthy argument about the defense hearsay objection to the victim's statements to Cohn on the morning of the exam (63:258-74). In the course of that argument, the following interchange occurred.

> THE COURT: All right. Well, I think we got — we got some apples and oranges going here because we got two things. And I will indicate that I have the summary of expert testimony in front of me, and — and I believe that that's where it should be held to, the testimony is what's been summarized in there.
>
> Based on that, based on my review as I have stated, it is at this point in terms of a hearsay question appropriate for the State to get into the — or excuse me, into the examination performed and the findings and the statements made by [the victim] in the examination. That's right from the summary. So, in other words, my shoulder hurts. It's tender to the touch. That's appropriate. Again, what happened that night. Appropriate. You know, I forget the exact statement, but it hurts. I don't think it can be — that's something for argument — tied down. Tied — it hurts, her statement from what happened that night, yes. The mark being tender to the touch. Again, part of the findings.
>
> The drawing together of the two I think has to land in the consistent or

inconsistent with non-consensual sexual contact or intercourse, which is the — which is the question of the findings.

So, in other words, am I — am I preventing . . . Nurse Cohn from testifying that she — her — the pain in the shoulders was caused by someone putting their hands on the shoulders when the sexual intercourse was going on, the answer would be yes, if that was a statement made by [the victim] to Nurse Cohn. In other words, if [the victim] says I'm — my shoulders hurt because when the person had intercourse with me they were holding my shoulders, that I'm — that would have to come in through a separate — separate basis. That would have to be [the victim] or something else. Okay?

MR. KRAUS [for the State]: I understand. But the court —

THE COURT: Hold on.

MR. KRAUS: Okay.

THE COURT: Let me finish.

MR. KRAUS: Yes.

THE COURT: And then because I think Mister — sadly enough, Mr. Rose — and not sadly. I shouldn't use that word. Mr. Rose opened up yet another can of worms that we're going to have to talk about in a second. Right now we're on hearsay and what comes in and out in hearsay.

What comes in on hearsay is her findings in terms of the statements made about what happened that night, the statements about the shoulders being tender, the statement that there was a palatable tenderness to the labia majora. That's all in under the hearsay doctrine. Okay.

Making those connections does not come in through the hearsay doctrine is the court's ruling.

. . . .

Now, when you draw that connection between she said it hurts and we have a mark in the labia majora that hurts, that's a conclusion that is not inconsistent or consistent with sexual — non-consensual sexual intercourse. Whether her shoulders hurt because of the hands or not, that's kind of more of a general diagnosis. So, that I'm going to say no making those — those leaps.

The other part that Attorney Rose now brings up in his — in his argument is something of foundation. And I'm going to want the — want the State to lay foundation for the basis of her opinion for whether a mark or what other of her findings — I didn't read the whole report. I don't know all the findings. So, whatever those findings are, why she believes that it's either consistent or inconsistent. And I'm going to be looking for that sort of foundation for her opinion.

I do believe that she's an expert in the field that she's in. It's now — I think *Daubert* actually — doesn't actually go to the qualifications, to be perfectly honest with you. I don't think *Daubert* changed the qualification rules at all. The qualifications of an expert have always been the qualifications of an expert.

The next part of the *Daubert* test really is whether or not the opinion that the expert is about to present is one that is scientifically reliable enough for the court to act as a gatekeeper in which to allow it in or out. And so, the objection that's being raised by — by counsel at this point is not one of hearsay but one of foundation. The question about whether there's sufficient foundation

for that opinion being given to the jury. Does that make sense?

MR. KRAUS: I believe so. And I'd like to clarify. Obviously, I have laid no foundation yet. That — that may come. Now, everything that's in the report to this point we've discussed comes in as hearsay in the medical record exception. I just want to make sure I and my witness understand that so we do not violate the court's ruling. So, we can discuss what is in the report.

THE COURT: Right.

MR. KRAUS: What we cannot do, what is being decided upon is I cannot ask her if the shoulder tenderness is consistent with being held on the shoulders, and I cannot ask her if the mark in the labia majora is consistent with it hurting.

THE COURT: With that statement of her saying it hurt, yes. That I'm not — those that's not — yes, that is the correct ruling.

MR. KRAUS: Now, if I choose to ask her a question such as this: Is tenderness — I may or may not, but I just want to understand fully — is tenderness to the shoulders consistent or inconsistent with non-consensual intercourse, that if I lay the proper foundation, which I obviously have not yet, that would be —

THE COURT: An appropriate question based — if there is an appropriate foundation for that sort of information.

(63:275-80). After some further argument regarding the admissibility of an expert opinion based on inadmissible evidence under Wis. Stat. § 907.03, the court continued.

> THE COURT: Give me one moment. I'm trying to determine whether that foundation is supposed to be done outside the presence of the jury or inside the presence of the jury.
>
> MR. KRAUS: I'm not going to be asking those questions, if that can short-circuit this. I'm not going to be asking her for any opinions.
>
> THE COURT: Oh, okay.
>
> MR. KRAUS:. At least the two that I — I asked about. I'm not going to be asking consistent with non-consensual sex.
>
> THE COURT: Oh, okay. Because I was doing all the *Daubert* reading.
>
> MR. KRAUS: Oh. No.
>
> THE COURT: Okay. All right. Then we can bring the jury back in. Thank you.
>
> (Jury returned to courtroom.)

(63:283-84).

The State then continued with direct examination eliciting among other things, reports of the victim's alcohol consumption, vaginal and anal contact, shoulders tender to the touch and vomiting (63:287-91). Cohn noted a mark on the victim's genitals (63:295). The mark appeared on "the right side of the her labia majora" (63:296). "It was a red mark. It appeared like an abrasion[,]" about a quarter in size (63:296). "It was very irritated. It was very red" (63:296). The direct examination concluded without Cohn giving any opinion about the cause of the mark (63:296-301).

On cross-examination, defense counsel questioned Cohn on her completion of a form during the physical examination (63:301).

> Q. All right. What is that form?
>
> A. This is the — part of the physical exam.
>
> Q. And this gives you the opportunity, does it not, of injury — of noting injuries or not; correct?
>
> A. Correct.
>
> Q. And you would agree — and you can count them — that you have checked no injury noted 11 times; correct?
>
> A. Well, I can count them. I don't know —
>
> Q. Please do.
>
> A. Sure. (Pause.) Yes.
>
> Q. And you put that little check no injury noted, correct?
>
> A. I did.
>
> Q. And with respect to the red mark, your — is this your handwriting?
>
> A. That is my handwriting.
>
> Q. And did you say small red mark tender to touch R side?
>
> A: I did.
>
> Q. And then under it you — again, above it and below it you say no injury noted; correct? Is that correct?

A. Above that but not where I wrote where the red mark is.

Q. You said small red mark tender to touch.

A. I did not check no injury noted there?

Q. Yes. You said small red mark there?

A. Correct.

(63:301-02).

On re-direct examination, The State asked:

Q. Nurse Cohn, the defense in their cross-examination yesterday afternoon noted that you checked no injury noted I believe it was 11 times regarding the genital exam. Is that correct?

A. Correct.

Q. Is it common or uncommon to find injuries in these types of exams?

MR. ROSE: Objection, irrelevant.

THE COURT: Overruled. You may have the answer.

A. It's common to not see many injuries.

BY MR. KRAUS:

Q. And why is that?

MR. ROSE: Objection, hearsay.

THE COURT: Overruled.

A. The reason why it's common is the vagina is a very elastic part of a woman's body. I mean, if you — the vagina accommodates for child birth, it accommodates for penis penetration. So, it's elastic; and our bodies are pretty smart in trying to protect us from injury. So —

BY MR. KRAUS:

Q. Now, you did note an injury to the labia majora?

A. Correct.

Q. And can you please — there's a description of the injury that was discussed yesterday. Could you please describe how you make these notes?

A. I make the notes while I'm doing the exam. I — and then I go ahead and put it on the — the actual body chart at the end. We do take pictures as well, which is a cross-reference to us. There's a lot of documentation on this record. So, we have pictures to also help us to determine what kind of injuries that were made.

Q. Do you write absolutely everything down about an injur[y] you see?

A. I try to, but it doesn't always happen.

MR. KRAUS: May I approach?

THE COURT: You may. Have you showed —

MR. KRAUS: Yes, he saw a photo.

BY MR. KRAUS:

Q. I'd like to show you what's been previously marked as Exhibit No. 45. Do you recognize this?

A. Yes, I do.

Q. And what is that?

A. That's a picture of the external genital area, particularly the labia where there was injury noted.

Q. And is a true and accurate reproduction of the photograph you took?

A. Yes.

MR. KRAUS: I'd like to move Exhibit 45 into evidence.

THE COURT: Attorney Rose.

MR. ROSE: No objection.

(64:9-11). Re-direct examination concluded after further testimony concerning Cohn's observations of the red mark and questions concerning other aspects of the physical examination. (64:11-18).

On re-cross examination defense counsel asked:

Q. Isn't it a fact that this red mark could be caused by many things?

A. It could be.

Q. And you have — it could be caused by consensual sex, couldn't it?

A. Anything is possible.

Q. It could be caused by consensual sex, couldn't it?

A. It could be.

Q. And it could be used — it could be caused by use of a tampon?

A. Where the injury is, unlikely.

(64:18).

Finally, on re-direct, the State asked:

Q. Now, Attorney Rose asked you if it could be caused by — the injury — that injury could be caused by consensual sex. Is it likely to be caused by consensual sex?

MR. ROSE: Objection. There's no foundation laid for the answer. Speculation.

THE COURT: I'll sustain it as to foundation at this time.

BY MR. KRAUS:

Q. How many SANE exams have you done?

A. Over 50.

Q. And have you gotten training on injuries that could be caused by consensual sex?

A. Yes.

Q. Have you gotten — do you have experience and training on what injuries could be caused by non-consensual sex?

A. Yes.

Q. Are you able to give opinions because of this training about whether an

injury is consistent with consensual or non-consensual sex?

A. Yes.

Q. And you answered Attorney Rose's question about it being possible to be caused by consensual sex.

A. Correct.

Q. And what was your answer to that question?

MR. ROSE: Objection, it's repetitious. The record speaks for itself.

THE COURT: Sustained. It's been previously gone into.

BY MR. KRAUS:

Q. So, is this injury, the follow-up to Attorney Rose's question, likely to be caused by consensual sex?

MR. ROSE: Objection. Doesn't meet the necessary standard of to a reasonable degree of medical probability. She's not qualified to render a medical — it's [a] medical opinion as to the cause of injury.

THE COURT: Okay. Attorney Kraus.

MR. KRAUS: This is well-within her area as an expert. Attorney Rose asked essentially the same question but slightly different. I'm asking the flip side of that same question. She has done a number of exams. She's an expert in this area. She has the SANE-A qualification, which was discussed. This is not a conclusion. It may not be to a medical degree of certainty. I'm not aware if — if that can be given. And that can certainly be gone into by Mr. Rose at other times. And

it's proper for cross-examination. Proper for argument.

But as far as this question, I believe it's proper; and she has established that as an expert, especially as a SANE-A given her experience that she can give opinions as to whether or not it is likely — it is likely to be caused by consensual sex and given that Attorney Rose has already asked a very similar if not essentially the same question.

THE COURT: I think the door got opened, and I believe he can have an answer to that question. So, the objection is overruled. You may have the answer.

BY MR. KRAUS:

Q. Is that injury, the red mark on the labia majora, likely to be caused by consensual sex?

A. No.

Q. Why not?

A. Because with consensual sex there would be probably more lubrication, and this is a friction injury.

Q. What do you mean by lubrication?

A. Lubrication by the patient for arousal.

Q. And is there a relationship between lubrication and consensual and non-consensual sex?

A. Yes.

MR. ROSE: Objection, speculation.

THE COURT: Sustained.

BY MR. KRAUS:

Q. Through your training and experience have you learned anything about lubrication in regards to consensual and non-consensual sex?

MR. ROSE: Objection, insufficient foundation. Immaterial.

MR. KRAUS: I'm in the process of laying foundation.

THE COURT: It is a foundational question. So, I'll allow the answer to it.

THE WITNESS: Can you repeat it?

BY MR. KRAUS:

Q. You have had training and experience as a SANE nurse?

A. Correct.

Q. You have additional training to be a SANE-A?

A. Correct.

Q. Did you receive training in how a female lubricates herself?

A. Yes.

Q. And did you receive training regarding how a female lubricates herself in consensual versus non-consensual encounters?

MR. ROSE: Objection, insufficient foundation.

THE COURT: It's a foundational question. Overruled. You may have the answer.

A. Yes.

BY MR. KRAUS:

Q. And do you have experience seeing injuries in non-consensual and consensual sex?

A. Yes.

MR. ROSE: Judge, I'm going to object to this line of questioning. We didn't get into all of this.

MR. KRAUS: It's a follow-up to his question.

MR. ROSE: First of all, my question was not objected to. But secondly, we didn't get into all of that.

THE COURT: If we could have a side bar.

(Off the record discussion.)

THE COURT: All right. Thank you very much, ladies and gentlemen.

BY MR. KRAUS:

Q. Nurse Cohn, you indicated this injury was unlikely to be caused by consensual sex. Correct?

A. Correct.

MR. ROSE: Objection, repetitious.

THE COURT: Based on the — on the ruling I'll overrule. You may have it.

BY MR. KRAUS:

Q. Why do you believe that?

> MR. ROSE: Objection, repetitious.
>
> THE COURT: Based on the side bar, overruled.
>
> A. I believe it because this type of injury is a friction injury. Most abrasions are caused by friction usually when — in an unlubricated patient.
>
> MR. KRAUS: I have nothing further.

(64:25-30).

Johnson now appeals the circuit court's refusal to exclude Cohn's opinion testimony that the red mark she observed was unlikely to have been caused by consensual sex and the reasons for her conclusion.

STANDARD OF REVIEW

Wisconsin appellate courts review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Ford*, 2007 WI 138, ¶ 30, 306 Wis. 2d 1, 742 N.W.2d 61. That standard also applies to expert testimony. *State v. Shomberg*, 2006 WI 9, ¶ 10, 288 Wis. 2d 1, 709 N.W.2d 370. This court's published decisions establish an erroneous exercise of discretion standard for evidence generally, *State v. Prineas*, 2012 WI App 2, ¶ 15, 338 Wis. 2d 362, 809 N.W.2d 68, and for experts, *Wingad v. John Deere & Co.*, 187 Wis. 2d 441, 456, 523 N.W.2d 274 (Ct. App. 1994).

Johnson invites this court to use a different standard for expert testimony under the revised version of Wis. Stat. § 907.02 — one which he claims finds support in the decisions of the United

States Court of Appeals for the Seventh Circuit, *see, e.g.*; *United States v. Pansier*, 576 F.3d 726, 737-38 (7th Cir. 2009); *United States v. Hall*, 165 F.3d 1095, 1103 (7th Cir. 1999), and one other federal circuit, *United States v. Roach,* 582 F.3d 1192, 1206 (10th Cir. 2009). This court should decline Johnson's invitation for a number of reasons.

First, as noted in *Ford*, the Wisconsin Supreme Court has established for evidence generally that trial court rulings should be reviewed for an erroneous exercise of discretion. *Ford*, 306 Wis. 2d 1, ¶ 30. And in *Shomberg*, the supreme court used that standard for reviewing admission of expert testimony. *Shomberg*, 288 Wis. 2d 1, ¶ 10. As noted, this court has followed these standards in published decisions. *Prineas*, 338 Wis. 2d 362, ¶ 15; *Wingad*, 187 Wis. 2d at 456. The State questions this court's authority to change the standard of review in view of these cases. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case . . . . [O]nly the supreme court . . . has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

Second, the standard the Seventh Circuit uses is only persuasive in Wisconsin. And it is questionable in light of *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Joiner* the United States Supreme Court held that abuse of discretion is the appropriate standard in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*

v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). *Joiner*, 522 U.S. at 138-39. And in *Kumho Tire,* the Court reiterated that "the law grants a [trial] court the same broad latitude when it decides how to determine reliability [under *Daubert*] as it enjoys in respect to its ultimate reliability determination." *Kumho Tire*, 526 U.S. at 142.

Other federal circuits have applied the traditional abuse-of-discretion review in post-*Daubert* cases involving Rule 702. *See McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995) ("The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous."); *Government of Virgin Islands v. Sanes*, 57 F.3d 338, 341 (3d Cir. 1995) ("Whether to allow scientific or technical expert testimony . . . is within the discretion of the district court and is reviewed only for abuse."); *Benedi v. McNeil–P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) ("*Daubert* clearly vests the district courts with discretion to determine the admissibility of expert testimony."); *Pedraza v. Jones*, 71 F.3d 194, 197 (5th Cir. 1995) (stating that "[t]he district court did not abuse its discretion" in concluding that the proffered expert testimony did not satisfy *Daubert's* reliability requirements); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382, 384–85 (8th Cir. 1995) ("The [District] Court concluded that the testimony was not scientifically valid and would not aid the jury in its fact finding. We do not find that the District Court abused its discretion in any of its analysis."); *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597–98 (9th Cir. 1996) (stating that the district court did not abuse its discretion in concluding that, under *Daubert*, the methodology

underlying the proffered expert witness's testimony was not scientific).

State cases likewise use an abuse of discretion standard of review. *See State v. Hudson*, 208 P.3d 1236, 1240 (Wash. App. 2009) (finding the trial court abused its discretion admitting expert's opinion); *State v. Schreiner*, 754 N.W.2d 742, 752 (Neb. 2008) ("The standard for reviewing the admissibility of expert testimony is abuse of discretion."); *Rodriguez v. State*, 635 S.E.2d 402, 405 (Ga. App. 2006) ("[T]he trial court did not abuse its discretion in determining that the nurse's qualifications were appropriate and adequate for her to render [an expert] opinion."); *State v. Fuller,* 603 S.E.2d 569, 577 (N.C. App. 2004) ("[The] trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion."); *Velazquez v. Commonwealth*, 557 S.E.2d 213, 218 (Va. 2002) (whether a witness qualifies as an expert is within the trial court's discretion); *Gregory v. State*, 56 S.W.3d 164, 178 (Tex. App. 2001) ("[T]he qualifications of a witness to testify as an expert under Rule 702, are within the discretion of the trial court.").

Third, a separate test for experts is neither necessary nor advisable. The current erroneous exercise of discretion standard contains a simple methodology for testing whether a court fulfills its gatekeeping function. An appellate court "will uphold a decision to admit or exclude evidence if the circuit court examine[s] the relevant facts, applie[s] a proper legal standard, and, using a demonstrated rational process, reache[s] a reasonable conclusion." *Martindale v. Ripp*,

2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. If the trial court ignores its function to determine an expert's opinion must rest on reliable principles, it has not used the proper legal standard. If the expert has not applied reliable principles in a reliable method, the trial court has not reached a reasonable result. If the basis for the expert's opinion is not relevant to the facts in the particular case, the trial court has not sufficiently examined the relevant facts. *See, e.g., State v. Burton*, 2007 WI App 237, ¶¶ 15-19, 306 Wis. 2d 403, 743 N.W.2d 152. Johnson's proposed standard requires separating the "gatekeeping function" where an appellate court applies de novo review from the deferential determinations of the factors to apply and the application of those factors in the particular case. Johnson's suggested approach adds needless complexity.

Nor is such a complex analysis advisable. The exercise of the trial court's "gatekeeping" and its determination of factors and their application is not always easily or neatly divisible. This is especially true in the case of non-scientific expert testimony. *See United States v. Jones*, 107 F.3d 1147, 1154 (6th Cir. 1997) ("[T]he general reliability of non-scientific expert testimony does not always neatly separate itself from whether the particular expert in the case is qualified and whether the testimony will be helpful to the trier of fact . . . ."). Parsing out the gatekeeping functions for de novo review will inevitably result in increased litigation. That litigation will needlessly consume precious resources of both the parties and the courts.

For these reasons, this court should apply an erroneous exercise of discretion standard to

admission of expert testimony under Wis. Stat. § 907.02(1).

ARGUMENT

I. JOHNSON "INVITED" THE EVIDENTIARY ERROR OF WHICH HE NOW COMPLAINS.

Johnson claims that the circuit court erred in admitting Cohn's opinion. He limits his challenge to her opinion that the red mark she observed on her physical examination did not likely result from consensual sex. Johnson's brief at 22-23, 34-42. He also claims that the opinion "did not logically advance a material aspect of the State's case." Johnson's brief at 42-44.

Johnson does not challenge Cohn's testimony the State elicited on redirect examination that it was common not to see many injuries during sexual assault physical exams because of the female anatomy and its ability to accommodate a male penis (64:9-10), nor could he. In order to preserve his right to appeal on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based. *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991). "To be sufficiently specific, an objection must reasonably advise the court of the basis for the objection." *Id.* Johnson's counsel's objections based on relevance and hearsay did not sufficiently preserve any challenge to the reliability of Cohn's testimony. *See Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001) (objection to the evidence premised upon relevancy, insufficient to preserve claim that opinion did not rest upon an unreliable

foundation). *See also Clay v. Commonwealth*, 291 S.W.3d 210, 216-17 (Ky. 2009) (objection as to qualifications of expert does not preserve challenge to reliability of testimony).

Where a party invites or contributes to the error complained of, this court will deem the error waived for purposes of appellate review. *See State v. Cooper*, 2003 WI App 227, ¶ 14, 267 Wis. 2d 886, 672 N.W.2d 118. "If a defendant selects a course of action, that defendant will not be heard later to allege error or defects precipitated by such action. Such an election constitutes waiver or abandonment of the right to complain." *State v. Robles*, 157 Wis. 2d 55, 60, 458 N.W.2d 818 (Ct. App. 1990) (citation omitted), *aff'd sub nom. State v. Martin*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991); *accord State v. Gary M.B.*, 2004 WI 33, ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475; *State v. Staples*, 99 Wis. 2d 364, 375, 299 N.W.2d 270 (Ct. App. 1980); *In re Shawn B.N.*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992.

Here, the State did not solicit Cohn's opinion about the cause of the red mark on direct examination. Her testimony addressed only her personal observations on conducting the victim's physical examination. Her observations, while based on specialized knowledge (a physical examination unfamiliar to lay witnesses), are not subject to a gatekeeping function. "A treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party." *Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir. 1999). *See also Williams v. Mast Biosurgery USA, Inc.*, 644 F.3d 1312, 1317-18 (11th Cir. 2011). When an expert witness testifies

to matters within his or her personal knowledge, that testimony is not subject to a *Daubert* inquiry. *See Schreiner*, 754 N.W.2d at 754 ("If a witness is not offering opinion testimony, that witness' testimony is not subject to inquiry pursuant to *Daubert*."); *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096 (8th Cir. 2012) ("Dr. Simon did not testify as an expert, but rather he testified about his own personal observations and experiences . . . . ").

Johnson's trial attorney introduced Cohn's opinion about whether the red mark she observed resulted from consensual sex or not. Trial counsel asked, "[I]t could be caused by consensual sex, couldn't it?" (64:18). The situation here mirrors the Eleventh Circuit's conclusion regarding the government's evidence to rebut an inference from the failure to recover inculpatory evidence.

> [B]y introducing the fact that the investigators had failed to recover any inculpatory hairs or bodily fluids, and arguing the significance of that failure, Frazier plainly opened the door for the government to offer reliable evidence that could help explain the significance of that failure. He cannot now complain that the government stepped through that door and rose to the challenge he presented.

United States v. Frazier, 387 F.3d 1244, 1270 (11th Cir. 2004) (en banc). "A defendant may not complain on appeal that he was prejudiced by evidence relating to a subject which he opened up at trial." *United States v. Carey*, 589 F.3d 187, 193 (5th Cir. 2009) (internal quotation marks omitted). *See also United States v. Robinson*, 485 U.S. 25, 33-34 (1988) (prosecutor allowed a fair response to defense argument).

To the extent Johnson complains about the trial court's inadequate explanation of its assessment of Cohn's reliability, his argument suffers the same hurdle. The trial court clearly admitted the State's questions regarding whether the red mark was likely caused by consensual sex because Johnson had opened the door (64:27).

II. EVEN IF THIS COURT DOES NOT CONSIDER JOHNSON TO HAVE INVITED COHN'S OPINION TESTIMONY, THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS DISCRETION IN ADMITTING THAT OPINION.

In January 2011, the Legislature adopted a change in Wis. Stat. § 907.02 inserting language tracking Fed. R. Evid. 702 (2000). 2011 Wis. Act 2. In addition to the requirements of assisting the trier of fact to understand the evidence or to determine a fact in issue, and a witness qualified as an expert, requirements which existed under the old version of Wis. Stat. § 907.02, *see In re Commitment of Watson*, 227 Wis. 2d 167, 186-91, 595 N.W.2d 403 (1999), expert opinion must now also (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) the witness must have applied the principles and methods reliably to the facts of the case. Wis. Stat. § 907.02(1).

The statutory language codifies the progeny of three United States Supreme Court cases: *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire v. Carmichael,* 526 U.S. 137 (1999). The rule "establishes a standard of

evidentiary reliability." *Daubert,* 509 U.S. at 590. The trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* at 592; *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

Federal Rule 702 envisions a "flexible" inquiry by the trial judge, who is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 594, 597. The list of factors the *Daubert* Court mentioned was meant to be helpful, not definitive. *Kumho Tire*, 526 U.S. at 151. *See also* Rule 702 advisory committee note (2000 amendment) ("No attempt has been made to 'codify' [the] factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive.").

The rule also "makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony." Fed. R. Evid. 702 advisory committee note (2000 amendment). A separate hearing is not always necessary. *See, e.g., Kumho Tire Co.,* 526 U.S. at 152 (noting that the trial judge has the discretion "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted . . . ."); *United States v. John*, 597 F.3d 263, 274 (5th Cir. 2010) (holding no abuse of discretion to admit fingerprint expert testimony without a hearing); *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (trial court not compelled to conduct pretrial hearing in order to discharge the gatekeeping function of proffered expert testimony about the value and

distributable quantity of marijuana); *See United States v. Nacchio*, 555 F. 3d 1234, 1245 (10th Cir. 2009) ("[The defendant] had no entitlement to a particular method of gate-keeping by the district court.").

Johnson argues the circuit court failed to determine that Cohn was qualified. Johnson's brief at 31. He recognizes that Cohn had training on consensual and non-consensual sexual injuries and experience in treating sexual assault victims. Johnson's brief at 31. But he claims that her training and experience did not qualify her to give an opinion "regarding the cause of [the victim's] injury." Johnson's brief at 31. Initially, Johnson overstates what opinion Cohn offered here. Cohn did not testify the red mark on the victim's labia resulted from non-consensual sex; she testified that it was possible but unlikely to have been the result of consensual sex (64:18, 26).

More to the point, the text of Rule 702 and Wis. Stat. § 907.02 expressly contemplates that an expert may be qualified on the basis of experience and training alone. *Kumho Tire*, 526 U.S. at 156 ("[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience."); *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993) ("Experience alone can qualify a witness to give expert testimony."); *State v. Robinson*, 146 Wis. 2d 315, 332-35, 431 N.W.2d 165 (1988) (Sexual assault advocate with six years experience and dealings with 70 to 80 victims qualified as an expert).

In certain fields, experience is the predominant, if not sole, basis for a great deal of

reliable expert testimony. *See, e.g., Jones*, 107 F.3d at 1161 (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail). The practice of medicine and the related practice of nursing are such fields. *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247-48 (5th Cir. 2002) (reversing the exclusion of an opinion based on experience and personal observations by a physician specializing in infectious diseases); *McCullock,* 61 F.3d at 1043-44 (the district court, in the sound exercise of its discretion, properly admitted physician's opinion testimony based on his clinical experience); *Rodriguez*, 635 S.E.2d at 404-05 (SANE nurse qualified to give an opinion that reddened vaginal area and small abrasions at the entry to the vaginal vault observed during examination were consistent with injuries that might occur from the penetration of an adult finger).

Cohn held a diploma in nursing (63:248), held a certification as a psychiatric nurse (63:248), had twenty-eight years of experience as a nurse (63:248), received specialized training as a SANE Nurse (63:246), held a special certification as a SANE-A nurse (63:247), and worked as an on-call SANE nurse (63:247-48). She had performed over fifty sexual assault exams (63:249). The circuit court found her qualified as an expert in the medical field (63:279). The record supports the court's conclusion. The circuit court did not erroneously exercise its discretion.

Johnson complains that Cohn did not explain the details of her methodology or refer to any studies she had performed regarding her

conclusion. Johnson's brief at 32-33. He also criticizes her failure to refer to studies by others. Johnson's brief at 34-35. Cohn's method consisted of empirical observation upon physical examination which is a commonly accepted scientific methodology. "It is hard to imagine any method of scientific inquiry that is more well established" than personal observation. *Schreiner*, 754 N.W.2d at 754. Cohn did explain the procedure she used to examine the victim along with her observations (63:249-58, 287-301). "[I]n clinical medicine, the methodology of physical examination and self-reported medical history employed by [the medical profession] is generally appropriate." *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000).

"Experience is to nonscientific experts as experimentation is to scientists. Perhaps more than any other area of Evidence law, nonscientific expert testimony bears out Locke's position that 'all our knowledge is founded in experience . . . .' Nonscientific experts are 'experientially qualified.' Their experience largely is their expertise." *Jones*, 107 F.3d at 1155 (citation and internal quotation marks omitted). The 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. *See Drexler v. All American Life & Cas. Co.*, 72 Wis. 2d 420, 430, 241 N.W.2d 401 (1976) ("[A] medical expert may express an opinion as to whether the pain of one he has attended or examined is real, imaginary or feigned" (citing *Quaife v. Chicago & Northwestern Ry. Co.*, 48 Wis. 513, 4 N.W. 658 (1880)); *Proper v. State*, 85 Wis. 615, 55 N.W. 1035

(1893) (A medical expert could testify based on his examination of the prosecutrix that the redness of her genitals could be attributed to the defendant if he did that to which the prosectutrix testified). Cohn's observations "based on [her] medical experience, provided sufficient scientific basis" for her opinion that consensual sex unlikely caused the abrasion she observed during her exam. *Gayton v. McCoy*, 593 F.3d 610, 618 (7th Cir. 2010).

Johnson's complaint regarding studies, error rates, test groups, control groups, and the like also does not establish the circuit court erroneously exercised its discretion in allowing Cohn's opinion. Factors like these "are not particularly relevant where[,] as here, the expert derives [her] testimony mainly from first-hand observations and professional experience in translating these observations into medical diagnoses." *Pipitone,* 288 F.3d at 246. Johnson's characterization of Cohn's opinion as "I know it when I see it" ignores the reality that physicians, nurse practitioners, and nurses daily use physical examination and patient reported symptoms to diagnose illness and injury. That is the primary and generally accepted methodology in medical practice. *Gayton,* 539 F.3d at 618; *Cooper*, 211 F.3d at 1020; *Pipitone*, 288 F.3d at 247; *Rodriguez*, 635 S.E.2d at 404.

Johnson's complaint that Cohn was not a "gynecological examiner" similarly misses the mark. Identifying abrasions and their cause is not specialized knowledge held only by "gynecological examiners." *See Gayton*, 593 F.3d at 618 (Upholding admission of the opinion on the effects of vomiting from a non-cardiologist because "[t]he effects of vomiting on potassium and electrolyte

levels in the body is not specialized knowledge held only by cardiologists . . . .").

Finally, courts routinely admit the opinion of nurses in regard to causation for injuries observed on victims of sexual assault. *See Rodriguez*, 635 S.E.2d at 404-05 (registered nurse could render an opinion on cause of injuries observed on examination in child sexual assault); *Fuller*, 603 S.E.2d at 578 (SANE could testify that excoriations on child's labia majora were consistent with vaginal penetration); *Commonwealth v. Jennings*, 958 A.2d 536, 541 (Pa. Super. 2008) (SANE qualified to testify about causation of injuries to victims of sexual crimes); *Newbill v. State*, 884 N.E.2d 383, 396–97 (Ind. App. 2008) (allowing a SANE to apply her expertise to testify as to whether redness and irritation in the victim's vaginal area was likely the result of forced sex); *Hudson*, 208 P.3d at 1239 & n.2 (rejecting SANE opinion that non-consensual sex caused injuries observed on victim but noting in a footnote that opinion that non-consensual sex was consistent with injuries observed was probably admissible); *Hussen v. Commonwealth*, 511 S.E.2d 106, 108 (Va. 1999) (permitting SANE testimony that injury was not consistent with consensual sex based on injury observed and knowledge of the human sexual response in females).

III. JOHNSON'S CLAIMS THAT COHN'S OPINION WAS NEITHER RELEVANT NOR APPROPRIATE FAILS.

Johnson raises two additional points. The State will address them together because the points are

somewhat related. Johnson first claims that Cohn's opinion is not relevant. He contends that the opinion did not logically advance "any material aspect of the State's case." Johnson's brief at 42.

Wisconsin Stat. § 904.01 provides: "'Relevant evidence' means evidence having any tendency to make *the existence of any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.". "In determining a dispute concerning the relevancy of proffered evidence, the question to be resolved is as to whether there is a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been *made an issue in the case*." *State v. Alsteen*, 108 Wis. 2d 723, 729-30, 324 N.W.2d 426 (1982) (emphasis added) (internal quotation marks omitted).

In his opening statement, Johnson's attorney told the jury that Johnson contended the victim consented to having sex with him (62:140-42). The fact that Cohn held the opinion that the red mark she observed was unlikely the result of consensual sex connected rationally and logically to something Johnson made an issue in his opening statement. Cohn's opinion tended to make Johnson's claim of consent less likely. In addition, it directly addressed his cross-examination question about whether the mark could have possibly been caused by consensual sex. The observation and Cohn's opinion were relevant.

Johnson also claims that Cohn's opinion was directed to "lay matters" that the jury was capable of understanding and deciding without an expert's help. Johnson's brief at 44-45. In his view, Cohn's

testimony duplicated the jury's knowledge and "usurped the jurors' common knowledge and experience . . . ." Johnson's brief at 47.

"The scheme adopted by the legislature separates the universe of testimony into two conceptual spheres: lay testimony . . . and expert testimony . . . ." 7 DANIEL D. BLINKA, *Wisconsin Practice Series: Wisconsin Evidence* § 702.55 at 102 (3d ed. Supp. May 2013). By definition, lay testimony cannot be predicated on specialized knowledge. Wis. Stat. § 907.01(3).

Cohn's testimony regarding her physical exam is predicated on specialized knowledge. Lay persons are not commonly knowledgeable on conducting physical exams for medical purposes. Moreover, the significance of observations made on physical examination is even more removed from the common knowledge and experience of lay persons. "An expert's testimony is admissible . . . when experience and observation . . . give the expert knowledge of a subject beyond that of persons of common intelligence and ordinary experience." *Velazquez*, 557 S.E.2d at 218 (internal quotation marks omitted). That is the case here.

CONCLUSION

For the reasons stated above, this court should affirm Johnson's judgment of conviction.

Dated at Madison, Wisconsin, this 8th day of July, 2013.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,364 words.

Dated this 8th day of July, 2013.

_____
Warren D. Weinstein
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 8th day of July, 2013.

_____
Warren D. Weinstein
Assistant Attorney General