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OF WISCONSIN**

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

No. 2015AP457-CR

DANIEL L. SCHMIDT,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE OCONTO COUNTY CIRCUIT COURT
HONORABLE MICHAEL T. JUDGE, PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Whether exclusion of a child psychologist's expert testimony on influences which could affect a child's memory and testimony violated Mr. Schmidt's basic Due Process right to present a defense.

Over objection, the court below granted the State's motion *in limine* prohibiting admission of the expert testimony and later denied a postconviction motion for new trial.

2. Whether it was prejudicial error to find Mr. Schmidt waived the husband-wife privilege as to a statement about killing Kimberly Rose.

Over objection, the court below granted the State's pretrial motion to admit the statement, finding waiver of the husband-wife privilege.

3. Whether the State presented evidence sufficient to satisfy the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979) as to victim Leo Marsh.

The court below denied Mr. Schmidt's motion to dismiss presented after the State rested.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules. The second issue may be one of first impression.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Schmidt's conviction by a jury of 2 counts of 1st degree murder and of the denial of his postconviction motion.

2. Proceedings Below

On September 5, 2012, complaint number 12 CF 156 was filed in Oconto County Circuit Court charging Mr. Schmidt with 2 counts of violating §940.01(1)(a), *Wis. Stats.* (1st Degree Intentional Homicide) committed on May 19, 2009. (1). Mr. Schmidt appeared with counsel that day and the initial appearance was continued. (26:4). Bail was set at \$2 million cash. (26:7).

On September 13, 2012, the State Public Defender appointed staff counsel to represent Mr. Schmidt. (4).

On September 25, 2012, trial counsel filed a motion to dismiss the complaint as defective. (10).

On September 26, 2012, the court denied the motion and set a date for preliminary hearing. (27)

On October 3, 2012, preliminary hearing was held and Mr. Schmidt was ordered bound over for trial. (24:127). An information making the same charges as in the complaint was filed as well as the State's speedy trial demand. (22)(23).

On November 5, 2012, Mr. Schmidt was arraigned and by counsel entered not guilty pleas to the information. (28).

On February 25, 2013, the State filed motions *in limine* and other pretrial motions. (29)(30)(31)(32).

On February 28, 2013, the State filed additional pretrial motions (33)(34), including a motion to admit Mr. Schmidt's statements to his wife. (35).

On March 1, 2013, defense filed motions *in limine* (37) and to suppress statements. (38). The State filed additional pretrial motions. (39)(40)(41)(43)(44)(45).

On March 27, 2013, the court postponed the trial by stipulation. (57:7).

On April 15, 2013, defense filed a notice of alibi (58) and a motion to suppress statements. (59). The State filed an analysis of the suppression issues. (61).

On April 16, 2013, the court heard the suppression of statements motion (82) and denied it by memorandum decision on April 18, 2013. (64).

On May 24, 2013, the court filed its memorandum decision granting the State's motion to introduce other acts evidence. (70).

On June 5, 2013, the court filed its memorandum decision granting the State's motion to admit certain of victim Rose's statements. (83).

On June 17, 2013, the court adjourned the trial due to the prosecutor's appointment to the bench. (85).

On August 1, 2013, the new prosecutor filed a proposed witness list. (93).

On August 19, 2013, the court heard the defense *Denny* motion (98) and denied it by memorandum decision on September 10, 2013. (96).

On September 12, 2013, the State filed motions *in limine*, including for exclusion of defense expert testimony on influences on a child's testimony (100:2) with a supporting brief. (101).

On September 25, 2013, defense filed its briefs opposing the motion to exclude expert testimony. (105)(106).

On September 26, 2013, defense filed a letter brief opposing the motion to find Mr. Schmidt waived the marital privilege as to a statement about killing Ms. Rose. (107).

On October 2, 2013 the court heard the State's motion to exclude expert testimony (160) and also filed its memorandum decision granting the State's motion to find waiver of the marital privilege as to a statement about killing Ms. Rose. (111).

On October 4, 2013, the court filed its decision granting the State's motion to exclude the defense's expert testimony. (113).

Trial began on October 11, 2013 with jury selection. (153). A jury was selected and sworn. (153:108-109).

On October 14, 2013, the State began presenting its evidence (157:67).

On October 15, 2013, the State continued presenting its case. (155).

On October 16, 2013, the State rested. (158:116). The defense motion to dismiss was denied. (158:117-118). The defense began presenting its evidence. (158:119). Mr. Schmidt waived his right to testify. (158:230-232).

On October 17, 2013, the defense rested. (154:44). The jury returned its verdicts, finding Mr. Schmidt guilty as charged in the information. (137)(154:163-165).

On January 21, 2014, the court sentenced Mr. Schmidt to two consecutive life terms without possibility of extended supervision. (145)(152:47-50).

Notice of Intent was filed January 28, 2014 (148) and Notice of Appeal was first filed July 18, 2014. (163).

Present counsel dismissed the first appeal so a postconviction motion could be heard (169)(170) and the motion was denied on February 16, 2015. (179). Notice of Appeal was again filed on March 4, 2015. (180).

3. Facts of the Offenses

On the morning of May 19, 2009, Kimberly Rose and her brother, Leonard Marsh were found dead at their residence. (157:72-78)(157:83-85). They had been killed with a shotgun. (158:22, 33).

Mr. Schmidt, married to Stephanie (157:158), had been having an affair with Ms. Rose (157:160-165) and owned a rusty shotgun. (157:179-183). After his wife discovered this affair, Mr. Schmidt said, according to her, "I'd like to shoot [Ms. Rose], then myself." (157:199). A witness testified Mr. Schmidt's mother said he was sick of Leo Marsh meddling in the affair with Leo's sister. (155:158-159).

The murder shotgun could not be identified. (155:129-133). No physical evidence connected Mr. Schmidt to the scene of the crime. (154:10-14).

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Argument

I. EXCLUSION OF THE CHILD PSYCHOLOGIST'S EXPERT TESTIMONY VIOLATED MR. SCHMIDT'S BASIC DUE PROCESS RIGHT TO PRESENT A DEFENSE.

A. Additional Facts

Because no hard evidence placed Mr. Schmidt at the scene of the crime on the fatal morning, a key State's witness was Ms. Rose's son, Donovan Rose-Turner, who was 11 years old at the time of the crime and 16 years old when he testified at trial. (155:12). He testified at trial to seeing a couple at his house arguing with his mother the night before the killings. (155:21-22). Though he could not recognize their voices or see their faces, he believed one of the couple was Stephanie Schmidt. (155:21 [lines 4-9])(155:25-26). He also swore he saw a truck looking like Mr. Schmidt's parked at his house that night. (155:22). Donovan's trial testimony as to these key details was different from his statements to police in 2009 and different than his preliminary hearing testimony a year before. (155:24-27, 31-33, 37-40).

The State filed a motion *in limine*, requesting defense be prohibited from presenting expert testimony of a child psychologist, Dr. Thompson, as to the influences which could affect a child's memory and testimony. (100:2, ¶8). Trial counsel responded with a brief arguing the psychologist's testimony would aid the jury in understanding the evidence. (105). The court heard the State's motion (160 [transcript]) and filed its decision granting it. (113).

Mr. Schmidt filed a postconviction motion objecting to the exclusion on constitutional grounds (172) and the court below denied it. (179).

B. Standard of Review

Issues involving the right to present a defense are reviewed *de novo*. *State v. St. George*, 2002 WI 50, ¶16, 252 Wis.2d 499, 643 N.W.2d 777.

C. Discussion

It is well settled an accused has a basic Due Process right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324-326, 126 S.Ct. 1727 (2006)(summarizing rules). See also *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920 (1967)(declaring right to be “fundamental”).

With respect to expert testimony, the state supreme court has outlined the constitutional rules for its admission. See *St. George, supra*, ¶48- ¶73, This two part test first requires the accused to “satisfy each of the following four factors through an offer of proof.” *Id.* at ¶54.

“ 1) The testimony of the expert witness [meets] the standards of §907.02 . . .”

“ 2) The expert witness’s testimony [is] clearly relevant”

“ 3) The expert witness’s testimony is necessary to the defendant’s case.” and

“ 4) The probative value of the testimony of the defendant’s expert outweigh[s] its prejudicial effect.”

Id. at ¶54.

In the second part of the test, the court “determine[s] whether the defendant’s right to present the proffered evidence is nonetheless outweighed by the State’s compelling interest to exclude the evidence.” *Id.* at ¶55.

Applying the *St. George* test here, counsel analyzes the first part as follows:

1) the *Daubert* determination

In January 2011, the legislature amended § 907.02, *Wis. Stats.*, to make Wisconsin law on admissibility of expert testimony consistent with “the *Daubert* reliability standard embodied in Federal Rule of Evidence 702.” *State v. Kandutsch*, 2011 WI 78, ¶26, n.7, 336 Wis.2d 478, 799

N.W.2d 865. Since this amendment, only one Wisconsin case attempts “to explain what the *Daubert* rule is and what it is not.” *State v. Giese*, 2014 WI App 92, ¶1, 356 Wis.2d 796, 854 N.W.2d 687.

The amended Rule allows expert testimony for 2 reasons, *i.e.*, if it “will assist the trier of fact to understand the evidence **or** to determine a fact in issue . . .” §907.02, *Wis. Stats.*, emphasis added. Here, trial counsel argued the child psychologist’s testimony would aid the jury in understanding Donovan Rose-Turner’s testimony. (105:3-4.) The court below never made a finding on that issue before trial (113) nor did it do so after trial (179) when counsel raised it again. (172:3)

The *Giese*, *supra*, court cited with approval to Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, 84 Wis. Lawyer 3 (Mar. 2011) at 14. 2014 WI App 92, ¶19. In that article, Prof. Blinka endorses the use of advisory committee notes to the 2000 amendment to Federal Rule of Evidence 702 for guidance in understanding *Daubert*. 84 Wis. Lawyer 3 (Mar. 2011) at 16. As Prof. Blinka there shows, the federal advisory committee notes make clear the *Daubert* standard is meant to continue the “venerable practice” of expert testimony on general principles. *Id.* at 18. “It might also be important in some cases for an expert to educate the fact finder about general principles *without ever attempting to apply those principles to the specific facts of the case.*” *Id.* at 18, quoting Fed. R. Evid. 702 advisory committee note (2000 amendment), emphasis added.

Counsel submits Dr. Thompson’s testimony would have helped the jury understand the reasons for the changes in the young Rose-Turner’s testimony over time and so passed the *Daubert* test now embodied in §907.02, *Wis. Stats.* See *State v. Kirshbaum*, 195 Wis.2d 11, 25, 535 N.W.2d 462, 467 (Ct.App.1995)(child interviewing techniques “is a subject with which a lay juror may be unfamiliar.”).

2) Relevance

As credibility of the juvenile witness was in issue, Dr. Thompson’s testimony was “clearly relevant.” *St. George* at

¶54. And see *St. George* at ¶60 (finding expert testimony on interviewing techniques relevant).

3) Necessity

Since there was no physical evidence or testimony placing Mr. Schmidt at the scene at the time of the killings, the young Rose-Turner's testimony was an important part of the State's case because it identified a truck which looked like Mr. Schmidt's as present the night before the killings when there was allegedly a confrontation between his mother and other persons, whom he believed included Mr. Schmidt's wife. (155:12-23). It was, therefore, crucial to the defense to help the jury understand how his memory and testimony had changed over time, especially since he couldn't identify anyone in his earliest testimony. *Id.* at 25-27. Compare *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 867-868, 102 S.Ct. 3440 (1982) (where evidence could have "affected the outcome of the trial," it was "critical" to defense.).

4) Probative vs. Prejudicial

Since the State would have had full opportunity for cross-examination of Dr. Thompson at trial, it could have done there what it did at the motion hearing, *i.e.*, make its best effort to impeach the expert's methods and conclusions. (160: 24-54). And see *Daubert v. Merrill Dow Pharm, Inc.*, 509 U.S. 579, 596 (1993)("Vigorous cross-examination, presentation of contrary evidence, . . . are [] traditional means of attacking shaky but admissible evidence.") followed in *Giese, supra* at ¶28. Considering this, there could be little or no prejudice to the State from Dr. Thompson's testimony whereas it had ample probative value in helping the jury to assess the young witness' testimony.

Therefore, counsel respectfully submits trial counsel's offer of proof in the form of the expert's testimony met the first part of the *St. George* test.

Turning to the second part of the test, the court "must apply a strict scrutiny analysis . . ." *State v. Dodson*, 219 Wis.2d 65, 83, ¶35, 580 N.W.2d 181, 191 (1998) followed in *St. George*, ¶20, n.22. See *St. George*, ¶55, n.41. That is, it

determines “whether the defendant’s right to present the proffered evidence is nonetheless outweighed by the State’s compelling interest to exclude the evidence.” *Id.* at ¶55.

In *St. George*, the State urged expert testimony on witness recantation and interviewing techniques would mislead the jury, 2002 WI 50, ¶¶68-70, as did the State here. (177:4) The supreme court rejected that claim because the State could cross-examine on those parts of the testimony it thought misleading. *Id.*

The great Justice Traynor once succinctly summarized a basic principle applicable here. “[T]he state has no interest in denying the accused access to all evidence that can throw light on the issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.” *People v. Riser* (1956), 47 Cal.2d 566, 586, 305 P.2d 1, 13. Similarly here, counsel submits the State had no compelling interest in preventing Mr. Schmidt from presenting the child psychologist’s testimony to the jury.

II. IT WAS PREJUDICIAL ERROR TO FIND MR. SCHMIDT WAIVED HIS HUSBAND-WIFE PRIVILEGE AS TO A STATEMENT ABOUT KILLING MS. ROSE.

A. Additional Facts

At trial, Mrs. Schmidt was allowed to testify to a statement in which, she swore, her husband said “I’d like to shoot [Ms. Rose], then myself.” (157:199 [lines 21-22]).

Before trial the State moved to admit this statement, arguing Mr. Schmidt waived the husband-wife privilege by voluntarily disclosing a significant part of the statement. (35:2-10). Trial counsel objected with a letter brief. (107). The court below granted the State’s motion in a written decision. (111). In that decision, the court found as fact that when confronted by police with his wife’s statement, “Initially, Schmidt denied making that type of comment, but thereafter admitted he might have said he would like to kill only himself, but not Kimberly.” (111:2).

B. Standard of Review

Issues of interpretation of privilege statutes are issues of law reviewed *de novo*. *State v. Denis L.R.*, 2005 WI 110, ¶35, 283 Wis.2d 358, 699 N.W.2d 154.

C. Discussion

The husband-wife privilege

is supported by the policy of encouraging marital confidences. The damage which is thought to result from the unconsented-to disclosure of such communications extends beyond an individual marriage. The domestic confidence is a very important basis of the marriage relationship. That relationship is considered so valuable to society that it should be fostered by preserving or guaranteeing the confidentiality of private communications in judicial proceedings.

Muetze v. State, 73 Wis.2d 117, 129, 243 N.W.2d 393 (1976).

The privilege has “ancient roots,” *Trammel v. U.S.*, 445 U.S. 40, 43-44, 100 S.Ct. 906 (1980), and in Wisconsin it protects “any private communication by one [spouse] to the other made during their marriage . . .” §905.05(1), *Wis. Stats.*

The waiver of privilege by voluntary disclosure, on the other hand, see §905.11, *Wis. Stats.*, is of much more recent vintage, originating with proposed Federal Rule of Evidence 511 in 1972. *State v. Denis L.R.*, 2004 WI App 51, ¶15, 270 Wis.2d 663, 678 N.W.2d 326. See 56 F.R.D. 258-259 (text of proposed Rule and advisory committee note).

The court below found Mr. Schmidt had waived his privilege by disclosing a “significant part” of it to police. (111:2). The “significant part” the court below referred to was Mr. Schmidt’s confirmation to police he said he wanted to kill himself. *Id.*

There is little law in any jurisdiction, and nothing definitive, on what amounts to a “significant part” of a privileged communication such that the remainder of it is considered disclosed under §905.11, *Wis. Stats.*, or parallel statutes. See, e.g., *Mitchell v. Superior Court* (1984), 37 Cal.3d 591, 602, 691 P.2d 642, 648 (“Relatively few reported

cases interpret [parallel statute]; none are definitive . . .”); *State v. Eison*, 2011 WI App 52, ¶33, 332 Wis.2d 331, 797 N.W.2d 890 (statute cited but no discussion of “significant part”). California follows a rule that “[w]hat constitutes a significant part of the communication is a matter of judicial interpretation; however, the scope of the privilege should be determined primarily by reference to the purpose of the privilege.” *Transamerica Title Ins. Co. v. Superior Court* (1989), 188 Cal.App.3d 1047, 1052, 233 Cal.Rptr. 825, 828. (atty-client privilege).

As noted above, the purpose of the husband-wife privilege is “encouraging marital confidences” because the marriage “relationship is considered so valuable to society that it should be fostered by preserving or guaranteeing the confidentiality of private communications . . .” *Muetze, supra*, 73 Wis.2d at 129.

Counsel submits the only significant part of the statement was the part which was not disclosed, *i.e.*, the incriminating part. Allowing disclosure of such significant private communication is clearly against the public policy of guaranteeing marital confidences. That is to say, the important thing “is not the content of the communication, but the relationship which must be preserved and enhanced as a societal value.” *Lohman v. Superior Court* (1978), 81 Cal.App.3d 90, 97, 141 Cal.Rptr.171, 175.

It was error to allow disclosure of the marital confidence here and it seems clear it was prejudicial since the case was almost entirely circumstantial.

III. THE EVIDENCE MR. SCHMIDT KILLED LEO MARCH WAS CONSTITUTIONALLY INSUFFICIENT.

A. Standard of Review

To determine if the evidence supporting a criminal conviction is constitutionally significant, a court asks whether “any rational jury could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2281 (1979). See also *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752

(1990)(standard of review same in either a direct or circumstantial evidence case).

B. Discussion

Leo Marsh is the forgotten man in this case. What scant evidence in the record about him there is portrays him as cantankerous. See (155:56 [Leo fighting with sister])(158:155 [same]), (155:34 [Leo had fight with boyfriend]), (158:157 [Leo curses at twin brother]). The only evidence connecting him with Mr. Schmidt was hearsay that Mr. Schmidt was sick and tired of Leo meddling in his affair with Leo's sister. (155:158).

The State presented Leo's killing almost as if it were a matter of *res ipsa loquitur*, i.e., Mr. Schmidt killed Ms. Rose so he must have killed her brother who lived with her. (154:155 [closing argument]).

But some relevant facts are: the door to the residence was unlocked that morning (157:75 [lines 6-9, Ms. Rose tells friend she is leaving door unlocked]); the State's pathologist presented no evidence as to the time of death of either victim; the State's ballistics expert could not testify the same gun killed both victims (155:132-133) and the State could not even say both victims were killed with the same type of shot. Cf. (158: 18, 32 [pathologist testifies shot was pellets]) with (155:113 [ballistics expert testifies shot was slugs]).

Furthermore, the *modus operandi* of the shootings was different, i.e., Ms. Rose was shot at close range from the front (155:12-15) while Leo was shot in the back from a good distance. (158:25 [lines 14-15], 32 [lines 4-5]).

Counsel submits, in light of these facts, the State's bare suggestion Leo was killed so he could not be a witness (154:155) is insufficient circumstantial evidence to prove beyond a reasonable doubt the essential elements of the crime: identity, causation, and intent, Wis II-Criminal 1010, in accordance with the *Jackson, supra*, test.

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Conclusion

Counsel respectfully submits the foregoing demonstrates prejudicial error and prays the Court for reversal and remand of the judgment below.

Dated: June 14, 2015

Respectfully submitted,

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SCHMIDT

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

No. 2015AP457 CR

DANIEL L. SCHMIDT,

Defendant-Appellant.

CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 3,558 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: June 15, 2015

So Certified,

Signature: _____

Timothy A. Provis

Bar No. 1020123

STATE OF WISCONSIN
C O U R T O F A P P E A L S

DISTRICT III

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v.

No. 2015AP457-CR

DANIEL L. SCHMIDT,

Defendant-Appellant.

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on June 15, 2015. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: June 15, 2015

So Certified,

Signature: _____

Timothy A. Provis

Bar No. 1020123