

FILED
11-23-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2021AP1252-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANNY ARTHUR WRIGHT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN DOUGLAS COUNTY CIRCUIT COURT,
THE HONORABLE GEORGE L. GLONEK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

ISSUE PRESENTED.....	5
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	5
STATEMENT OF THE CASE	5
STANDARD OF REVIEW.....	6
ARGUMENT	7
The trial court properly exercised its discretion when it allowed Detective Jaszczak to testify about the properties of stun guns because his expertise was obtained from years of training and experience with electronic weapons including stun guns	7
A. The trial court's pretrial ruling admitting the expert testimony, the detective's trial testimony, and the in-court demonstrations of the Zap-Stick stun gun	7
B. Expert testimony is admissible if the expert is qualified and if his testimony will assist the jury.....	13
C. Detective Jaszczak was qualified by his training and experience to testify about the properties of stun guns; and his relevant testimony assisted the jury in deciding whether the stun gun used by Wright on the victim was a dangerous weapon.	16
D. If the trial court should have excluded the detective's expert testimony, the error was harmless.	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993)	14
<i>In re Branden O.</i> , 94 Cal. Rptr. 3d 520 (Cal. App. 2009)	19
<i>In re M.S.</i> , __ Cal. Rptr. 3d __, 2021 WL 4931619 (Oct. 22, 2021).....	19
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999)	14, 15
<i>People v. Yanna</i> , 824 N.W.2d 241 (Mich. App. 2012).....	9
<i>Seifert v. Balink</i> , 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816.....	14, 15
<i>State v. Dobbs</i> , 2020 WI 64, 392 Wis. 2d 505, 945 N.W.2d 609.....	7, <i>passim</i>
<i>State v. Giese</i> , 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687	6, <i>passim</i>
<i>State v. Harvey</i> , 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189.....	22
<i>State v. Hogan</i> , 2021 WI App 24, 397 Wis. 2d 171, 959 N.W.2d 658	7, <i>passim</i>
<i>State v. Howes</i> , 875 N.W.2d 684 (Iowa 2016).....	20
<i>United States v. Hankey</i> , 203 F.3d 1160 (9th Cir. 2000)	21

Statutes

Wis. Stat. § 907.02(1).....	13, 14, 16
Wis. Stat. § 939.22(10).....	8
Wis. Stat. § 940.225(1)(b)	7
Wis. Stat. § 941.295(1c)(a).....	8

Other Authority

Fed. R. of Evid. 702.....	14, 15
---------------------------	--------

ISSUE PRESENTED

Did the trial erroneously exercise its discretion when it allowed a police detective trained and experienced in the use of electronic weapons such as tasers and stun guns to testify about the properties of a stun gun such as the one deployed against the victim here?

The trial court ruled at a pretrial hearing that the State could introduce the expert opinion testimony of a detective trained and experienced in the use of tasers and stun guns about the properties of a stun gun such as the one deployed against the victim. The state then introduced that testimony at trial.

This Court should affirm. The trial court properly exercised its discretion because the detective was qualified by many years of training and experience in the use of electronic weapons such as tasers and stun guns to testify about the properties of the stun gun Wright used against the victim.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The parties' briefs should adequately address the legal and factual issues presented. Publication is not necessary because recent decisions of the Wisconsin Supreme Court and this Court have clarified when a police witness may present expert testimony based on his or her training and experience.

STATEMENT OF THE CASE

After a trial held on August 13 and 14, 2020, a Douglas County jury found Danny Arthur Wright guilty of first-degree sexual assault while using a dangerous weapon, strangulation, and misdemeanor battery, all arising out of the violent sexual assault of L.M. on March 12, 2020. (R. 72; 95:72.) Wright challenges only his conviction for first-degree

sexual assault while using a dangerous weapon, namely, a stun gun.

L.M. testified at trial that what began as a consensual sexual encounter with Wright at his home turned violent and non-consensual when Wright struck her, strangled her, inserted a flashlight into her anus and vagina, forced his penis into her anus and vagina, and repeatedly used a stun gun on her, ignoring her pleas to stop. (R. 96:172–85.) Wright videotaped the hour-long ordeal. (R. 96:189, 204–05.) The video was shown to the jury. (R. 96:217–18.) L.M. finally escaped with Wright in pursuit, stun gun in hand tasing her as she fled down the stairs (R. 96:179–80, 182), and ran to a neighbor’s house for help (R. 96:185–86).

The jury found Wright guilty of first-degree sexual assault for having sexual intercourse without L.M.’s consent while using a dangerous weapon, the stun gun. (R. 95:72.) The jury also found Wright guilty of strangulation and misdemeanor battery. (R. 95:72.)

The court imposed concurrent sentences on the three counts totaling 15 years of initial confinement followed by ten years of extended supervision. (R. 88:22.)

There were no postconviction proceedings. Wright appeals directly from the judgment of conviction. (R. 105.) Wright argues that the trial court erroneously exercised its discretion when it allowed the State to introduce expert testimony through a police detective trained and experienced with electronic weapons regarding the operation and effects of tasers and stun guns.

STANDARD OF REVIEW

This Court reviews the trial court’s decision to admit or exclude expert testimony for an erroneous exercise of discretion. *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687. “We will not overturn the circuit court’s

exercise of discretion if the decision had a ‘reasonable basis’ and was made in accordance with the proper legal standard and the facts in the record.” *State v. Dobbs*, 2020 WI 64, ¶ 32, 392 Wis. 2d 505, 525, 945 N.W.2d 609 (citation omitted). “This standard is highly deferential: we will search the record for reasons supporting the trial court’s decision, and we will sustain a ruling even where we disagree with it, so long as appropriate discretion was exercised.” *State v. Hogan*, 2021 WI App 24, ¶ 26, 397 Wis. 2d 171, 959 N.W.2d 658.

ARGUMENT

The trial court properly exercised its discretion when it allowed Detective Jaszczak to testify about the properties of stun guns because his expertise was obtained from years of training and experience with electronic weapons including stun guns.

Detective Michael Jaszczak was qualified to provide expert testimony about electronic weapons in general and stun guns in particular. His testimony about the capabilities of stun guns enabled the jury to draw the reasonable inference that the Zap Stick brand of stun gun Wright used on the victim and demonstrated in court was a dangerous “electric weapon” because it was, like other stun guns described by Jaszczak, designed to temporarily immobilize or incapacitate a person with an electric current.

A. The trial court’s pretrial ruling admitting the expert testimony, the detective’s trial testimony, and the in-court demonstrations of the Zap-Stick stun gun

The issue for the jury was whether the stun gun used by Wright against the victim, a “Zap Stick” brand, was a “dangerous weapon” as defined in Wis. Stat. § 940.225(1)(b), which outlaws (pertinent here) sexual intercourse without consent “by use or threat of use of a dangerous weapon.” The

definition of a “dangerous weapon” under Wis. Stat. § 939.22(10) includes (pertinent here), “any electric weapon, as defined in s. 941.295(1c)(a).” That section, in turn, defines an “electric weapon” as “any device which is designed, redesigned, used or intended to be used, offensively or defensively, to immobilize or incapacitate persons by the use of electric current.” Wis. Stat. § 941.295(1c)(a). The trial court instructed the jury consistently with that statutory definition of an “electric weapon.” (R. 96:59; 95:55.)

Wright filed a pretrial motion in limine to prevent the State from introducing the proffered expert testimony of Superior Police Detective Michael Jaszczak regarding the characteristics of electronic weapons such as tasers and stun guns. (R. 38.) The court held a pretrial hearing on the motion August 11, 2020, at which Detective Jaszczak testified. (R. 94.) The summary in Wright’s brief of the trial court’s pretrial ruling and the trial testimony regarding the stun gun evidence is complete and accurate. (Wright’s Br. 8–22.)

The pretrial hearing

Detective Jaszczak described his training and experience with electronic weapons including tasers and stun guns. In his 25 years on the police force, Jaszczak has trained other officers on how tasers and stuns gun operate, how they are similar, and how they are different. (R. 94:25–31.) At the time of the hearing, he was serving on the State’s Tactical Skills Advisory Committee tasked with determining what training police recruits receive and, pertinent here, advising when on the police use of force continuum a taser should be deployed. (R. 94:25–26.) Jaszczak testified that he has deployed a taser once on the street, but hundreds of times in training, and has himself been tased during training. (R. 94:26.) He also has been trained on the effects a taser or stun gun has on a person’s body. (R. 94:27.) Both weapons can cause muscle contraction that, in the case of a stun gun used

as a defensive weapon, allows the person deploying it a short amount of time to escape an attacker. (R. 94:27–28.)

Jaszczak then described how tasers and stun guns operate, how they are different from each other, and what effects they have. (R. 94:28–29.) Despite their differences, both emit electric current through two contact probes that can cause muscle contraction. (R. 94:28.) A taser is often fired from a distance sending its two probes to separate contact points on the target’s body, while a stun gun is to be held against the body. The two probes in both weapons can be applied directly to the skin as a “pain compliance technique.” (R. 94:29.) In general, he said, tasers use 26 watts of electricity while stun guns use 7 to 11 watts. (R. 94:34–35.) The Zap Stick stun gun used by Wright against the victim emitted 7 watts of electricity. (R. 94:34.) In response to the court’s question, Jaszczak said he has learned from his training and experience that stun guns can cause temporary paralysis. (R. 94:36.)¹

According to Jaszczak, the Zap Stick stun gun used by Wright and examined by him is similar to other stun guns he described. (R. 94:29.) He reviewed the description of the Zap Stick stun gun in its instruction manual and testified that the description is consistent with his training and experience as to how other stun guns are used and what their effects are. (R. 94:30–31.) The instruction manual describes what happens when the Zap Stick is deployed defensively to ward off an attacker:

¹ “The term ‘Taser,’ although a trademark for a particular brand of device, is commonly applied to a device that delivers an electric charge through barbs that can be propelled several feet away and penetrate clothing or skin. By contrast, a stun gun must be held in direct contact with the target.” *People v. Yanna*, 824 N.W.2d 241, 243 n.3 (Mich. App. 2012).

A short blast (1/4 second) will startle an attacker, cause minor muscle contractions and can have a repelling effect.

A moderate blast (1 - 4 seconds) can cause attacker to fall and can cause mental confusion. It may make the assailant unwilling to continue attack, but they will be able to get up almost immediately.

A full blast of 5 seconds or more can immobilize an attacker, causing disorientation, loss of balance, falling to the ground, weakness and leaving them dazed for several minutes afterwards.

The ZAP™ charge will have an effect anywhere on the body, but the maximum effect is in areas marked with an “X” in the drawing.

(R. 48:2.) The drawing in the manual has “Xs” marked in the head, chest and genital regions. (R. 48:2.)

Wright established on cross-examination that Jaszczak had no training or experience with the Zap Stick brand of stun guns used by Wright, and he was not aware of any studies regarding the effects of the Zap Stick stun gun when used on humans or animals. (R. 94:32, 37.) As it relates to the statutory definition, Jaszczak was not aware of any studies or experiments that prove a Zap Stick stun gun causes a person to be immobilized or incapacitated. (R. 94:32–33.) While most stun guns use 9 volt batteries, the Zap Stick uses two 3-volt batteries. (R. 94:35–36.)

In arguing for admissibility, the prosecutor assured the court that Jaszczak would not be asked to render the legal opinion whether the stun gun used by Wright satisfies the statutory definition of “electric weapon.” Jaszczak would simply describe, based on his training and experience, what happen when a stun gun is deployed against a person. (R. 94:38.) In arguing against admissibility, defense counsel maintained that the State had to present the testimony of an expert from the manufacturer of the Zap Stick stun gun to establish its unique characteristics and whether it was designed to immobilize or incapacitate a person when deployed. (R. 94:38–39.)

The trial court allowed Jaszczak to testify about stun guns in general based on his training and experience so long as he did not render a legal opinion regarding whether the stun gun used by Wright satisfied the statutory definition of an “electric weapon.” (R. 94:41.) The court reasoned that Wright’s challenges to the detective’s testimony go to its weight rather than its admissibility and are fair game for cross-examination. (R. 94:40–41.) Any question whether the Zap Stick stun gun used by Wright could cause temporary immobilization or incapacitation also goes to the weight rather than the admissibility of the detective’s expert testimony. (R. 94:41–42.)

The trial testimony and demonstrations

Detective Jaszczak testified at trial consistently with the pretrial ruling. He described for the jury the similarities and differences of tasers and stun guns. (R. 96:206–10.) He described a stun gun as a “pain compliance tool” that can immobilize or “tighten up the muscles” at the point of contact. (R. 96:208.) It also can briefly lock up the nerve bundle depending on the duration of the contact. (R. 96:208.) Jaszczak then demonstrated the Zap Stick stun gun for the jury. (R. 96:210.) He told the jury: “This particular stun gun has a flashlight, and then you’ll see the electricity between these two contacts when I push the button. . . . It operates for as long as I push the buttons.” (R. 96:210.)

Counsel for Wright established on cross-examination that Jaszczak had no training or experience with the Zap Stick stun gun and was unaware of any studies or experiments regarding the Zap Stick’s effect on humans, or whether a Zap Stick can cause incapacitation or immobilization. (R. 96:211–12.)

In closing argument, the prosecutor explained why a stun gun is a dangerous weapon (R. 95:23–26), stating: “It’s a stun gun. You saw it operated in court. You saw it operated

on the video. This is not some kid's toy that we're talking about here." (R. 95:23.) The prosecutor explained further: "This is a weapon that is meant to immobilize and incapacitate by the use of electric current. You press into someone's skin, you push the button, the electric current runs under the skin." (R. 95:23–24.)

In his closing argument, Wright's counsel argued there is no evidence that the stun gun Wright used was designed to immobilize or incapacitate. It was, counsel argued and as Jaszczak described it, only a "pain compliance tool[]." (R. 95:31–32.) As did Detective Jaszczak, defense counsel demonstrated the Zap Stick stun gun for the jury. He acknowledged that "it's kind of startling, right?" (R. 95:32.) Counsel then took the unusual step of demonstrating the Zap Stick stun gun on Wright. After doing so, counsel again stated, "I mean it's startling, but that's not enough." (R. 95:32.) Counsel then asked Wright if it "hurt." Wright answered: "No." (R. 95:32–33.) Counsel argued that Wright did not "flinch," but acknowledged that the victim "flinched" on the video when Wright used the stun gun on her. But, counsel argued, she was not incapacitated; Wright intended to inflict pain on L.M. but he did not use the stun gun to force her into sexual intercourse without consent. (R. 95:33.)

In rebuttal argument, the prosecutor described how defense counsel's demonstration deploying the Zap Stick stun gun on Wright went:

I hope you were watching. I hope you saw what happened when Mr. Wright was subjected to a blast that was as long as the snap of a finger and the control he lost over his arm with a blast that was that short. Think about that when you consider whether or not that's a dangerous weapon.

(R. 95:42.) Defense counsel did not object to the prosecutor's description of the courtroom demonstration.

In its instructions to the jury, the trial court defined a "dangerous weapon" consistent with the statutory definition

(R. 95:55.) It instructed the jury on how to evaluate the weight and credibility of all witnesses (R. 95:67–68.) And it specifically instructed the jury in a manner consistent with the requirements of Wis. Stat. § 907.02(1) on how to evaluate the testimony of an expert witness such as Jaszczak:

In determining the weight to give to this opinion, you should consider: the qualifications and credibility of the witness; the facts on which the opinion is based; and the reasons given for the opinion. Opinion evidence was received to help you reach a conclusion. However, you are not bound by any witness's opinion.

(R. 95:68–69).

B. Expert testimony is admissible if the expert is qualified and if his testimony will assist the jury.

The admissibility of expert testimony is governed by Wis. Stat. § 907.02(1). *Giese*, 356 Wis. 2d 796, ¶ 17. It provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02(1).

Expert testimony has always been admissible if the expert is qualified to give it, and the expert testimony would help the jury to understand the evidence or determine a fact in issue. Wis. Stat. § 907.02(1). After the 2011 amendments to Wis. Stat. § 907.02(1), the expert's proffered testimony must also be "based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." *Giese*, 356 Wis. 2d 796, ¶ 17 (quoting Wis.

Stat. § 907.02(1)). After the 2011 amendments, “[t]he reliability of expert testimony ceased being a question for the jury and became a gatekeeping assessment for the trial court.” *Hogan*, 397 Wis. 2d 171, ¶ 23. The “gatekeeper function” of the trial court “is to ensure that the expert’s opinion is based on a reliable foundation and is relevant to the material issues.” *Giese*, 356 Wis. 2d 796, ¶ 18. The “gatekeeper function” is not limited to scientific expert testimony; it applies to all expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149–50 (1999).

The 2011 amendments codified the standard for reliability of expert testimony adopted by the Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny. *Dobbs*, 392 Wis. 2d 505, ¶ 34; *Hogan*, 397 Wis. 2d 171, ¶ 18. Wisconsin case law interpreting the expert witness statute adheres to case law interpreting *Daubert* and Federal Rule of Evidence 702 which is identical to Wis. Stat. § 907.02(1). *Seifert v. Balink*, 2017 WI 2, ¶ 55, 372 Wis. 2d 525, 888 N.W.2d 816. “Since § 907.02(1) is identical to the language of Rule 702, we also look to the federal interpretation of Rule 702 for guidance. . . . Lastly, although not dispositive, we consider how other state courts have interpreted analogous state laws.” *Dobbs*, 392 Wis. 2d 505, ¶ 35.

There are three threshold requirements for admissibility: (1) the witness must be qualified, (2) the testimony must be relevant in that it will assist the jury in determining a fact in issue, and (3) the testimony must be reliable. *Hogan*, 397 Wis. 2d 171, ¶ 19. The use of the phrase “opinion or otherwise” in the statute, “signifies that expert testimony may take a form other than an opinion, which courts should encourage when the trier of fact can itself draw the requisite inference from the facts of the case.” *Dobbs*, 392 Wis. 2d 505, ¶ 36. “[P]ersonal knowledge and experience may form the basis for expert testimony.” *Hogan*, 397 Wis. 2d 171,

¶ 25 (citing *Seifert*, 372 Wis. 2d 525, ¶ 77). “To assess reliability in this context, ‘the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.’” *Id.* (citing *Seifert*, 372 Wis. 2d 525, ¶ 73).

The specific factors discussed in *Daubert* for evaluating the reliability of *scientific* expert testimony—peer review and publication, reliable methods of testing, rate of error and control standards, testing a theory or technique, and general acceptance of a theory or technique in a scientific community—may or may not be pertinent depending on the nature of the proffered expert testimony. *Kumbo Tire*, 526 U.S. at 150–51. “In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise.” *Id.* at 150. “[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.” *Id.* (citation omitted). “[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Id.* at 152. See *Hogan*, 397 Wis. 2d 171, ¶ 22 (“*Daubert* involved expertise of a scientific nature. Of course, Rule 702 goes beyond such expertise, as it expressly encompasses ‘technical’ or ‘other specialized knowledge.’ See FED. R. EVID. 702.”); *id.* ¶ 29 (“The trial court rightly determined that *Daubert*’s reliability factors often have little application to nonscientific, experience-based expert testimony. This does not, again, mean that social science testimony is inherently unreliable, but only that other considerations must guide the reliability analysis.”) “Particularly for those gaining hands-on expertise in sociology, criminology, and similar fields, the ‘methodology’

underlying the expert's conclusions is part and parcel of the expert's qualifications, and may be nothing more than rigorous participation in all of the various activities, trainings, and experiences available to that individual." *Id.* ¶ 30.

C. Detective Jaszczak was qualified by his training and experience to testify about the properties of stun guns; and his relevant testimony assisted the jury in deciding whether the stun gun used by Wright on the victim was a dangerous weapon.

In the words of Wis. Stat. § 907.02(1), Detective Jaszczak had "specialized knowledge" and was "qualified as an expert by" 25 years of "experience [and] training" in law enforcement to testify "in the form of an opinion or otherwise" about the characteristics and effects of stun guns because his testimony assisted the trier of fact in deciding whether the stun gun used by Wright on the victim was a dangerous "electric weapon."

There is no dispute that Wright had forcible sexual intercourse with L.M., that he battered and strangled her during the assault, and that he used a stun gun that emitted an electric current on her repeatedly during the assault, it caused her pain, and she did not consent to it. (R. 96:171–85.)

Wright insists that, "the state needed an expert to prove that element ["electric weapon"] because L.M. never claimed that Wright's "ZAP Stick" was either designed or used to "immobilize or incapacitate [her] by the use of electric current." (Wright's Br. 22 (alteration in original).) That is an odd position to take because, if Jaszczak was not qualified to opine whether the Zap Stick was designed to immobilize or incapacitate, most assuredly *L.M.* was not qualified to so testify.

Wright argues that the State needed an expert “to opine whether the Zap Stick was either designed or used to ‘immobilize or incapacitate.’” (Wright’s Br. 22–23.) Detective Jaszczak provided the needed testimony. While he did not render the legal opinion that the Zap Stick was an “electric weapon” as defined in the statute (R. 94:38, 40–41), Jaszczak provided the necessary expert testimony about the qualities and effects of electric weapons in general, and stun guns in particular. (R. 96:206–10.) His testimony enabled the jury to draw the reasonable inference that the stun gun used by Wright was a dangerous “electric weapon” as defined in the statute. (R. 96:206–10.) His extensive experience over 25 years with both being trained in and training others in the operation and effects of electronic weapons such as tasers and stun guns provided sufficient data for him to render a reliable opinion on their operation and effects. His hands-on experience in operating such weapons and even having them tested on himself provided the requisite, perhaps the most reliable, method to enable him to render a reliable opinion on their operation and effects. (R. 94:25–31.) *See Giese*, 356 Wis. 2d 796, ¶ 17.

Detective Jaszczak’s testimony was in the nature of “exposition testimony on general principles” designed to educate the jury about stun guns without opining on the ultimate issue whether the Zap Stick stun gun used by Wright fit the statutory definition of “dangerous weapon” and, more specifically, “electric weapon.” *See Dobbs*, 392 Wis. 2d 505, ¶¶ 31–32, 42. In any event, “an expert need not even know the specific facts of the case to satisfy the requirements of” the identical federal statute or similar state statutes so long as the expert’s testimony educates the trier of fact about general principles relevant to the case. *Id.* ¶¶ 40–41.

That is precisely what occurred here. Jaszczak testified about the general characteristics of electronic weapons, and more specifically stun guns, but did not opine on the ultimate

issue of whether the stun gun used by Wright satisfied the statutory definition of “dangerous weapon.” (R. 94:38, 40–41; 96:206–10.)

When deciding whether to admit this sort of testimony, the trial court must consider: “(1) whether the expert is qualified; (2) whether the testimony will address a subject matter on which the factfinder can be assisted by an expert; (3) whether the testimony is reliable; and (4) whether the testimony will “fit” the facts of the case.” *Dobbs*, 392 Wis. 2d 505, ¶ 43 (citation omitted).

Jaszczak’s testimony checked all of those boxes. The State proved by a preponderance of the evidence at the pretrial hearing that he was qualified by 25 years of training and experience in the use and effects of electronic weapons including stun guns. (R. 94:25–31.) His testimony addressed the relevant subject matter of whether a stun gun is a “dangerous weapon,” thereby assisting the jury in deciding whether the stun gun used by Wright was a dangerous weapon. The reliability of his testimony came from 25 years of training and experience in law enforcement. His testimony fit the facts of this case because it was relevant to educating the jury about how stun guns operate and what they are designed to do, something beyond the common understanding of the average person. *See Dobbs*, 392 Wis. 2d 505, ¶¶ 43–44.

Wright does not seem to challenge Jaszczak’s expertise based on his training and experience in the properties of electronic weapons and, more specifically stun guns, in general. Wright’s “real dispute” is “with the assumptions the expert made” about the specific stun gun used by Wright—the Zap Stick brand. *Giese*, 356 Wis. 2d 796, ¶ 28. Jaszczak’s assumptions were not arrived at out of thin air. He relied on the manufacturer’s instruction manual to confirm that the Zap Stick brand of stun gun operates like other stun guns; they are designed to have some capacity to incapacitate or immobilize with an electric current. (R. 48:2.) It was then for

the jury to decide whether his informative testimony about stun guns in general also applied to the Zap Stick stun gun used by Wright in the video, introduced into evidence, and demonstrated in court.

The trial court correctly held that Wright's challenge to the expert's assumption that the Zap Stick stun gun operates like other stun guns goes to the weight rather than the admissibility of his testimony. (R. 94:40–42.) *See Giese*, 356 Wis. 2d 796, ¶ 28. Wright “remains free to challenge the accuracy of the expert's assumptions” with contrary evidence and vigorous cross-examination, coupled with argument and careful instruction on the State's burden of proof. *Id.* Wright did that here. Wright's attorney also challenged the expert's assumptions about the Zap Stick stun gun by actually deploying it on Wright during closing argument; an experiment that appears to have backfired. (R. 95:42.).

In *In re Branden O.*, 94 Cal. Rptr. 3d 520 (Cal. App. 2009), the court upheld the admissibility of a detective's expert testimony based on his training and experience about the operation and effects of stun guns even though he did not test the specific stun gun used by the defendant. *Id.* at 525–26.

We agree with the juvenile court that it was not necessary that [the expert] Donleavy have used “the exact same gun” that the minor used in order to testify about its capabilities, where he was sufficiently familiar with the way stun guns are used based on his training and experience.

Id. at 525. The court also held that, under the applicable statute, the State was not required to prove that the stun gun actually incapacitated the victim; only that it was *capable of* incapacitating a person. *Id.* at 524. *C.f. In re M.S.*, __ Cal. Rptr. 3d __, 2021 WL 4931619, *3 (Oct. 22, 2021) (a detective was allowed to testify based on training and experience about tasers and stun guns in general, but the evidence was held insufficient to convict because the expert did not testify about

the specific stun gun used by the defendant, the gun was not deployed on the victim, and there was no in-court demonstration of the gun).

In *State v. Howes*, 875 N.W.2d 684, 686–87 (Iowa 2016), the court relied on a detective’s expert testimony strikingly similar to Detective Jaszczak’s testimony before arriving at the conclusion that a stun gun is a dangerous weapon as a matter of law even if it is inoperable. *Id.* at 690–93. The court rejected the same argument presented by Wright here; that “stun guns were not designed to immobilize, but rather to cause pain.” *Id.* at 691. The court relied on several dictionary definitions of “stun gun” indicating that the weapon is designed to immobilize or stun with an electric shock. *Id.* Because the Iowa legislature intended “to provide a generic description of a stun gun or taser, . . . it would not be necessary in each case to provide evidence and prove that every particular stun gun is capable of emitting high voltage and immobilization.” *Id.* In light of Iowa’s broad statutory definition of a dangerous weapon, similar to the broad statutory definition in Wisconsin and other states encompassing a variety of electric weapons including stun guns, *id.* at 692–93, “[t]here is no need to question witnesses regarding whether the specific stun gun or Taser involved in the case produces a certain amount of voltage, and no need to delve into the difference between immobilize versus incapacitate” *Id.* at 692.

In *Hogan*, this Court upheld the admissibility of a police detective’s expert testimony “about trends in human trafficking, including the methods and characteristics of traffickers and the common characteristics of their victims,” based on her “specialized knowledge” gained from extensive training and experience in human trafficking cases. 397 Wis. 2d 171, ¶ 2; *see id.* ¶¶ 8–16. The defendant did not challenge the expert’s qualifications or the relevancy of her testimony; he challenged only its reliability. *Id.* ¶ 27. This

Court upheld the trial court's decision to admit the detective's testimony because her "professional experience, education, training, and observations' were more meaningful indicators of reliability." *Id.* ¶ 29 (citation omitted). "From all these sources of experience, [the detective] was able to reach a generalized conclusion about common behavioral and personality traits of traffickers." *Id.* ¶ 30.

Wright relies heavily on the factors listed in *Daubert* for evaluating the reliability of scientific testimony. (Wright's Br. 26, 33–34.) But, as discussed above, those factors are not inflexible and may or may not apply depending on the nature of the expert testimony. "The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000).

Wright does not dispute that the Zap Stick he used on the victim was a stun gun that emits a seven-volt electric current. (R. 94:34.) In his opening statement at trial, Wright's counsel conceded that the video shows "he zaps her with this electric device called a Zap Stick." (R. 96:82.) Wright also does not dispute that he used it to inflict pain on the victim and did so intentionally. (R. 96:84–85; 95:33.) The jury saw Wright on the homemade video repeatedly zap the victim with the same Zap Stick stun gun introduced into evidence. The jury saw firsthand the demonstration of the Zap Stick stun gun in court by Detective Jaszczak. (R. 96:210.) The jury again saw firsthand during closing arguments the demonstration of the same Zap Stick stun gun by defense counsel on Wright. As defense counsel aptly observed, it was "startling." (R. 95:32.) In short, the jury saw on video and firsthand in the courtroom that the Zap Stick stun gun deployed by Wright on the victim during the assault operated the same as other electric stun

guns that Detective Jaszczak's training and experience over 25 years exposed him to.

As instructed, the jury did not have to accept Jaszczak's opinion. The jury reasonably accepted his expert opinion and found that the stun gun used by Wright on the victim was, like other stun guns, capable of immobilizing or incapacitating her with an electric current whether or not it in fact immobilized or incapacitated her. It found beyond a reasonable doubt that the Zap Stick used on the victim and demonstrated in court satisfied the statutory definition of "electric weapon," making it a "dangerous weapon."

The trial court properly exercised its discretion when it allowed Detective Jaszczak to describe the capabilities of stun guns in general. His expertise assisted the jury in deciding whether the Zap Stick stun gun that Wright intentionally used on the victim, and was demonstrated by both Jaszczak and defense counsel in court, was a dangerous electric weapon. This Court should defer to that reasonable decision. *See Dobbs*, 392 Wis. 2d 505 (upholding the trial court's discretion to exclude a defense expert's testimony about the factors that contribute to false confessions because it did not fit the facts of the case, *id.* ¶ 45, but acknowledging that the trial court in its discretion also could have found a sufficient fit to admit the testimony, and holding that the reviewing court must look for reasons to sustain the trial court's discretionary decision *id.* ¶¶ 47–48). This Court should affirm.

D. If the trial court should have excluded the detective's expert testimony, the error was harmless.

It is clear beyond a reasonable doubt that, if the admission of Detective Jaszczak's expert testimony was erroneous, it was harmless because it had little or no impact on the outcome of the trial. *State v. Harvey*, 2002 WI 93, ¶ 49,

254 Wis. 2d 442, 647 N.W.2d 189. Beyond a reasonable doubt, his testimony had no impact whatsoever on the strangulation and battery convictions because Wright's attorney conceded in argument to the jury at trial that he was guilty of battery (R. 96:82–83), and L.M. testified that Wright strangled her with his bare hands (R. 96:181.)

Wright does not challenge the sufficiency of the evidence to convict him of first-degree sexual assault. He argues only that the verdict may have been different had the jury not heard Detective Jaszczak's testimony. But the evidence that Wright had sexual intercourse with L.M. without her consent was overwhelming. (R. 96:171–85.) The violence was all graphically preserved on the video for the jury to see. (R. 96:217.) It wholly corroborated the victim's graphic testimony. (R. 96:171–85.) Beyond a reasonable doubt, Jaszczak's testimony had no impact on the first-degree sexual assault conviction.

The jury's finding that Wright used an electric weapon would remain unchanged even without testimony from the expert witness. Wright does not dispute that stun guns in general can be dangerous weapons because they are capable of immobilizing or incapacitating a person with an electric current. Wright does not dispute that he used an electric stun gun on L.M. (R. 96:82), and his attorney admitted in argument to the jury that Wright intended to inflict pain on her with it. (R. 96:84–85; 95:33.) Wright does not dispute that the stun gun he used on L.M. emitted an electric current. (R. 96:82.) The gun was operational and it was not a toy. Wright's use of the stun gun on L.M. as she cried out in pain was graphically preserved on the video for the jury to see. The Zap Stick stun gun used on the victim also was demonstrated in court for the jury to see. (R. 96:210; 95:32, 42.)

Wright only disputes whether the Zap Stick stun gun he used, as opposed to other stun guns, was designed to temporarily immobilize or incapacitate. He insists that the

State had to call someone from the manufacturer of Zap Stick to discuss its operation and effects. (R. 94:38–39; Wright’s Br. 22–23.) That witness, however, presumably would have repeated the description provided in the manufacturer’s instruction manual showing unequivocally that the Zap Stick stun gun, like other stun guns, emits an electric current and is designed to immobilize and incapacitate. (R. 48:2.)

Most important, the jury saw with its collective eyes how this particular Zap Stick stun gun operates both on the graphic video and in the “startling” courtroom demonstrations. (R. 95:32.) When defense counsel zapped Wright, according to the prosecutor, Wright briefly lost control of his arm. (R. 95:42.) If the jury agreed with the prosecutor’s observation, not challenged by Wright at trial, it supported the finding that this particular stun gun, like all others, was designed with the capacity to temporarily immobilize or incapacitate its target. It is, after all, called a “stun” gun—not a “pain” gun.

The jury did not need Detective Jaszczak’s opinion to confirm its finding that Wright’s stun gun was a dangerous weapon. The jury would have arrived at the same finding based on its observations on the video and in the courtroom of just how Wright’s stun gun operated and what it could do to a targeted individual. Beyond a reasonable doubt, the jury would have arrived at the same verdict without his testimony.

CONCLUSION

This Court should affirm the judgment.

Dated this 23rd day of November 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Daniel J. O'Brien
DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 294-2907 (Fax)
obriendj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6071 words.

Dated this 23rd day of November 2021.

Electronically signed by:

Daniel J. O'Brien

DANIEL J. O'BRIEN

Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of November 2021.

Electronically signed by:

Daniel J. O'Brien

DANIEL J. O'BRIEN

Assistant Attorney General