

concluded that termination was in the children's best interest.

Discussion

The balance between the competing priorities of family preservation and child welfare becomes increasingly complicated when cultural preservation is also considered. Within the context of maintaining Native American culture, the ICWA represents a shift toward the prioritization of the preservation of the family unit. The ICWA may have inspired other similar acts. The Adoption Assistance and Child Welfare Act (AACWA; Pub. L. No. 96-272)(1980) created the federal policy for foster care. States have widely interpreted it as promoting the reunification of families (Allen M, Bissell M: Safety and stability. . . . *Future Child* 14:49–73, 2004).

These acts represent a preventative, rather than reactive, approach. Instead of immediately displacing children, parents are provided with social support, including financial and housing assistance, as well as access to mental health treatment and parenting classes. The ICWA requires “active efforts” (*Lucy J.*, p 1111) to provide rehabilitative programs in comparison to the AACWA’s “reasonable efforts.” In addition, only the ICWA requires the use of experts in the family’s culture.

Almost 20 years after the AACWA, the balance between the perceived importance of family preservation versus child welfare shifted again. The Adoption and Safe Families Act of 1997 (Pub. L. No. 105-89)(1997) addressed the perception that child welfare was biased toward family preservation and that adoption as a permanent placement option was given little attention (Murray KO, Gesiriech S. Available at <http://pewfostercare.org/research/docs/Legislative.pdf>. Accessed September 1, 2012). However, the ICWA prevented this shift from affecting Native American families. In practice, it would be difficult to differentiate how the case if *Lucy J.* would have been handled if *Lucy’s* children had not met the ICWA standard. Other than the inclusion of tribal leaders and expert witnesses, the theoretical difference between the acts may not have a practical effect. When relevant personnel were questioned regarding the difference between active and reasonable efforts to prevent parental termination, 51 percent of state workers and 77 percent of tribal workers did not employ a different standard (Limb GE, Chance T, Brown EF: An empirical examination. . . . *Child*

Abuse Negl 28:1279–89, 2004). The researchers did not indicate whether this implied that all cases were judged at the higher active level or the lower reasonable level.

The definition of reasonable versus active efforts is even more complex in the context of addiction treatment. Research has consistently shown that, similar to chronic diseases, long-term recovery from alcohol addiction often requires repeated episodes of treatment (White WL, Boyle M, Loveland D: Alcoholism/addiction as a chronic. . . . *Alcohol Treat Q* 20: 107–29, 2002). In a termination case, the potential for protracted abstinence must be balanced against the harm children might endure if parental rights are retained. The ICWA adds a third element, cultural preservation, to the balance between family preservation and child welfare. The courts, with the aid of expert witnesses, are charged with ensuring that the best interests of the child are not outweighed in the required balancing act.

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Sleep Terrors and the Restriction of Expert Witness Testimony

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Expert Witness’ Testimony Can Reasonably Be Restricted if Unreliable

In *Rivera v. State*, 7 A.3d 961 (Del. 2010), the Supreme Court of Delaware considered whether the superior court, after a conviction of first-degree murder, had erred when it denied Mr. Rivera’s motion to suppress evidence found during a search of a motor vehicle and improperly restricted his psychiatric expert witness testimony at trial.

Facts of the Case

In October 2007, the body of Christine Pate was found floating in a river approximately 10 miles from her Delaware trailer home. According to the medical examiner, the physical condition of her body indicated that she had died of asphyxiation secondary to drowning, but she had also sustained blunt-force trauma to the head, a complicating cause of her death. Ms. Pate had been living with her friend Deanna Hall, who was divorced from Mark Rivera, who had previously lived in the home. Ms. Pate's boyfriend told investigating police that he had last seen Ms. Pate the night before her body was found and that Mr. Rivera had made advances toward her in the past. A neighbor also told police that, on the same night, he saw a man he thought to be Mr. Rivera carry a small-framed woman out of the woman's residence. He also reported having seen a second man inside the home. When police interviewed Mr. Rivera at his residence, they found a Pontiac Grand Am, registered to Ms. Hall, with dirt and blood samples that, on analysis, were likely matches to Ms. Pate's DNA profile. Police also noted fresh lacerations on Mr. Rivera's dominant (left) hand. He stated that he had been sleeping at home the night before but was unable to provide confirmatory witnesses.

In the trailer home, blood spots, tooth fragments, and hair clumps with DNA matching Ms. Pate's were found, indicating she had been physically attacked and had struggled with her assailant. The medical examiner stated that the manner of death was homicide and that her injuries were consistent with an attack by a left-handed person. The medical examiner also found that Ms. Pate might have survived had she received medical attention shortly after sustaining her injuries.

Police also spoke with Ms. Hall, who stated that her relationship with Mr. Rivera had ended, in part, because he had become increasingly violent toward her during reported sleep terror episodes. To provide data for expert witness testimony, Mr. Rivera subsequently participated in a sleep study, which did not reveal any such episodes.

Mr. Rivera was convicted of first-degree murder after a jury trial. Before the trial, he filed a motion to suppress the evidence found in the car and argued that the police lacked sufficient probable cause. The court denied the motion.

Dr. Burton T. Mark, Mr. Rivera's expert witness, prepared a report and provided testimony at trial based on a review of the sleep study, statements made to police, and prepared statements. Dr. Mark did not meet or speak with Mr. Rivera. The court allowed Dr. Mark to testify regarding whether or not Mr. Rivera had sleep terrors, but he was not permitted to present his view that he had experienced a sleep terror the night Ms. Pate was killed. Mr. Rivera appealed this decision as well as the denial of the motion to suppress the evidence found in the car.

Ruling and Reasoning

The Supreme Court of Delaware found that the trial court had not erred by refusing to grant the motion to suppress evidence revealed in the motor vehicle search and had not improperly restricted the psychiatric expert's testimony.

Regarding the motion to suppress the evidence found during the vehicle search, Mr. Rivera argued that the trial court had erroneously denied the motion, reasoning as follows: the trial court judge had relied on the mistaken belief that Ms. Hall was a missing person when determining there was probable cause for the search of the vehicle; and the police had "recklessly" omitted facts that, had they been revealed, would have prevented the finding of probable cause. The higher court noted that the trial court judge had not made the determination of probable cause based on Ms. Hall's status as a missing person. Rather, it was based on multiple facts presented in an affidavit, including that Ms. Pate's injuries were consistent with an assault by a left-handed person and Mr. Rivera had fresh lacerations on his left hand; that he had frequently contacted Ms. Pate regarding his ex-wife; and that the car was in Mr. Rivera's possession when the police interviewed him. Regarding Mr. Rivera's second argument, although the supreme court expressed concerns that the police did not disclose important information, it found that the inclusion of the omitted facts, whether recklessly omitted or not, would not have been necessary, or "material," for a finding of probable cause or lack thereof.

Mr. Rivera also argued that the trial court had improperly restricted Dr. Mark's testimony regarding whether he had experienced sleep terrors on the night of Ms. Pate's death, testimony necessary to disprove that he had the requisite state of mind to establish first-degree murder. The higher court noted a discrepancy in the arguments presented by the par-

ties to address the question of whether the testimony had been improperly restricted. On the one hand, the defense and the state cited case law relevant to Del. R. Evid. 704 (2001), which pertains to the admissibility of expert witness testimony when it “embraces” an ultimate legal issue. On the other hand, the parties presented their arguments overall in terms of Del. R. Evid. 702 (2001), which requires that expert witness testimony, to be admissible, must be “based upon sufficient facts or data” and “a product of reliable principles and methods” and that “the witness [must have] applied the principles and methods reliably to the facts of the case.” Given that the argument in the lower court was framed in terms of Del. R. Evid. 702, the higher court restricted its assessment of the trial court’s decision to the question of whether it reasonably based its decision upon the principles of Del. R. Evid. 702. Although it appeared that Dr. Mark had reviewed the sleep study, the higher court noted that his testimony was based only on Mr. Rivera’s prepared statement and the statements of third parties who were not qualified medical experts and noted that he had not conducted an independent examination of Mr. Rivera. For these reasons, it was reasonable, not an abuse of discretion, for the lower court to find that there were not “sufficient facts or data” (Del. R. Evid. 702) to render Dr. Mark’s testimony admissible. Moreover, given that a conclusion regarding whether Mr. Rivera experienced sleep terrors would be based on this insufficient data, it was also not an abuse of discretion for the lower court to restrict the expert’s testimony based on a concern that the methodology was not reliable. Finally, although Dr. Mark was not allowed to testify as to whether Mr. Rivera was experiencing a sleep terror the night Ms. Pate died, he did present his view that Mr. Rivera had sleep terrors, and presented Mr. Rivera’s version of the events of that night in a light favorable to the view that he did not have the requisite *mens rea* to be convicted of first-degree murder. That is, the restriction on Dr. Mark’s testimony did not, as the defense had argued, prevent Dr. Mark from providing evidence regarding Mr. Rivera’s state of mind on the night in question.

Discussion

This case was reviewed on the basis of Del. R. Evid. 702, addressing whether the expert’s testimony would be reliable and based upon sufficient information. The American Academy of Psychiatry and the

Law’s *Ethics Guidelines for the Practice of Forensic Psychiatry* (May 2005; available at <http://aapl.org/ethics.htm>. Accessed November 30, 2012) stipulate that, in most circumstances, a forensic psychiatrist must examine an individual. If examination is not possible, then the psychiatrist should make this limitation explicit and delineate how it may constrain the resulting opinion. According to a review article by Siclari *et al.* (*Brain* 133:3494–509, 2010), diagnostic procedures relating to sleep disorders associated with violence generally include polysomnography; home videos when possible (as various sleep disorders do not occur in the laboratory setting); and a history and a general physical, neurological, and psychiatric examination. In the present case, it is not clear why an independent examination was not conducted. Although there may have been legitimate reasons not revealed in the higher court’s decision, the court was concerned about the adequacy of the data presented and the resulting methodology. This case illustrates both the importance of performing comprehensive and transparent evaluations and a central danger of not doing so, a potential loss of credibility with the court system that restricts the utility of the forensic work.

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Difficulties in Determining Competency and Appropriate Sentences for Defendants With Intellectual Impairments

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The State Is Not Required to Adopt a Higher Competency Standard to Waive Counsel for Mentally Ill and Intellectually Impaired Defendants

In *State v. Bell*, 53 So. 3d 437 (La. 2010), the Louisiana Supreme Court reviewed the appeal of Anthony Bell, who argued that the trial court erred in