

present to reject the Supreme Court's guidance in *King*. The California court ruled that the defendant was lawfully arrested and a request for a DNA sample at booking was not unreasonable and, therefore, did not violate the California Constitution.

Dissent

Associate Justice Goodwin Liu wrote the first dissent and cited several disagreements. The dissent argued that a defendant cannot be convicted of refusing to provide a DNA sample in the absence of a valid arrest by judicial determination. Additionally, the dissent disagreed with the majority's assumption that the U.S. Supreme Court's decision in *King* was correct. The dissent ruled that Mr. Buza's misdemeanor refusal conviction was invalid under the California Constitution.

Associate Justice Mariano-Florentino Cuéller wrote the second dissent and was joined by Justice Dennis Perluss. The second dissent echoed the arguments within the first dissent and cited additional disagreements with the majority decision. The dissent rejected the idea that arrestees have a diminished expectation of privacy and argued that, under California law, arrestees are provided greater protection against searches than under federal law. The dissent argued that governmental interests did not outweigh the arrestee's right to bodily autonomy and privacy of DNA information. The dissent ruled that the state did not prove reasonableness of its searches to outweigh the intrusion on an individual's reasonable expectation of privacy.

Discussion

The *Buza* case highlights the balancing between governmental interests and individual privacy expectations. The Supreme Court of California relied heavily upon *Robinson* and *King* to support the constitutionality of California's DNA Act, as it applied to Mr. Buza, ruling that the Act did not violate his search-and-seizure protections under the California Constitution and the Fourth Amendment. Balancing of governmental interests of identification and assistance in processing arrestees with arrestees' expectations of privacy at the time of arrest and booking led this court to determine that DNA collection did not violate Mr. Buza's search-and-seizure rights under the California Constitution and Fourth Amendment. The court acknowledged that DNA technological advances may affect this balance in the future.

Forensic Expert Witness Testimony Admissibility

Joshua Griffiths, MD

Fellow in Forensic Psychiatry

Richard Martinez, MD, MH

*Robert D. Miller Professor of Forensic Psychiatry
Director, Psychiatric Forensic Services*

Division of Forensic Psychiatry

Department of Psychiatry

*University of Colorado Denver School of Medicine
Colorado Office of Behavioral Health
Denver, CO*

Lack of Familiarity with Specific Test Protocol Does Not Render Inadmissible the General Testimony of an Otherwise Qualified Forensic Expert Witness

DOI:10.29158/JAAPL.3797L1-18

In *State of South Dakota v. Jonathan Charles Wills*, 908 N.W.2d 757 (S.D. 2018), the South Dakota Supreme Court reversed and remanded a state circuit court conviction of Mr. Jonathan Wills for first-degree rape and sexual contact with a child under 16 because of the trial court's decision to exclude expert forensic psychiatric testimony. Using expert witness standards from South Dakota Codified Laws (SDCL) 19-19-702 (2016) and the U.S. Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the South Dakota Supreme Court concluded that the trial court had misapplied the state's expert witness standard. Wills argued that because the case was dependent on the weight given to expert witness testimony, the decision to exclude Wills' expert created unfair prejudice against him. Mr. Wills contended that precluding his expert from testifying about the methods used by the state's forensic interviewer was inappropriate and warranted a new trial.

Facts of the Case

Mr. Wills lived with his girlfriend, Ms. Lisa Trebelcock, and her three children in Beadle County, South Dakota. Shortly after Mr. Wills' relationship with Ms. Trebelcock ended, Ms. Trebelcock reported Mr. Wills to police for the alleged sexual abuse of one of her children. Mr. Wills alleged that Ms. Trebelcock "set up" the allegations of abuse to obtain custody of the children. Ms. Robyn Niewenhuis, a forensic social worker, conducted a structured

interview of the alleged victim using the CornerHouse protocol, a protocol for the forensic interview of alleged underage victims or witnesses of sexual abuse. Ms. Niewenhuis had a master's degree in social work and had completed a one-week course in the administration of the CornerHouse protocol. She had also performed more than 480 forensic interviews.

During the forensic interview, the alleged victim reported various forms of sexual abuse by Mr. Wills. The alleged victim testified at Mr. Wills' trial regarding the alleged abuse and the jury was shown the video of her interview with Ms. Niewenhuis. The state also called Ms. Niewenhuis as an expert witness on forensic interviews. In her testimony, Ms. Niewenhuis explained the CornerHouse protocol and how she used the protocol to interview the alleged victim. Ms. Niewenhuis testified that she saw no "red flags" with the child's description of the alleged abuse.

At trial, Mr. Wills called Dr. Sarah Flynn, a forensic psychiatrist who alleged a number of flaws in Ms. Niewenhuis' interview. Specifically, Dr. Flynn believed that Ms. Niewenhuis had asked questions repeatedly and in a way that suggested bias. She also believed that the alleged victim appeared to recant a statement at one point and that Ms. Niewenhuis failed follow-up on this. Dr. Flynn assured the court that her testimony was only to opine on the quality of the interview, not the truthfulness of the alleged victim. Dr. Flynn had completed general psychiatric residency and fellowships in child and adolescent psychiatry as well as forensic psychiatry. She was board-certified in general psychiatry as well as child and adolescent psychiatry. She was employed as a forensic psychiatrist at the time of the trial. Dr. Flynn admitted that she had only conducted one forensic interview of a child victim in her career and was only familiar with the CornerHouse protocol based on literature and research she had read. However, she noted that forensic psychiatrists were trained to review an interview and give opinions on the quality of the interview. She also had been trained according to the National Institute of Child Health and Human Development method of forensic interviewing, a research-based and nationally recognized protocol for the forensic interview of children.

Despite this, the trial court ruled that Dr. Flynn was not qualified to give an expert opinion on forensic interviews because she was not sufficiently familiar with the CornerHouse protocol. The trial court

characterized Dr. Flynn's proposed critique of Ms. Niewenhuis' interview as "rank speculation" (*Wills*, p. 765). The trial court based its exclusion of Dr. Flynn's testimony on South Dakota state statute (SDCL 19-19-702, eff. January 1, 2016), a statute that adopts Federal Rule of Evidence 702, as well as standards set forth in *Daubert*. The jury found Mr. Wills guilty of first-degree rape and sexual contact with a child under 16. Mr. Wills appealed the conviction to the South Dakota Supreme Court.

Ruling and Reasoning

The South Dakota Supreme Court concluded that the trial court erred in excluding Dr. Flynn's testimony, reversing and remanding for a new trial. In its decision, the court quoted the previous South Dakota Supreme Court case of *State v. Fisher*, 805 N.W.2d 571, 580 (S.D. 2011) which gave specific guidance for applying *Daubert* criteria, stating, "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." In reviewing the evidence of the case, Dr. Flynn's proposed testimony, and Dr. Flynn's qualifications, the court reasoned that the trial court had misapplied *Daubert* standards as encapsulated in SDCL 19-19-702 (2016). That is, the court reasoned that Dr. Flynn's specialized knowledge would have assisted the trier of fact in understanding the evidence.

The court noted that Dr. Flynn had "extensive education, training, knowledge, and experience in child psychiatry and forensic interviewing" (*Wills*, p. 765). The court noted that both Dr. Flynn and Ms. Niewenhuis had been trained in generally accepted interview protocols. They added that Dr. Flynn reported using the National Institute of Child Health and Human Development protocol as a matter of preference and out of the opinion that it was supported by a greater evidence base than the CornerHouse protocol. The court further reasoned that Dr. Flynn and Ms. Niewenhuis had both trained in forensic interviewing and agreed-upon general principles of forensic interviewing, such as the importance of remaining neutral and avoiding leading questions. The court noted that Dr. Flynn's proposed criticism of Ms. Niewenhuis' interview was not merely speculation about the proper administration of an unfamiliar test protocol, rather what Dr. Flynn believed to be violations of general principles

of forensic interviewing. The court cited another South Dakota Supreme Court case, *State v. Guthrie*, 627 N.W.2d 401, 417 (S.D. 2001): “When opposing experts [have] contradictory opinions on the reliability or validity of a conclusion, the issue of reliability becomes a question for the jury.” Furthermore, in *Daubert*, the U.S. Supreme Court noted, “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence” (*Daubert*, p. 596). The court explained that Dr. Flynn’s lack of personal experience with the interview protocol might affect the weight placed on her testimony but did not render the testimony inadmissible. The court opined that the trial court record established Dr. Flynn as a qualified expert in child forensic interviews and that her experience as a child psychiatrist could assist the jury in evaluating Ms. Niewenhuis’s interview of the child. The court reversed and remanded, ordering a new trial for Mr. Wills.

Discussion

There appears to be tension between permissive and strict modes of applying *Daubert* criteria in determining the admissibility of scientific testimony. The South Dakota Supreme Court with its ruling in this case does not appear to advocate for one extreme or another. Rather, it identifies what it considers to be a too-narrow application of *Daubert* as encapsulated in SDCL 19-19-702. In *Wills*, the South Dakota Supreme Court concluded that experts need not be intimately familiar with all aspects of an opposing expert’s protocol to be considered qualified to provide assistance to the trier of fact that is meaningful. The ruling is particularly salient with regard to psychiatric and psychological testimony given the proliferation of scales, testing, and instruments in forensic practice. Some might argue and this ruling suggests that it is expecting too much of reasonably qualified forensic experts to be intimately familiar with and trained in the administration of all possible instruments an opposing expert might employ. While this decision would not give an opposing expert license to comment on whether an unfamiliar test was administered according to protocol, it would allow for the general critique of another expert’s adherence to general principles and standards of practice within a general subject area. It encourages trial courts to have some flexibility in admitting forensic experts, especially when

the outcome may well depend on the jury’s assessment of the weight given conflicting expert testimony.

Defendant’s Entitlement to an Independent Psychiatric Expert to Aid Defense in Determination of Competency to Proceed

Brian Kristoff, MD
Fellow in Forensic Psychiatry

Richard Martinez, MD, MH
Robert D. Miller Professor of Psychiatry and Law
Director, Psychiatric Forensic Services

Division of Forensic Psychiatry
Department of Psychiatry
University of Colorado Denver School of Medicine
Colorado Office of Behavioral Health
Denver, CO

Arkansas Supreme Court Held That Law of the Case Doctrine Precluded Reconsideration of Challenges Previously Rejected in Death Penalty Case; an Evaluation at the State Hospital Was Sufficient to Satisfy *Ake v. Oklahoma*, and *McWilliams v. Dunn* Did Not Require the Court to Meet Any Additional *Ake* Requirements

DOI:10.29158/JAAPL.3797L2-18

In *Ward v. State of Arkansas*, 2018 Ark. 59 (Ark. 2018), the petitioner, Mr. Bruce Earl Ward, argued that he was entitled to an independent defense expert. Mr. Ward was convicted of murder and sentenced to death for strangling a convenience store worker in 1989. After multiple appeals and sentence reversals extending over many years, Mr. Ward was eventually resentenced to death by the Arkansas State Supreme Court in 1997. In a motion in 2017, Mr. Ward asserted that the court erred in not following precedent set in *Ake v. Oklahoma*, 470 U.S. 68 (1985) because he was not afforded an independent mental health expert to aid in his defense. In addition, Mr. Ward requested a stay of execution until the U.S. Supreme Court issued its opinion in *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), as it could have a direct impact on his case. The Arkansas Supreme Court granted the stay and took the motion to consider Mr. Ward’s claims.