**EXCERPTS FROM CROSS-EXAMINATION OF PSYCHOLOGIST TESTIFYING AS**

**DEFENSE EXPERT SUPPORTING NON-RESPONSIBILITY DEFENSE**

**IN SEXUAL ABUSE CASE**

##### State of Wisconsin

**By Prosecutor:**

**Q.** Dr. F., you are a Ph.D. not an M.D.; is that correct?

**A.** That’s correct.

**Q.** And the business that you are employed with, is that a self-proprietorship?

**A.** Yes, it is.

**Q.** And you are the head of that particular business?

**A.** That’s correct.

**Q.** Now, you were specifically retained by the defense attorney in this case, Mr. J.W., to conduct your examination of Mr. N.; is that correct?

**A.** Yes.

**Q.** And you were paid for conducting that particular examination by Mr. W.; is that right?

**A.** Probably the pay of that is in process, yes.

**Q.** Well, you were not hired by the Court to conduct any examinations of Mr. N.?

**A.** That’s correct.

**Q.** And you were not compensated by the Circuit Court for any work in this particular case; is that right?

**A.** Correct.

**Q.** Can you inform the jury, Doctor, as to the charge for your examination of Mr. N.?

**A.** I’d have to check the billing to be exact on that, but the charge is $75 per hour.

**Q.** And what is the nature of—You are being paid for your testimony here today in court also; is that correct?

**A.** That’s right. That would be paid for privately by the defendant or his family.

**Q.** And what is the charge for your testimony here today in court?

**A.** $75 per hour.

**Q.** Now you indicated that previously you have participated in approximately 75 to 100 cases where you did psychological evaluations for the court systems; is that correct?

**A.** I don’t recall making that specific statement. For the court system? You mean at the request of the Court?

**Q.** No, in conjunction with people who were charged with criminal offenses.

**A.** Oh, yes. I would say so, yes.

**Q.** But you have only conducted between five and seven specific examinations designed to determine a defendant’s criminal responsibility; is that correct?

**A.** At the request of the Court not at the request of attorneys.

**Q.** How many have you conducted in that regard for attorneys on that particular issue?

**A.** Oh, I would say that would number into probably 40 or 50.

**Q.** So you have conducted previously 40 to 50 non-responsibility examinations during the course of your employment as a—

**A.** No, sir, not responsibility just criminal. At times I’ve been asked to perform a psychological evaluation to aid the attorney in developing his case to help decide on the sentencing outcome.

**Q.** I see. How many specifically have you conducted examinations of criminal defendants for the express purpose of determining their mental responsibility at the time of the offense?

**A.** There would be in the nature of four to five.

**Q.** And on all of those instances when you conducted those evaluations, those were at the behest of a defense attorney; isn’t that correct?

**A.** To my memory, that is correct.

**Q.** You have never been hired by the State of Wisconsin or the District Attorney’s Office in Kenosha to conduct such an evaluation; is that correct?

**A.** I believe that’s correct, yes.

**Q.** And in fact have you ever been hired by the District Attorney’s Office or the State of Wisconsin to conduct any examinations of criminal defendants in any capacity?

**A.** I don’t recall any.

**Q.** You are not a forensic psychiatrist; is that correct?

**A.** Correct.

**Q.** Do you know what a forensic psychiatrist is?

**A.** Forensic psychiatrist?

**Q.** Yes, sir.

**A.** I suppose in a general sense.

**Q.** Well, would you give us your interpretation of what you understand a forensic psychiatrist to be?

**A.** One who examines people psychiatrically in terms of trying to provide information that would relate directly to the law.

**Q.** Specifically, those are the types of people that most routinely conduct non-responsibility examinations?

**A.** I would think so.

**Q.** And there is a certification for that particular practice in the State of Wisconsin; isn’t that correct?

**A.** I’m not familiar.

**Q.** You don’t have certification, do you?

**A.** No. If there is such a certification, I do not have that.

**Q.** How many times have you testified previously in non-responsibility types of cases?

**A.** In any kind of case, sir?

**Q.** No, specifically on the issue of a defendant—criminal defendant’s non-responsibility for a particular criminal offense with which they’ve been charged.

**A.** I would say four to five.

**Q.** And in each one of those cases you have supported the position, have you not, Doctor, that that defendant was not legally responsible for his conduct?

**A.** The cases that I have appeared in court, that is true.

**Q.** Now, in conducting this particular examination of G.N., can you inform the jury as to the specific reason why you were hired to conduct an evaluation of Mr. N.?

**A.** To my recollection the initial request was to ascertain the current level of—it was probably—I’m sorry. It was to determine the competency of the individual to stand trial on the recent criminal charges.

**Q.** That is a different determination than determining whether a person is criminally responsible for a particular offense; isn’t that right?

**A.** Yes. That’s my understanding.

**Q.** And what other reasons were you hired for in this particular case?

**A.** As I understand it, I was hired to provide data as to whether Mr. N. was in fact responsible for his actions, to provide a picture of his psychological status, and to provide some recommendations on what might be suitable for him treatment-wise.

**Q.** Doctor, did you conduct your examination of Mr. N. with all of those objectives in mind?

**A.** Generally speaking, yes.

**Q.** So in large measure a portion of your evaluation of Mr. N. Was oriented towards aspects which are not being presented to the jury here today; isn’t that right?

**A.** I don’t—I don’t understand, sir.

**Q.** Well, Doctor, you’ve listed a number of things that you did, one, evaluate for his competency to stand trial. And we’re not here today on that issue; isn’t that right?

**A.** That’s my understanding. That’s correct.

**Q.** And one of the things that you evaluated him for was to determine possible treatment recommendations, and we’re not here to decide that here today either, are we?

**A.** Okay.

**Q.** So of the three things that you listed, two of them had nothing to do with your testimony here today in court; isn’t that correct?

**A.** I suppose not.

**Q.** And in terms of determining Mr. N.’s current psychological status, what do you mean those words to be, an assessment of his current psychological status?

**A.** That was at the time that he was assessed to assess his mental status as well as his intellect at that time.

**Q.** What do you mean by mental status, Doctor?

**A.** That is whether or not there are—whether this man has problems of mental disease, nature, whether or not he’s depressed, whether he has anxiety, whether he appears to be mentally ill, whether or not he has serious mental pathology present.

**Q.** Isn’t that something that’s quite different from making a specific determination as to whether or not an individual is legally non-responsible?

**A.** It probably is, sir.

**Q.** So in fact in this particular case you were not hired to conduct an evaluation of Mr. N. for the express purpose of determining whether or not he was legally responsible; isn’t that right?

**A.** I would have to agree.

**Q.** And, in fact, your conclusions that he is not responsible were something of an afterthought after you conducted your evaluation of Mr. N.; isn’t that right?

**A.** I don’t think I would go quite that far, to say it was a complete afterthought.

**Q.** Well in fact the portion of your particular report, which I believe is marked as State’s Exhibit No. 2, contains a portion which says summary and conclusions. And it is in the final sentence of that particular area of the report that you make the statement, finally, in this examiner’s opinion Mr. N. was not actually responsible for his actions due to the lack of knowledge and understanding his behavior was wrong due to the significant mental defect.

Wouldn’t you say, Doctor, that that was really your final conclusion in this whole process and that it came really at the end of the conclusion that you made in this case?

**Defense Counsel:** Objection, your Honor. That’s a compound question.

**THE COURT:** Sustained.

**Q.** (by prosecutor) Well, in terms of Mr. N.’s responsibility for this criminal offense, that particular sentence is the only portion of your report which deals specifically with that substantive issue; isn’t that right?

**A.** I imagine that’s right.

**Q.** And you did file a five-page report with the Court?

**A.** Yes.

………………………………………

**Q.** When you conduct an evaluation to determine an individual—a criminal defendant’s legal responsibility, what do you consider to be the most important information that you receive in making your determination?

**A.** Well, let me just state that I ordinarily—I’ve had a lot of experience in evaluating people, but I would certainly admit that in most—well, over 90 percent of the cases I’m not asked to conduct an evaluation specifically for that purpose. So I really can’t answer that question, sir.

**Q.** Well, would you consider it important for you to receive information regarding the specific nature of the acts that are alleged to have taken place?

**A.** That is possible. I really don’t know.

**Q.** Would you consider it important information to know whether or not the person you were examining ever made any statements to anybody regarding the nature of the offense?

**A.** Again, I really don’t know.

**Q.** Would you consider it important to have information regarding an individual’s self-professed or self-claimed motivations for why he committed a particular act?

**A.** That’s possible. In this case I was not provided background information.

**Q.** Nor did you request that information, did you, Doctor?

**A.** That’s correct. That’s correct.

**Q.** And you could have obtained information either from Mr. Ward or from the District Attorney’s Office if you had requested that in your experience; isn’t that right?

**A.** I would assume so.

**Q.** Well, Doctor, did you consider it important to be able to look at the criminal complaint that had been filed against Mr. N.?

**A.** Not really. I—I’ve done quite a number of evaluations without knowledge of the background, and I think that it’s important for my own defense of what I’ve done here is that I did not go into the evaluation with that specific purpose in mind; therefore, I rarely have asked for background information. I guess what you are telling me that it’s necessary in this case, but that was not the reason for my—real reason for my evaluation.

**Q.** Doctor, I’m not suggesting any opinion whatsoever. I’m asking what your opinion is. Did you consider it important in this particular instance to obtain any information such as police reports which may have documented Mr. N.’s behavior, which was at issue in this case?

**A.** The answer would be I didn’t consider it important because I didn’t do it.

**Q.** Well, in other cases have you done that where you have conducted this type of an evaluation?

**A.** As I mentioned, I don’t conduct evaluations really to declare legal responsibility for one’s acts so I rarely do that.

**Q.** Well, you didn’t review any statements of witnesses regarding Mr. N.’s behavior involving these criminal offenses, did you?

**A.** No.

**Q.** You didn’t review any police reports?

**A.** No.

**Q.** You didn’t review Mr. N.’s statements to the police regarding his commission of these offenses; is that correct?

**A.** No.

**Q.** And you didn’t review the reports of Dr. I., who had been hired by the Court to conduct a competency evaluation on Mr. N., did you?

**A.** No.

**Q.** You based your conclusions and your opinion in this particular case solely on the tests which you conducted of Mr. N. and the interview that you conducted of Mr. N.?

**A.** That’s correct.

**Q.** Doctor, what do you understand the words in terms of—The statute that a defendant is capable of appreciating the wrongfulness of his behavior, what do you interpret that particular language under the statute to mean?

**Defense Counsel:** Object to the nature of the question. His interpretation of the statute is not relevant.

**THE COURT:** He’s given the opinion.

**Defense Counsel:** Well, he can ask what his opinion—what he testified to, but he’s asking him to interpret a statute, and that’s not his—

**THE COURT:** No. He’s asking him to understand what that language means in terms of his opinion. I—I’m not sure I agree it’s that relevant, but I’ll allow him to say what he determined it to mean because he gave that opinion so—

**A.** I would interpret that to mean that whether or not the person was able to comprehend the entire situation as to whether it was wrong or right and to be able to take that information, conceptualize it, and apply it to a given situation.

**Q.** (by prosecutor) And in your particular—In this particular case, your opinion is that Mr. N. was unable to appreciate that having sexual contact or fellatio with a nine-year-old boy was wrong behavior; isn’t that right?

**A.** I wouldn’t go so far as to say that. I would go so far as to say that he might have known that it was wrong in the sense of a young child knowing something was wrong like disobeying your parent, but I do not feel that Mr. N. knew that it was wrong in terms of the law and how it was punishable and any of the other aspects that went along with wrongfulness.

**THE COURT:** Excuse me. Mark that spot, C.

……………………………………..

**Q.** (by prosecutor) Well, Doctor, if the standard that’s to be decided isn’t whether or not Mr. N. knew that having sex with a child was against the law or against a Wisconsin statute, would your opinion as to whether or not he was capable of appreciating the wrongfulness of his behavior change?

…………………………………..

**A.** It might.

**Q.** Well, specifically, if the determination was to be whether or not he knew that having sex with a child was wrong, would your opinion be that Mr. N. was capable of making that appreciation?

**A.** I believe that he probably would be.

**Q.** In your opinion, Mr. N. was capable of appreciating that he had been charged with a criminal offense, correct?

**A.** Yes.

**Q.** He was capable of understanding that he had been alleged to have violated the law, correct?

**A.** Yes.

**Q.** You specifically found that Mr. N.’s mental age was that of an 11 or 12-year-old; is that correct?

**A.** That’s the closest that I can estimate it at on the basis of his test scores.

**Q.** Doctor, is it your opinion that most 11 or 12-year-olds are capable of appreciating that having an adult having sexual relations with a minor is improper behavior or wrongful behavior?

**A.** I guess I would answer that to the extent of what that appreciation really is. I think that probably in our society a vast majority of children of that age do have a pretty good idea that something like that is wrong. How much they really know about that in detail and conceptual understanding is certainly another question.

………………………………….

**Q.** Doctor, you never specifically questioned Mr. N. regarding whether or not he knew that having sex with a minor child, in this particular case, M.B., was or was not wrongful, did you?

**A.** No.

**Q.** And you never asked him any general questions regarding adults having sexual contact with minor children as to whether or not that was wrong or not, did you?

**A.** No. I don’t think so.

**Q.** Wouldn’t you say that Mr. N.’s ability to answer those particular questions would be pretty important in your ability to make a determination?

**A.** Yes, I’d agree that it would be important.

**Q.** Well, then why in this particular case did you not ask those questions, Doctor?

**A.** I really can’t answer that.

**Q.** Well, you are rendering your opinion here today to a reasonable degree of psychological certainty; is that correct?

**A.** I’m trying.

**Q.** Are you willing to base that opinion solely on the information that you’ve received without ever having conducted the types of inquiries that I’ve questioned you about before?

**A.** It’s my feeling, sir, ,that there are other aspects of the total disposition of this case that would come into play besides my report alone.

**Q.** In other words, what Mr. N. may have said or not said at the time of the offense itself?

**A.** Any—any—any aspect of it, yes.

**Q.** Well, you are ready and willing to offer your opinion under oath to a reasonable degree of psychological certainty without ever having questioned Mr. N. as to his own personal understanding about the alleged behavior in question as to whether or not it was wrongful or not; isn’t that right?

**A.** You see, in my evaluation of Mr. N. I didn’t have, as we discussed earlier—I didn’t have the specific information I was evaluating him for in a general sense you might say then in specific regarding either boy or boys.

**Q.** Well, Doctor, if I were to tell you that Mr. N. gave a statement to Detective L. on the date when one of these particular incidents took place, that being April 15, 1989, and in that particular statement Mr. N. told Det. L. that on several occasions he had had sex with this young boy, M.B., would you consider that information to be important in making your determination as to whether or not Mr. N. was capable of appreciating the wrongfulness of his behavior?

**A.** It would be important information

**Q.** And if Mr. N. gave such admissions to the police officers, would you consider that to be an acknowledgment that he appreciated the wrongfulness of his behavior?

**A.** I don’t know as I would go that far.

**Q.** Well, what if he had told the person who had walked in on him at the McDonald’s where the acts took place that it wouldn’t happen again and he was sorry for his behavior? Would you consider that to be information which would bear upon Mr. N.’s ability to appreciate the wrongfulness of his behavior?

**A.** Yes.

**Q.** And if in fact those statements had been made, and if in fact Mr. N. had told that particular person who caught him at McDonald’s that he was sorry and it wouldn’t happen again, would that in your opinion indicate that Mr. N. did appreciate the wrongfulness of his behavior?

**A.** It would suggest to me that he had some appreciation; that’s correct.

**Q.** If Mr. N. had told the young boy who he was sexually assaulting, in this case M.B., not to tell anybody about his behavior, would that in your opinion indicate that Mr. N. was capable of appreciating the wrongfulness of his behavior?

**A.** I would it would have a bearing.

**Q.** In other words, that information would indicate some appreciations for the wrongfulness of his behavior?

**A.** Yes.

**Q.** If Mr. N. had indicated to the police officers at the time he was apprehended by them that he hoped his parents wouldn’t find out about the incidence in question, would that in your opinion indicate that Mr. N. was capable of appreciating the wrongfulness of his behavior?

**A.** I would think so.

**Q.** Doctor, if all of those things were true in this particular case, and accepting those as true by way of a hypothetical, would it change your opinion of Mr. N. in this particular case?

………………………………….

**A.** If we had all those—If I had all those facts, that may have influenced my conclusions.

**Q.** Well, would it change your opinion?

**A.** It would change my opinion to the extent that it would show some degree of appreciation for the wrongfulness of his acts.

**Q.** Enough to meet the legal criteria in your opinion that he was capable of appreciating the wrongfulness of his behavior?

**A.** I’m not sure I can answer that. It would—It would certainly influence my opinion, that’s correct.

**Q.** Doctor, are you aware of where these particular alleged incidents of sexual contact between Mr. N. and M.B. took place?

**A.** I was sitting in the courtroom today, and I heard the statements made to the jury about that.

**Q.** In the criminal complaint by the Judge?

**A.** Yes. That’s all I know about it.

**Q.** Doctor, if I were to advise you that Mr. N. had told the police that several of the incidents took place in bathroom stalls at the McDonald’s and in private residences, would that in your opinion indicate to you any information regarding whether or not Mr. N. was capable of appreciating the wrongfulness of his behavior?

**A.** Yes, I suppose, if he had admitted that.

**Q.** It suggests that Mr. N. was attempting to conceal his behavior, does it not?

**A.** It could be a conclusion.

**Q.** Are you aware that Mr.—If Mr. N. had offered money to the young boy in question as a means of keeping him from relating specific information to others about this particular—these particular acts, would that in your opinion indicate that Mr. N. was capable of appreciating the wrongfulness of his behavior?

……………………………………..

**A.** Yes, I would say that would be an indication.

……………………………………

**Q.** If Mr. N. had been read *Miranda* rights by the police department; that is, the right to remain silent, the right to have an attorney, the right to consult with an attorney before questioning, the right to refuse to answer questions, and then had proceeded to give a detailed statement regarding his participation in various acts of sexual behavior with M.B., would that indicate to you, Doctor, that Mr. N. appreciated the wrongfulness of his behavior with respect to conduct involving M.B.?

**A.** I’d have to say that’s a possibility, yes, possibly true.

**Q.** Doctor, if Mr. N. upon initially being confronted by law enforcement officers outside of the McDonald’s restaurant where one of these incidents took place initially responded to the questions by law enforcement as to why Mr. N. thought the law enforcement officer was there, and if Mr. N. then responded in a questioning manner for a “sexual assault,” would that in your opinion indicate that Mr. N. was aware or capable of appreciating the wrongfulness of his behavior?

**A.** If that were the case, that would certainly be an indication.

**Q.** And if Mr. N. had informed that same law enforcement officer, and I quote, “I didn’t expect him to call right away; I thought he would wait a few minutes,” referring to the person who caught him in McDonald’s and had summoned the police out to that location, would that in your opinion indicate that Mr. N. appreciated the wrongfulness of his behavior?

…………………………………….

**A.** Given that, yes.

**Q.** If Mr. N. were engaging in these acts with this young boy in the stall of the restroom at McDonald’s and one of the employees had come into the bathroom, at which point Mr. N. then got up off the floor where he was with this boy, would that indicate to you that Mr. N. was aware that what he was doing was wrongful?

**A.** Yes, it would.

**Q.** …Doctor, if Mr. N. had told Det. L., the detective who interviewed him on the day of April 15, that on one occasion he saw M.B., the person with whom he’s allegedly had these—the person with whom he had these sexual encounters, and that M.B. had advised Mr. N. that he told his mother regarding the sexual assaults and that thereafter Mr. N. indicated to Det. L. that he saw M.’s mother and at that time Mr. N. indicated he told M.’s mother that he was very sorry, would that indicate that Mr. N. was capable of appreciating the wrongfulness of his behavior?

**A.** I would have to say yes.

**Q.** If Mr. N. had told M.B. not to tell anyone about the sexual acts because if he did, then Mr. N. would get in trouble, would that indicate to you that Mr. N. was capable of appreciating the wrongfulness of his behavior?

…………………………………………….

**A.** I would say yes.

…………………………………………….

**Q.** If all of these things were true, these questions that I’ve been asking you, Doctor, in terms of these hypotheticals, would they change your opinion in this particular instance?

**A.** They probably would.

**Q.** Doctor, have you ever rendered an opinion that a defendant who was involved in a sexual assault case was responsible for his behavior?

**A.** Yes.

**Q.** Not in the context of non-responsibility examinations, though; is that correct?

**A.** Correct.

**Q.** So, specifically, when you’ve been asked to examine on that particular issue, you’ve never rendered an opinion that a person was legally responsible; isn’t that right?

**A.** That’s correct. There’s been a very limited number of those kinds of evaluations.

**Q.** Well, there have been four at least in the last two years; isn’t that correct, Doctor?

**A.** I haven’t kept track, but I would say that would be about right, mm-hmm.

**Q.** Not all people who are mildly mentally retarded such as Mr. N. are incapable of appreciating the wrongfulness of their behavior in a legal sense; isn’t that right?

**A.** I’d agree.

**Q.** And in fact most of the people who have a mental capacity in the age of 11 to 12 years of age are certainly capable of appreciating the wrongfulness of their behavior; correct?

**A.** To some degree, yes, I would think that they would be.

**Q.** Now, you offered your opinion here today in response to a specific question that you had asked Mr. N. regarding what the word rape meant; isn’t that right?

**A.** I mentioned that one previously, yes.

**Q.** Well, did you ever ask him a specific question involving sexual behavior between an adult and a child as to whether or not that was wrong in his opinion?

**A.** No, I did not ask that question.

**Q.** Mr. N., to your knowledge, was not charged with the offense of rape; isn’t that correct?

**A.** He was charged with sexual assault.

**Q.** Involving sexual activity with a minor child, correct?

**A.** Yes.

**Q.** And at no time did you ask any specific questions as to Mr. N.’s opinion or knowledge as to whether or not that behavior was in his opinion wrong, right?

**A.** In one of his answers to me he alluded to a younger person….I asked him what the term sexual assault meant. He gave me the answer, having sex with a younger person when they don’t expect it.

**Q.** Well, Doctor, if you never asked any specific questions of Mr. N. as to whether or not he felt his behavior in this particular instance involving M.B. was wrong or not, your opinion would have to be speculative as to Mr. N.’s basis for knowledge; isn’t that right?

**Defense Counsel:** Objection, argumentative.

**Prosecutor:** I’ll withdraw the question. I have nothing further.