COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP449-CR **Cir. Ct. No. 2013CF495**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID H. KROUBETZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. David Kroubetz appeals a judgment of conviction for one count of repeated sexual assault of the same child at least three times, in

violation of WIS. STAT. § 948.025(1)(d).[1] Kroubetz raises four arguments on appeal, all of which relate to WIS. STAT. § 908.08 and the use in this case of an audiovisual recording of the statements of the child witness/victim. We affirm.

BACKGROUND

¶2 On April 11, 2013, Linda,[2] then a nine-year-old girl, watched an educational video in her health class about a young boy being sexually molested by a relative. Shortly after watching the video, Linda informed the school guidance counselor that her mother's boyfriend had improperly touched her on numerous occasions. After speaking with Linda about the matter, the counselor contacted Brown County Child Protective Services (CPS).

¶3 An individual from CPS and sergeant Timothy Thomas from the Brown County Sheriff's Department went to the school that same day to investigate. While there, the two conducted a videotaped interview of Linda. Afterwards, the two went to Linda's mother's workplace to inform her of the allegations and their interview of Linda. Later that day, Thomas interviewed the mother's boyfriend, Kroubetz, and eventually placed him under arrest.

¶4 A bench trial occurred on October 31, 2013. After the case was called for trial, but prior to opening statements or any evidentiary presentation, the parties disputed the admissibility of the videotaped interview of Linda. After hearing from the parties and receiving a stipulation from Kroubetz's trial counsel, the circuit court stated it would "then make the requisite findings under [WIS.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Pursuant to WIS. STAT. RULE 809.86, we refer to the victim by a pseudonym.

STAT.] 908.08 and then allow the video to be used by the Court for evidentiary purposes." Prior to the videotape being played in court, the court made a request of both counsel that the court reporter would not transcribe the videotape because it was being admitted as an exhibit (specifically, as Exhibit 1) and would speak for itself:

> THE COURT: All right. I'll admit Exhibit No. 1. Do you want to play it now[?]
>
> [Deputy District Attorney]: Yes, Your Honor.
>
> THE COURT: Go ahead.
>
> Do we have a stipulation [that] the reporter does not need to report the video since it would be it's [sic] own exhibit?
>
> [Deputy District Attorney]: Yes, Your Honor.
>
> [Defense Counsel]: I'm sorry, I didn't hear.
>
> THE COURT: Is there a stipulation that the reporter doesn't have to report the words on the video?
>
> [Defense Counsel]: Yes.
>
> (Exhibit No. 1 played in open court and not reported.)

¶5 After the videotape was played, Thomas testified, followed by Linda. Linda admitted she had watched her videotaped interview the day before she testified at trial. Also, the prosecution asked Linda a number of questions that referenced portions of the videotape. Linda was cross-examined by Kroubetz's counsel and questioned by the circuit court. Several other witnesses also testified, including the school counselor, as well as Linda's mother, sister and brother. Kroubetz did not testify.

¶6 At the trial's conclusion, the circuit court found Kroubetz guilty of violating WIS. STAT. § 948.025(1)(d) and imposed a total sentence of eighteen years. Kroubetz now appeals.

DISCUSSION

¶7 Kroubetz raises four issues on appeal, all involving the use of Linda's videotaped interview. We address each of these arguments in turn and, ultimately, reject each of them.

I. Application of WIS. STAT. § 908.08 in this case did not violate Kroubetz's constitutional right to confrontation.

¶8 Kroubetz first argues that WIS. STAT. § 908.08, regarding the admissibility of audiovisual recordings of children's statements, is unconstitutional.[3] He notes the statute does not provide for a defendant or the defendant's counsel to be present when a child is interviewed on a videotape that is later played at trial, such that the defendant cannot confront his or her accuser *before* the accuser's recorded statement is played in court. Kroubetz contends this procedure occurred in his case and violated his constitutional right to confront his accuser.

¶9 Kroubetz did not raise this confrontation issue at trial or in a postconviction motion before the circuit court. The State argues—and we agree—that Kroubetz therefore forfeited his right to raise this constitutional challenge.

[3] Kroubetz's issue statement and conclusion both purport to have fashioned his constitutional challenge as an "as applied" argument. His arguments, however, at times read more as a facial challenge based on the statute's alleged infirmities regarding confrontation rights generally. We address Kroubetz's constitutional arguments as made in his briefs and reject them for the reasons stated, none of which are affected by whether his challenge is "as applied" or "facial."

See ***State v. Caban***, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997). Still, we opt to reach the merits, on which we also agree with the State that Kroubetz's constitutional rights were not violated. *See* ***State v. Wilks***, 121 Wis. 2d 93, 107, 358 N.W.2d 273 (1984) ("Consideration of a constitutional issue raised for the first time on appeal is discretionary[.]"). Whether the introduction of a child victim's recorded statement at trial violates a defendant's right to confrontation is a question of constitutional fact subject to de novo review. ***State v. Pulizzano***, 155 Wis. 2d 633, 648, 456 N.W.2d 325 (1990).

¶10 The Sixth Amendment of the United States Constitution provides that in all criminal prosecutions, the accused has the right to confront the witnesses against him or her. The scope of the Confrontation Clause has traditionally been limited to the right of the accused at trial. ***Pennsylvania v. Ritchie***, 480 U.S. 39, 52 (1987); *see also* ***California v. Green***, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause[.]"). In ***Crawford v. Washington***, 541 U.S. 36 (2004), the Supreme Court reaffirmed that the Confrontation Clause's requirement of an opportunity to cross-examine prior to trial applies only when the declarant is absent from trial. ***Id.*** at 59 n.9 (citing ***Green***, 399 U.S. at 162). When, as with Linda in this case, "the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements." ***Id.***; *see also* ***State v. James***, 2005 WI App 188, ¶10, 285 Wis. 2d 783, 703 N.W.2d 727. Applying these principles here, Kroubetz's right to confrontation was not violated by the admission of Linda's recorded statement, as he had the opportunity to fully and effectively cross-examine his accuser at trial.

¶11 Kroubetz submits that even where the declarant is available for cross-examination at trial, we should extend the right of confrontation to a pretrial

context. As best we can tell, his argument is that either the defendant or the defendant's counsel must be allowed the opportunity to attend any interview or statement that is recorded for the recording to later be used at trial.[4] However, Kroubetz offers little by way of rationale or authority for his proposed rule.[5] We decline this invitation to materially extend the right of confrontation in the manner Kroubetz suggests, including to pretrial interviews that may be affected by the application of WIS. STAT. § 908.08.

¶12 As an initial matter, this court has already concluded the admission of a child's statement at trial under WIS. STAT. § 908.08 does not violate a defendant's right to confrontation. ***James***, 285 Wis. 2d 783, ¶11; ***State v. Tarantino***, 157 Wis. 2d 199, 213-15, 458 N.W.2d 582 (Ct. App. 1990). Second, subsection (1) of the statute itself expressly requires that the child be "available to testify" and thus "present at trial to defend or explain [the statement]," ***Crawford***, 541 U.S. at 59 n.9, thereby easily satisfying the ***Crawford*** standards. WIS. STAT. § 908.08(1); *see also* ***James***, 285 Wis. 2d 783, ¶11. Furthermore, § 908.08(5)(a) also requires, upon the request of any party, that the circuit court "shall order that

[4] Accordingly, Kroubetz's arguments are not directly addressed at the issue of whether his absence at Linda's recorded interview violated his constitutional rights of confrontation. Rather, Kroubetz appears to be arguing that defendants or their counsel *should be* expressly permitted to attend such recorded interviews. The latter argument is well beyond this court's province, given our conclusion no constitutional violation occurred, and, if anything, is a legislative matter.

[5] Kroubetz implies his argument is supported by ***Long v. State***, 742 S.W.2d 302, 314 (Tex. Crim. App. 1987). However, three years after ***Long***, the Texas Court of Criminal Appeals overruled itself, concluding that because the relevant Texas statute, like Wisconsin's statute, required that the child be available to testify at trial, the statute did not violate the Confrontation Clause. ***Briggs v. State***, 789 S.W.2d 918, 922 (Tex. Crim. App. 1990). We also note that this court rejected ***Long*** in ***State v. Tarantino***, 157 Wis. 2d 199, 213, 458 N.W.2d 582 (Ct. App. 1990), which conclusion is binding on this court, *see* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (holding only the supreme court has authority to overrule, modify or withdraw language from a published court of appeals opinion).

the child be produced immediately following the showing of the statement to the trier of fact for cross-examination." *See also* ***James***, 285 Wis. 2d 783, ¶¶9-11. Kroubetz's argument completely ignores that the child witness must testify at trial if the defendant asks, at which time the child will be subject to a full cross-examination, including examining the witness regarding the video's contents.

¶13 Finally, Kroubetz's proposal makes little practical sense. Unlike the organizational structures and strictures of a trial and testimony therein, where, how, when and why a recorded statement of a child witness occurs is necessarily and understandably variable. This inherent flexibility is not amenable to Kroubetz's proposed requirement of having the defendant or defense counsel present for pretrial interviews. By way of example, such recordings commonly happen before law enforcement has even identified a suspect (or at least the primary suspect), much less arrested one, and they often happen before a suspect has retained counsel. Kroubetz's argument ignores these and other practicalities, thereby never addressing how his proposal could even work in practice.

II. Kroubetz is not entitled to relief based upon any of the circuit court's alleged failures to strictly comply with WIS. STAT. § 908.08.

¶14 Kroubetz next argues the circuit court failed to follow the strict requirements of WIS. STAT. § 908.08 in three ways. First, he argues the court failed to watch the audiovisual recording of Linda's statement before ruling on its admissibility, contrary to § 908.08(2)(b). Second, Kroubetz contends the circuit court failed to conduct the hearing on the admissibility of the audiovisual recording before the trial had begun, also contrary to § 908.08(2)(b). Finally, he argues the court failed to make the specific findings required by § 908.08(3) before ruling on the admissibility of the audiovisual recording. We reject

Kroubetz's contention that he is entitled to acquittal or to a new trial based upon any failure of the circuit court to strictly comply with § 908.08.

¶15 First, the State concedes the circuit court erred in failing to watch the audiovisual recording before ruling on its admissibility. *See* WIS. STAT. § 908.08(2)(b) ("At or before the hearing, the court shall view the statement."). Based on the appellate record, it appears the circuit court did not view the video at any time before its ruling on the matter. However, we agree with the State that Kroubetz was not prejudiced by the court's error, which prejudice is required. *See, e.g.*, ***Waukesha Cty. v. Steven H.***, 2000 WI 28, ¶¶56-57, 233 Wis. 2d 344, 607 N.W.2d 607. Kroubetz does not clearly explain how he was prejudiced by the court's failure to watch the audiovisual recording of Linda's statement, noting only the general importance of Linda's testimony. This is not a perceptible prejudice argument. Therefore, Kroubetz's claim that the circuit court's error should result in acquittal or a new trial must fail.

¶16 As to Kroubetz's claim that the circuit court failed to conduct a hearing on the admissibility of Linda's statement before trial, Kroubetz is mistaken about when a bench trial begins. A bench trial does not begin when the court calls the case. Rather, a bench trial begins with the opening of the case to the trier of fact—i.e., opening statements or the presentation of the first witness. *See, e.g.*, ***City of Pewaukee v. Carter***, 2004 WI 136, ¶¶21-22, 276 Wis. 2d 333, 688 N.W.2d 449. In this case, the court ruled on the admissibility of Linda's statement before opening statements and before the presentation of any evidence. There is nothing in WIS. STAT. § 908.08(2)(b) that would prohibit the court from conducting a hearing on the admissibility of the child's statement on the same day

as trial, so long as it occurred before the trial began. WIS. STAT. § 908.08(2)(b).[6] What occurred in this case therefore fully comports with the statutory directive.

¶17 Finally, Kroubetz claims the circuit court erred when it failed to make the specific findings required by WIS. STAT. § 908.08(3). This argument fails because the court relied upon the stipulation of the parties. Moreover, the court was required to admit Linda's statement if each of the elements of § 908.08(3)(a)-(e) were met. In this case, there was no dispute that the trial began before Linda's twelfth birthday; that the recording was accurate and free from excision, alteration, or distortion; that Linda's statement was made with an understanding that false statements are punishable and of the importance of telling the truth; and that the admission of the statement was not an unfair surprise. Nor did the statement's admission deprive Kroubetz of a fair opportunity to meet the allegations in the statement.

¶18 The only issue Kroubetz's counsel raised at trial was whether there were indicia of trustworthiness, as required by WIS. STAT. § 908.08(3)(d). After raising the issue, counsel requested to review § 908.08 before stipulating to the statement's admission. After reviewing the statute, counsel concluded the statute only required a prima facie showing of the enumerated requirements for mandatory admission and that the content of the statement was subject to full cross-examination. Counsel then stipulated to the admission of the statement.[7] At

[6] Kroubetz does not dispute that he was on notice the State intended to introduce the statement at trial, and it was clear during the hearing that both parties had watched the audiovisual recording of the statement multiple times.

[7] The existence of the stipulation also implicates the doctrine of invited error, by which we generally decline to review alleged errors that are brought about by the appellant's conduct before the circuit court. *See* ***State v. Freymiller***, 2007 WI App 6, ¶15, 298 Wis. 2d 333, 727 N.W.2d 334 (2006).

that point, the court pronounced: "All right. Then based on that stipulation[,] I'll then make the requisite findings under 908.08 and then allow the video to be used by the court for evidentiary purposes."

¶19 Kroubetz faults the circuit court for accepting the stipulation, but he cites no authority indicating the court was precluded from admitting the statement based upon the parties' stipulation that each element of WIS. STAT. § 908.08(3) was satisfied. Under WIS. STAT. § 901.03, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and … a timely objection … appears … stating the specific ground of objection[.]" WIS. STAT. § 901.03(1)(a). There was no objection to the admission of Linda's statement as both parties agreed the requirements of § 908.08(3) were satisfied, and, as a result, the court had no discretion to otherwise exclude the statement. *See* WIS. STAT. § 908.08(3) ("The court or hearing examiner shall admit the recording upon finding all of the following ….").

III. There was no error in Linda being allowed to view the video recording prior to her testifying at trial or in the prosecution referring to the recording during direct examination.

¶20 Kroubetz also argues the circuit court erred in allowing Linda to review her videotaped interview the day before the trial. Kroubetz argues allowing this pretrial review denied him his right to a "fair trial," such that her testimony should have been stricken from the record. In particular, he asserts a child witness cannot review a prior statement before trial unless there was a proper foundation laid *at* trial establishing that the witness's recollection needed to be refreshed. It is unclear from what legal authority or theory Kroubetz derives his argument, or whether he is claiming an error of an evidentiary nature, constitutional nature, or both.

¶21 Assuming without deciding this issue was not waived (and regardless of the actual nature of Kroubetz's argument), we need not spend much time with it. Any argument along the lines Kroubetz advances is wholly without merit. The "refresh recollection" rule to which Kroubetz seems generally to refer is one of trial procedure, WIS. STAT. § 906.12; it nowhere prohibits witnesses from reviewing statements or exhibits prior to trial.

¶22 Kroubetz seems to admit as much regarding the force of WIS. STAT. § 906.12, opting instead to make mostly public policy arguments. These arguments are unpersuasive because, among other reasons, they ignore how Wisconsin's rules of evidence anticipate that witnesses refresh their memories prior to trial, and Kroubetz provides no compelling reason to make an exception to this reality for child witnesses whose prior recorded statements are admitted under WIS. STAT. § 908.08. While Linda reviewed an audiovisual recording and not a writing, Kroubetz's argument, again, is not directly based on § 906.12, which appears limited to "writings."

¶23 Furthermore, there is no dispute Kroubetz was provided with the recording prior to trial, or that he had the opportunity to inspect it and to cross-examine Linda about her use of the recording in preparation for her testimony. Kroubetz provides no clear rationale or apt authority for his assertion that something "more" should be required in this context. The closest he comes is to argue that Linda's "refreshing of her recollection" in the manner she did impermissibly enhanced her credibility. We disagree that anything "unfair" occurred with respect to Linda's testimony in this case. The circuit court was well aware Linda reviewed her prior statement before she testified. As the trier of fact, the court could appropriately weigh that as a factor in determining the weight and credibility given to her testimony, if it mattered at all. In short, WIS. STAT.

§ 906.12 was complied with, his trial was fair, and Kroubetz has no greater "due process" rights.

¶24 Kroubetz also asserts the circuit court erred when it denied his single objection to a few "leading" questions posed to Linda in the form of whether she "remembered" what she said during her recorded statement. Assuming without deciding such questions were leading, Kroubetz has failed to establish the court erred in allowing the State to ask a then ten-year-old witness a leading question. "There are occasions when leading questions may be not only necessary, but desirable." ***State v. Barnes***, 203 Wis. 2d 132, 138, 552 N.W.2d 857 (Ct. App. 1996); *see also* WIS. STAT. § 906.11(3) ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."). One such occasion is the direct examination of a child: "[W]hen § 906.11(3) is applied to a child witness, an exception to the undesirability of leading questions on direct examination has been historically recognized." ***Barnes***, 203 Wis. 2d at 139 (cited sources omitted). There was no error in allowing the State to ask Linda a few leading questions.

IV. There was no error in the circuit court not having the playing of the video recording transcribed into the record.

¶25 Finally, Kroubetz argues the circuit court erred by not having the playing of the video recording transcribed into the record, which he contends is required by WIS. STAT. § 885.42(4) and SCR 71.01(2)(d). The issue of whether these provisions require transcription of a recording admitted under WIS. STAT. § 908.08 is a question of law we review de novo. ***State v. Ruiz-Velez***, 2008 WI App 169, ¶3, 314 Wis. 2d 724, 762 N.W.2d 449.

¶26 Kroubetz initially relies on ***Ruiz-Velez***, where this court required transcription of a recording admitted under WIS. STAT. § 908.08 based upon the 2007-08 version of WIS. STAT. § 885.42(4). ***Ruiz-Velez***, 314 Wis. 2d 724, ¶¶4-6. At that time, court rules required that "[a]t trial, videotape depositions *and other testimony presented by videotape* shall be reported." ***Ruiz-Velez***, 314 Wis. 2d 724, ¶4 (emphasis added); *see also* SCR 71.01(2) (2007-08).

¶27 Kroubetz's reliance on ***Ruiz-Velez*** fails, as both WIS. STAT. § 885.42(4) and SCR 71.01(2) have since been materially modified. The scope of § 885.42(4) was narrowed by the deletion of the phrase "and other testimony," thereby limiting mandatory transcription to only videotaped depositions. *See* WIS. STAT. § 885.42(4); *see also* ***State v. Marinez***, 2010 WI App 34, ¶19 n.4, 324 Wis. 2d 282, 781 N.W.2d 511. The transcription of other types of audiovisual recordings—such as recordings admitted pursuant to WIS. STAT. § 908.08—is now discretionary. *See* WIS. STAT. § 885.42(2) and SCR 71.01(2)(e). This change has been in effect since January 1, 2011, well before the trial in this case. *See* Sup. Ct. Order No. 10-06. Therefore, the circuit court did not have a mandatory duty to require transcription of the audiovisual recording. Instead, that decision was left to its discretion, and Kroubetz offers no reason to question the court's discretionary decision regarding the transcription of the recorded interview.

¶28 Rather, on appeal, Kroubetz contends Linda's videotaped testimony "constituted a deposition" and thus still falls within the scope of the current statute. He reasons that because WIS. STAT. § 885.42(4) and SCR 71.01(2) still require that the playing of videotaped depositions be recorded at trial, and because both depositions and a video recording under WIS. STAT. § 908.08 generally must be made upon oath or affirmation (and the State does not dispute Linda's was), Linda's video recording thus constituted a "deposition."

¶29 This reasoning represents a classic logical fallacy and is patently wrong. Law enforcement and CPS's video recording of Linda was not remotely conducted as a deposition is done pursuant to WIS. STAT. § 804.05, nor was it required to be. The mere fact that both means of recording statements are usually done under oath does not alone make them one and the same, either generally or under § 885.42(4) and SCR 71.01(2). Moreover, the supreme court clearly (and unremarkably, in our view) knows how to distinguish between "depositions" and "other testimony presented by videotape," having done so in the prior versions of these very rules. *See* ***Ruiz-Velez***, 314 Wis. 2d 724, ¶¶4-5 (focusing on how recordings under WIS. STAT. § 908.08 represent "testimony," and not concluding that they are depositions). The court's decision now to refer in the rules only to "depositions" plainly defeats Kroubetz's statutory argument.

¶30 Finally, we note the circuit court asked the defense if it had any objection to not transcribing the video recording, which, again, was itself a marked exhibit at a bench trial. Defense counsel did not object but rather agreed. Thus, it appears Kroubetz had the opportunity for transcription and declined. This fact represents an additional reason for us to conclude the circuit court did not err on this matter.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.