COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP348-CR **Cir. Ct. No. 2003CF515**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG R. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 SNYDER, P.J. Craig R. Nelson appeals from a judgment of conviction on three counts of second-degree sexual assault contrary to WIS. STAT.

§ 940.225(2)(a) (2003-04),[1] and two counts of attempted second-degree sexual assault. He contends that the trial court erred when it allowed hearsay statements into evidence. The trial court ruled that the testimony was admissible as a prior consistent statement and, in the alternative, as an excited utterance. We hold that the first issue is waived and, alternatively, that the testimony was properly allowed under the excited utterance exception and affirm the judgment of the trial court.

FACTS AND PROCEDURAL BACKGROUND

¶2 This case involves Nelson's sexual assault and attempted sexual assault of Nicole D., which occurred on September 30, 2003. Nicole was sixteen at the time of the offense. At trial, Nicole testified that she had known Nelson for approximately two years but had not known him well. On September 29, 2003, she unexpectedly received a call from Nelson on her cell phone. Nelson said he was having a party, and Nicole decided to go. Nicole, her brother, and two friends went to the Lake Geneva Motel, where Nelson had a room. Nicole testified that she had hoped to get some marijuana from Nelson. No one was able to locate any marijuana and several hours after arriving, Nicole went home.

¶3 The next day, Nicole received a voicemail message from Nelson. Nicole understood the message to mean that Nelson could now get her some marijuana. She returned the call to Nelson and then asked her brother and his girlfriend to drive her to the motel. They agreed. At the motel, Nelson indicated that it might take some time to get the marijuana ready. Nicole's brother could not stay, so he and his girlfriend left. Nicole stayed.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Nelson left Nicole in his room, where she sat on the bed and watched television for about forty minutes. When Nelson returned, he straddled Nicole on the bed and the initial sexual assaults and attempts at sexual assault took place. During an attempt by Nelson to insert his penis into Nicole's vagina, there was a knock on the door and a second later Nicole's friend walked into the room. Nelson left the room and returned shortly thereafter. He told Nicole he wanted to tell her something and then grabbed her and pulled her into the bathroom, locked the door, and turned on the water. Nelson grabbed Nicole's hand, making her touch his penis. While Nicole and Nelson were in the bathroom, a phone began ringing. Nicole's friend, who was still in Nelson's room, called out to say that Nicole's brother was on the line. Nicole struggled past Nelson out of the bathroom and left the motel room with her friend.

¶5 On the morning of October 1, the day after the assault, Nicole reported the incident to Julie Rice, the administrator at Nicole's school. Rice stated that she could tell something was wrong with Nicole, noting that Nicole was tearful and had her head down. Rice had to ask Nicole what was wrong more than once before Nicole would answer. Nicole told Rice that something had happened in a motel room the previous night. She proceeded to tell Rice about the assault. Rice did not probe for additional detail but instead suggested they contact the police because Nicole would have to repeat everything for them anyhow. Nicole agreed to talk to the police. Rice took Nicole to the hospital, and Detective Nethery of the Lake Geneva Police Department met them there. Further investigation resulted in three charges of second-degree sexual assault and two charges of attempted second-degree sexual assault against Nelson. A two-day jury trial took place in June 2004.

¶6 Nelson denies that the assaults and attempted assaults ever took place. His contention at trial was that Nicole and her friend took money and cigarettes from him and made the allegations of sexual assault in an attempt to distract attention from their actions. In her testimony, Nicole admitted that her friend took a pack of cigarettes on the way out of Nelson's room. The jury nonetheless convicted Nelson on all five counts.

¶7 During the trial, Nelson objected to a portion of Rice's testimony on grounds it was hearsay. The trial court determined that Rice could testify as to what Nicole said to her on the morning of October 1 about the sexual assault and attempted assault. The court held that Rice's testimony was admissible as a prior consistent statement under WIS. STAT. § 908.01(4)(a)2 and also as an excited utterance under WIS. STAT. § 908.03(2). Asserting that both evidentiary rulings were improper, Nelson appeals.

DISCUSSION

¶8 Nelson argues that Rice should not have been allowed to testify as to Nicole's statements to her about the assault.[2] He asserts that her statements were inadmissible hearsay under WIS. STAT. § 908.01(3). Nelson first challenges the trial court's ruling that Rice's testimony falls under the definition of a prior consistent statement "offered to rebut an express or implied charge … of recent fabrication or improper influence or motive." *See* § 908.01(4)(a)2. The State counters that Nelson has waived any claim of error in this regard, and we agree.

[2] Our reference to "the assault" encompasses all five charges, including the two counts of attempted second-degree sexual assault.

¶9 When the State called Rice to the stand, the trial court excused the jury and explained to the parties that it was concerned about hearsay in Rice's testimony, particularly with regard to Nicole's statements to Rice on the morning after the assaults. The court raised the issue sua sponte; the transcript does not show either party requesting to be heard on the issue. After the court explained the rule of prior consistent statements, the following exchange took place:

> THE COURT: Why would you go to a teacher and tell her these things that happened to get the defendant in trouble in order to divert attention from a charge of theft if the defendant had never even brought the charge of theft …. Why would you even want to make up the story? Therefore, maybe it is admissible on that basis.
>
> ….
>
> [DEFENSE COUNSEL]: Your Honor, yes, I believe that … the facts as you stated them are correct.
>
> THE COURT: So, in other words, it would be proper for the state to put this witness on because at least the state could make an inferential argument that that rebuts a claim that your client is going to make … the purpose of the victim making this up is for a … motive to cover up a theft … it's consistent with her testimony and is offered to rebut any claim of improper motive.
>
> [DEFENSE COUNSEL]: If that's what it's being offered for.
>
> THE COURT: Okay. And is that what you're offering it for, in part?
>
> [PROSECUTOR]: Yes ….

Nelson's failure to object to the court's holding waives his right to raise the issue on appeal. *See* ***State v. Hartman***, 145 Wis. 2d 1, 9-10, 426 N.W.2d 320 (1988). When a party acquiesces in a trial court's ruling, the party is estopped from raising a challenge to the ruling on appeal. *See* ***State v. Schmaling***, 198 Wis. 2d 756, 762,

543 N.W.2d 555 (Ct. App. 1995). Accordingly, we do not reach the merits of this claim.

¶10 We, however, do reach Nelson's alternative issue.[3] Nelson argues that the trial court erred when it allowed Rice to testify under the excited utterance exception to the hearsay rule. *See* WIS. STAT. § 908.03(2). The admission of out-of-court statements under the excited utterance exception to the hearsay rule is a determination left to the discretion of the trial court. *See* ***State v. Huntington***, 216 Wis. 2d 671, 680-82, 575 N.W.2d 268 (1998). Because the trial court is in a better position to weigh the reliability of circumstances surrounding out-of-court statements, we look to see if the trial court exercised its discretion in accordance with accepted legal standards and the facts of the record. *See* ***id***. If we can discern a reasonable basis for the court's evidentiary decision, then the trial court has not committed an erroneous exercise of discretion. *See* ***id***. at 681.

¶11 A hearsay statement may be admissible as an excited utterance if it meets three requirements. "First, there must be a 'startling event or condition.'" ***Huntington***, 216 Wis. 2d at 682 (citation omitted). Next, the out-of-court statement must relate to the startling event or condition. ***Id.*** Finally, the statement must be made while the declarant is still under the stress or excitement caused by

[3] We recognize that we need not consider whether the hearsay statements are admissible under the excited utterance exception. Our determination that Nelson waived any objection to the admissibility of the statements under the prior consistent statement exception resolves the appeal. If a decision on one point disposes of the appeal, we will not address the other issues raised. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938). However, in the interest of judicial economy, we may consider additional issues that have been fully briefed by the parties and that are likely to appear in a future appeal. *See* ***Metropolitan Greyhound Mgt. Corp., v. Wisconsin Racing Bd.***, 157 Wis. 2d 678, 693-94, 460 N.W.2d 802 (Ct. App. 1990). Here, both parties have briefed the issue and, therefore, to avoid the possibility that the issue will return to us on appeal by way of an ineffective assistance of counsel claim, we choose to decide whether the hearsay statements were also admissible under the excited utterance exception.

the event or condition. ***Id.***; WIS. STAT. § 908.03(2). The only question Nelson presents here is whether the third requirement was satisfied.

¶12 Nelson contends that Nicole's out-of-court statements to Rice about the events in Nelson's motel room were not made while Nicole was still under any stress. He asserts that "[t]he key to the excited utterance exception is timing," and argues that "as many as twelve to fourteen hours had passed between the event and the reporting." This, Nelson argues, shows that Nicole had the time and opportunity to evaluate matters and plan what she would say.

¶13 We agree with Nelson that timing is a key consideration of the excited utterance exception. "'The excited utterance exception … is based upon spontaneity and stress' which, like the bases for all exceptions to the hearsay rule, 'endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.'" ***State v. Huntington***, 216 Wis. 2d at 681-82 (citation omitted). The interval between the startling event and the utterance is key, and time is measured by the duration of the condition of excitement rather than "mere time lapse from the event or condition described." ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 57, 252 N.W.2d 81 (1977). The significant factor is the stress or nervous shock acting on the declarant at the time of the statement. "The statements of a declarant who demonstrates the opportunity and capacity to review the [event] and to calculate the effect of his [or her] statements do not qualify as excited utterances." ***Id.*** at 58.

¶14 Wisconsin appellate courts have liberally construed the excited utterance exception where a young victim states an allegation of sexual assault because there is a compelling need for the admission of such statements where the victim and perpetrator are likely to be the only witnesses to the crime.

Huntington, 216 Wis. 2d at 682. In ***State v. Gerald L.C.***, 194 Wis. 2d 548, 557, 535 N.W.2d 777 (Ct. App. 1995), the court noted three characteristics common to the admission of out-of-court statements under the excited utterance exception concerning allegations of sexual assault of a child: (1) that the declarant is less than ten years old, (2) the statement is made to the declarant's mother, and (3) the statement is made less than one week after the last incident of abuse. The ***Gerald L.C.*** court acknowledged, however, that facts and circumstances may exist that allow the admission of out-of-court statements but do not conform to these characteristics. *See* ***id.*** at 558-59 ("[T]hese factors by themselves are not dispositive, and the statement may be admissible if the declarant was still under the stress or excitement caused by the event at the time he or she made the statement.").

¶15 The ***Huntington*** court expressly declined to create a bright line rule based on the three ***Gerald L.C.*** characteristics, noting that courts have allowed hearsay statements made by young victims more than one week after the incident to be admitted under the excited utterance exception. ***Huntington***, 216 Wis. 2d at 684. Huntington's eleven-year-old victim first reported the sexual assault to her mother and sister two weeks after the last assault. ***Id.*** at 677, 684. There, our supreme court affirmed the trial court's decision to allow the testimony of the mother and sister concerning the victim's statements to them under the excited utterance exception. ***Id.*** at 685.

¶16 That is not to say that a report by any victim made within two weeks of an assault will rise to the level of an excited utterance. In the case of younger victims, spontaneity may occur at "longer time periods from the event than is normally the case with adults." ***State v. Padilla***, 110 Wis. 2d 414, 421, 329 N.W.2d 263 (Ct. App. 1982). For example, an adult victim's statement was

admitted where the statement was made three to five hours after the assault. *See* ***State v. Boshcka***, 178 Wis. 2d 628, 639-41, 496 N.W.2d 627 (Ct. App. 1992). Noting that a three-to-four-hour interval between the event and the report by an adult victim does not necessarily prevent application of the excited utterance exception, the ***Boshcka*** court explained:

> [T]he basic rule focuses on the intensity and continuation of the stress, not the amount of time elapsing since the incident. And given [the victim's] description of the assaults—which the jury obviously believed—and the witness's acknowledgment of [the victim's] agitated and exited demeanor as she related the events to them, it is apparent that the stress of the incident continued at least to the time she made the statements.

Id. at 641 n.3. The trial court, therefore, must determine that the statements of the victim demonstrate sufficient trustworthiness under particular facts and circumstances of the case.

¶17 Here, Rice testified that Nicole was crying and had her head down when she came to the office that morning. Rice described Nicole as "visibly upset." The State argued that Nicole, a sixteen-year-old girl, was "in emotional turmoil over what had occurred to her less than fifteen hours prior."

¶18 Nelson countered that Nicole's actions prior to reporting to Rice tend to demonstrate that she was not in a highly stressed or traumatized condition from the assault. He notes that Nicole did not run from the motel room when she came out of Nelson's bathroom; rather, she talked to her brother on the cell phone and then she and her friend stole Nelson's cigarettes before leaving. She did not tell her friend about the assault until later in the evening. Also, Nicole did not tell her mother about the assault; instead Rice called Nicole's mother after they talked the next morning. Nelson also notes Nicole took time before responding to Rice's

questions. These factors, Nelson argues, indicate that Nicole's statements were not spontaneous. He argues that Nicole had plenty of opportunity to calculate what to say and that her statements to Rice were "well thought out."

¶19 The trial court acknowledged that this was a "close case," but it was ultimately satisfied that Nicole was still under the stress of the assault at the time she made the statements to Rice. The court considered Nicole's age of sixteen at the time of the assault and her demeanor when she reported the incident to Rice. The court stated that Nicole was, "in the eyes of [a] trained teacher," in an "emotional state" with tears flowing and her head down. It observed that Nicole made the statements to Rice approximately thirteen hours after the assault. It noted that the assault occurred in the evening and that Nicole went to see Rice "fairly quickly" when she arrived at school the next morning. The court concluded that on the morning after the assaults, Nicole appeared "to have been making that statement [to Rice] under the stress of excitement caused by the event or condition, and … it was a startling event or condition."

¶20 Wisconsin case law demonstrates that the period of time between an event and an excited utterance may be longer in some cases and shorter in others. *See* ***Huntington***, 216 Wis. 2d at 684; ***Boshcka***, 178 Wis. 2d at 640-41. Excited utterances are not "clocked with stopwatches. Subjective factors also play a role…. In short, the trial court must look to the nature of the startling event and the particular facts of the case." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 803.2 (2d ed. 2001). By considering Nicole's age, her demeanor, and the nature of the startling event, the trial court properly exercised its discretion to conclude that Nicole was still under stress almost thirteen hours after the incident occurred.

CONCLUSION

¶21 We conclude that the trial court properly admitted Rice's testimony under the excited utterance exception to the hearsay rule. The trial court considered the appropriate factors under WIS. STAT. § 908.03(2), the facts presented in the offer of proof, and the arguments of the parties. Because the trial weighed the reliability of circumstances surrounding Nicole's out-of-court statements in accordance with accepted legal standards and the facts of the record, the trial court has not committed an erroneous exercise of discretion. *See* ***Huntington***, 216 Wis. 2d at 680-81. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.