COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1727

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

IN THE INTEREST OF CRAIG M.E.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CRAIG M.E.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Craig M. E. appeals a juvenile court dispositional order entered after he was found delinquent for committing five counts of sexual impropriety, including sexual intercourse and contact with a child. *See* WIS. STAT. § 948.02(1). Craig claims that the trial court erred by failing to suppress statements he made to a psychologist and a social worker that led to the current delinquency counts. The issue on appeal is whether Craig agreed to reveal the previously undisclosed sexual assaults with knowledge that this information could be shared with the supervising social worker from his county and law enforcement. This court upholds the trial court's rulings and affirms the dispositional order.

¶2 Craig was placed in the custody of the Department of Corrections at Lincoln Hills School in April 1999 for a previous sexual offense. On May 25, 1999, psychologist Dr. Catherine Bard was asked to evaluate Craig's cognitive abilities to determine an appropriate treatment setting for him. During the interview, Craig revealed that he had committed a previously undisclosed sexual assault. He told Bard that he had earlier lied to Lincoln Hills social worker Alicia Weix by not disclosing the incident to her, fearing that his mother would be angry with him "for telling about it." Near the session's end, Craig asked Bard to intercede with Weix on his behalf so that he could share the assault information with her without Weix being angry with him for having lied to her. When Craig later met with Weix, he admitted other sexual assaults in addition to the one he described to Bard.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶3 Craig's disclosures to Bard and Weix resulted in the delinquency counts on appeal. Craig moved to suppress the statements and any "derivative evidence," primarily on the theory that his statements to Bard, his therapist, were privileged and she "wrongfully relayed by the therapist to his social worker and on to other social workers in Manitowoc and Outagamie County."[2] The arguments Craig asserts on appeal notwithstanding,[3] it appears the only issue that was squarely addressed at the hearing was whether Craig agreed to reveal sexual assaults with the knowledge that this information could be shared with the supervising social worker from his county and with law enforcement.[4]

¶4 At the beginning of the suppression hearing, Craig's attorney indicated that Craig's statements to Bard and Weix were confidential under WIS. STAT. § 905.04. The attorney stated that the motion turned upon a release that Craig signed[5] and, under ***State v. Locke***, 177 Wis. 2d 590, 605, 502 N.W.2d 891

[2] It appears from the delinquency petition that Craig resided in Outagamie County and his mother resided in Manitowoc County.

[3] As the State contends, and as will be discussed below, certain issues are not properly raised.

[4] The trial court observed that "the main issue here today is Craig's intent: that is, in making these statements, did Craig have an understanding that they—that is the statements that he would make regarding new offenses—would be reported to others outside of the treatment setting."

[5] Shortly after arriving at the institution, Craig signed a document entitled "Limits of Confidentiality Regarding Information Rendered to Treatment Staff." It is apparent from the hearing record that Craig's attorney was referring to this document, marked exhibit one at the hearing. The form essentially advised Craig of the type of divulged information that would be released within the DOC and the circumstances under which information could be shared with those outside of the department.

On appeal, Craig concedes that exhibit one "is neither a release nor a waiver."

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(Ct. App. 1993), upon Craig's "intent as to the scope of the privilege." At the close of evidence, Craig's attorney highlighted the testimony that suggested Craig had a "very limited understanding of concepts and more complex issues, particularly legal issues, such as releases …." He argued that the evidence supported the inference that Craig did not intend law enforcement and others to learn of his admissions.

¶5 Both Bard and Weix testified that they advised Craig that any new sexual assault he admitted could be referred for further investigation to Greg Otto, Craig's supervising social worker from his home county. The facts concerning these admonitions will be addressed in further detail below. They both also expressed the opinion, in words or substance, that Craig understood that his disclosures could be shared with Otto and law enforcement. Craig testified and essentially denied that he knew the information concerning the assaults would be related to Otto or law enforcement.[6]

¶6 The trial court held that Craig agreed to reveal the previously undisclosed sexual assaults knowing that this information could be shared with the supervising social worker from his county and law enforcement. It thus denied the

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Craig's attorney also argued that releasing Craig's admissions violated exhibit one because none of the provisions in the form for disclosing information outside the DOC applied in this case. After some undeveloped assertions whose interconnection and materiality are unclear, Craig's attorney finally reiterated that under ***State v. Locke***, 177 Wis. 2d 590, 605, 502 N.W.2d 891 (Ct. App. 1993), the trial court must look at Craig's intentions, implying that he did not intend that the statements would go beyond the department. Thus, while Craig sought to rely on exhibit one to delimit his admission's dissemination, he tacitly conceded that he could render it inapplicable by making disclosures he knew could be revealed to his Outagamie County social worker and law enforcement.

[6] Craig did admit on cross-examination, however, that Bard may have told him that she might go to the police or the county with any information. He could not remember.

suppression motion. Craig was ultimately adjudicated delinquent on all five counts in the petition, and this appeal followed.

1. WISCONSIN STAT. § 905.04 Privilege

¶7 Craig contends that the trial court erred by ruling that the information Bard and Weix obtained from him was not confidential "for purposes of sec. 905.04, Stats." It appears that this issue involves whether Craig intended that confidential communications not be disclosed to law enforcement and his county social worker and whether "his expectations were objectively reasonable."[7] This court assumes the expectations to which Craig's brief refers were that the information would remain within the institution and be used for diagnosis and treatment.

¶8 The Wisconsin legislature has determined that communications between patients and medical providers are privileged. Under WIS. STAT. § 905.04(2), a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment.[8] The patient-health care

[7] This section of Craig's analysis is somewhat confusing because it discusses what the State and trial court did or did not do relative to what is repeatedly referred to as "the question of confidentiality" and the "issue of confidentiality" without ever stating precisely what the question or issue is. Moreover, on the one hand Craig contends that the court did not "specifically rule on the question of confidentiality" and, on the other, states that "although the trial court phrased its ruling in terms of waiver, it really ruled on the issue of confidentiality."

[8] WISCONSIN STAT. § 905.04(2) provides:

> GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's

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provider privilege is purely statutory. *See* ***State v. Allen***, 200 Wis. 2d 301, 311, 546 N.W.2d 517 (Ct. App. 1996). Evidentiary privileges interfere with the trial court's search for truth and therefore must be strictly construed consistent with the fundamental tenet that the law has a right to every person's evidence. *See* ***Locke***, 177 Wis. 2d at 602.

¶9 It is undisputed that Craig is a "patient" within the meaning of WIS. STAT. § 905.04(1)(c) and that the privilege applies to communications made to the psychologist and social worker.[9] WISCONSIN STAT. § 905.04 provides in pertinent part:

> (1) Definitions. In this section:
>
> ….
>
> (b) A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient's family.

Thus, a communication is privileged unless it was intended to be disclosed to others not involved in providing the services to which the privilege applies.

> social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

[9] WISCONSIN STAT. § 905.04(1)(c) provides: "'Patient' means an individual … who consults with or is examined or interviewed by a … psychologist [or] social worker …."

¶10 Craig relies on ***Locke*** for the proposition that "the patient's objectively reasonable perceptions and expectations of the medical provider are the proper gauge of the scope of the sec. 905.04 privilege." *See* ***Locke***, 177 Wis. 2d at 604. ***Locke*** also held the patient's intent to disclose confidential information to third persons is crucial in determining whether a valid privilege exists. *See* ***id.*** at 605. Craig recognizes, citing ***Crawford v. Care Concepts, Inc.***, 2000 WI App 59, ¶7, 233 Wis. 2d 609, 608 N.W.2d 694, that a statement is not entitled to the confidentiality privilege if it was not intended to be confidential when made. The trial court denied the suppression motion on the factual finding that at the time Craig disclosed the other assaults, he did not intend that the communication be confidential. Craig points to evidence, including his own testimony, supporting his position that he did not intend that the evidence be released, that he was not intellectually capable of appreciating the information Bard gave him in that regard and that his expectation that it would not go beyond the institution was objectively reasonable. The evidence upon which the trial court relied, however, was not the evidence Craig argues should influence this court's decision.

¶11 The trial court agreed that under ***Locke***, the issue whether Craig's admissions were privileged turned upon his objective, reasonable expectation.[10] The court, reciting the testimony at length, stated that the record demonstrated by

[10] Craig argues that "the legal basis of the trial court's ruling is not entirely clear in some respects." He finds the court's ruling highly confusing "as to the basic questions of confidentiality." From this court's perspective, however, the trial court was not squarely presented with any confidentiality issue other than whether Craig revealed other assaults knowing that they could be used against him by authorities outside the DOC. This is the only theory that Craig's trial counsel meaningfully developed, notwithstanding his amorphous references to "905.04 privilege" and "the release." A party must raise an issue with some prominence to allow the court to address the issue and make a ruling. ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984).

clear and convincing evidence that despite Craig's testimony to the contrary, he was told that if he disclosed new offenses, they would be reported to the Outagamie County social worker and may be investigated.[11] The court further found by clear and convincing evidence that Craig understood what Bard told him. The court relied on the "record as a whole,"[12] and, in particular, several items of testimony. The court noted that Craig asked Bard and Weix several questions about who was going to find out, indicating a particular concern about his mother and family learning of other incidents and about going to prison. This indicated to the court that Craig understood "that others were going to find out about his

[11] The court, for example, accepted Bard's testimony that at the beginning of her initial interview with Craig, she told him that virtually everything he said to her would be shared with Greg Otto and, specifically, that if he reported additional sex offenses, they would be reported to a number of people, including Otto, and would be investigated by his county.

Bard repeated this testimony several times. Once she indicated that because she was acting as an evaluator and not a therapist, "I warned him very carefully that all the information he gave me would be released to his county." Later on cross-examination when asked if she told Craig that he would not be charged for other sexual assaults he admitted, she responded, "I'll tell you exactly what I remember along those lines. … I did not say that, but I did say that—that there—the county would investigate, that he could have additional charges …."

Weix testified that she informed Craig that if she was told by a superior to report any incidents he revealed, she would. She further advised Craig that any admissions he made may or may not be referred for prosecution. When they began to discuss the details of the assaults he "was a little nervous but was willing to talk …."

Both Bard and Weix testified that Craig was concerned about his mother learning of the new assaults. Both indicated that it was his decision whether to reveal the incidents.

Craig was also concerned about other consequences of admitting other assaults, such as going to prison. However, Bard testified:

> He was fearful and tearful about what the consequences were going to be of his disclosing what he disclosed, but he also knew, because I had told him in the beginning, that the county was going to know everything that we talked about during the session.

[12] Craig testified at the hearing. The trial court therefore had an opportunity to observe his demeanor and ability to understand and answer questions.

additional statements, if he made any." Further, the trial court again relied upon Bard's testimony that it was very clear to her that Craig understood what she was saying about the consequences of disclosure. Bard was experienced in eligibility diagnostic testing and teaching the developmentally disabled. The court also considered testimony that Craig felt relieved[13] after making his disclosure and the lack of evidence that he was angry at those who disclosed the information, a relevant circumstance under ***Locke***. Having heard testimony concerning Craig's cognitive functioning,[14] it reiterated its finding "from clear and convincing evidence" that Craig knew prior to admitting an additional assault, that this information would be given to Otto to follow up with further investigation. On these findings, the court concluded that there were no grounds upon which to suppress Craig's admissions.

¶12 This court reviews the circuit court's findings of fact under the clearly erroneous standard. *See* WIS. STAT. § 805.17(2). The trial court is the arbiter of the witnesses' credibility, and its findings will not be overturned on appeal unless they are patently incredible, or in conflict with the uniform course of nature or

[13] Bard testified that after Craig admitted one previously undisclosed assault and was told the information would be released to Otto and others, he reacted with a whole range of emotions. He cried, indicated remorse, spoke of being relieved that he could talk about it and indicated that he was happy to be able to "come clean." He wanted to discuss the incident further with Bard. He also wanted to talk to Weix because earlier he had lied to her about not having engaged in other assaults.

[14] Bard, who testified that she was convinced Craig understood the consequences of revealing new incidents, was asked to meet with him for the very purpose of determining his cognitive abilities to assist in determining a proper treatment program. She met with Craig on at least four occasions and spent a total of six to eight hours with him. In addition to a clinical interview, she completed formalized testing, including the Wechsler Intelligence Scale for Children and the Sentence Completion Test.

Weix testified that she did not perceive that Craig had a "low ability" to "understand anything."

with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Craig merely highlights evidence favorable to his position. He does not address the evidence upon which the trial court relied nor does Craig attempt to show why the trial court's findings are patently incredible or otherwise clearly erroneous. Because the trial court's findings are supported by the record and have not been shown to be clearly erroneous, this court affirms its order denying the suppression motion.

2. Mandatory Reporting Rule, WIS. STAT. § 48.981

¶13 Craig next argues that the trial court erred by failing to find that the mandatory reporting rule of WIS. STAT. § 48.981 has no application to this case. His argument premised on § 48.981 was first raised on appeal. Craig's counsel's single reference at the hearing to § 48.981 was as follows:

> The Department of Corrections perhaps, I can only assume, relied on the mandated report or statute. I'm familiar with that statute. There are instances where it is mandatory; there are instances where it's not. And in any instance, they gave the information out and thus we are here. It's not a waiver. The Court must look at what the intentions are of the individual defendants.

Craig thus failed to address in the trial court the issue he seeks to raise on appeal, except to make a brief, vague reference to the "mandated report or statute."

¶14 Generally, this court will not decide issues that have not first been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). There is no reason that this court should take a rare departure from this rule because Craig's precise assignment of error is that the trial court did not consider a contention not before it. It is self-evident that the trial court could not err by failing to address an issue that was not advanced. A party must raise an

issue with some prominence to allow the court to address the issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). Craig's failure to do so constitutes abandonment of the issue in the trial court. *See* ***Zeller v. Northrup King Co.***, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985). Finally, to the extent Craig's counsel's statement could be viewed as an argument, it is purely speculative. Appellate courts do not address speculative arguments. *See* ***State v. Tarantino***, 157 Wis. 2d 199, 217, 458 N.W.2d 582 (Ct. App. 1990). This court cannot conceive of any reason why this rule should not apply equally to the trial court. This court therefore declines to review this issue on appeal.

3. Voluntary and Intentional Waiver

¶15 Craig also argues that the trial court erred by ruling that he waived any privilege under WIS. STAT. § 905.04(2). Specifically, he contends that he could not voluntarily waive the privilege without knowing that he had the right to it. Once again, however, the issue was not addressed to the trial court. Indeed, the court specifically observed that the issue was not raised, noting that there was no testimony with respect to whether Craig knew of the privilege. Thus, the precise question whether Craig intentionally relinquished a known right was waived. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (issue not properly raised before trial court waived).

4. Duty to Warn Exception to Privilege

¶16 The trial court recognized that "the main issue here today is Craig's intent: that is, in making these statements, did Craig have an understanding that they—that is the statements that he would make regarding new offenses—would be reported to others outside of the treatment setting." After resolving this issue

against Craig, the trial court went on to address an issue not argued to it: "whether or not this information falls under the duty-to-warn requirement." The trial court ultimately concluded that it did.

¶17 The supreme court in ***Schuster v. Altenberg***, 144 Wis. 2d 223, 424 N.W.2d 159 (1988), recognized a "dangerous patient" exception to the WIS. STAT. § 905.04(2) privilege. Under certain circumstances, the privilege gives way to mental health providers' "duty to warn third parties or to institute proceedings for the detention or commitment of a dangerous individual for the protection of the patient or the public." ***Id.*** at 239-40. Craig argues that the trial court erred by ruling that the "duty to warn" exception applied under the facts of this case. He contends that the evidence was insufficient to support the court's conclusion, given the exception's elements.

¶18 This court need not address Craig's assignment of error. The trial court found that Craig understood before disclosing the new assaults that his statements would be reported to others outside of the treatment setting. As this issue is dispositive of the suppression motion, it is not necessary to address the trial court's additional reasons for denying it.

5. Statements' voluntariness

¶19 Finally, Craig asserts that the trial court erred by ruling that his statements were voluntary. He reiterates evidence that he argues would support an inference that he disclosed the new assaults because of coercive State conduct. Again, however, this argument was first raised on appeal. Neither Craig's written motion nor his argument at the suppression hearing put voluntariness in issue. There was nothing to suggest to the trial court that it must resolve the question

whether either Bard or Weix used improper methods to coax an admission out of Craig. The issue was thus waived. *See* ***Terpstra***, 63 Wis. 2d at 593.

¶20 This court affirms the trial court's dispositional order and its order denying the suppression motion.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.