COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1798-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEAN A.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Reversed.*

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

SNYDER, P.J. Sean A. appeals from an order binding him over for trial on a charge of second-degree sexual assault contrary to § 940.225(2)(a), STATS. [1] He argues that the trial court misused its discretion when it upheld a

[1] We granted Sean A.'s petition for leave to appeal this nonfinal order on July 3, 1997.

court commissioner's admission of hearsay at the preliminary hearing under the excited utterance exception. Sean maintains that the lengthy statement made by the alleged victim, and testified to by the interviewing detective, did not qualify as an excited utterance and should not have been admitted. He asks that this court reverse the bindover and grant his motion to dismiss this action.

We conclude that the hearsay statement was not admissible under either the excited utterance exception or the residual exception to the general rule against hearsay. Absent the inadmissible hearsay, we conclude that the evidence is insufficient to constitute probable cause that Sean committed an assault. We therefore reverse the bindover order.

The sexual assault charge against Sean was based on a statement made by the complainant, J.S., to Detective Peggy Heiring. Heiring testified at the preliminary hearing that she was dispatched to Kenosha Memorial Hospital to interview an individual regarding a possible sexual assault. When she arrived at the hospital at approximately 1:00 p.m., she was directed to a private family room where she found J.S. with a representative from a group called "Kenoshans Against Sexual Assault." J.S. was seventeen years old at the time and was a friend of Sean's. Heiring testified that during the interview J.S. was very upset, sobbing and trembling. The alleged incident had occurred nine to twelve hours earlier.

Heiring's testimony concerned the information J.S. had related during their interview. Repeated objections were lodged by defense counsel throughout Heiring's testimony about what J.S. had told her about the incident. Heiring testified that during the interview J.S. was "sobbing uncontrollably, [and] often had a hard time talking in between her sobs." The court commissioner ultimately ruled that the testimony was admissible under the excited utterance

exception to the hearsay rule, concluding that "the alleged victim here was upset, and I believe that there is an exception to excited utterances, and I would find that this is an exception."

Following the preliminary hearing, Sean brought a motion to dismiss "on the grounds that the evidence presented at the preliminary examination does not support a finding that the defendant probably committed any crime …." The trial court agreed with the court commissioner's determination that Heiring's testimony was admissible under the excited utterance exception to the hearsay rule. The court stated:

> The Court does not believe that the Commissioner abused his discretion in making a determination that the police officer received an excited utterance. I think the courts have said a number of times that it is not a matter of hours or the time doesn't have to be measured in hours; and I think in this case it was the Commissioner that listened to the testimony, listened to the officer[] describe the conditions of the alleged victim, [and] made a determination that this did fall within what has been described as an excited utterance.

Based solely on Heiring's testimony, the trial court found that there was sufficient evidence for the commissioner to make the finding of probable cause and bind the matter over for trial. Sean appeals from this order.

Standard of Review

A decision on whether to admit an out-of-court statement under the excited utterance exception is within the discretion of the trial court. *See* ***State v. Moats,*** 156 Wis.2d 74, 96, 457 N.W.2d 299, 309 (1990). We may not disturb the trial court's ruling unless it was manifestly wrong or a misuse of discretion. *See* ***id.*** The excited utterance exception to the hearsay rule is based on the spontaneity of the statements and the stress of the incident as a means of "endow[ing] the

statements with the requisite trustworthiness necessary to overcome the general rule against admitting hearsay evidence." ***Id.*** at 97, 457 N.W.2d at 309. We will uphold the court's determination that the evidence is admissible if it is based on "a reasoned application of the proper legal standards to the facts." ***State v. Gerald L.C.,*** 194 Wis.2d 548, 555, 535 N.W.2d 777, 779 (Ct. App. 1995).

Excited Utterance Exception

Section 908.03(2), STATS., sets forth the excited utterance exception to the hearsay rule:

> **(2)** EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This exception is based on the belief that "excitement or agitation stills the declarant's capacity for conscious reflection, thus reducing the risks associated with fabricated or insincere testimony." ***Gerald L.C.,*** 194 Wis.2d at 556, 535 N.W.2d at 779 (quoted source omitted).

A declarant's statements will be admitted where indications are that the individual was still under the shock of injuries or other stress due to special circumstances. *See* ***Moats,*** 156 Wis.2d at 97, 457 N.W.2d at 309. It is against this legal standard that we must review the trial court's discretionary decision to admit the testimony of the detective as to J.S.'s statement. The record should show that discretion was in fact exercised and the basis of that exercise. *See* ***Christensen v. Economy Fire & Cas. Co.,*** 77 Wis.2d 50, 56, 252 N.W.2d 81, 84 (1977).

From an examination of the record in this case, we conclude that the trial court had a mistaken view of the law, and to the extent that it was exercising

its discretion, this was done on improper grounds. *See* ***id.*** The trial court erred when it determined that the complainant's statement was admissible under the excited utterance exception to the hearsay rule. Based on a number of factors, we conclude that J.S.'s statement should not have been admitted.

In order for hearsay testimony to be admissible under this exception, the statement must: (1) relate to a startling event or condition and (2) be made while the declarant was under the stress of excitement caused by the event or condition. *See* § 908.03(2), STATS. The important factors for the court's consideration are timing and stress. *See* ***Christensen,*** 77 Wis.2d at 56-57, 252 N.W.2d at 85. Furthermore, it is the proponent of the evidence who must establish its admissibility. *See* ***Auburndale State Bank v. Dairy Farm Leasing Corp.,*** 890 F.2d 888, 893 (7th Cir. 1989) ("The general rule is that the party that asserts the affirmative of an issue has the burden of proving the facts essential to its claim.").

We examine J.S.'s statement in light of the statutory excited utterance exception. The principles governing the admission of out-of-court statements as excited utterances are well established:

> [T]ime is measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described. 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 [incident] and to calculate the effect of his [or her] statements do not qualify as excited utterances…. It is the condition of excitement that temporarily stills the capacity for reflection which is the significant factor assuring trustworthiness, assuring that the declarant lacked the capacity to fabricate.

Christensen, 77 Wis.2d at 57-58, 252 N.W.2d at 85 (footnotes omitted). Because J.S.'s allegations related to a sexual assault, the necessity that the utterance be related to a "startling event" is satisfied. The remaining factor is the trial court's

determination that at the time J.S. spoke to the detective, she was still under stress or excitement as a result of the incident. It is here that the trial court's analysis fails.

The key to the time factor analysis is an examination of whether the individual making the statement was still under the impact of the event or condition described. *See* ***id.*** at 57, 252 N.W.2d at 85. The statement of a declarant who demonstrates the opportunity or capacity to review the incident and/or to calculate the effect of any statement made does not qualify as an excited utterance. *See* ***id.*** at 58, 252 N.W.2d at 85. In determining whether to apply the excited utterance exception to hearsay, the court must assess the "special circumstances in which the statement is made [that] make it reliable and trustworthy." ***Id.*** (quoted source omitted).

In ***Gerald L.C.,*** this court concluded that the statement of a fourteen-year-old girl who recounted an episode of sexual abuse to a police officer approximately two weeks after it occurred was not admissible as an excited utterance.[2] *See* ***Gerald L.C.,*** 194 Wis.2d at 559, 535 N.W.2d at 780. Although the complainant in that case "appeared shaken and crying" when recounting the assault, we concluded that there was no evidence which would indicate that this emotional state had persisted over a two-week period. *See* ***id.*** The State had argued that it was reasonable for the trial court to conclude that the stress of the assault "still dominated [the victim's] thought processes" at the time she gave a

[2] At the time of the events alleged in the instant case, J.S. was seventeen years old. While the State notes that she was not a "mature woman," the State does not argue for, nor do we consider, the more expansive application of the hearsay exception allowed for young victims of sexual assault. *Cf.* ***State v. Gerald L.C.,*** 194 Wis.2d 548, 559, 535 N.W.2d 777, 780 (Ct. App. 1995) (the rationale that the stressful influence continues over a two-week time lapse fails for fourteen-year-old girl who alleged her father had sexually assaulted her).

statement to the officer. ***Id.*** We held that such a conclusion was not supported by the evidence before the court. *See* ***id.***

Here, there was a time lapse of nine to twelve hours between the alleged sexual assault and J.S.'s statement to Heiring. The trial court utilized J.S.'s demeanor at the time—shaking, trembling and crying—as supportive of its conclusion that J.S. continued to be under the stress of the assault. However, this analysis is undermined by other factors. Heiring found J.S. in the presence of an individual from "Kenoshans Against Sexual Assault," a volunteer support group. The State presented no evidence that the detective was the first person J.S. had spoken to after the incident. The facts as presented—that J.S. was at the hospital, hours had passed since the alleged incident, and she was in the presence of a sexual assault crisis volunteer—could readily lead one to infer that J.S. had already spoken to at least one person, and perhaps more, before the arrival of the detective. *Cf.* ***State v. Boshcka***, 178 Wis.2d 628, 641, 496 N.W.2d 627, 631 (Ct. App. 1992) (excited utterance hearsay exception evidence admitted where statements were made to the first people the victim talked to following the incident). In addition, J.S.'s statement was lengthy and included detailed comments in response to direct questioning by Heiring. Much of Heiring's testimony was in narrative form and included statements such as the following: "[J.S.] said that [Sean] then rolled over looking sad and started to cry about his girlfriend who had recently passed away. She said she felt bad because he did this, so she figured she would stay with him as a friend to help him through this."

The trial court utilized only J.S.'s demeanor in making its admissibility ruling. The State, as proponent of the evidence, offered nothing further to support a ruling that J.S. was still under the stress of the sexual assault at the time she was questioned. Lacking was any evidence that J.S.'s sobbing,

trembling and shaking had persisted over the past nine to twelve hours. We conclude that it was unreasonable for the trial court to find, given the passage of time and all of the other factors known about the incident, that J.S.'s statement to the police detective satisfied the criteria for an excited utterance.

Residual Exception

We must also address whether J.S.'s statement falls within the residual hearsay exception. *See* § 908.03(24), STATS. ("A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."). Although the trial court did not consider the admissibility of J.S.'s statement under this section, we will uphold a trial court's discretionary decision if the record contains facts which would support such a decision. *See* ***Gerald L.C.,*** 194 Wis.2d at 560, 535 N.W.2d at 781. We examine J.S.'s statement for "circumstantial guarantees of trustworthiness." *See* § 908.03(24).

J.S. was of an age where she would have knowledge of sexual matters such that her reporting of the details of a sexual act would not implicitly render the account credible. *See* ***Gerald L.C.,*** 194 Wis.2d at 562, 535 N.W.2d at 781. We do not mean to imply that her allegations are untrue, merely that a circumstantial guarantee of truthfulness is not present. Second, J.S.'s statement was made to a detective, not to a family member or a close friend, *see* ***id.***, nor was there was any evidence presented that Heiring was the first person J.S. spoke to after the incident. Given the passage of time since the alleged assault, the fact that J.S. was at the hospital and that she was with a sexual assault crisis volunteer, it is logical to infer that J.S. had already spoken to at least one other person about the assault. Therefore, her initial report to the detective lacks a certain "guarantee of trustworthiness." *Cf.* ***id.*** (initial report to police officer lacks guarantee of

trustworthiness because complainant had told boyfriend first, rather than a family member).

The length of time between the assault and J.S.'s statement is also problematic because although the use of the residual hearsay exception is less reliant on the immediacy of statements, this exception requires other indicia of reliability. *See* ***id.*** When, as here, those other indicia are lacking, an extended lapse of time also weighs against trustworthiness. *See* ***id.*** at 562-63, 535 N.W.2d at 782. Last, we consider the fact that the State did not present any other corroborating witnesses or evidence to support the detective's hearsay testimony. *See* ***id.*** at 563, 535 N.W.2d at 782. Under the totality of these factors, we conclude that J.S.'s statement, without more, does not possess sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception.

Probable Cause for Bindover

The final issue before us is to review the trial court's order binding Sean over for trial. Our review of a bindover is de novo. *See* ***Moats,*** 156 Wis.2d at 84, 457 N.W.2d at 304. Probable cause is established at a preliminary hearing when there exists "a plausible account of the defendant's commission of a felony." ***Gerald L.C.,*** 194 Wis.2d at 564, 535 N.W.2d at 782 (quoted source omitted). If evidence is excluded by the statutory rules of evidence, it may not be used to establish a basis for the bindover. *Cf.* ***Moats,*** 156 Wis.2d at 84, 457 N.W.2d at 304 (there are no special exceptions that exist to otherwise allow for admissibility of evidence barred by the rules of evidence).[3]

[3] In ***Mitchell v. State,*** 84 Wis.2d 325, 333-34, 267 N.W.2d 349, 353-54 (1978), the court specifically rejected a request that it adopt a rule permitting the admission of hearsay evidence at the preliminary hearing stage.

Heiring was the sole witness presented by the State at the preliminary hearing. Because J.S.'s statements to Heiring constitute inadmissible hearsay and this was the only evidence put forth by the State, there was insufficient evidence to support the bindover. We therefore conclude that the trial court's finding of probable cause was improper and we reverse the bindover order.

By the Court.—Order reversed.

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