

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

No. 98-1734

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

IN THE INTEREST OF ALEX W.S.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

ALEX W.S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
STEVEN W. WEINKE, Judge. *Affirmed.*

NETTESHEIM, J. Alex W.S. appeals from a juvenile court dispositional order finding him delinquent based on repeated acts of sexual assault pursuant to § 948.025(1), STATS. The issues on appeal are whether the juvenile court correctly determined that Alex's confession to the police was voluntary and

whether the confession was sufficiently corroborated. We uphold the court's rulings and affirm the dispositional order.

FACTS AND PROCEDURAL HISTORY

As the result of a prior incident involving a charge of lewd and lascivious conduct, Alex was placed in the Kids in Treatment (KIT) program. Karen Barter, who works through the juvenile court services program and coordinates this program, was assigned as Alex's therapist. As part of this program, Alex signed an agreement which required that all discussions and revelations made during the treatment be treated as confidential. However, Alex was also advised that Barter would have to report any statements or revelations which Alex might make about sexual assaults.

Through Alex's social worker, Barter learned of allegations that Alex had engaged in sexual activity with the four-year-old daughter of his brother's girlfriend. The next day, Barter confronted Alex with this information. Alex admitted to the conduct and provided Barter with a written statement. Barter then reported Alex's admission to social worker who, in turn, contacted the Fond du Lac County Sheriff's Department.

Shortly thereafter, Detective Robert Ausloos arrived at Barter's office. Ausloos advised Alex of his *Miranda* rights both verbally and in writing. Alex waived his rights and provided Ausloos with both an oral and written statement admitting the conduct. Barter was present during the interview. Barter testified that she was "probably supportive in [Alex] talking to the detective."

Later, the State filed a petition for determination of status alleging that Alex had committed three or more acts of sexual assault against a child pursuant to § 948.025(1), STATS. The petition was based principally upon the

statement which Alex had provided to Ausloos. Alex moved to suppress the statement contending that it was involuntary. More specifically, Alex contended that the statement was the product of a breach of the confidential relationship between himself and Barter. The juvenile court held that Alex's statement was not involuntary because Alex, like all other participants in the KIT program, had been forewarned that any admissions of sexual assault would have to be reported to the authorities. Therefore, the court denied the motion to suppress.

At the ensuing bench trial, Alex argued that his confession was not sufficiently corroborated. Following the close of evidence, the juvenile court adjudged Alex delinquent and placed him in the serious juvenile offender program at Lincoln Hills School. Alex appeals.

DISCUSSION

Voluntariness

Although this case concerns two statements which Alex provided—one to Barter and the other to Ausloos—and although Alex sought to suppress the statement which he gave to Ausloos, the focus of Alex's challenge is really on the statement he gave to Barter. Alex reasons that his statement to Barter was privileged and that Barter's revelation of the statement to Ausloos prompted him to confess to Ausloos. As such, Alex contends that his statement to Ausloos was involuntary.

While Alex concedes that Barter was under a mandatory duty to report the sexual assault, he contends that this duty does not govern the

admissibility of the statement.¹ We agree with Alex that Barter was under a mandatory duty to report the sexual assaults revealed by Alex. Section 48.981(2), STATS., requires certain designated persons who have reasonable cause to suspect that a child seen in the course of their professional duties has been abused or neglected, or is at risk of such abuse or neglect, to report such suspicion or concern to the appropriate authorities. Here, Barter had not seen the victim so this provision did not apply. However, the statute goes on to state:

Any other person, including an attorney, having reason to suspect that a child has been abused or neglected or reason to believe that a child has been threatened with abuse or neglect and that abuse or neglect of the child will occur may make such a report.

Alex's confession obviously provided Barter with a suspicion of sexual abuse against the victim. This portion of the statute permitted Barter to report her suspicions to the authorities.

However, Alex contends that he had a reasonable expectation that the statement he gave to Barter would be confidential. Alex bases his argument on § 905.04(2), STATS., which provides in relevant part:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained ... for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, ... the patient's professional counselor or persons ... who are

¹ We note that Alex's appellate argument focuses in part on the statutory interplay of § 905.04(2), STATS., governing confidentiality, and § 48.981(2), STATS., governing the duty to report. However, the tension between these two statutes was not raised before the trial court as a basis for the inadmissibility of Alex's confession. Nor was it addressed by the trial court in its decision. We therefore limit our discussion to that issue presented before the trial court—the voluntariness of Alex's statement to Barter given his expectation of confidentiality per § 905.04(2). See *Vollmer v. Luety*, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801 (1990) (in the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review).

participating in the diagnosis or treatment under the direction of the physician ... or professional counselor.

Alex argues, pursuant to *State v. Locke*, 177 Wis.2d 590, 604, 502 N.W.2d 891, 897 (Ct. App. 1993), that “[t]he patient’s objectively reasonable perceptions and expectations of the medical provider are the proper gauge of the scope of the sec. 905.04 privilege.” However, Alex did not present any testimony before the trial court as to his perceptions or otherwise, whereas Barter testified that “the boys [in the KIT group] know that if they reveal a sexual assault” she is obligated to report it.

Based on Barter’s unrefuted testimony, the juvenile court found that Alex had been advised of the limits of the confidentiality between him, the KIT group and Barter. We will not overturn the trial court’s findings of fact unless clearly erroneous. *See* RULE 805.17(2), STATS. Because there was no evidence presented to the contrary, we uphold the trial court’s finding that Alex was aware of the confidentiality limits between him and Barter. We therefore reject Alex’s argument that Barter’s disclosure of his statement to Ausloos was in violation of § 905.04(2), STATS., and thus unlawfully obtained by the police.²

Alex also argues that his statement to Ausloos was involuntary because Barter’s presence during his interrogation by Ausloos “constituted a coercive influence under which he could not freely and voluntarily give a statement.” We are unpersuaded.

“In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or

² We therefore need not reach Alex’s further argument that the statement given to Ausloos should be suppressed due to the “illegal taint” of the first statement.

whether it was the product of improper pressures exercised by the police.” *State v. Clappes*, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). If there is no affirmative evidence of improper police tactics, such as questioning a defendant for excessively long periods of time or threatening physical force, our inquiry ends and the confession is deemed to be voluntary. *See id.* at 239-40, 401 N.W.2d at 767.

Any disputes as to the factual circumstances surrounding the confession must be resolved by the trial court. *See id.* at 235, 401 N.W.2d at 765. We will not disturb these findings unless they are contrary to the great weight and clear preponderance of the evidence. *See id.*

Here, the juvenile court found:

There is no doubt in this Court’s mind that as it relates to Detective Ausloos, that he properly mirandized [sic] [Alex], told him about his six rights and, certainly, among those is that he has a right to remain silent ... and he signed a statement ... that he read and had these read to him, and he was asked if he would make a voluntary statement.

....

In looking at the totality of the circumstances as it surrounds the situation, it does not appear that there was any external pressure to make a statement

Based on our review of the record, we conclude that the juvenile court’s findings are supported by the great weight of the evidence and, therefore, are not clearly erroneous.

At the suppression hearing, the juvenile court heard testimony from Barter and Ausloos. Ausloos testified that he informed Alex of his rights and that he did not at any time threaten or have physical contact with Alex. In Ausloos’ opinion, Alex gave his confession willingly. The setting in Barter’s office was noncustodial. Alex was not under arrest nor did Ausloos employ any physical

restraint. Nor did Ausloos brandish or threaten the use of any weapon. Barter testified that although she was “probably” supportive of Alex talking with Ausloos, she did not threaten him before Ausloos arrived or while he was making his statement to Ausloos.

Alex contends that Barter’s presence during the statement to Ausloos amounted to “psychological pressure” such that his confession was not voluntary. However, there is nothing in the record which supports this claim. We are not persuaded that Alex’s statement was involuntary simply because Barter may have encouraged him to speak with Ausloos. We conclude that Alex’s statement to Ausloos was voluntary and, thus, was properly admitted by the trial court.

Corroboration

Finally, Alex contends that the State failed to produce sufficient evidence at trial to corroborate his confession.³ The confession was the primary proof offered by the State at the trial. However, the State also provided the birth certificate of the victim and Ausloos’ testimony that he had confirmed that the victim’s mother was in fact Alex’s brother’s girlfriend and that the address Alex had given as his brother’s residence was partially correct. Alex argues that because this additional evidence fails to “confirm[] the happening of any fact significant to the crime,” it is insufficient. We disagree.

³ We note that the juvenile court did not expressly address this issue. However, the court’s rejection of this argument is implied by its finding that Alex committed the charged offense. See *Hintz v. Olinger*, 142 Wis.2d 144, 149, 418 N.W.2d 1, 3 (Ct. App. 1987) (when a trial court fails to make express findings of fact, we may assume that a missing finding was determined in favor of the judgment).

The parties agree that the law set forth in *Holt v. State*, 17 Wis.2d 468, 117 N.W.2d 626 (1962), provides the proper guidance on this issue. There the court stated:

All the elements of the crime do not have to be proved independently of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. *Such corroboration is required in order to produce a confidence in the truth of the confession.* The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Id. at 480, 117 N.W.2d at 633 (emphasis added).

Alex stated in his confession that he was “caught doing a sexual assault to [the victim,] my brother’s girlfriend’s daughter.” Here, the State provided the birth certificate of the victim which verified the name of the victim and her age. The birth certificate also provided the name of the victim’s mother, who was verified as Alex’s brother’s girlfriend. Thus, the birth certificate verified certain aspects of Alex’s confession. Moreover, it confirmed that the victim was under the age of thirteen—an element of the crime of engaging in repeated acts of sexual assault of the same child under § 948.025(1), STATS.

Alex’s confession also recited the street, street number and town of his brother’s residence. Ausloos testified that his own investigation revealed that Alex’s brother lived on the street indicated in the confession, although the street number was different.

The purpose of corroborating evidence is to “produce a confidence in the truth of the confession.” *See Holt*, 17Wis.2d at 480, 117 N.W.2d at 633. We conclude that the State’s evidence in this case did so. We therefore reject

Alex's contention that the adjudication must be vacated based on the State's failure to corroborate his confession.

CONCLUSION

We uphold the trial court's finding that Alex was aware that any statements made to Barter regarding a prior sexual assault would not be confidential. Therefore, Barter's disclosure of his statement was not unlawful. We further uphold the trial court's finding that Alex's statement to Ausloos was voluntary. Finally, we conclude that the State provided sufficient evidence to corroborate Alex's confession. Accordingly, we affirm.

By the Court.—Ordered affirmed.

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

