COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3158-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN L.C.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. Kevin L.C. appeals a judgment of conviction for two counts of first-degree sexual assault involving two minor females, one his stepdaughter, K.R.; the other a neighbor. Kevin asserts that the trial court erroneously exercised its discretion by: (1) allowing use of a videotape deposition instead of K.R.'s live testimony; (2) shielding Kevin from K.R. at the videotape

deposition; and (3) disallowing evidence of a claimed prior untruthful sexual assault allegation by K.R. Because the record supports findings that K.R. would be traumatized by testifying before Kevin and in court before a jury, we affirm the court's exercise of discretion authorizing the videotape deposition and shielding Kevin from K.R. at the deposition. We also affirm the court's rejection of Kevin's attempt to introduce claimed prior untruthful allegations of sexual assault because Kevin did not show that a reasonable person would have reasonably concluded that K.R. made prior untruthful allegations. Accordingly, we affirm the judgment.

BACKGROUND

Kevin was charged with two counts of sexual assault involving minor females. Both offenses allegedly occurred five years earlier. The trial court granted the State's motion to videotape K.R.'s testimony pursuant to § 967.04(7), STATS. K.R.'s deposition apparently took place in a room where Kevin was shielded from K.R.'s view. The trial court also granted the State's request pursuant to § 972.11, STATS., the rape shield law, to exclude evidence of K.R.'s alleged untruthful allegations of an earlier sexual assault by another. After a jury trial, Kevin was convicted of both counts.

The State's first motion requested the deposition be conducted in a specific room with a one-way mirror. Two witnesses testified at the hearing: Beth Young-Verkuilen, a psychotherapist who works primarily with young sexual abuse victims, and K.R.'s stepmother, Dawn. At the State's request, Young-Verkuilen evaluated whether K.R. should testify at trial. Before interviewing K.R., she spoke to her treating therapist, reviewed his records, the police reports and the statutory factors relating to child videotaped depositions.

Young-Verkuilen testified that at the beginning of the interview, K.R. was tearful, tense and anxious, and that it was difficult for her to talk because she feared having to disclose her experience to yet another person. Young-Verkuilen also testified that K.R. had nightmares specifically related to the pending court experience. She dreamed about Kevin murdering members of her family as well as the jurors. Kevin had threatened to kill K.R.'s mother and brother if she told anyone about the assaults. K.R. feared being responsible for Kevin's incarceration because she did not want to hurt her stepfather or other family members. Her mother did not believe or support her and tried to convince her that she had not been abused.

Young-Verkuilen observed that K.R.'s mental health was "fragile," that she suffered from low self-esteem, that she reported suicidal ideations, and that she exhibited symptoms of post-traumatic stress disorder, including nightmares, avoidance, anxiety, fear, psychological and physiological reactivity, increased arousal, flashbacks and emotional numbing. Young-Verkuilen testified that it was appropriate to protect K.R. from having to tell her story again before an audience in a courtroom because testifying in court would be emotionally strenuous for K.R. and would provoke anxiety. Additionally, she noted there was less chance that K.R. would testify accurately. Young-Verkuilen recommended the testimony occur in a smaller room, with as few people present as possible. She also testified that having K.R. testify in a closed courtroom with a support person nearby would not alleviate all of her anxieties and fears because she would still have to face her mother and Kevin.

Dawn recounted that when K.R. talked with the district attorney about the assault, she was uncomfortable and showed stress. She became very

emotional, cried, got red in the face and upset. Dawn also testified that K.R. said that she would "eat dirt and die" rather than see Kevin and have to testify in front of him. The last time K.R. had seen Kevin was months before when she went to visit her mother. When she saw Kevin, she started to cry, became red and left.

ANALYSIS

1. Challenge to the Videotape Deposition

A trial court's decision to authorize a videotape deposition under § 967.04(7), STATS., will only be reversed if the trial court erroneously exercised its discretion. *See* ***State v. Thomas***, 144 Wis.2d 876, 890, 425 N.W.2d 641, 646 (1988) (***Thomas I***), *aff'd & modified*, 150 Wis.2d 374, 442 N.W.2d 10 (1989) (***Thomas II***). Discretion is appropriately exercised if the trial court employed proper legal standards and a demonstrated process of reasoning pertinent to the issue at hand based upon facts of record. *See* ***Thomas II***, 150 Wis.2d at 387, 442 N.W.2d at 16-17. We must support the exercise of discretion whenever facts of record support the court's decision. ***Id***. at 388, 442 N.W.2d at 16.

Our analysis begins with § 967.04(7)(a), STATS., which provides in pertinent part:

> In any criminal prosecution … any party may move the court to order the taking of a videotaped deposition of a child who has been or is likely to be called as a witness. Upon notice and hearing, the court may issue an order for such a deposition if the trial or hearing in which the child may be called will commence:
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> 1. Prior to the child's 12th birthday; or
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> 2. Prior to the child's 16th birthday and the court finds that the interests of justice warrant that the child's

> testimony be prerecorded for use at the trial or hearing under par. (b).[1]

In addition to the statute, we look to the ***Thomas*** decisions. Our supreme court indicated that the circuit court must find that the statute's purposes are served. ***Thomas II***, 150 Wis.2d at 386-87, 442 N.W.2d at 16; *see also* ***Thomas I***, 144 Wis.2d at 890-91, 425 N.W.2d at 646-47. Specifically, the circuit court must determine that the "protection of child-witnesses from further traumatization by the legal process … will be served by taking the videotaped deposition of the child." ***Id***.

Kevin claims the trial court erred by failing to apply the proper legal standards in five different ways: (1) it concluded that if the trial were held before K.R. turned twelve, it would not have been required to exercise discretion; (2) it concluded that because K.R. was twelve years and twenty-seven days old, it did not need to exercise discretion; (3) there was no finding that the deposition would in any way benefit K.R.'s condition; (4) there were no findings in support of isolating Kevin from K.R. during the deposition; and (5) it failed to give a cautionary instruction to the jury as to the reason for the deposition. We reject Kevin's claims.

We summarily reject Kevin's first two claims of error. The trial court did opine that if the child were under the age of twelve, the statute would authorize the videotape deposition without the court first exercising its discretion.

[1] Subsection (b) sets forth criteria the court is to examine to determine whether the interests of justice warrant videotape testimony.

To the extent the trial court's statutory interpretation is erroneous,[2] it is harmless error. The trial court recognized, contrary to Kevin's second contention, that K.R. was over twelve years old and that it was therefore "necessary to consider the factors set forth in [§ 967.04]2(b) …." It then considered the hearing evidence under the applicable statutory factors.

On the third point, we disagree that either ***Thomas*** decision requires a finding that the deposition would benefit K.R. ***Thomas II*** requires a finding that the videotape deposition will protect K.R. from further traumatization by the legal process. *See* ***id***. at 386-87, 442 N.W.2d at 16. The court implicitly made this and, contrary to Kevin's fourth contention, other necessary findings[3] in its review of the statutory factors[4] and by ordering the deposition. K.R.'s young age at the time of

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[2] Neither ***Thomas*** decision squarely addresses the issue. *See* ***State v. Thomas***, 144 Wis.2d 876, 425 N.W.2d 641 (1988) (***Thomas I***), *aff'd & modified* 150 Wis.2d 374, 442 N.W.2d 10 (1989) (***Thomas II***).

[3] A circuit court's determination will be affirmed when it is supported by the record, even though the court fails to make formal findings. ***Thomas II***, 144 Wis.2d at 893-94, 442 N.W.2d at 648.

[4] Section 967.04(7)(b), STATS., contains statutory factors the court is to consider when determining whether to permit a videotape deposition; it provides

> Among the factors which the court may consider in determining the interests of justice are any of the following:
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> 1. The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
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> 2. The child's general physical and mental health.
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> 3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
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> 4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.

(continued)

court proceedings, her fragile mental health, the trauma she continued to experience as a result of the assault, the difficulty she had verbalizing the event to new people, her fear of and for the defendant and her family and her particularized fear of testifying in court were sufficient to permit the court to conclude in a proper exercise of its discretion that K.R. should be permitted to testify in a videotape deposition because having to testify live in court would be too traumatic

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> 5. The child's familial or emotional relationship to those involved in the underlying proceeding.
> 6. The child's behavior at or reaction to previous interviews concerning the events involved.
> 7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.
> 8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.
> 9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required, the likely length of time until the last such proceeding, and the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for that period of time.
> 10. Whether a videotaped deposition would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify.

The trial court considered K.R.'s age; her fragile mental health; that the events she would testify to were crimes perpetrated against her and that she sustained emotional injury as a result; that this was a "classic situation" involving child abuse where there is a division in the family and "non-belief by one of the parents"; the incident involved her step-father; that she wouldn't be able to testify in court proceedings; that K.R. had been told people would be harmed if she testified; that people disbelieved her; and that she manifested symptoms of post traumatic stress, including anxiety, nightmares, lack of self esteem, and some delinquent behavior.

for her. Finally, the court explicitly found that a videotape deposition was necessary for ascertaining the truth. This finding directly corresponds to the videotape deposition statute's underlying purpose, which is to serve the interests of justice. *See* § 967.04(a) and (b), STATS.

Kevin waived his fifth point of failing to give the jury a cautionary instruction. He did not request such an instruction. We will not find error in the failure to give an instruction that the defendant did not request. *See* ***State v. Feela***, 101 Wis.2d 249, 272, 304 N.W.2d 152, 163 (Ct. App. 1981), *rev'd on other grounds*, ***State v. Pharr***, 115 Wis.2d 334, 340 N.W.2d 498 (1983).

2. Shielding Kevin From K.R.

The record does not reflect precisely how the videotape deposition proceeded because neither the videotape nor its transcript was included in the appellate record.[5] The motion for the deposition suggested that Kevin would be in a separate room, able to view the deposition through a one-way mirror and speak to his attorney via telephone. It is the appellant's duty to ensure that the record is sufficient to address the issue raised on appeal. *See* § 809.15(2) and (3), STATS. Nevertheless, because the State does not dispute that Kevin was shielded from K.R., we presume he was.

Whether to shield a child witness from the defendant is a discretionary determination. ***Thomas I***, 144 Wis.2d at 893-94, 425 N.W.2d at

[5] The only information in the record regarding the facilities used for the deposition was in the State's motion, which specified, and contained photographs of, the room it desired to use.

648. Unlike the decision to permit a videotape deposition, whether to shield involves confrontation clause considerations.[6] *See* ***State v. Street***, 202 Wis.2d 533, 553, 551 N.W.2d 830, 639-40 (Ct. App. 1996). As stated above, in determining whether to order a videotape deposition, the trial court must consider whether the *legal process* will traumatize the child witness. An order that the defendant be shielded from a witness's sight requires a finding that testifying *in the defendant's presence* would traumatize the child. ***Id***.

Kevin argues that the trial court's findings were inadequate and based upon impermissible presumptions and generalizations. *See* ***Thomas II***, 150 Wis.2d at 378, 442 N.W.2d at 13. He relies on the differences between these facts and those in ***Thomas II*** as proof that the record is inadequate to support shielding. Kevin points out that unlike ***Thomas II***, there was no attempt to elicit testimony from K.R. in front of him at a preliminary hearing or otherwise, that the assault was more serious in ***Thomas II***, and that K.R. had no difficulty testifying.

Thomas II requires only that the court find the child would be traumatized by testifying in the defendant's presence, not that the facts are similar or identical to those in ***Thomas II***. Here, the trial court implicitly found that K.R. would be traumatized by testifying in Kevin's presence. It heard testimony establishing K.R.'s stress and fears over testifying in front of Kevin. It also heard her reaction to seeing Kevin several months before. From that testimony the court inferred that K.R. could not testify in a courtroom nor in front of Kevin. Based on

[6] Videotape testimony is the functional equivalent of live testimony; it does not implicate confrontation clause issues. *See* ***Thomas II***, 150 Wis.2d at 392, 442 N.W.2d at 18.

the facts and inferences therefrom, we conclude that the record reflects an appropriate exercise of discretion.

3. Alleged Prior False Accusation of Sexual Assault

At K.R.'s videotape deposition, there was apparently a reference to another instance when K.R. claimed to have been sexually assaulted. The prosecutor indicated that when K.R. was five years old, she was sexually touched by her twelve-year-old aunt. Social services initiated, but did not pursue, an investigation. The State filed a motion in limine to preclude testimony of the alleged prior assault under the rape shield law, § 972.11(2)(b), STATS.[7]

Kevin did not present witnesses at the motion hearing, but represented that the investigating social worker would testify as to why she did not pursue the investigation, and the aunt would deny any inappropriate contact. He sought admission of the evidence to attack K.R.'s credibility and to show that she knew she could use the system to avoid contact with Kevin. After argument on the matter, the court ruled in the State's favor, determining that there was no evidence of prior untruthful allegations within the meaning of § 972.11(2)(b)3, STATS. The court found that the evidence of the assault was speculative, somewhat nebulous and would confuse the jury. The court also found that the evidence would have no probative value and would create a trial within a trial that would not aid the jury.

[7] The motion also dealt with several other matters not at issue on appeal.

On appeal, Kevin contends that the court erred by applying an incorrect legal standard. He asserts that the court failed to consider the appropriate criteria and excluded the evidence "on the grounds that to do so would, in effect, result in 'a trial within a trial.'" We are unpersuaded.

As a general rule, evidence of a complaining witness's prior sexual conduct is inadmissible. *See* § 972.11(2)(b), STATS.; ***State v. Jackson***, 216 Wis.2d 646, 657, 575 N.W.2d 475, 480 (1998). A complaining witness' prior untruthful allegations of sexual assault may be admissible. *See* § 972.11(2)(b)3, STATS.;[8] ***State v. DeSantis***, 155 Wis.2d 774, 784-85, 456 N.W.2d 600, 605 (1990). Under the terms of §§ 972.11(2)(b)3 and 971.31(11), STATS.,[9] Kevin must make a three-part showing that: (1) there is a sufficient factual basis for allowing a jury to hear evidence that K.R. made a prior untruthful sexual assault allegation; (2) the evidence is material to a fact at issue; and (3) the evidence's probative value

[8] Section 972.11(2)(b)3, STATS, states:

> (2) If the defendant is accused of a crime under s. 940.225, 948.02, 948.025, 948.05, 948.06 or 948.095, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):
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> ….
>
> 3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

[9] Section 971.31(11), STATS., provides:

> In actions under s. 940.225, 948.02, 948.025 or 948.095, evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

outweighs its inflammatory and prejudicial nature. *See* ***DeSantis***, 155 Wis.2d at 784-85, 456 N.W.2d at 605. We examine the court's discretionary decision within the context of this legal standard. ***Jackson***, 216 Wis.2d at 659, 575 N.W.2d at 481. If the record supports the trial court's evidentiary ruling, we will not reverse even though the court may have given the wrong reason or no reason at all. ***State v. Patino***, 177 Wis.2d 348, 362, 502 N.W.2d 601, 606 (Ct. App. 1993). In the absence of the videotape or its transcript, we will assume that every fact essential to sustain the court's findings regarding K.R.'s testimony is supported by the missing record. *See* ***Duhame v. Duhame***, 154 Wis.2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

The first prong of the three-part test requires that Kevin produce evidence sufficient for the court to conclude that a reasonable person could reasonably infer that K.R. made a prior untruthful allegation of sexual assault. *See* ***DeSantis***, 155 Wis.2d at 788, 456 N.W.2d at 606. The court found that the evidence was insufficient. We agree. Kevin failed to produce any particularized evidence regarding K.R.'s prior allegation. The record does not indicate what the "sexual touching" was or how the claim originated. The prosecutor characterized the circumstances surrounding the claim as so vague and uncertain that social services did not pursue it.

Although Kevin submitted that the aunt would testify "to the effect that she never did inappropriately touch her niece," he did not represent that she never touched K.R.'s intimate parts. We can only speculate what the touching was. Given the aunt's age, the touching could have been innocent or inadvertent as opposed to intentional touching for sexual purposes. It could be that both were telling the truth; that K.R. had been touched, but that it was not inappropriate. The

court found the evidence on with this issue "speculative, somewhat nebulous, and if anything, it's going to be confusing." The record supports its conclusion that there was no evidence of a prior untruthful allegation under the § 972.11(2)(b)3, STATS.[10]

CONCLUSION

The videotape deposition and shielding K.R. from Kevin at the deposition reflect the court's appropriate exercise of discretion. There was ample testimony for the trial court to conclude that K.R. would be traumatized by testifying in court as well as having to face Kevin. Excluding K.R.'s alleged prior untruthful sexual assault claim was also an appropriate exercise of discretion because Kevin failed to satisfy the first criteria for admission of that evidence.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[10] Because Casey failed to establish the exception under § 972.11(2)(b)3, STATS., we do not reach his reasons for offering evidence of K.R.'s prior allegations.