COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1215-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD L. DANTUMA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Reversed and cause remanded with directions*.

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 EICH, J. Ronald Dantuma appeals from a judgment convicting him of four counts of second-degree sexual assault of a child and one count of child enticement, and from an order denying his motion for postconviction relief. He

challenges the admission into evidence of a statement he made to police in an earlier case in which he acknowledged having sexual contact with the victim. The statement was suppressed by the court in the former case on grounds that the statement was the result of an un-***Mirandized*** custodial interrogation; and Dantuma argues that the doctrine of issue preclusion bars its admission in this case.

¶2 The circuit court rejected Dantuma's issue-preclusion argument without really considering it, ruling only that a related rule—claim preclusion—didn't apply. The court then read the transcript of the suppression hearing in the earlier case and "re-decided" the issue—concluding that the judge in that case had wrongly ruled that Dantuma was in custody during his interrogation. Then, ruling that, as a result, there was no ***Miranda*** violation, the court denied Dantuma's motion to suppress the statement and allowed it to go to the jury.

¶3 Because we are satisfied that issue preclusion applies to the ruling in the former case, we reverse the judgment and order.

¶4 The material facts are not in dispute. The charge of which Dantuma was convicted in this case was the 1997 sexual assault of a thirteen-year-old girl. The victim, M.A.G., was also one of three victims in an earlier case in which Dantuma had been charged and convicted of a similar offense. During the investigation of that case, Dantuma gave a statement to police admitting that he had had sexual contact with M.A.G. and two other young girls. He moved to suppress the statement and the trial court granted the motion, ruling that because the statement was given in the course of a custodial interrogation in which Dantuma had not been advised of his ***Miranda*** rights, it was inadmissible as a matter of law. The case was concluded by a plea agreement in which the State

reduced the number of counts in the charge from six to two and Dantuma entered a plea of guilty.

¶5 Prior to Dantuma's trial in the instant case, the State moved, in limine, for an order allowing it to introduce the inculpatory statement Dantuma had given in the previous prosecution as "other-acts" evidence tending to show that he had the intent and motive to seek sexual gratification from M.A.G. in this case as well. Following a hearing at which Dantuma argued, among other things, that principles of issue preclusion barred admission of the evidence, the circuit court—basing its ruling, as we have indicated, on the transcript of the hearing in the previous case—concluded that Dantuma had not been in custody at the time he made the statement, and thus no ***Miranda*** violation had occurred. The court also found from the prior transcript that the earlier statement had been voluntarily made and was admissible in this action.

¶6 Issue preclusion, once known as "collateral estoppel," is a rule designed to limit relitigation of issues that have been contested and litigated in a previous action between either the same or different parties. Relitigation is barred if: (1) the issue in the present case is the same as that in the prior case; (2) the issue was actually litigated in the prior case; (3) the party against whom preclusion is sought (here, the State) was the same; and (4) precluding relitigation comports with principles of fundamental fairness. ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993).

¶7 In this case, Dantuma argued that both claim and issue preclusion applied so as to bar re-decision of the suppression issue determined in his favor in the earlier case. And while counsel argued at some length on both points—they

are related but distinct rules[1]—the court appears to have discussed only claim preclusion in its oral decision, ruling that neither doctrine applied because "a previous determination had not been reached [on] the ultimate issue of guilt or innocence." No mention was made, or discussion had, with respect to any of the ***Michelle T.*** factors. Indeed, as indicated, issue preclusion (or collateral estoppel) was mentioned only once in the court's discussion, and that was in the brief statement that neither rule applied. We think that the circuit court erred as a matter of law in failing to consider the application of issue preclusion.

¶8 Considering the underlying requirements of the issue preclusion rule—identity of issues and parties and actual litigation of the issue—our review is de novo. ***Ambrose v. Continental Ins. Co.***, 208 Wis. 2d 346, 353-356, 560 N.W.2d 309 (Ct. App. 1997). There is no question that there is an identity of parties in each action—the State of Wisconsin and Dantuma. That it may have been a different assistant district attorney prosecuting each case is irrelevant, for the party against whom issue preclusion was being asserted in each case is the State of Wisconsin. Nor is there any question that there is an identity of issues in each case: the admissibility of Dantuma's inculpatory statement—specifically, whether he was "in custody" during the questioning. It is also clear from the record that the issue was "actually litigated and decided" in the former case: The court, after hearing testimony from several witnesses, concluded that Dantuma's statement should be suppressed because it was given while he was in custody, during an interrogation and without the benefit of ***Miranda*** warnings having been administered.

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[1] *See* ***Northern States Power Co. v. Bugler***, 189 Wis. 2d 541, 549, 525 N.W.2d 723 (1995).

¶9 That leaves for consideration the "fairness" factors discussed in ***Michelle T.*** Generally, the "fairness" element of the issue preclusion rule is committed to the trial court's discretion. And while the circuit court "is to use its discretion to consider an array of factors to determine fairness in applying issue preclusion, certain of the ***Michelle T.*** factors present questions of law." ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 225, 594 N.W.2d 370 (1999) (citing ***Ambrose,*** 208 Wis. 2d at 356, 560 N.W.2d at 309). We have also said that "the standard of review of a particular decision on issue preclusion may be affected by the context in which its application is sought." ***Id.*** On the peculiar facts of this case—and considering the manner in which the fairness inquiry has been brought to us by the parties on this appeal—we believe we may decide each aspect of the fairness inquiry. First, as to the ability of the State to obtain review of the decision, WIS. STAT. § 974.05(1)(d)3 (1997-98) permits the State to appeal from any order which results in "[s]uppressing a confession or admission." Second, it is clear from the record that the legal issue does not involve multiple claims. There was—and is—a single issue presented: whether Dantuma's statement was the result of an un-***Mirandized*** custodial interrogation, and thus inadmissible as a matter of law. And there have been no significant changes in the law with respect to a suspect's Fifth Amendment privilege against self-incrimination which would warrant reconsideration of the admissibility of that statement. Nor are there any differences in the quality or extensiveness of the proceedings between the two courts which would warrant relitigation of the issue. Both the State and Dantuma had the opportunity to present their arguments in each proceeding and, as indicated, the issues and the burden of proof were identical in both cases. Thus, the first four factors favor application of issue preclusion.

¶10 The fifth and final factor is whether there are public policy factors, or concerns over the individual circumstances of the case, which would render application of issue preclusion fundamentally unfair to the State. As indicated, this normally would be reviewed under rules applicable to discretionary determinations. The State's argument, however, is quite limited. It says only that applying issue preclusion would be unfair in this case because it would "rob the Second Court of an important part of its inherent power to consider a proffer of evidence in any case before it, and to rule on the admissibility thereof." We disagree. The very purpose of the rule is to foreclose relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. It is designed to promote judicial economy, while ensuring to the litigants their right to be heard. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 549, 525 N.W.2d 723 (1995). And it was created "to ward off endless litigation and ensure the stability of judgments"—and to "guard against inconsistent decisions on the same set of facts." ***Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 301-02, 592 N.W.2d 5 (Ct. App. 1998). As such, it is a valid and necessary limitation on a court's ability to rehear and re-litigate issues that were litigated by the parties in a prior proceeding. The State's lone fairness argument fails as a matter of law.

¶11 We are satisfied, therefore, that the court's prior suppression of Dantuma's statement was binding in this case. We therefore reverse the judgment and remand to the circuit court with directions to enter an order denying the

State's motion to allow the statement in evidence, and to grant Dantuma's motion for a new trial.[2]

By the Court.—Judgment and order reversed and cause remanded with directions.

Not Recommended for publication in the official reports.

[2] The State suggests in its brief that any error in admitting Dantuma's statement should be considered harmless. Again, we disagree. We think a statement admitting prior sexual contacts with the victim and two of the other witness in this case would impact significantly on his credibility.

We also reject the State's argument that Dantuma waived any objection to the statement's admissibility by failing to include it in a motion in limine. At the close of the motion hearing, the court asked defense counsel if he had any objection to receipt of the State's exhibits—one of which was Dantuma's statement. Counsel replied: "No," and the State claims this answer constitutes "a clear, unequivocal, indisputable waiver of Dantuma's objection to the admissibility of the statement." We think otherwise. We see no reason why Dantuma, who had objected to admission of the statement throughout the entire proceedings, may be held to have waived those objections by failing to object to the admission of the State's exhibits at the close of the pretrial hearing on the motion in limine.