COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2235

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

STATE OF WISCONSIN EX REL. MILO S. COUILLARD,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Milo Couillard appeals the trial court's judgment and order affirming Couillard's probation revocation. He argues that the Division of Hearings and Appeals erroneously admitted hearsay evidence, without which insufficient evidence supports the revocation. Couillard also argues that he was

denied his constitutional right to confront his accusers. We disagree and affirm the judgment and order.

BACKGROUND

¶2 Couillard was sentenced for burglary (party to a crime) as a repeater on August, 14, 1996. He was placed on probation and served four months in jail as a condition. On August 1, 1997, he was sentenced for robbery by force (party to a crime) and habitual criminality. Couillard was placed on probation for seven years and sentenced to a stayed seven-year prison term.

¶3 Couillard was arrested for sexually assaulting two children on April 22, 1999. The Department of Corrections conducted an investigation and issued a notice of probation violation, listing four items:

> 1.) Sometime between the end of October 1998 and the end of November 1998 (Halloween and Thanksgiving), [Couillard] did insert his finger in Kelsey[‘s] underwear and place his finger on her buttocks. This behavior is in violation of Probation and Parole Rules #1 and #22 signed by [Couillard] on 05-11-98 and his Alternative to Revocation signed 05-11-98 by [Couillard].
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> 2.) Sometime between the end of October 1998 and the end of November 1998 (Halloween and Thanksgiving), [Couillard] did expose his penis to Kelsey [] and McKenzie [] This behavior is in violation of Probation and Parole Rules #1 and #22 signed by [Couillard] on 05-11-98 and his Alternative to Revocation signed 05-11-98 by [Couillard].
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> 3.) On or about 03/16-18/99 [Couillard] did have police contact and failed to notify his agent within 72 hours. This behavior is in violation of Probation and Parole Rules #1 and #2 signed by [Couillard] on 05-11-98.
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> 4.) On 05-05-99, [Couillard] did start working at the Wausaukee sawmill and failed to notify his agent within 72 hours. This behavior is in violation of Probation and Parole Rule #1 and #7 signed by [Couillard] on 05-11-98.

¶4 At the probation revocation hearing, the following facts were presented. Couillard lived with Lisa who had a five-year-old daughter, McKenzie. McKenzie was friends with Kelsey, age eight, who lived nearby. Lisa and Couillard babysat for Kelsey, including frequent overnights, because her mother, Janey, worked night shifts as a nurse. One evening, Kelsey told her mother that she did not want to go to Lisa and Couillard's house for babysitting. Janey asked her why. Kelsey responded that about three months previously Couillard had inserted his finger inside her underwear and placed his finger on her buttocks and that she was afraid of him.

¶5 The following day, Janey contacted Lisa and asked McKenzie and her to come over to discuss what Kelsey had reported. Kelsey gave the same account to Lisa and also informed the mothers that McKenzie had told Kelsey a secret. The secret was that Couillard had "put [McKenzie] on his dick."

¶6 McKenzie admitted this to the two mothers, but not to the police. McKenzie did tell law enforcement officers that Couillard had touched her buttocks inside her underwear. She also stated that she was afraid of Couillard. Kelsey repeated to them what she had told the mothers. Kelsey further reported that on the same day Couillard sexually touched her, he exposed his penis to the two girls. She stated, "It was stiff and he kept bouncing McKenzie up and down on it." The police report indicates that McKenzie did not deny that Couillard had exposed his penis to the girls.

¶7 These facts were introduced via Janey, Lisa, Lieutenant Andrew Lewis, and Janey's boyfriend, Kelly, who was also present when the girls reported the incidents to the mothers. Also in evidence were the written statements that the

girls, Lisa, and Couillard made to the police. The two children, Kelsey and McKenzie, did not testify in person.

¶8 Janey further testified that Kelsey would not lie about something of this magnitude. Officer Lewis testified that Kelsey's account was consistent with the information received from McKenzie. Lisa stated that Kelsey was lying, that McKenzie had started telling lies since being around Kelsey and that Janey had a motive for her actions.

¶9 The administrative law judge (ALJ) concluded that Couillard violated the rules of his probation as alleged in violations one and two. The ALJ discounted Lisa's testimony because it was motivated by Couillard's situation and self-serving. The ALJ rejected the personal character assaults on Janey.[1] He determined that a medical exam of Kelsey was unnecessary because she had not alleged penetration and the incident occurred three months before it was first reported. Although McKenzie was examined and the exam did not show any sexual abuse indicators, the written allegations only allege touching and exposure. Therefore, the exam results did not dispose of the allegations. The ALJ concluded that the department's evidence was more persuasive than the personal attacks on Janey, and that the personal attacks failed to dispute the evidence, including statements made to the mothers and the police.

[1] Lisa contended that Janey was motivated to create charges against Couillard because Janey wanted Lisa to end her relationship with Couillard so that Lisa could date a friend of Janey's. Lisa also contended that Janey had invited her to participate in group sexual activity and was angry when Lisa refused. Another individual, Ronald Kral, testified to information about Janey supplied to him by Lisa. He testified that Janey allowed Kelsey to watch pornographic movies and that Janey was "hitting on" Couillard while using marijuana and drinking alcohol.

¶10 The ALJ also concluded that Couillard violated the rules of his probation as alleged in violations three and four. Couillard does not deny that he did not call his probation agent within seventy-two hours of the police request for him to make a statement regarding the alleged sexual assaults. He also does not deny violation four.

¶11 The department reported that no alternative to revocation was available. The ALJ agreed, finding that revocation was necessary to protect the public from further criminal activity. He further determined that failure to revoke probation would unduly depreciate the seriousness of the violations.

¶12 The ALJ thus revoked Couillard's probation. Couillard appealed the revocation to the division, which affirmed the ALJ's decision. Couillard appealed the division's determination to the trial court, which also affirmed the revocation.

ANALYSIS

I. STANDARD OF REVIEW

¶13 When reviewing probation revocation decisions, we defer to the division's determinations. ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). Our review is limited to:

> (1) whether the division kept within its jurisdiction; (2) whether the division acted according to law; (3) whether the division's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the division might reasonably make the order or determination in question.

Id.

¶14 The State has the burden at the revocation hearing to prove the alleged probation violation by a preponderance of the evidence. ***Id.*** However, on appeal the burden shifts to the probationer who must show that the decision was arbitrary and capricious. ***Id.***

¶15 If the division properly exercises its discretion, its decision is not arbitrary and capricious or represent its judgment. ***Id.*** at 656. The division properly exercises its discretion if it employs a reasoning process based on the facts of record and reaches a conclusion based upon a logical rationale founded upon proper legal standards. ***Id.*** The division should consider alternatives to revocation that are available and feasible. ***Id.*** This court will examine whether substantial evidence supports the division's decision. ***Id.*** We will not substitute our judgment for that of the division. ***Id.*** If we conclude that substantial evidence supports the decision, we must affirm, even if the evidence supports a different determination. ***Id.*** The evidence is substantial if it is "relevant, credible, probative and of a quantum upon which a reasonable fact finder could base a conclusion." ***Id.*** (quoting ***Cornwell Personnel Assocs. v. LIRC***, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993)).

II. HEARSAY AND SUFFICIENCY OF THE EVIDENCE

¶16 Couillard contends that Janey could not properly testify to what her daughter told her and that Lewis should not have been permitted to testify to what the girls told two other detectives. He argues that this testimony is hearsay and should have been excluded. Without the hearsay testimony, substantial evidence does not support revocation.

¶17 Restrictions on the admission of hearsay evidence, normally applicable in criminal trials and other trials, do not apply in probation revocation

proceedings. WIS. STAT. § 911.01(4)(c).[2] Couillard concedes as much in his reply brief. Parole revocation proceedings "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." ***Morrisey v. Brewer***, 408 U.S. 471, 489 (1972). In ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 583, 326 N.W.2d 768 (1982) (interpreting the term "unsubstantiated hearsay" in ***State ex rel. Henschel v. DHSS***, 91 Wis. 2d 268, 282 N.W.2d 618 (Ct. App. 1979)), the supreme court concluded that a probation violation may be proved with hearsay as long as the evidence is reliable.[3]

¶18 In this case, the children were five and eight years old. Although the children did not testify, the evidence of what occurred was introduced via several witnesses. The record supports the ALJ's determination that the evidence was reliable. The record shows that Kelsey was afraid of Couillard and thus was under stress when she told her mother that she did not want to go to Lisa's house, where Couillard also lived. Kelsey provided a consistent statement to her mother,

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[2] WISCONSIN STAT. § 911.01(4) provides:

> (4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911 [which includes WIS. STAT. ch. 908 regarding hearsay evidence] do not apply in the following situations:
>
> ….
>
> (c) *Miscellaneous proceedings*. Proceedings for … revoking probation ….

All references to the Wisconsin Statutes are to the 1997-98 version.

[3] Couillard cites ***State ex rel. Henschel v. DHSS***, 91 Wis. 2d 268, 282 N.W.2d 618 (Ct. App. 1979), to argue that hearsay allegations are not sufficient to sustain a probation revocation. ***Henschel*** concluded that *parole* revocation could not be proved "entirely by unsubstantiated hearsay testimony." ***Id.*** at 271. However, Couillard ignores ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 583, 326 N.W.2d 768 (1982), which reinterprets the term "unsubstantiated hearsay." Further, ***Henschel*** does not refer to WIS. STAT. § 911.01(4)(c), and § 911.01(4)(c) does not refer to parole revocation.

McKenzie's mother and the police. Although McKenzie provided a different statement to the police than she made to Janey, she did not deny the exposure incident and admitted that Couillard had sexually touched her and that she was afraid of him. Her statement made to her mother and Janey under stress was reliable. Officer Lewis testified that children their age would not be able to give the details they did if they were fabricating. There is thus a basis in the record for the ALJ to find, and the division to concur, that the children were not fabricating. We conclude that the ALJ did not err when it admitted the evidence at the hearing and the division appropriately affirmed the decision.

¶19 The division fully considered the evidence presented at the hearing. It made extensive factual and credibility findings. Its order reflects a logical rationale based on the facts in the record and proper legal standards. We conclude that substantial evidence supports revocation.

III. CONFRONTATION

¶20 Couillard contends that his due process rights to confront his accusers, guaranteed by the United States Constitution, amendments VI and XIV, and Wisconsin Constitution, art. I, § 8, were denied when the two children he was accused of sexually assaulting did not testify. Constitutional confrontation claims are not preserved by merely asserting hearsay objections—particularly in situations as here when a statute expressly makes hearsay evidence admissible. *See* WIS. STAT. § 911.01(4)(c). The record does not show that Couillard asserted his confrontation rights at the hearing. He has therefore waived review of this argument. *See* ***State v. Gove***, 148 Wis. 2d 936, 941, 437 N.W.2d 218 (1989) ("Specifically, we have indicated that a defendant may waive the constitutional right to confrontation by failing to object on confrontation grounds.").

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.