COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1292-CR **Cir. Ct. No. 98-CF-191**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

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

¶1 PER CURIAM. Mark Nelson appeals from the judgment of conviction entered after a jury trial and the order denying his motion for postconviction relief. He argues on appeal that the trial court erred when it admitted certain evidence. Because we conclude that the trial court did not err, we affirm the judgment and order.

¶2 Nelson was convicted of two counts of repeated sexual assaults of the same child. The two victims were Jolene M. and Stephanie M., the daughters of the woman with whom Nelson sometimes lived. Nelson argues that the trial court erred when it allowed testimony about the use of drugs, alcohol and cigarettes at his home, and that the court should have excluded evidence about the victims' prior statements. Nelson's motion for postconviction relief was denied by the trial court. He now appeals.

¶3 Nelson argues first that the court erred when it allowed testimony about drugs, alcohol consumption and cigarettes at his house. He asserts that this was improper "other acts" evidence under WIS. STAT. § 904.04(2) (1999-2000),[1] and should not have been admitted. He further asserts that the trial court erred because it never applied the three-part analysis established in ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998), for determining whether the other acts evidence should be admitted.

¶4 The trial court found that this evidence was not other acts evidence, but rather was part of the *res gestae* which demonstrated Nelson's grooming of the girls, and explained why the girls would continue to go over to his house. Nelson argues that the State did not use this evidence as *res gestae* evidence, but rather used the evidence to show that Nelson was a person of bad character and ran a party house. "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). Testimony of other acts is allowed for the purpose of providing background or establishing the context of the case. ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995).

¶5 We agree that this evidence was part of the *res gestae* and explained why these girls continued to go to Nelson's house. One of the victims testified that Nelson gave her marijuana and cigarettes and that she liked it when he gave them to her. When defense counsel objected, the prosecutor said that it showed "grooming." This was done in the presence of the jury so the jury knew and understood the purpose of the evidence. Further, even had the State not argued that the evidence showed grooming, the jury could have reasonably interpreted it that way.

¶6 The victims' therapist testified that grooming behavior is not uncommon by sexual predators. Nelson argues that the therapist testified that Nelson did not groom his victims. But as the State points out, this overstates what the therapist actually said. The therapist's testimony indicated that he was not aware of Nelson grooming the girls. This is not the same as saying that Nelson did not engage in grooming activities. We agree with the trial court that this was not other acts evidence, but rather showed the context in which the crimes were committed.

¶7 Similarly, we reject Nelson's contention that the evidence that he ran a party house was improper other acts evidence. Again, this testimony showed why the girls would continue to go to Nelson's house even though their mother no longer was involved in a relationship with him. Further, this evidence supported the grooming theory by providing a context in which the crimes were committed

and establishing Nelson's opportunities to commit the crimes. This evidence was not improper.

¶8 Nelson also complains that the trial court erred because it did not perform the three-part analysis required by ***Sullivan***. Since we have concluded that the evidence offered was not other acts evidence, the trial court was not required to conduct the analysis.

¶9 Nelson also asserts that the trial court erred when it allowed certain witnesses to testify about statements made to them by the victims or statements made by other persons to whom the victims had reported the crimes. Nelson argues that these statements were inadmissible hearsay. At the hearing on the motion for postconviction relief, the trial court found that the testimony had been admitted as prior consistent statements of the victims, and reaffirmed that conclusion. The State concedes on appeal that this was not a proper basis on which to admit this testimony under ***State v. Peters***, 166 Wis. 2d 168, 479 N.W.2d 198 (Ct. App. 1991). The State argues, however, that the testimony was admissible on other grounds. If the trial court's decision is supportable by the record, we will not reverse even if the trial court gave the wrong reason, or no reason at all. ***Jenkins***, 168 Wis. 2d at 186. We agree with the State that the testimony was admissible, but for different reasons.

¶10 Nelson first argues that the testimony of the victims' parents should not have been admitted. The parents testified about what the victims had told them about the assaults. This testimony was not offered for the truth of the matter asserted. Rather, as the trial court told the jury, it was offered for the effect that the information had on the parents. The court gave this limiting instruction three times, but Nelson argues that the limiting instruction was not given when the

mother testified about what Stephanie had told her about the assault. The court, however, had given the limiting instruction previously, and the State's follow-up question was "Now, after you got this information from Stephanie, what did you do?" Under these circumstances, we conclude that the jury would have understood the purpose of the testimony.

¶11 Nelson also argues that the trial court admitted the victims' statements to the police. Statements by children to law enforcement or social services personnel about recent sexual assaults may be admissible under the residual hearsay exception in WIS. STAT. § 908.03(24). ***State v. Sorenson***, 143 Wis. 2d 226, 421 N.W.2d 77 (1988). The court weighing the admissibility of these statements should consider the following five factors:

> First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.
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> Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.
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> Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.
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> Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.

> Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.
>
> The weight accorded to each factor may vary given the circumstances unique to each case. It is intended, however, that no single factor be dispositive of a statement's trustworthiness. Instead, the court must evaluate the force and totality of all these factors to determine if the statement possesses the requisite "circumstantial guarantees of trustworthiness" required by sec. 908.045(6), Stats.

Sorenson, 143 Wis. 2d at 245-46.

¶12 We conclude that the statements made by the two victims are admissible under this standard because there is ample evidence of the statements' reliability. The girls were nine and eleven years old when they made the statements, and they made the statements less than three weeks after the last assault. Moreover, they made the statements to a veteran police officer with experience investigating sensitive crimes, and who was specially trained in the investigation of child sexual abuse. Both girls were frightened and cried when they made the statements. Further, the detective interviewed the girls separately and there was no one else in the room when she interviewed the girls. Jolene's statement was corroborated by other witnesses who saw one of the assaults on her. These statements had sufficient indicia of reliability and were admissible under the residual hearsay exception.

¶13 Nelson also argues that Stephanie was improperly allowed to read at trial the entire statement she made to the police. We agree with the State, however, that this testimony was proper both under the residual hearsay rule and as a recorded recollection under WIS. STAT. § 908.03(5). There are four prerequisites to the admission of a past-recollection-recorded document under

§ 908.03(5). "First, the witness must once have known about the matter that is recorded in the document. Second, the witness must have insufficient present memory about the event to permit full and accurate testimony. Third, the document must have been made when the matter was fresh in the witness' mind. Finally, the document must accurately reflect what the witness once knew." ***Jenkins***, 168 Wis. 2d at 194.

¶14 In this case, Stephanie was not able to recall some of the details of the events about which she was testifying. Given this circumstance, and that the testimony was otherwise reliable under the factors discussed above, the statement was admissible as a recorded recollection.

¶15 Nelson also argues that Stephanie's school counselor should not have been permitted to testify about statements Stephanie made to her. The State argues that Nelson waived this argument because he asked Stephanie about statements she made to the counselor. We reject this argument. Introducing a topic into evidence does not abrogate the rules of evidence.

¶16 Nonetheless, we agree that the testimony was admissible under the residual exception. The statements were made by Stephanie to a school counselor with a degree in psychology and twenty-five years' experience. Stephanie had seen the counselor give a presentation on inappropriate touching and then told the counselor about the assaults. This occurred only a few days before the girls talked with the police, and only a few weeks after the last assault. Applying the ***Sorenson*** factors, this statement contained sufficient indicia of reliability to be admissible under the residual exception.

¶17 Nelson also argues that the court improperly admitted the testimony of one of Jolene's friends. Jolene's friend testified about what Jolene had said

about one of the assaults. The friend testified that she had just witnessed Nelson touching Jolene on her chest and crotch. Moments later, Jolene told the friend about a previous incident in which Nelson had lifted up her shirt and commented on her breasts.

¶18 We agree with the State that this was properly admissible as an excited utterance exception to the hearsay rule. WIS. STAT. § 908.03(2). Although the statement referred to an incident which occurred earlier, it was made very shortly after Jolene had again been assaulted by Nelson.

¶19 Nelson finally argues that he is entitled to a new trial in the interests of justice. He bases his claim, however, on the perceived evidentiary errors. Since we have concluded that the testimony was all admissible, Nelson is not entitled to a new trial. For the reasons stated, we affirm the judgment of conviction and the order denying the motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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