COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1761-CR **Cir. Ct. No. 03CF000376**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. DANFORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Michael Danforth appeals a judgment convicting him of first-degree sexual assault of a child. The conviction followed Danforth's jury trial. The issues concern the State's decision to recharge Danforth after dismissal of a prior prosecution, two evidentiary rulings, and allegedly

inconsistent verdicts rendered on the two charges against Danforth. We affirm on all issues.

¶2 The State charged Danforth with sexually assaulting Caitlyn T. and Heather S. The complaint alleged that the assaults occurred at Heather's home in Lake Mills, Wisconsin, between August 2001 and January 2002, when the girls were eight- and seven-years-old respectively. During that time, Caitlyn was living with her mother in Lake Mills. The assault allegations came to light in December 2002, when Caitlyn told her father, with whom she was then living in Iowa, having moved there in June 2002. A social worker at an Iowa child protection agency conducted a videotaped interview of Caitlyn, also in December 2002, in which Caitlyn described the assaults.

¶3 Six days before Danforth's scheduled trial in July 2003, the State belatedly informed the defense it intended to introduce the interview videotape. The court granted Danforth's motion to exclude the tape from evidence because the State's late disclosure violated the discovery provisions of WIS. STAT. § 908.08(2) (2003-04).[1] The State then moved to dismiss the case, and the trial court dismissed it without prejudice. The State refiled the charges against Danforth, which is the case before us now.

¶4 Before trial on the refiled charges, Danforth contested whether the videotape met the criteria for admissibility set forth in WIS. STAT. § 908.08(3). The trial court concluded that it did, and the State was thus permitted to introduce the videotape at trial.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 Caitlyn also testified in person at the trial. To impeach her, Danforth sought admission of medical records pertaining to Caitlyn's May 2001 inpatient hospital stay for a psychological evaluation. The trial court excluded the records, and Danforth did not use them in his defense.

¶6 Caitlyn and Heather presented irreconcilable versions of the events in question, with Caitlyn testifying that Danforth took both girls to his room and assaulted them in each other's presence, while Heather testified that Danforth never touched her or Caitlyn. At the time of the incident, Danforth was living in Heather's household and was her mother's fiancé.

¶7 The jury found Danforth guilty of assaulting Caitlyn but not guilty of assaulting Heather. On appeal, he contends that the trial court should have dismissed the first prosecution with prejudice or barred the State's use of the videotape in the second trial. Danforth also claims that the court erroneously allowed the videotape into evidence over Danforth's substantive objection and erroneously excluded Caitlyn's medical records. Finally, Danforth also contends that the inconsistent verdicts require either acquittal or a retrial.

¶8 The State's discovery violation during its first prosecution of Danforth did not preclude the subsequent prosecution or the State's use of the videotape in it. Danforth contends that allowing re-prosecution with the videotape as evidence effectively deprived him of a remedy for the State's discovery violation. He contends that this court should fashion a remedy in such cases, by either barring re-prosecution or, if allowing it, only doing so without permitting use of the originally excluded evidence. We reject Danforth's contention. A trial court may not dismiss a criminal prosecution with prejudice unless the defendant's double jeopardy or speedy trial rights are implicated. ***State v. Krueger***, 224 Wis.

2d 59, 61, 588 N.W.2d 921 (1999). Furthermore, in a re-prosecution, a previously imposed discovery sanction does not carry over, even if the dismissal and re-prosecution resulted from that sanction. *See* ***State v. Miller***, 2004 WI App 117, ¶34, 274 Wis. 2d 471, 683 N.W.2d 485, *review denied* (WI Aug. 2, 2004) (No. 03-1747-CR).

¶9 Next, we conclude that the trial court properly admitted the videotape, but not for the reason it did so. Under WIS. STAT. § 908.08(3)(c), a child's videotaped statement is admissible if, among other criteria, "the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth." A child's understanding that there are consequences for failing to tell the truth must be demonstrated by words actually used during the interview. ***State v. Jimmie R.R.***, 2000 WI App 5, ¶41, 232 Wis. 2d 138, 606 N.W.2d 196. Here, the videotape does not satisfy this requirement because Caitlyn's interview was not under oath, and it does not sufficiently demonstrate Caitlyn's understanding of the importance of telling the truth and the consequences of lying.

¶10 Notwithstanding that omission, however, the taped interview is admissible under WIS. STAT. § 908.08(7), which allows videotaped evidence to be admitted if it falls under an exception to the hearsay rule. We conclude the videotape meets the requirements for the residual hearsay exception, WIS. STAT. § 908.03(24). A trial court may admit a child's videotaped statement under that exception after conducting the following analysis:

> 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.
>
> 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.
>
> 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.

State v. Sorenson, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988). We have viewed the videotape and conclude that, under the cited criteria, no reasonable judge would exclude it. Caitlyn clearly understood the questions and clearly communicated her answers. She was admonished to tell the truth. Nothing in the tape, or elsewhere in the record, suggests a motive for her to lie. Caitlyn did not, for instance, have any relationship with Danforth, nor did anyone in her family. A disinterested professional conducted the interview, and Caitlyn gave no signs of coaching. Nothing about the tape, in short, impugns its trustworthiness.

¶11 We acknowledge that the trial court admitted the tape on grounds that the record does not support. However, we will affirm a ruling if the trial court reaches the right result, even if for a wrong reason. ***State v. Alles***, 106 Wis. 2d 368, 392, 316 N.W.2d 378 (1982).

¶12 Even if Caitlyn's medical records were admissible, we conclude that the decision to exclude them was harmless. At trial, Caitlyn testified that the sexual assault prompted her move to Iowa as a means of avoiding any further contact with Danforth. She also testified that she could not remember any discussions about killing herself during her May 2001 hospitalization. Danforth contends that the medical records impeach her on both counts, because they suggest other motives for her move to Iowa, and also report that she exhibited suicidal ideation. We disagree that the records impeached Caitlyn. The fact that Caitlyn may have expressed dissatisfaction with her mother and with her living arrangements in May 2001 is not inconsistent with the motive she testified to for moving to her father's home in June 2002. Also, the evidence that Caitlyn may have expressed suicidal thoughts in May 2001, at the age of seven, does not impeach her trial testimony almost three years later that she did not remember those statements. An error is harmless if there is no reasonable possibility that it contributed to the conviction. *See* ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. Such is the case here.

¶13 Finally, we conclude that the jury's allegedly inconsistent verdict does not entitle Danforth to a new trial. He concedes that, under present law in Wisconsin, arguably inconsistent verdicts are permitted. *See* ***State v. Mills***, 62 Wis. 2d 186, 191, 214 N.W.2d 456 (1974). We are bound by that precedent. *See* ***Cook v.Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Judgment affirmed.

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