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DISTRICT II

April 23, 2025

To:

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Circuit Court Judge
Electronic Notice

Nicholas DeSantis
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

David Malkus
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You are hereby notified that the Court has entered the following opinion and order:

2023AP1134-CR

State of Wisconsin v. Antelmo Cobos Rojas (L.C. #2020CF593)

Before Neubauer, Grogan, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Antelmo Cobos Rojas appeals from a judgment of conviction for repeated sexual assault of the same child. He argues the circuit court incorrectly admitted the child victim's recorded forensic interview at trial. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2023-24).¹ We conclude the recorded interview was admissible under the residual hearsay exception.² We therefore affirm.

On the first day of trial, the fifteen-year-old victim testified that Rojas began touching her vagina when she was around eleven years old. About a year later, Rojas began having forced sexual intercourse with her. The assaults continued until the victim was nearly fourteen years old.

The second day of trial began with the State calling a social worker who had conducted a forensic interview with the victim. The State sought to admit a recording of the interview, asserting the recording was admissible as a prior consistent statement given the opening statements of Rojas's counsel and his cross-examination of the victim, both of which could be construed as attacking the victim's credibility. The circuit court concluded the recording was admissible as a prior consistent statement. Rojas argues the court erroneously exercised its discretion by admitting the recording.

The State concedes that, contrary to the circuit court's determination, the recording was not admissible as a prior consistent statement because it did not predate the victim's alleged motive to fabricate. However, the State alternatively proposes that the recording was admissible under the residual hearsay exception, WIS. STAT. § 908.03(24). We agree and therefore conclude that the circuit court did not erroneously exercise its discretion by admitting the recording. *See*

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

² Because we decide this matter based on the residual hearsay exception, we do not address the State's alternative arguments regarding admissibility under WIS. STAT. § 908.08(3).

State v. Raczka, 2018 WI App 3, ¶7, 379 Wis. 2d 720, 906 N.W.2d 722 (2017) (holding that evidentiary decisions are reviewed for an erroneous exercise of discretion).

As a threshold matter, Rojas argues we should not entertain the State’s residual hearsay argument because it was not raised below. Rojas asserts that to decide the matter on residual hearsay grounds would require us to exercise discretion on the circuit court’s behalf, which we avoid. See *Krier v. EOG Env’t, Inc.*, 2005 WI App 256, ¶24, 288 Wis. 2d 623, 707 N.W.2d 915. Rojas’s argument in this respect is contrary to black-letter law. This court may affirm a circuit court’s admission of evidence over a hearsay objection based on an exception to the hearsay rule that was not the basis for the lower court’s decision. *State v. Sorenson*, 143 Wis. 2d 226, 250, 421 N.W.2d 77 (1988).

Turning to the substance of WIS. STAT. § 908.03(24), the statute excludes from the general hearsay prohibition any “statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.” The use of the residual exception is specifically appropriate to admit the statements of children witnesses in sexual assault cases if the statements are otherwise proven sufficiently trustworthy. *Sorenson*, 143 Wis. 2d at 243.

Courts consider five factors when determining whether a child’s statement exhibits circumstantial guarantees of trustworthiness: (1) the child’s attributes, including age and comprehension; (2) the relationship to the child and motivations of the recipient of the communication; (3) the circumstances under which the statement was made; (4) the content of the statement; and (5) any corroborating evidence. *Id.* at 245-46. No one factor is dispositive,

and the weight to be afforded to any one factor may vary depending upon the circumstances. *Id.* at 246.

Considering these factors here, we conclude the recorded interview was admissible under the residual hearsay exception. Rojas argues the child's advanced age (fourteen at the time of the interview) cuts against admissibility. Though the victim was "old enough to understand the effect of making allegations" against Rojas, she was also old enough to comprehend questions, communicate verbally, and know the difference between the truth and a lie. *See id.* at 245-47. Indeed, the victim took an oath to be truthful during the interview. She also had reason to fear retribution for false accusations given her familial relationship with Rojas and the fact that she lived with him.³ *See id.* at 247. Contrary to Rojas's argument, the first factor favors admissibility.

The second and third factors also point toward admissibility. The statements were made at a neutral location to a neutral party, a social worker trained in forensic interview techniques. Statements uttered under these circumstances carry strong indicia of trustworthiness. *See State v. Mercado*, 2021 WI 2, ¶59, 395 Wis. 2d 296, 953 N.W.2d 337. Though this was a case of delayed disclosure, contemporaneity and spontaneity of statements are not weighed heavily against the admissibility of hearsay statements of young sexual assault victims. *Id.*, ¶60.

As for the fourth factor, Rojas observes that the victim omitted certain things during the forensic interview that she disclosed just prior to trial. For example, the victim did not disclose

³ And, turning momentarily to the content of the statements, the delayed disclosure is particularly understandable in this instance. The victim reported that Rojas had threatened her and her family if she reported his conduct.

during the interview that the assaults started with hand-to-vagina touching, that Rojas had threatened her with a knife under a table when she was about to tell her mother about the assaults, or that Rojas had attempted forcible oral sex with her on one occasion. Rojas reasons that the recorded statement lacks sufficient circumstantial guarantees of trustworthiness given the omission of these matters.

We disagree. The fourth factor assesses the content of the statement itself for “any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.” *Sorenson*, 143 Wis. 2d at 246. We cannot conclude a statement should be excluded as hearsay under this factor merely because it omits some details of assaults that are revealed by later statements. Indeed, *Sorenson* concluded a victim’s statements to a social worker were admissible under the residual hearsay exception even though the victim seriously undermined her own veracity by later changing her answers to questions and admitting to lying to the social worker. *See id.* at 237-38, 246-50.

Rojas also challenges the trustworthiness of the victim’s recorded statement because the chain reaction that led to Rojas’s prosecution began with a tarot card reading by a family friend. While the circumstances of the initial disclosure might arguably fit within the *Sorenson* analysis, we do not perceive them to have materially affected the reliability of the victim’s statements during the forensic interview. Rather, given the interviewer’s training and emphasis on truth-telling, the interview was a prime opportunity to suss out any false perceptions or fabrications.

Considering all the factors, including the apparent lack of corroborating evidence under the fifth factor, we conclude that on balance, the victim’s recorded statement demonstrated

sufficient guarantees of trustworthiness to be admissible under the residual hearsay objection. We conclude the recording was properly admitted, albeit on different grounds than those relied upon by the circuit court.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals