COURT OF APPEALS
DECISION
DATED AND RELEASED

August 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0713

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

PHILIP ESSER, AND DELORES ESSER,

Plaintiffs-Respondents,

v.

RICHARD SKOGEN AND DONNA SKOGEN,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

VERGERONT, J.[1] Richard and Donna Skogen appeal from a judgment for damages to property caused by the willful and malicious acts of their son, Aaron Skogen, under § 895.035(2), STATS.[2] The Skogens contend that

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

[2] Section 895.035(2), STATS., provides:

> The parent or parents with custody of a minor child, in any circumstances where he, she or they may not be liable under

the court erroneously admitted a police report into evidence contrary to § 48.396, STATS., erroneously relied on hearsay, and that the evidence produced at trial was insufficient to sustain the damage award. We reject each of these contentions and affirm.

Philip and Delores Esser filed a small claims action against the Skogens to recover damages they claimed they suffered when Aaron burglarized their home and farm on February 9, 1994, and "throughout the rest of the year." The trial was to the court. The Essers represented themselves and the Skogens were represented by counsel. Philip Esser was the only witness for the plaintiffs. He submitted a list of items valued at $426.79, Exhibit 1, which he claimed were either stolen or damaged when his home was burglarized on February 9, 1994. Exhibit 1 also contained a list of items which Esser testified had been missing over the past year from his home in the amount of $917.41, and an item valued at $340 which Esser claimed was the rental charge for use of tools that Aaron took without permission. Esser also presented two affidavits. Each affiant stated that he observed Aaron take certain items from the Essers' house without permission. Finally, Esser presented an incident report from the Dane County Sheriff's Department relating to the burglary reported by the Essers' son at their home on February 9, 1994. The report states that the Essers were not at home when the burglary occurred but were away on vacation.

Philip Esser testified that Aaron's uncle was a tenant on his farm from May 1993 until September 1994. Esser testified that Aaron was often at his farm because his uncle was there as a tenant and that is when things started to disappear. Esser also testified that on one occasion he confronted Aaron's uncle about taking his tools without his permission. On another occasion, he caught Aaron with two jacks of his [Esser's] in Aaron's truck. Esser testified that he had never given Aaron permission to use or take any of these items. Esser's belief that Aaron had burglarized his house in February 1994 was based on the

(..continued)

> the common law, are liable for damages to property, for the value of unrecovered stolen property or for personal injury attributable to a wilful, malicious or wanton act of the child. The parent or parents with custody of their minor child are jointly and severally liable with the child for the damages imposed under s. 943.51 for their child's violation of s. 943.50.

information contained in the incident report. That information had apparently also been related to him verbally by an investigating officer.

The Skogens' attorney initially objected to admission of the incident report on the ground that under § 904.10, STATS., evidence of a plea of guilty or no contest is not admissible in any civil or criminal proceeding against the person. The court overruled this objection but reserved ruling on the admissibility of the report until counsel had the opportunity to question Esser. The Skogens' counsel later objected to admission of the report on the ground that under § 48.35(1)(b), STATS., "the disposition of a child, and any record of evidence given in a hearing in court, shall not be admissible as evidence against the child in any case or proceeding in any other court."

In response to questioning by the court and the Skogens' counsel, Esser testified that he asked the investigating officer how he could obtain a copy of the report and was told that he could go to the juvenile court and ask for it. Esser asked a clerk in the office of the juvenile court for the court record of Aaron Skogen, explaining that he was the owner of the house that Aaron broke into. According to Esser, the clerk initially stated that she did not know if that was permissible; however, the clerk did give him a copy of the report. The court overruled the Skogens' objection on the ground that either by order or policy of the juvenile court, the records were released to Esser as the property owner.

Richard and Donna Skogen each testified. Richard testified that Aaron was eighteen years old on the date of the trial, January 12, 1996, and was living with them on that date and had lived with them continuously since his birth. The Skogens both testified that they had never seen any of the property contained on Exhibit 1 at their home.

Although the trial court overruled the objection to the admission of the incident report based on §§ 904.10 and 48.35(1)(b), STATS., the court stated that it would review the incident report to determine whether it contained statements providing sufficient evidence under § 799.209(2), STATS. Section 799.209(2) provides:

> The proceedings [in small claims action] shall not be governed by the common law or statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence. [Emphasis added.]

In concluding that the Skogens were liable to the Essers, the court explained that there were direct transcriptions in the incident report of statements made by Aaron which were admissions on his part and therefore came within a hearsay exception. The court found that these statements were sufficient to permit a finding that on February 9, 1994, Aaron Skogen entered the Essers' premises without consent and with intent to steal. Based on his admissions in the incident report, the court found that Aaron took beer; that he entered through a window; and that damages to the window, screen and patio door and scratches to the car, contained on Exhibit 1, were locations where Aaron admitted he was present. The court also found that Aaron took wine, meat and two pairs of sunglasses, all of which were listed on Exhibit 1 as items stolen on February 9, 1994. The court found by a preponderance of the evidence based on Esser's testimony, Exhibit 1 and Aaron's confession contained in the incident report that a total of $426.79 was stolen by Aaron when he unlawfully entered the Esser residence on February 9, 1994.

The court concluded that there was insufficient evidence to find that Aaron, rather than his uncle or someone else, took the other items that were listed on Exhibit 1 as missing or stolen from the Esser farm during the "past year." The court also concluded that the statements in the two affidavits were hearsay and could not stand by themselves to support a judgment.

The court found that Aaron was a minor in February 1994 and was living with his parents at the time and therefore they were responsible for his acts under § 895.035(2), STATS. The court found that Aaron's acts were willful, intentional and malicious based on the nature of the theft, the statements in the incident report that he first denied the thefts, and the fact that the acts constitute

a crime. The court later awarded attorney's fees in the amount of $300, pursuant to § 895.031(4), STATS., and statutory costs in the amount of $49.

The Skogens first argue that under § 48.396, STATS., juvenile records may not be inspected or disclosed except by order of the court or to the victim of a child's act after certain procedures are followed. The procedures include a written petition with the contents specifically prescribed, notice to the child and the child's attorney, hearing if there is any objection to the disclosure, judicial inspection of the records and a decision of the record. Section 48.396(5). However, this was not the juvenile code provision that the Skogens' counsel relied on at trial. Instead, the Skogens' counsel relied on § 48.35(1)(b), STATS., which provides, with certain exceptions:

> (b) The disposition of a child, and any record of evidence given in a hearing in court, shall not be admissible as evidence against the child in any case or proceeding in any other court except....

Section 48.35(1)(b), STATS., does not apply. The incident report was not admitted as evidence against Aaron but as evidence against his parents. The Skogens concede this when they argue, in the context of their hearsay objections, that the incident report was offered against the defendants, Richard and Donna Skogen, not against Aaron.

Because the Skogens did not raise an objection under § 48.396, STATS., before the trial court, we will not consider it on appeal. The general rule is that in order to preserve the right to an appeal on a question of admissibility of evidence, the litigant must apprise the court of the specific grounds on which the objection is based. ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). The purpose of this rule is to allow the trial court to remedy any possible error and thus avoid creation of an issue for appeal. ***State v. Barthels***, 166 Wis.2d 876, 884, 480 N.W.2d 814, 818 (Ct. App. 1992). Had the Skogens raised the issue of § 48.396 before the trial court, the trial court would have determined whether the procedures prescribed there, if applicable, had been followed. If the court determined the procedures had not been followed, it might have determined that the Essers, who were unrepresented, should have the opportunity to obtain the records through appropriate means or present

alternative proof. Under these circumstances, we decline to consider the applicability of § 48.396.

The Skogens also object to the admission of the incident report because it was not appropriately identified, authenticated and offered into evidence as required by the rules of evidence.[3] However, § 799.209(2), STATS., provides that the rules of evidence do not apply with one exception: that an essential finding of fact "may not be based solely on declarant's oral hearsay statement unless it would be admissible under the rules of evidence." The incident report is, at the first level, hearsay in that it consists of written reports by investigating deputies who were not present at the trial. However, the written reports are not "oral hearsay." Under the plain language of the statute, the single exception to the application of the rules of evidence does not apply to the written reports of the investigating officers.

The Skogens are correct, however, that oral statements made by others to the officers that are contained in their written reports must be examined to determine whether those statements would be admissible under the rules of evidence. One such statement is that made by Aaron when he left a telephone message on Detective Mahoney's answering machine. That statement was transcribed and attached to Mahoney's report:

> Yes Det. Mahoney this is Aaron Skogen calling you, you left about a half hour ago um I am admitting I did break a window on Phillip [sic] and Delores' house but all I took was that beer that I had told you and the window was broke just by accident because I hit the screen and I did get in through the front win, or the front door still. Thanks, call back, bet [sic] a hold of me whenever. I called Phillip [sic] and Delores and left a message on their answering machine that I need to get a hold of them and have a meeting with them as soon as possible. Thank you. Bye.

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[3] We reject the Skogens' argument that neither Exhibit 1 or Exhibit 4 (the incident report) were offered or received into evidence. It is true the Exhibit List is not checked "received" for these two exhibits, but a review of the transcript shows that the court did receive both exhibits.

The Skogens argue that this is hearsay and that the exception for statements against interest, which the court relied on, § 908.045(4), STATS., does not apply because that exception requires that the declarant be unavailable as a witness. There is no indication in the record that Aaron was "unavailable" as defined in § 908.04(1).

We assume, for purposes of discussion, that being "admissible under the rules of evidence" under § 799.209(2), STATS., means that if the hearsay exception is found under § 908.045, STATS., the declarant must be unavailable. We also assume that Aaron's transcribed statement is an "oral statement." It may nevertheless be considered by the court as evidence under § 799.209(2) as long as it is not the sole basis for the court's finding that Aaron committed the burglary on February 9, 1994.

The incident report also contains a statement made by Travis Gudgeon to Deputy Mahoney that in early 1994 Aaron contacted him and asked him to keep a case of beer and a jug of homemade wine for him. Gudgeon questioned Aaron about where he had gotten them. Aaron said he had gotten them from the Essers' house; he (Aaron) had broken a window at the residence, entered the residence and taken the beer and wine from the garage while the Essers were on vacation.

Aaron's statement to Gudgeon was corroborated by J.B. Trainor, Gudgeon's girlfriend. She stated to Deputy Mahoney that she was at Gudgeon's residence when Skogen arrived and asked Gudgeon to store a case of beer and a jug of homemade wine, which he (Aaron) admitted he had taken that evening or the night before from the Esser residence. Aaron admitted he broke a window and entered the residence.

Deputy Mahoney's report also states that earlier on the same day Aaron left the telephone message, May 27, 1994, he met with Aaron. Aaron said he did not commit the burglary but he did enter the garage after finding the garage door standing open. Mahoney met with Aaron a second time that day and confronted Aaron with evidence that Aaron had lied about other property in his possession--a floor jack--which Mahoney had verified as stolen from Mount Horeb High School. Aaron then informed Mahoney that he had, in fact, lied to Mahoney about that floor jack. Mahoney told Aaron to contact him by May 31, 1994, and provide him with a truthful statement regarding the Esser

burglary. Upon returning to his office that same day, Mahoney found the message from Aaron on his answering machine.

We may affirm the trial court's decision for reasons other than that relied on by the trial court. *See* ***State v. Patricia A.M.***, 176 Wis.2d 542, 549, 500 N.W.2d 289, 292 (1993). We conclude that Aaron's telephone statement is not the only basis for a finding that he committed the burglary. Trainor's and Gudgeon's statements also support that finding. Although their statements are also "oral hearsay" (and contain another level of hearsay), the three statements may be considered together, consistent with § 799.209(2), STATS., to support essential findings.

The Skogens also object to consideration of Aaron's telephone message because it does not comply with the safeguards for recorded telephone conversation under § 885.365, STATS. The Skogens did not make this objection before the trial court. For reasons we have explained earlier, we decline to consider it on appeal.

Finally, the Skogens argue that the evidence was insufficient to support the damage award of $426.79. Most of their argument here is based on their position that the incident report is inadmissible. Since we have concluded that it is admissible and that the statements of Aaron, Gudgeon and Trainor may be considered by the court, we conclude that there is sufficient evidence to sustain the trial court's findings that Aaron took the beer and a gallon of wine, damaged the window, screen, patio door and scratched the car hood during the unlawful entry and the theft. We also note that in the incident report, Deputy Cattanach states that when he investigated the burglary, he observed the scratches on the car in the garage and the damaged window and screen. We conclude that Esser's testimony that the sunglasses and meat were missing from his house at the same time supports the trial court's finding that those items were taken by Aaron during his unlawful entry. We reject the Skogens' argument that Esser's testimony, through Exhibit 1, of the value of the items taken and the cost of repairs is insufficient to support a finding of the amount of damages the Essers incurred as a result of the burglary. We conclude that the trial court's finding that Aaron's conduct was willful, malicious and intentional is supported by the incident report and, in particular, the statements of Aaron, Trainor and Gudgeon contained in Deputy Mahoney's report.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.