

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 31, 1997

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1722-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES D. S.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. James D.S.<sup>1</sup> appeals from a judgment convicting him of first-degree sexual assault of a child. He also appeals from an order

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<sup>1</sup> The court, on its own motion, has amended the appellate caption to remove the defendant's surname and protect the identity of the child victim.

denying postconviction relief. The issue is whether the trial court allowed the jury to hear inadmissible testimony. We conclude that the trial court's evidentiary rulings were correct, and therefore affirm.

The State charged James D.S. with sexually assaulting his three-year-old daughter. Approximately four days after the assault, the victim described it to her aunt, Dana Stanger, and to a county child protection worker, Beth Wydeven. Wydeven then interviewed the child again two weeks later. At trial, the State called Stanger and Wydeven as witnesses to the victim's statements. James D.S. objected to that testimony as hearsay, and in each case the trial court allowed it under the excited utterance hearsay exception, § 908.03(2), STATS. The trial court also concluded that the testimony was admissible under the "catchall" exception to the hearsay rule, § 908.03(4).

The State also presented testimony and evidence from the victim's treating physician, without objection. However, James D.S. objected, on grounds of relevance and foundation, to testimony from an expert on the sexual abuse of children as to whether the doctor's recorded findings were consistent with sexual abuse. The trial court overruled the objection and allowed the witness, Colleen O'Brien, to testify. The jury returned a guilty verdict and James D.S. contends on appeal that allowing testimony from Stanger, Wydeven and O'Brien was prejudicial error.

The trial court properly allowed Stanger's testimony under the excited utterance hearsay exception. In applying that exception to a child assault case, the trial court must, in its discretion, primarily consider the age of the child and the timeliness and spontaneity of the child's statement in relation to the alleged assault. *State v. Gerald L.C.*, 194 Wis.2d 548, 557, 535 N.W.2d 777, 779

(Ct. App. 1995). Wisconsin courts have admitted statements under this exception where the child is young, the statement is made less than a week after the alleged assault and the child first reports the incident to his or her mother. *Id.* Here, the child was three, she spoke to Stanger four days after the incident and first reported it to her cousin. Under these circumstances, the trial court reasonably concluded that the statement was sufficiently spontaneous and reliable to allow it as the product of stress or excitement.

Wydeven's testimony was properly admitted under the residual hearsay exception, § 908.03(24), STATS. The trial court relied on this exception only in passing, and without significant analysis. However, we will uphold a circuit court's discretionary decision if the record contains facts which would support the decision had the court fully exercised its discretion. *Id.* at 560, 535 N.W.2d at 781. Five factors determine admissibility under § 908.03(24) of statements made by a young sexual assault victim. These are: (1) the child's particular attributes and relation to the defendant, (2) the person hearing the statement and his or her relationship to the child, (3) the circumstances and timeliness of the statement, (4) the content of the statement, and (5) other corroborating evidence. *Id.* at 560-61, 535 N.W.2d at 781. Here, the record indicates that the child consistently related the same facts to relatives, her doctor, Wydeven and to the jury at trial; that Wydeven was a capable child protection agent and that nothing in her relationship with the victim allows an inference of fabrication; that the first statement to Wydeven was made shortly after the assault; and that her statements were strongly corroborated by the physical evidence. As a result, the child's statements made during the interviews with Wydeven were sufficiently trustworthy to be admitted under § 908.03(24).

The trial court properly allowed O'Brien to testify. James D.S. contends that her testimony was not relevant because it merely reiterated testimony from the victim's physician. However, testimony that is cumulative to admittedly relevant testimony must necessarily be relevant as well. Although the trial court has discretion to exclude testimony as cumulative, that is not the foundation for James D.S.'s objection. Although James D.S. contends that O'Brien's testimony was also unfairly prejudicial, that argument is also waived for his failure to timely advance it at trial. Section 901.03(1)(a), STATS. In any event, O'Brien's testimony was a very small portion of the evidence against James D.S. He cannot reasonably contend that, but for its admission, he would have been acquitted.

*By the Court.*—Judgment and order affirmed.

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

