

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP2126-CR

Cir. Ct. No. 2003CF116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. PANOSH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Robert J. Panosh appeals a judgment convicting him of two counts of incest with his daughter and an order denying his motion for a new trial in the interest of justice. He argues that: (1) his confession should have been suppressed because police exploited his anxiety disorder by questioning

him for two-and-one-half hours and because the confession was not recorded; (2) if the confession should not have been suppressed, the court should have instructed the jury to consider the fact that the interrogation was not recorded; and (3) the real controversy was not fully tried because the defense failed to present expert testimony in support of Panosh's claim that he suffered a panic attack during the interrogation. We reject these arguments and affirm the judgment and order.

¶2 Panosh's daughter reported that he inappropriately touched her and had her touch his penis. Panosh was arrested and interrogated at the police station, eventually admitting to his daughter's allegations. Two days later, his daughter recanted her accusations and, at trial, testified that Panosh did not sexually assault her. The State relied on the child's initial accusations and argued that she was pressured into recanting the statements by her mother.

¶3 Panosh testified on his own behalf, denying sexual contact with his daughter. He explained that he had a panic attack during the interrogation and agreed with deputy Bonnie Stoneberg's accusations in order to terminate the interrogation and return to his family. He testified that Stoneberg told him she and a social worker would help him get a signature bond if he admitted some of his daughter's allegations. Panosh described previous panic attacks that occurred while he was driving, indicating that he thought he was having a heart attack and could not breathe. His girlfriend (the victim's mother) and a friend corroborated that he displayed these symptoms during previous panic attacks. They indicated the symptoms would subside if he left his truck and went for a short walk.

¶4 Stoneberg denied telling Panosh that she would help him get released on bond if he confessed. Panosh never told her that he was suffering a

panic attack. Neither she nor any jail personnel observed any symptoms of a panic attack or unusual behavior other than Panosh's use of the restroom three times during the two-and-one-half hour interrogation.

¶5 The trial court properly refused to suppress Panosh's confession to deputy Stoneberg. Although the trial court made no specific findings on Stoneberg's and Panosh's credibility, we may assume that the court found Stoneberg's account more credible. See *State v. Echols*, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993). Panosh never told Stoneberg that he was having a panic attack and displayed no symptoms. He was allowed to leave the interrogation room three times to use the restroom. Stoneberg denied telling him that she would support his release from custody if he confessed. Nothing in the record suggests improper police coercion or improper exploitation of Panosh's anxiety disorder.

¶6 Stoneberg's failure to record the interrogation session does not provide a basis for suppressing the confession. The prospective rule set out in *State v. Jerrell C.J.*, 2005 WI 105, ¶59, 283 Wis. 2d 145, 699 N.W.2d 110, applies only to juvenile interrogations. The legislature's enactment of 2005 Wis. Act 60, §§ 31-40, requiring recording of adult interrogation was not applicable at the time of Panosh's interrogation. *Id.* at § 51. Panosh concedes that this court lacks authority to require that all custodial interrogations be recorded in light of the limited and prospective applications dictated by the Wisconsin Supreme Court and the legislature.

¶7 There is also no basis for instructing the jury to consider the failure to record the interrogation. Panosh requested no such instruction at trial.

WISCONSIN STAT. § 972.115(2)(a)¹, created by 2005 Wis. Act 60, § 40, addresses jury instructions and was not applicable at the time of Panosh's trial. No law mandated a jury instruction suggesting that failure to record an interrogation was suspect or improper.

¶8 Finally, we conclude the real controversy was fully and fairly tried. This court can order a new trial in the interest of justice if the jury was precluded from considering important testimony that bore on an important issue in the case. *See State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Panosh presented testimony and a medical report at his postconviction hearing from a psychologist, Dr. Harlan Heinz, that Panosh contends the jury should have heard. We conclude that Heinz's testimony was not sufficiently important to the case to support a conclusion that the real controversy was not fully tried.

¶9 Heinz did not testify to a reasonable degree of medical certainty that Panosh suffered a panic attack during the interrogation. He indicated that the Diagnostic and Statistical Manual-IV indicates that diagnosis of a panic attack requires at least four of thirteen symptoms. Heinz could not identify any of the symptoms Panosh suffered during the interrogation. He merely accepted Panosh's self-diagnosis because Panosh had experience with panic attacks and knew their symptoms. Heinz also did not indicate that a person suffering a panic attack would be likely to confess to a crime he did not commit, especially in circumstances where he could leave the room and could terminate the interrogation without confessing. At best, Heinz would have supported Panosh's

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

defense by testifying that a person can suffer a panic attack without another person knowing it. However, Heinz offered no explanation for Stoneberg's and the jail personnel's failure to observe the symptoms Panosh associated with a panic attack, inability to breathe and believing he was having a heart attack.

¶10 In addition, Heinz's report contained psychological tests that would have been harmful to the defense, including statements that Panosh made "several predatory or male entitled responses" and gave a neutral response to the statement "a child will never have sex with an adult unless the child really wants to." The report also indicated that Panosh said he would lie to get out of jail. We conclude that Heinz's testimony and report were not sufficiently helpful to the defense to support the conclusion that the true controversy was not fully and fairly tried.

By the Court.—Judgment and order affirmed.

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

