

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 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. 2005AP1824

Cir. Ct. No. 2004CV3777

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. RYON S. R.,

PETITIONER-APPELLANT,

V.

**DAVID SCHWARZ, ADMINISTRATOR, DIVISION OF
HEARINGS AND APPEALS, STATE OF WISCONSIN,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Ryon S.R. appeals a circuit court order affirming the revocation of his probation on certiorari review. For the reasons discussed below, we affirm the revocation decision.

BACKGROUND

¶2 In 1995, Ryon was convicted of first-degree sexual assault of a child for having vaginal and anal intercourse with his five-year-old stepdaughter, Rebecca. The trial court withheld sentence and placed Ryon on probation for ten years with the condition that he serve a year in the county jail, allowing release to a halfway house after six months with the approval of Ryon's probation agent.

¶3 In 2004, Rebecca reported that Ryon had been having repeated intercourse with her for over two years, from shortly after he was allowed to return to the family home without supervision until he was removed from the home for unrelated violations. Rebecca also claimed that Ryon had provided her with alcohol and marijuana on multiple occasions to keep her from telling. Based on Rebecca's allegations, the State charged Ryon with additional offenses and the Division of Probation and Parole initiated probation revocation proceedings.

¶4 At the revocation hearing, the Division introduced a videotaped interview of Rebecca describing the abuse. The Division also presented testimony from a detective who had investigated the allegations, and introduced several written statements and reports. Ryon testified on his own behalf and denied the allegations. He also presented testimony from his wife and another daughter, two neighbors, and a classmate of Rebecca's to highlight inconsistencies in Rebecca's various accounts of the abuse. The administrative law judge found Rebecca's allegations to be credible and revoked Ryon's probation. Additional facts will be set forth as necessary in the discussion below.

DISCUSSION

¶5 When reviewing a probation revocation decision, we are limited to considering only: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the Division's actions were arbitrary, oppressive, or unreasonable, representing its will rather than its judgment; and (4) whether the evidence was such that the Division might reasonably make the decision in question. *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527 (Ct. App. 2001).

¶6 Ryon first contends that the administrative law judge violated WIS. ADMIN. CODE § HA 2.05(5)(b)¹ by failing to indicate on the record the reasons for taking Rebecca's "testimony" outside Ryon's presence and failing to provide Ryon with an opportunity to submit questions to Rebecca. He also claims for the first time in his reply brief that the videotape was inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), because Rebecca's statement was testimonial in nature. We conclude that Ryon waived both of these issues by failing to raise them in the administrative proceeding and by affirmatively informing the administrative law judge that he had no objection to the admission of the

¹ WISCONSIN ADMIN. CODE § HA 2.05(5)(b) (Sept. 2001) provides:

Testimony of a witness may be taken outside the presence of the client when there is substantial likelihood that the witness will suffer significant psychological or emotional trauma if the witness testifies in the presence of the client or when there is substantial likelihood that the witness will not be able to give effective, truthful testimony in the presence of the client at hearing. The administrative law judge shall indicate in the record that such testimony has been taken and the reasons for it and must give the client an opportunity to submit questions to be asked of the witness.

videotape. *See generally State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376 (this court will ordinarily not consider an issue which was not properly raised before the administrative agency). We see no compelling reason not to apply waiver here.

¶7 Ryon next argues that, even if the videotape was admissible, his probation could not properly be revoked based on Rebecca's statements because those statements were unreliable or unsubstantiated under *State v. Higginbotham*, 110 Wis. 2d 393, 399 n.1, 329 N.W.2d 250 (Ct. App. 1982) (discussing the general rule that revocation may not be based entirely upon unreliable or unsubstantiated hearsay, and explaining how the test differs from the reliability required under the rules of evidence). We do not agree that Rebecca's statements were unreliable or unsubstantiated. As discussed below, many of the details Rebecca gave were directly or indirectly supported by the testimony of other witnesses.

¶8 Rebecca asserted that Ryon brought home dildos that he made her use. During their search of the family home, the police recovered dildos like those Rebecca described. Rebecca's mother testified that Ryon used the same dildo technique with her that Rebecca had described.

¶9 Rebecca said Ryon told her to "take it like a woman" when she cried during anal sex. This assertion was also supported by Rebecca's mother, who testified—and had also told the detective—that Ryon made the same comment to her when she complained about anal sex being painful.

¶10 Rebecca asserted that she thought Ryon had moved out of her mother's bedroom to a basement bedroom to have easier access to Rebecca.

Rebecca's mother testified that she was starting to get suspicious because Ryon and Rebecca spent a lot of time together down in the basement.

¶11 Rebecca said when she refused to have sex with Ryon, he hit her and called her a bitch and a slut. Rebecca's mother testified that she saw Ryon slapping and hitting Rebecca all the time, calling her a slut and a whore.

¶12 Rebecca said that Ryon would give her drugs to prevent her from telling. The police recovered drug paraphernalia from Ryon's briefcase.

¶13 Finally, Rebecca said Ryon threatened to kill her if she ever told on him. Rebecca's mother testified that Ryon warned her several times that he was going to slit her throat from ear to ear. Also, at one of Rebecca's treatment sessions, Rebecca's AODA counselor, upon learning that Ryon had driven Rebecca there, went out to the car to meet Ryon and, when they walked up to the car, the counselor observed Ryon sitting in the driver's seat sharpening a folding knife.

¶14 Taken together, the observations of other witnesses regarding Ryon's behavior tend to support Rebecca's statements.

¶15 Ryon argues that Rebecca should be considered unreliable because she was a troubled teen who had been using drugs and having sex with multiple boys, and Ryon was a strict disciplinarian. We disagree. While Rebecca's behavior certainly goes to her credibility, it does not make her account unreliable or unsubstantiated. The probation agent stated that Rebecca's acting out with drugs and sexual behavior was "rather typical behavior for a sexual assault victim," that is, a reaction to the assaultive behavior. The detective testified that it was common for child sexual assault victims to get their dates confused, especially

when the abuse has happened repeatedly over a period of time. Furthermore, Rebecca's behavior improved after Ryon was removed from the household and she disclosed what was happening. Thus, we are not persuaded that Rebecca's assertions were sufficiently unreliable to warrant exclusion. The administrative law judge could assess whether Rebecca's behavior was cause to doubt her credibility or a reaction to having been abused. Likewise, the administrative law judge was able to consider whether inconsistencies (in Rebecca's account of how old she was when the abuse resumed and when certain incidents took place) showed she was lying or was exhibiting the inexact memory of a child.

¶16 In sum, Rebecca's statement was substantiated "to the degree that a reasonable and fair decision maker would repose confidence in [her] veracity, [her] powers of hearing and recall." *Higginbotham*, 110 Wis. 2d at 400.

¶17 Ryon next complains that the administrative law judge improperly allowed the detective to testify that she believed Rebecca was being honest during her interview. He claims this violates the general rule that a witness may not testify as to the veracity of another witness. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). As the State points out, however, *Haseltine* is based on evidentiary rules, which do not apply at administrative proceedings. WIS. ADMIN. CODE § HA 2.05(6)(e) (Sept. 2001). In addition, given the administrative law judge's repeated comments during the detective's testimony that the videotape itself was the best evidence of Rebecca's statement, we are satisfied that any error in admitting the detective's opinion was harmless.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

