COURT OF APPEALS DECISION DATED AND FILED

April 24, 2002

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. 01-2136-CR

Cir. Ct. No. 00-CF-310

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NIKOLAUS NYTSCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Nikolaus Nytsch appeals from the judgment convicting him of one count of first-degree sexual assault of a child. The issue on appeal is whether the trial court erroneously permitted hearsay testimony to be introduced. Because we conclude that the testimony was permissible, we affirm.

¶2 Nytsch, a seventy-five-year-old man, was charged with sexually assaulting a five-year-old girl. Prior to trial, Nytsch brought a motion seeking an order requiring the State to elect whether it would present the child's testimony live, by videotape pursuant to WIS. STAT. §§ 967.04 and 972.11 (1999-2000),[1] or attempt to introduce the child's statements as hearsay through other witnesses. The State said that it would present the child's testimony by videotape, and did, in fact, do so.

¶3 At trial, the State also asked certain witnesses to testify to the statements the child made to them. The child's mother repeated the statements the child made to her immediately after the assault. Nytsch objected, and the court overruled the objection. While the court did not immediately explain its reason for overruling the objection, it subsequently stated on the record that the testimony came in as an excited utterance exception to the hearsay rule. *See* WIS. STAT. § 908.03(2).

¶4 Nytsch called as a witness a social worker who had interviewed the child. The social worker's testimony showed that the child had embellished her story of the events surrounding the sexual assault. On cross-examination, the State asked the social worker if the child had talked to her about what Nytsch had done to her. The social worker then described the child's account of the sexual assault. Nytsch again objected and the court overruled the objection.

¶5 Nytsch argues that the trial court improperly allowed this hearsay evidence. Specifically, Nytsch argues that once the State elected to introduce the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

child's testimony by videotape, it was precluded from introducing hearsay testimony about the child's statements. We disagree with this argument. Although Nytsch's motion asked the State to elect one of three options—live, videotaped or hearsay—the State subsequently filed its own motion to be allowed to introduce the videotaped testimony. At one of the hearings, the court discussed with the parties that the decision to be made was between live testimony and videotaped testimony. When the court granted the State's motion to allow videotaped testimony, it did not preclude the State from offering hearsay statements as well.

¶6 Furthermore, there is nothing in the statutes which prohibits the State from offering hearsay statements of the same witness once it has elected to offer videotaped testimony. A videotape deposition under WIS. STAT. § 967.04(7) is the functional equivalent of live testimony. ***State v. Thomas***, 150 Wis. 2d 374, 392, 442 N.W.2d 10 (1989). Just as the State could have introduced the child's live testimony and these hearsay statements, it is not prohibited from introducing the videotaped testimony and the hearsay statements, as long as the statements were admissible hearsay. Nytsch does not offer any law to support his argument and we are not aware of any.

¶7 We also agree with the trial court that the statements were admissible hearsay. The child's mother testified to what the child told her about the sexual assault immediately after it happened. This testimony was admissible as an excited utterance exception to the hearsay rule. WIS. STAT. § 908.03(2).

¶8 While the statements made to the social worker were somewhat more removed in time from the assault, we nonetheless conclude that these statements were admissible under the residual exception to the hearsay rule. WIS.

STAT. § 908.03(24). Statements by children to law enforcement or social services personnel about recent sexual assaults may be admissible under the residual hearsay exception in § 908.03(24). ***State v. Sorenson***, 143 Wis. 2d 226, 245, 421 N.W.2d 77 (1988). The court weighing the admissibility of these statements should consider the following five factors:

> First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.
>
> Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.
>
> Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.
>
> Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.
>
> Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.
>
> The weight accorded to each factor may vary given the circumstances unique to each case. It is intended, however, that no single factor be dispositive of a statement's trustworthiness. Instead, the court must evaluate the force and totality of all these factors to determine if the statement

> possesses the requisite "circumstantial guarantees of trustworthiness" required by sec. 908.045(6), Stats.[2]

Id. at 245-46.

¶9 We conclude that the statements the child made to the social worker have sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception. For the reasons stated, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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

---

[2] This statute has been renumbered to WIS. STAT. § 908.03(24).