COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3435 **Cir. Ct. No. 01-CV-518**

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

STATE OF WISCONSIN EX REL. MILO COUILLARD,

PETITIONER-APPELLANT,

V.

JUDY P. SMITH, WARDEN, OSHKOSH CORRECTIONAL INSTITUTION, AND DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Milo Couillard has appealed from an order denying his petition for a writ of habeas corpus. Couillard challenges the effectiveness of the representation provided by his counsel at a probation revocation hearing held

in 1999. Because the trial court properly determined that Couillard was not entitled to relief based upon his ineffective assistance of counsel claim, we affirm the order.

¶2 Couillard was placed on probation based upon convictions which occurred in 1996 and 1997. His probation was revoked in June 1999 based upon a determination that he sexually assaulted Kelsey C., an eight-year-old neighbor and the daughter of Janey C. The administrative law judge (ALJ) also determined that Couillard indecently exposed his penis to Kelsey and McKenzie K., the five-year-old daughter of Lisa K., the woman with whom Couillard lived.

¶3 At the probation revocation hearing, Janey testified as to statements made by Kelsey indicating that Couillard put his finger inside her underpants and touched the area between her buttocks. She also testified that the day after Kelsey made her initial allegations, she asked McKenzie and her mother to come over to her house. Janey testified that during this encounter, McKenzie made a statement to her mother and Janey indicating that Couillard "put me on … his dick." Janey's boyfriend also testified regarding statements made by the girls during this meeting. In addition, statements made by Kelsey and McKenzie to the police were introduced into evidence, including Kelsey's statement that after Couillard touched her, he bounced McKenzie around on his exposed penis.

¶4 Although statements made by Kelsey and McKenzie were presented into evidence through the testimony of Janey, Janey's boyfriend, Lisa, and a police detective, neither girl testified. Based upon Janey's testimony regarding the statements made by the girls, and the statements made by the girls to the police, the ALJ found that Couillard committed the alleged probation violations and ordered Couillard's revocation. The revocation was subsequently upheld on

administrative appeal and in certiorari proceedings in the trial court and this court.[1]

¶5 At the revocation hearing, Couillard's counsel objected to the testimony regarding the girls' statements on hearsay grounds. However, he did not object that introduction of the girls' statements violated Couillard's constitutional right to confrontation. Couillard contends that his failure to do so constituted ineffective assistance.

¶6 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***State v. Johnson,*** 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶7 Couillard contends that if his counsel had objected to the introduction of the girls' statements on confrontation grounds, the evidence

[1] This court affirmed a trial court order denying a petition for a writ of certiorari and affirming Couillard's probation revocation in ***State ex rel. Couillard v. Schwarz***, No. 00-2235, unpublished slip op. (WI App May 15, 2001).

regarding their statements would have been excluded. He notes that no reason was offered for the girls' nonappearance at the revocation hearing, and that the ALJ made no finding that good cause existed for their nonappearance. Absent a finding of unavailability, Couillard contends that if an objection based on confrontation had been made, the evidence regarding the girls' allegations and statements would have been excluded. He further contends that absent evidence regarding the girls' statements, he would not have been revoked.

¶8 We reject Couillard's arguments based upon ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 527, *review denied*, 2002 WI 48, 252 Wis. 2d 150, 644 N.W.2d 686 (Wis. Mar. 19, 2002) (No. 01-0008).[2] Couillard argues that ***Simpson*** was wrongly decided. Although we also have some reservations about its correctness, we are bound by it. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶9 Among the minimum requirements of due process afforded a probationer is the right to confront and cross-examine adverse witnesses at a probation revocation hearing, unless the hearing examiner specifically finds good cause for not allowing confrontation. ***Simpson***, 2002 WI App 7 at ¶¶12-13. As does Couillard, the appellant in ***Simpson*** argued that his due process right to confront an adverse witness was violated when the ALJ permitted a parent and police officer to testify regarding statements made by the child victim, and the

[2] ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, 250 Wis. 2d 214, 640 N.W.2d 527, *review denied*, 2002 WI 48, 252 Wis. 2d 150, 644 N.W.2d 686 (Wis. Mar. 19, 2002) (No. 01-0008), was decided approximately one month after the trial court issued its decision denying Couillard's petition for a writ of habeas corpus. However, in denying the petition, the trial court essentially applied the same criteria that was applied in ***Simpson***, concluding that the girls' statements satisfied the residual exception to the hearsay rule.

victim did not testify. ***Id.*** at ¶11. As in Couillard's case, the ALJ found the child's statements to be reliable, but made no finding as to whether there was good cause for failing to require the child to testify.[3] ***Id.*** at ¶14. Like Couillard, the appellant argued that the failure to make a specific finding regarding good cause required automatic reversal. ***Id.***

¶10 This court rejected the appellant's claim that the ALJ's failure to make a finding of good cause required automatic reversal. ***Id.*** at ¶16. It concluded that the failure to make a specific finding of good cause is harmless where good cause exists, its basis is found in the record, and its finding is implicit in the ALJ's ruling. ***Id.*** This court further held that the good cause test is always met when the evidence offered in lieu of an adverse witness's live testimony would be admissible under the Wisconsin Rules of Evidence. ***Id.*** at ¶22. Because the hearsay statement of the child sexual assault victim in ***Simpson*** would have been admissible under the residual exception to the hearsay rule, this court concluded that the good cause requirement was satisfied, regardless of whether the child was available to testify. ***Id.*** at ¶¶22-23. Because the ALJ also specifically found the evidence to be reliable, this court concluded that a finding of good cause was implicit in the ALJ's ruling, and that the ALJ's failure to specifically find good cause was harmless error. ***Id.*** at ¶30.

[3] Although the ALJ who ordered Couillard's revocation did not expressly find that the girls' statements were reliable, her reasons for admitting the statements constituted an implicit determination that the statements were trustworthy and reliable. In addition, in the administrative appeal, the administrator of the Division of Hearings and Appeals expressly determined that the girls' statements to their mothers and Kelsey's statement to the police bore substantial indicia of reliability and established the sexual contact and indecent exposure violations.

¶11 The Wisconsin Supreme Court has enumerated a nonexclusive set of factors which courts may consider in assessing whether a child sexual assault victim's statements are admissible under the residual exception to the hearsay rule. ***Id.*** at ¶23. "The weight accorded each factor may vary and no single factor is dispositive." ***Id.***

> 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.

Id. at ¶¶23-28 (citations omitted).

¶12 Applying these criteria here, it is clear that the victims' statements possessed sufficient guarantees of trustworthiness to be admissible under the residual exception to the hearsay rule. The initial allegation was made by Kelsey to her mother, in response to a question from her mother as to why she did not want to go to McKenzie's home to be babysat. Evidence indicated that Kelsey was a good student, understood the difference between the truth and a lie, was able to communicate and understand questions, and would not lie about something as important as a sexual assault. In addition, she was eight years old when she made the sexual assault allegations, an age which suggested that she was telling the truth. *See* ***id.*** at ¶24.

¶13 The fact that Kelsey first told her mother also provided her statement with a circumstantial guarantee of trustworthiness. *See* ***id.*** at ¶25. While Couillard argued that Kelsey's mother, Janey, had a motive to lie or to encourage Kelsey to fabricate the charges, the ALJ specifically rejected his arguments as incredible. Because the ALJ's determination was based on a reasonable view of the evidence, it is conclusive in a reviewing court. ***George v. Schwarz***, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57, *review denied*, 2001 WI 114, 246 Wis. 2d 176, 634 N.W.2d 322 (Wis. July 18, 2001) (No. 00-2711). Moreover, Kelsey repeated her allegations to Lisa and during questioning by the police outside the presence of her mother, providing further indicia of the veracity of her statements.[4] ***Simpson***, 2002 WI App 7 at ¶25. Contrary to Couillard's contention,

[4] Couillard complains that the detective who testified concerning the statements made to the police by Kelsey and McKenzie was not the same person who interviewed them. However, the detective who testified was the officer to whom the case was assigned for investigation, and he read from written records of the girls' statements. No basis exists to conclude that the girls' statements were less reliable and trustworthy because made to other officers.

the fact that Kelsey provided additional detail to the police does not render her statements unreliable. *See* ***id.***

¶14 In contending that Kelsey's statements were unreliable, Couillard points out that she never told her mother of the assault until approximately four months after it occurred. However, because Kelsey was only eight years old, this fact is not crucial in determining the reliability of her statements. *See* ***id.*** at ¶26. In addition, as noted by the administrator in the administrative appeal, Kelsey made the initial statement to her mother when she was fearful of being sent to Couillard's home to be babysat. As noted by the administrator, the stress of the situation prompted Kelsey to tell her mother about the assault, and constituted circumstances rendering the statement trustworthy.

¶15 Examining the remaining factors delineated in ***Simpson***, the content of Kelsey's statements was sufficiently consistent to conclude that the statements were truthful. In addition, the graphic detail provided by her indicated that she was not fabricating. *See* ***id.*** at ¶28. The fact that Kelsey's mother did not take her to a doctor for a physical examination and the absence of physical evidence of a sexual assault are irrelevant based on the nature of the alleged contact, which would not cause physical injury. *See* ***id.*** at ¶29.

¶16 Considering the factors as a whole, Kelsey's statements to her mother, Lisa, and the police possessed sufficient circumstantial guarantees of trustworthiness to be admissible under the residual hearsay exception. Similarly, when questioned by Janey the day after Kelsey made her initial allegations, McKenzie admitted to Janey that Couillard "put [her] on … his dick," thus corroborating Kelsey's statements. According to Janey's testimony, McKenzie made her admission in the presence of her mother, increasing its reliability.

Although McKenzie subsequently denied that she had ever seen Couillard's "dick," she admitted to the police that Couillard touched her inside her pants on her "butt."

¶17 As with Kelsey, McKenzie's young age provides a basis for concluding that her statements were trustworthy. *See* ***id.*** at ¶24. Although McKenzie delayed telling an adult about Couillard's activities until questioned concerning the matter after Kelsey made her initial disclosures, this delay does not render her initial statements to Janey, her mother, and the police unreliable. Similarly, inconsistencies in the statements, including her subsequent recantation of the charges against Couillard, did not render her initial statements untrustworthy, particularly in light of her admission to the police that she was afraid of Couillard, and her mother's insistence that the allegations were fabricated.

¶18 Contrary to Couillard's contentions, the fact that a medical examination revealed no evidence of sexual assault does not render McKenzie's initial statements untrustworthy. As with the allegations involving Kelsey, the conduct relied upon by the ALJ in revoking Couillard's probation was not a type of conduct which would cause physical injury.

¶19 Under the totality of the circumstances, McKenzie's initial statement to Janey and Lisa, and her statement to the police indicating that Couillard touched her in a sexual manner, must be deemed sufficiently reliable to be admitted under the residual hearsay exception. Because the girls' statements would have been admissible at the revocation hearing under Wisconsin Rules of Evidence, the good cause requirement was satisfied. Couillard therefore was not prejudiced by his counsel's failure to object to the admission of the statements on confrontation

grounds, and the trial court properly denied his petition for a writ of habeas corpus.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).