

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 16, 2010**

David R. Schanker  
Clerk of Court of Appeals

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**Appeal No. 2009AP1065-CR**

**Cir. Ct. No. 2007CF591**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSE CARMAN GONZALEZ-RICARDO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jose Carman Gonzalez-Ricardo appeals from a judgment convicting him of first-degree sexual assault of a child under thirteen

contrary to WIS. STAT. § 948.02(1)(e) (2007-08)<sup>1</sup> and from an order denying his postconviction motion for a new trial due to an involuntary confession and the admission of other acts evidence. We conclude that the circuit court properly exercised its discretion when it admitted the other acts evidence, and we uphold its determination that Gonzalez-Ricardo's confession was voluntary. We affirm the judgment of conviction and the order denying postconviction relief.

¶2 Gonzalez-Ricardo was accused of having sexual contact with Eliud G., a nine-year-old boy, on September 1, 2007. The criminal complaint alleged that Gonzalez-Ricardo and Eliud G. shared a bedroom, and Gonzalez-Ricardo entered the boy's bed. Eliud G. told Gonzalez-Ricardo to go back to his own bed, and Gonzalez-Ricardo initially complied before returning again to Eliud G.'s bed. Gonzalez-Ricardo took Eliud G.'s hand and made him touch Gonzalez-Ricardo's "private part," which was hard. Then, Gonzalez-Ricardo pulled down Eliud G.'s pants and placed his "private part on [Eliud G.'s] butt."

¶3 During questioning by police, Gonzalez-Ricardo admitted that while he was in bed with Eliud G., he touched Eliud G.'s buttocks with his penis over the child's clothing and that he, Gonzalez-Ricardo, had an erection while he was pressed against Eliud G.'s buttocks. Gonzalez-Ricardo denied penetrating Eliud G.

¶4 Pretrial, the State moved the circuit court to admit evidence that during the second week in August 2007, roughly two weeks before the alleged

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. The notice of appeal refers only to the circuit court order denying Gonzalez-Ricardo's postconviction motion. We construe the notice of appeal as encompassing the judgment of conviction.

contact with Eliud G., Gonzalez-Ricardo attempted to have sexual contact with Eliud G.'s older brother, fifteen-year-old Efrain G. At the hearing on the motion to admit the other acts evidence, Efrain G. testified that a drunken Gonzalez-Ricardo graphically told him that he wanted oral and anal sex from him and followed Efrain G. to a sofa where he sat next to him and started touching his right thigh. When Efrain G. told Gonzalez-Ricardo to stop, Gonzalez-Ricardo left. Gonzalez-Ricardo then returned and touched Efrain G.'s chin and then Efrain G. left. Efrain G. reported this incident to the police on September 1 when the police responded to Eliud G.'s claim that Gonzalez-Ricardo had had sexual contact with him.

¶5 The State argued that the other acts described by Efrain G. were sufficiently similar and close in time to the charged acts with Eliud G. Gonzalez-Ricardo opposed the other acts evidence because the evidence would confuse the jury and would make it difficult for Gonzalez-Ricardo to defend himself against the uncharged allegation leveled by Efrain G.

¶6 The circuit court found that the uncharged incident with Efrain G. was similar to that with Eliud G. (both were underage boys), was not remote in time, and was relevant to the issue of intent to obtain sexual gratification, an element of the charged crime. The court found that the other acts evidence had probative value and noted the greater latitude for other acts evidence in child sexual assault cases. The court did not agree that the jury would be confused. Efrain G. testified at trial, and the jury was instructed about the purpose of this evidence.

¶7 On appeal from his conviction, Gonzalez-Ricardo argues that the circuit court erroneously admitted Efrain G.'s testimony as other acts evidence.

We review whether the circuit court properly exercised its discretion in admitting the other acts evidence. *State v. Gray*, 225 Wis. 2d 39, ¶48, 590 N.W.2d 918 (1999).

¶8 The admissibility of other acts evidence is governed by a three-step test: the evidence must be offered for an acceptable purpose under WIS. STAT. § 904.04(2), it must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). In child sexual assault cases, proof of intent is an acceptable purpose for admitting other acts evidence. *State v. Hunt*, 2003 WI 81, ¶61, 263 Wis. 2d 1, 666 N.W.2d 771. Greater latitude with regard to other acts evidence is allowed in child sexual assault cases. *State v. Davidson*, 2000 WI 91, ¶44, 236 Wis. 2d 537, 613 N.W.2d 606.

¶9 We agree with the circuit court that Efrain G.’s testimony was offered for a purpose other than to show that Gonzalez-Ricardo “acted in conformity with a particular disposition on the occasion in question.” *See State v. Johnson*, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994). Evidence that Gonzalez-Ricardo sought sexual activity with Efrain G. was offered for an acceptable purpose under WIS. STAT. § 904.04(2): to establish intent to seek sexual gratification, an element of first-degree sexual assault of a child. WIS. STAT. § 948.02(1).<sup>2</sup>

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<sup>2</sup> The elements of first-degree sexual assault of a child by sexual contact, WIS. STAT. § 948.02(1)(e), are: “whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.” Sexual contact is defined as “intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.” WIS. STAT. § 948.01(5)(a).

¶10 Having concluded that the evidence was admissible for a permissible purpose, we turn to the relevancy determination. The relevancy determination requires an assessment of probative value in relation to a consequential fact. *Sullivan*, 216 Wis. 2d at 785-86. Thus, “[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence.” *Id.* at 787. Evidence that Gonzalez-Ricardo sought sexual contact with Efrain G. is sufficiently near in time, place and circumstance to the charged crime of sexual contact with Eliud G. *See id.* at 786.

¶11 Finally, we conclude that the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. *See id.* at 772-73. The circuit court recognized the prejudicial nature of Efrain G.’s testimony but determined that the evidence’s probative value outweighed the possibility of unfair prejudice. The court gave the jury cautionary instructions regarding the other acts evidence, limiting its purpose to the issue of intent and warning the jury not to consider the evidence as proof of Gonzalez-Ricardo’s character or propensity. Such instructions “can go ‘far to cure any adverse effect attendant with the admission of the [other acts] evidence.’” *Id.* at 791 (citation omitted).<sup>3</sup>

¶12 We conclude that the circuit court properly exercised its discretion in admitting Efrain G.’s testimony about his encounter with Gonzalez-Ricardo during the State’s case-in-chief. *See State v. Friedrich*, 135 Wis. 2d 1, 17 n.7, 398 N.W.2d 763 (1987).

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<sup>3</sup> On appeal, Gonzalez-Ricardo argues that the graphic language Efrain G. used at trial to describe the incident with Gonzalez-Ricardo was inflammatory and highly prejudicial. We need not address this argument because we have already held that the circuit court properly admitted Efrain G.’s testimony in the form in which he offered it.

¶13 Gonzalez-Ricardo next argues that the circuit court should have suppressed his confession as involuntary. The Spanish-speaking officer who took Gonzalez-Ricardo's statement, Officer Adams, testified at the suppression hearing. The first contact with Gonzalez-Ricardo was to ascertain his identity. He was then transported to the hospital for roughly two hours to have a sexual assault kit examination. Gonzalez-Ricardo did not appear impaired during this time, and he communicated properly with Officer Adams. When Officer Adams and Gonzalez-Ricardo returned to the police station, Officer Adams granted Gonzalez-Ricardo's request for water, but Gonzalez-Ricardo declined Officer Adam's invitation to use the restroom. At that point, Officer Adams gave Gonzalez-Ricardo his *Miranda*<sup>4</sup> warnings in Spanish. Gonzalez-Ricardo stated that he understood the warnings, he was willing to speak with Officer Adams, and he signed the waiver form.

¶14 Officer Adams then began questioning Gonzalez-Ricardo about the allegations involving Eliud G. Officer Adams explained that he was suspected of inappropriately touching a child. Gonzalez-Ricardo described the living situation which required him to share a two-bed room with Eliud G. Gonzalez-Ricardo admitted being in bed with Eliud G., lying next to him with Eliud G.'s back to his front, and touching Eliud G.'s penis over his clothing. Gonzalez-Ricardo later admitted that he had an erection while he was with Eliud G., that his erection pressed into Eliud G.'s buttocks, but he denied touching Eliud G. under his clothes or penetrating him. Gonzalez-Ricardo then provided a written statement to the same effect. The interview took ninety minutes with a couple of short breaks for Officer Adams to consult with a supervisor.

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<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶15 On cross-examination, Officer Adams stated that he first met Gonzalez-Ricardo at 4:30 a.m. on September 1, 2007. Officer Adams knew that Gonzalez-Ricardo had urinated on the floor of the holding cell, but he could not recall if that happened before or after the trip to the hospital to complete the sexual assault kit. Officer Adams estimated that Gonzalez-Ricardo was alone in the holding cell for approximately forty-five minutes while the police obtained a warrant for the sexual assault examination. However, Officer Adams agreed Gonzalez-Ricardo could have been alone in the cell up to two hours before the hospital trip. The interview began around 10:00 a.m. Gonzalez-Ricardo did not testify at the suppression hearing.

¶16 The State argued that Gonzalez-Ricardo received and waived his *Miranda* warnings and his confession was voluntary. The State argued that there was no evidence of threats or coercion by the police, the length of the interrogation was not unreasonable, and Gonzalez-Ricardo was offered the restroom and a drink. Gonzalez-Ricardo argued that he was held for seven hours, left alone for substantial periods, he urinated on the holding cell floor, and that he did not knowingly waive his *Miranda* warnings.

¶17 The circuit court found that Gonzalez-Ricardo received and waived his *Miranda* warnings. He was held for seven hours, the bulk of which was spent preparing for and obtaining a sexual assault kit examination; the remaining ninety minutes were spent in interrogation. The court found that Gonzalez-Ricardo's hours' long sojourn in the holding cell resulted from the need to conduct a sexual assault kit examination on him at the hospital. Immediately prior to giving the *Miranda* warnings and beginning the interrogation, Officer Adams asked Gonzalez-Ricardo if he needed to use the restroom and granted Gonzalez-Ricardo's request for water to drink. From the evidence, the court could not find

exactly when Gonzalez-Ricardo urinated on the holding cell floor, but the fact that he did so was not the result of any police attempt to wear him down. No threats or promises were made to Gonzalez-Ricardo during the interrogation. Gonzalez-Ricardo responded appropriately to Officer Adams' questions. The court concluded that Gonzalez-Ricardo's statements were voluntary and did not result from any unfair strategy used against him.

¶18 We will sustain a circuit court's findings of historical or evidentiary fact unless they are clearly erroneous, but we independently consider whether those facts show a constitutional violation warranting suppression of a confession. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). When we review a suppression ruling, we defer to the circuit court's credibility determinations. *State v. Owens*, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989). The court's findings of fact that Gonzalez-Ricardo was coherent, received and waived his *Miranda* warnings, and was not threatened or coerced are not clearly erroneous based on the evidence adduced at the suppression hearing.

¶19 Determining whether Gonzalez-Ricardo's statement was voluntary requires us to apply constitutional principles to historical facts. See *State v. Hoppe*, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. A defendant's statement is voluntary if, under the totality of the circumstances, the statement was not the product of coercion or improper pressure when balanced against the defendant's personal characteristics. *Id.*, ¶36-38.

¶20 On appeal, Gonzalez-Ricardo argues that his statement was not voluntary because he was held for seven hours, and he urinated on the holding cell floor. The circuit court found no connection between urinating on the holding cell



floor and the voluntariness of the statement, which was given after Gonzalez-Ricardo emptied his bladder and then declined an offer to use the restroom.

¶21 The length of Gonzalez-Ricardo's detention, approximately seven hours, was not, in and of itself, a basis for deeming involuntary the confession elicited during a ninety-minute interrogation. There is no per se rule that interrogation for a specified period of time is inherently coercive. *Turner*, 136 Wis. 2d at 364 (thirty-seven hour detention not coercive).

¶22 We agree with the circuit court that Gonzalez-Ricardo's confession was voluntary and properly admitted at trial against him.

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

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

