COURT OF APPEALS DECISION DATED AND FILED

August 12, 2003

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. 02-2350-CR

Cir. Ct. No. 01-CF-44

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES F. G.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles F. G. appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child contrary to

WIS. STAT. § 948.02(1).[1] Charles argues the trial court erred by: (1) admitting statements the child made to a day-care teacher; (2) failing to enforce its pretrial orders compelling discovery; and (3) refusing to grant a mistrial. Charles also claims the evidence at trial was insufficient to support his conviction and the trial court erroneously exercised its sentencing discretion. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In April 2001, the State charged Charles with sexual assault of a child, arising from allegations that Charles had sexual contact with his then three-year-old granddaughter, Avanee C.-G. The complaint alleged that on the evening of December 8, 2000, Avanee's mother, Julie G., left Avanee in Charles's care for a few hours. The next morning, Avanee scooted back, squealed and said it hurt when Julie attempted to wipe Avanee's vaginal area with a baby wipe. Julie reported that when she asked Avanee why it hurt, Avanee responded, "Because Poppa touched me with his finger." Julie further reported that "Poppa" was the name Avanee used for Charles. In January 2001, a social worker interviewed Avanee regarding whether anyone had touched her vaginal area "in a bad way." After initially denying anyone had touched her, Avanee stated "Poppa did … right here." After further questioning, Avanee stated that "Poppa" had touched her in the vaginal area with his hand, "trying to get it out … my pink button." Likewise, in March 2001, a day-care teacher reported that Avanee had stated "Poppy hurt me," as she gestured to her genitals.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 Charles subsequently filed motions in limine requesting an adverse psychological examination of Avanee as well as relevant medical and mental health records of both Julie and Avanee. Charles also sought to suppress Avanee's statements and introduce evidence of Julie's prior allegations of sexual assault. The trial court conditionally granted Charles's request for an adverse psychological examination of Avanee. The court also granted Charles's motion to introduce evidence of Julie's prior sexual assault allegations and determined that any issues regarding the materiality, relevance or admissibility of Avanee's statements would be addressed at trial. With respect to his request for relevant medical and mental health records, the court granted the request indicating that Julie should sign the authorizations necessary for it to conduct an *in camera* review of the records.

¶4 After Julie refused to sign the authorizations, the court sanctioned Julie by limiting her trial testimony. At trial, Charles moved to dismiss the case with prejudice, based on his belief that Julie had testified in direct contradiction to the court's order. The motion was denied. Charles was ultimately convicted upon the jury's verdict and sentenced to five years' initial confinement followed by twenty years' extended supervision out of a maximum possible sixty-year sentence. This appeals follows.

ANALYSIS

A. Admissibility of Avanee's Statement

¶5 Charles argues the trial court erroneously exercised its discretion by admitting Avanee's statement to her day-care teacher as an excited utterance under WIS. STAT. RULE 908.03(2). A trial court's decision to admit evidence under one of the exceptions to the rule against hearsay is a discretionary determination that

we will uphold if the trial court has reasonably applied the facts to the governing legal principles. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

¶6 There are three factors that must be considered in determining whether a statement falls under WIS. STAT. RULE 908.03(2): (1) there must be a startling event or condition; (2) the out-of-court statement must relate to that startling event or condition; and (3) the out-of-court declarant must still be under the stress of excitement caused by the event or condition when he or she makes the out-of-court statement. ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998).

¶7 Here, Avanee's statement was made to her day-care teacher approximately fourteen weeks after the sexual abuse incident. Avanee's teacher, Russell Engler, put on some music to help the children wake up from their naps. Engler noticed that the voice on the song entitled "My Grampa" sounded like Avanee's voice. When Engler told Avanee the voice sounded like hers, she responded, "Poppy hurt me, my Poppy hurt me here" while gesturing to her genitals.

¶8 With respect to the first two factors, her grandfather's touching her genital area was a startling event and her statement to Engler related to that event. Citing the fourteen-week lapse in time between the startling event and the statement, Charles argues, however, that Avanee was no longer under the stress of excitement caused by the event or condition when she made her statementhttp://web2.westlaw.com/result/text.wl?RP=/Welcome/Wisconsin/default.wl&RS=WLW2.88&VR=2.0&SV=Split&FN=_top&MT=Wisconsin&CFID=1&DB=WI%2DCS&DocSample=False&EQ=Welcome%2FWisconsin&FCL=False&Method=TNC&n

=7&Query=908%2E03%282%29+%26+%22EXCITED+UTTER. Although fourteen weeks is a considerable time, our supreme court has refused to adopt a bright-line rule for determining what time lapse will disqualify a statement from being treated as an excited utterance. ***Id.*** at 684-85.

¶9 In ***State v. Lindner***, 142 Wis. 2d 783, 794, 419 N.W.2d 352 (Ct. App. 1987), this court concluded that statements made by a mildly retarded ten-year-old girl to her teacher were "sufficiently spontaneous," despite a three-week lapse between the startling event and the statement. In ***Lindner***, the child's statements were triggered by the school's showing a film designed to encourage children to report sexual abuse. ***Id.*** at 786. As in ***Lindner***, the song "My Grampa" triggered Avanee's statement. We therefore conclude the trial court properly exercised its discretion by determining that Avanee was still under the stress of excitement caused by the touching when she made her statement.

¶10 Alternatively, we conclude the statement was admissible under the residual hearsay exception found in WIS. STAT. § 908.03(24). This exception allows the admission of hearsay not specifically covered by any enumerated exception as long as the statement has "circumstantial guarantees of trustworthiness" that are comparable to those possessed by hearsay falling within a specific exception. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 191, 483 N.W.2d 262 (Ct. App. 1992). Statements by children about recent sexual assaults may be admissible under the residual hearsay exception in § 908.03(24). ***State v. Sorenson***, 143 Wis. 2d 226, 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.

Id. at 245-46. The ***Sorenson*** court added that "[t]he weight accorded to each factor may vary given the circumstances unique to each case [and] no single factor [is] dispositive of a statement's trustworthiness." ***Id.*** A 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 § 908.03(24). *See* ***id.***

¶11 We conclude that Avanee's statement was admissible under this standard because there is ample evidence of the statement's reliability. Engler had no motive to fabricate or distort Avanee's statement nor the circumstances under which the statement was made. Although fourteen weeks separated the assault

from the statement, Avanee's statement was made spontaneously in reaction to being told the voice in the song "My Grampa" sounded like hers. The statement's content reveals no sign of deceit or falsity and, in any event, there was corroborating evidence consistent with the assertions made in the statement. Although Avanee's age limited her ability to communicate verbally, the statement nevertheless had sufficient indicia of reliability, thus making it admissible under the residual hearsay exception.

B. Discovery

¶12 Charles contends the trial court erred by failing to enforce its pretrial order entitling him to an *in camera* review of Julie's psychological and medical records. At the time of the hearing on Charles's motion, the controlling case on this issue was ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), as clarified by ***State v. Munoz***, 200 Wis. 2d 391, 546 N.W.2d 570 (Ct. App. 1996). Under ***Shiffra***, a defendant must make a preliminary showing that the sought-after evidence is relevant and may be necessary to a fair determination of guilt or innocence. *See* ***Munoz***, 200 Wis. 2d at 396-98.

¶13 Within a year after the hearing, however, our supreme court set forth the applicable standard applied when a defendant seeks an *in camera* review of privileged records. In ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298, the court raised the bar slightly, holding that "the preliminary showing for an *in camera* review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." Whether a defendant made the preliminary evidentiary showing necessary for an

in camera review of a victim's privileged records is a question of law that we review independently. ***Id.*** at ¶20.

¶14 Here, Charles's request was based on information that Julie had attempted suicide on three occasions, twice accused men of sexually assaulting her and admitted hostility toward men, specifically Charles. We conclude that Charles failed to make the threshold showing of materiality required by ***Shiffra***. That Julie attempted suicide and had a hostile relationship with Charles does not establish an inability on her part to relay truthful information or recount events. Moreover, with respect to the fact that Julie had twice accused other men of sexually assaulting her, the trial court granted Charles's motion to introduce evidence of those allegations. As the State points out, there was no reasonable likelihood that Julie's records contained information relevant to a fair determination of Charles's guilt or innocence, particularly since Julie was neither the victim of the crime nor an eyewitness thereto.

¶15 Likewise under the slightly more stringent standard set forth in ***Green***, Charles has failed to show he was entitled to an *in camera* review of the privileged records. The information Charles sought from these records was cumulative to what he already knew about Julie's mental health problems. Charles and Julie's mother, Wanda G., knew about her suicide attempts, her hostile relationship with Charles and her prior allegations of sexual assault. We

therefore conclude the trial court erred by concluding Charles was entitled to an *in camera* review of these privileged records.[2]

¶16 Charles also claims he was entitled to an adverse psychological examination of Avanee. The trial court conditionally granted Charles's request, noting:

[2] The court imposed a sanction against Julie for refusing to authorize disclosure of her records. Because Charles was not entitled to an *in camera* review of Julie's records, Charles got more than he was entitled to when the court forbid Julie from testifying about conversations she had with Avanee regarding the sexual assault.

> Before the Court will allow the Defendant's expert to conduct an examination of the alleged victim, Defendant's expert shall review the documents, video, tapes and other materials regarding the investigation, including the medical, mental health, counseling or other records related to the alleged victim. Defendant's expert shall then prepare a conditional report as to his or her findings showing how examination of the alleged victim would be relevant to the case.

Charles does not dispute that he failed to satisfy the prerequisites for subjecting Avanee to an adverse psychological examination. The defense expert, Dr. Harlan Heinz, did not prepare a "conditional report" showing how Avanee's examination would be relevant to the case. Because Charles failed to fulfill the conditions established by the trial court, he has waived the right to now claim he was entitled to the examination.

C. Mistrial

¶17 Charles argues the trial court erred by refusing to grant a mistrial after Julie testified in violation of the pretrial order restricting her testimony. As we concluded above, Charles was not entitled to an *in camera* review of Julie's records and thus received more than he was entitled to when the court forbid Julie from testifying about conversations she had with Avanee regarding the sexual assault. *See* supra ¶15. Even, however, were we to assume the trial court correctly restricted Julie's testimony, we conclude the trial court properly exercised its discretion by denying the mistrial motion.

¶18 Whether to grant a mistrial is within the trial court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The trial court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id.*** We will uphold the trial court's discretionary decision if it examined the relevant facts,

applied a proper legal standard and employed a rational decision-making process. *See **id.*** at 506-07. Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶19 Here, the trial court sanctioned Julie for refusing to authorize release of her medical records. The court limited her trial testimony, indicating "that she may not testify about any conversation she may have had with [Avanee] that relates to the relationship between [Avanee] and [Charles] as to the underlying allegations of sexual assault by [Charles] against Avanee." At trial, the following exchange occurred:

> [Prosecutor]: At some point did you go – and this can be answered yes or no – did you go to wipe [Avanee] with a baby wipe?
>
> [Julie]: Yes.
>
> [Prosecutor]: And were you going to wipe her vaginal area?
>
> [Julie]: Yes.
>
> [Prosecutor]: Now, I don't want you to get into what she said, but can you tell me how she reacted when you went to do that?
>
> [Julie]: She was laying down and she had scooted back and she squealed and said it hurt.

Defense counsel's immediate objection was sustained and the trial court instructed the jury to "disregard what the child said." During a subsequent recess, the trial court additionally admonished Julie to simply answer the questions asked. Defense counsel nevertheless moved for a mistrial arguing Julie had violated the court's order when she testified that Avanee said "it hurt." The trial court denied the mistrial motion stating: "The response was spontaneous. It wasn't of such a

nature as to … convey a message that the defendant caused the pain. It's just that it hurt."

¶20 As the court noted, Avanee's statement that "it hurt" did not convey a message that Charles caused the pain. In any event, the trial court gave a curative instruction to the jury to disregard what the child said. We presume that the jurors acted in accordance with this instruction. ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). These steps were sufficient to address any potential prejudice. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court."). The drastic remedy of a mistrial was not necessary.

D. Sufficiency of Evidence

¶21 Charles argues that the evidence at trial was insufficient to support his conviction for first-degree sexual assault of a child. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Charles's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125

Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶22 Here, in order to find Charles guilty of first-degree sexual assault of a child, the State had to prove beyond a reasonable doubt that Charles had sexual contact with Avanee for the purpose of becoming sexually aroused or gratified. Charles argues that without any evidence to show that he would be sexually aroused by young children, the jury's verdict was based on a presumption and was thus insufficient to prove guilt beyond a reasonable doubt. The trier of fact, however, is free to choose among conflicting inferences of the evidence, and intent, including the intent to become sexually aroused or gratified, can be inferred from the conduct of the accused. ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987).

¶23 In ***State v. Shanks***, 2002 WI App 93, 253 Wis. 2d 600, 644 N.W.2d 275, this court concluded that, "Intent to become sexually aroused or gratified can be inferred when a man places his finger in the vagina of a two-year-old girl." ***Id.*** at ¶26. The jury saw social worker Timothy Markgraf's interview with Avanee in which she reported "Poppa" touched her between her legs with his hand. During the interview, Avanee also used gestures to explain that her underpants were down near her ankles when this occurred. The jury could infer that Charles had inserted his finger in Avanee's vagina based on her statement to the day-care teacher and her response to Markgraf that Charles was trying to "dig out" a pink button from her vaginal area. We conclude there was sufficient evidence to support Charles's conviction.

E. Sentencing Discretion

¶24 Sentencing lies within the discretion of the circuit court. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *See* ***id.*** at 681-82.

¶25 If the record contains evidence that the circuit court properly exercised its discretion, we must affirm. *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶26 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its discretion "only where the sentence is so excessive and unusual and so

disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶27 Here, the trial court considered the seriousness of the offense in light of Avanee's age and her relationship to Charles. The court also addressed Charles's character, noting that Charles was supposed to be caring for Avanee when he assaulted her. The court also believed Charles was in danger of reoffending, given his refusal to accept responsibility for his actions. Charles thus argues that the court ignored an independent presentence investigation report and psychological evaluation that concluded he was not a danger to the public or otherwise likely to reoffend. The trial court, however, was not bound by these opinions and likely assessed Charles's risk of reoffense based on Charles's trial testimony and the recommendation of the PSI prepared for the court. The trial court considered the proper sentencing factors and imposed a sentence authorized by law. Under these circumstances, it cannot reasonably be argued that Charles's sentence is so excessive as to shock public sentiment. *See **id.*** at 185. We therefore conclude the circuit court properly exercised its sentencing discretion.

By the Court.—Judgment affirmed.

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