COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1162-CR **Cir. Ct. No. 01CF000308**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. JENNINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Andrew J. Jennings appeals from a judgment convicting him of first-degree sexual assault of a child (penis-vagina) after a jury rejected his claim that he was not guilty by reason of mental defect. The jury determined that although Jennings has a mental defect, he did not lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his

conduct to the requirements of the law. On appeal, Jennings argues that his inculpatory statement to police was involuntary and that the child's statement to a detective should not have been admitted into evidence under a hearsay exception. We reject both claims and affirm.

¶2 The assault of the four-year-old child occurred in the child's home. The victim's brother observed the assault and told his mother's fiancé, who also lived in the home. When the fiancé put the victim to bed that night, he asked her what she did while he and her mother were out. She answered that she and Jennings played on the couch (which is where the victim's brother observed the assault occur). The crying child then told the fiancé, whom she and the other children call "Dad," that Jennings "put his pee-pee in—or on her back part." The police were informed, and the child was examined in a hospital emergency room. When the physician asked the child what happened, the child responded that Jennings "put his pee-pee in my mouth" and that "he put his pee-pee down here," indicating her genital area. The child also stated that her genital area hurt. The physician described the child's demeanor as calm and collected, and she was able to recite her history without showing a lot of emotion.

¶3 The next afternoon, detectives contacted Jennings at his sister's home. Jennings agreed to speak with the detectives in an open garage. The detectives noticed that Jennings appeared to have limited intellectual ability.[1] The meeting in the garage lasted one and one-half to two hours. After the first thirty

[1] The circuit court later found that Jennings, who was twenty-four years old at the time of the offense, functions at approximately the third-grade level.

minutes, Jennings admitted having sexual intercourse with the child. Jennings later moved to suppress his inculpatory statement as involuntary.

¶4 After the evidentiary portion of the suppression hearing, the circuit court made the following findings about the circumstances under which Jennings made his inculpatory statement. Jennings was questioned in his sister's garage, and he was not in custody during the one and one-half to two hour interview with the detectives. Jennings did not ask for any amenities or to leave the garage. Jennings is twenty-four years old and finished school at the age of eighteen. Jennings has a low IQ, has mild mental retardation and he functions at approximately the third-grade level. Jennings was relatively calm and the interview proceeded in a normal fashion before he made his inculpatory statement. Jennings was not under any particular pressure during the interview, no threats were made and he spoke freely with the detectives. After the first thirty minutes, Jennings admitted having sexual intercourse with the child.[2] Jennings contended that the child initiated the sexual contact, an idea first suggested by detectives during the interview. The detectives then gave Jennings his ***Miranda***[3] warnings and wrote down Jennings' statement.

¶5 The court found that the detectives did not use coercive means or improper pressures even though one of the detectives suggested to Jennings that the child might have initiated the sexual contact. This comment may have resonated with Jennings because his father had a child sexual assault conviction.

[2] Jennings also admitted to having sexual intercourse with the child on two other occasions. Charges relating to those incidents were dismissed.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Given Jennings' familiarity with the concept of child sexual assault, the detective's suggestion that the child initiated the contact was not coercive or improper pressure.

¶6 The court also considered whether there would be a basis to suppress Jennings' statement as involuntary in recognition of Jennings' limited intellectual ability. Jennings was not distraught during the interview and gave a detailed description of the assault. There were no psychological pressures which overcame Jennings' ability to resist them. Considering the totality of the circumstances, the court concluded that Jennings' statement was voluntary.

¶7 On appeal, determining whether Jennings' statement was voluntary requires us to apply constitutional principles to historical facts. ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. While we defer to the circuit court's findings regarding the circumstances under which he made the statement, we independently apply the constitutional principles of voluntariness to those facts. ***Id.***

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.
>
> The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation. Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness.
>
> We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers.

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.
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> The balancing of the personal characteristics against the police pressures reflects a recognition that the amount of police pressure that is constitutional is not the same for each defendant. When the allegedly coercive police conduct includes subtle forms of psychological persuasion, the mental condition of the defendant becomes a more significant factor in the "voluntariness" calculus. It is the State's burden to prove by a preponderance of the evidence that the statements were voluntary.

Id., ¶¶36-40 (citations omitted).

¶8 Jennings argues that the combined effect of the detectives' tactics and Jennings' personal characteristics created improper pressure which rendered Jennings' statement involuntary. Jennings points to the detectives' awareness of his limited intellectual ability, their suggestion that they understood what it was like when the child came onto Jennings, and the detectives' statement during the interview that they knew that Jennings' pants were down and his penis was out.

¶9 We disagree with Jennings' conclusion that his statement was involuntary. The circuit court's findings regarding the circumstances in which he made the statement are not clearly erroneous based on the evidence at the suppression hearing. Under the totality of the circumstances test, we balance Jennings' personal characteristics against the pressures brought to bear by the detectives.

¶10 Although Jennings has limited intellectual ability, he has held employment. Jennings also had contacts with law enforcement involving allegations of sexual misconduct with children eight and five years before the offense in this case, and Jennings knew that sexual contact with children was wrong by virtue of his father's conviction for such conduct. Jennings's demeanor during the garage interview was calm, and he did not appear confused during the interview or manifest a lack of understanding of the subject matter of the interview. While the police may have engaged in subtle psychological persuasion to get Jennings to admit the sexual assault, this pressure did not render Jennings' statement unconstitutionally involuntary.[4]

¶11 We note that in cases where a defendant's statement has been suppressed as involuntary, the conduct of the police was more egregious and the personal characteristics of the defendant were more extreme. For example, in ***Hoppe***, the defendant made inculpatory statements while he was hospitalized, undergoing severe alcohol withdrawal and experiencing other related disorders. ***Id.***, ¶¶3, 7. Hoppe was questioned over the course of three days, during which time he was taking tranquilizers, was demonstrably confused, had slurred speech, and went in and out of consciousness. ***Id.***, ¶¶4-25. The police suggested scenarios for the crime and asked Hoppe leading questions. ***Id.***, ¶21. In affirming the suppression of Hoppe's statements, the court concluded that Hoppe's severely debilitated physical and mental state left him vulnerable to the coercive pressures

[4] Jennings contends that he was coerced into admitting an incident which did not occur. He points to the physical examination in the emergency room which did not indicate that the child had been assaulted vaginally. However, the absence of physical evidence that the child was penetrated vaginally does not defeat the sexual assault claim. The child described the assault, and the child's brother observed the assault.

exerted by police and that these pressures overcame Hoppe's ability to resist. ***Id.***, ¶60.

¶12 Here, in contrast, Jennings was in his usual physical and mental condition when he was interviewed. The detectives' conduct during the interview did not overcome Jennings' ability to resist. The State met its burden to show that Jennings' statement was voluntary, and the circuit court did not err in permitting the statement as evidence at trial.

¶13 Jennings next argues that the circuit court erroneously admitted into evidence the victim's hearsay statement to Detective Trilling. The circuit court permitted the detective to testify to the child's out-of-court statement about the assault by Jennings under the excited utterance exception to hearsay, WIS. STAT. § 908.03(2) (2001-02),[5] and the residual exception, § 908.03(24). The detective was present while the child was examined in the emergency room. A doctor, a nurse, a sexual assault coordinator and the child's mother were also present.

¶14 As to the excited utterance exception, the circuit court ruled that the child had experienced a startling event or condition, i.e., the sexual assault, and the child made the statement in proximity to the assault in the presence of a parent. The out-of-court statement related to the startling event or condition. The fact that the child was calm did not preclude a determination that the statement was an excited utterance. The court observed that a four-year-old child without sexual experience may be less outwardly affected by an assault. Finally, the court noted

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

the greater latitude permitted for an out-of-court statement in cases of child sexual assault.

¶15 After the court overruled Jennings' objection on hearsay grounds, the detective testified that the child said she and Jennings were in the living room, and Jennings was wearing red pants with a zipper fly and white underpants. The child said Jennings' "pee-pee" was "red" and that it came out through the fly on his pants. The child also said that her vaginal area was sore.

¶16 Whether to admit an out-of-court statement as an exception to the hearsay rule is within the circuit court's discretion. ***State v. Huntington***, 216 Wis. 2d 671, 680, 575 N.W.2d 268 (1998). If the circuit court had a reasonable basis for its decision, we will uphold the decision. ***Id.*** at 681.

¶17 It is well settled that "there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime." ***Id.*** at 682 (citation omitted).

¶18 In this case, the four-year-old victim testified at trial that she was scared and had a bad headache. She further stated that testifying about Jennings made her sad because he did something. The child did not recall talking to anyone at the hospital. Her testimony ended after she stated that she did not feel well. The child's limited testimony raised the need to offer evidence of the assault via an exception to the hearsay rule.

¶19 Jennings first argues that the child's statement to the detective was not an excited utterance because the child did not display excitement or stress at the time she made the statement. An excited utterance is a "statement relating to a

startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." WIS. STAT. § 908.03(2). Generally, the excited utterance exception applies in child sexual assault cases when: "(1) the child is under ten years old; (2) the child reports the sexual abuse within one week of the last abusive incident; and (3) the child first reports the abuse to his or her mother." ***Huntington***, 216 Wis. 2d at 683 (citation omitted).

¶20 The child in this case was under ten years old, she made her statement within eight hours after the assault, and she first reported the assault to her mother's fiancé, whom she and the other children call "Dad." When she made her statement to the detective, the child was with a parent, was receiving medical care and was oriented. She may not have found the hospital treatment environment threatening. Therefore, that the child was calm when she made her statement to the detective does not defeat the application of the excited utterance exception.

¶21 We also agree with the circuit court that the child's level of excitement needs to be assessed consistent with the broader latitude given in cases of child sexual assault. It may not be correct to gauge a child's response to sexual assault by an older child's or adult's response. The circuit court did not err in admitting the child's statement to the detective under the WIS. STAT. § 908.03(2) excited utterance exception to hearsay.

¶22 The circuit court also admitted the child's out-of-court statement under the residual hearsay exception under WIS. STAT. § 908.03(24). The residual hearsay exception permits the admission of an out-of-court statement where there is sufficient indicia of reliability. ***Huntington***, 216 Wis. 2d at 687. In child sexual assault cases, the following five factors are considered: the child's attributes, the

child's relationship to the person to whom the statement was made, the circumstances under which the statement was made, the content of the statement and whether corroborating evidence exists. ***Id.*** at 687-88.

¶23 The circuit court concluded that the child's statement to the detective was reliable. Applying the five factors, the court found that the child responded to the physician's request for information, and she was oriented. When the child made her statement to the detective, her mother and the physician were in the room. The child made the statement to the detective shortly after the assault. The child's statement does not suggest deceit or falsity. She spoke about the assault using age-appropriate language to describe the involved body parts and was similar to the statement she made to her mother's fiancé with whom she has an apparent father-like relationship. Finally, there was corroborating evidence in the form of the statement of her brother that he had witnessed the assault.

¶24 The circuit court properly exercised its discretion in admitting the child's statement to the detective under the WIS. STAT. § 908.03(24) residual exception to the hearsay rule. The court's factual findings are not clearly erroneous, and it properly applied the five factors to reach a reasonable decision to admit the evidence.

By the Court.—Judgment affirmed.

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