COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2692-CR **Cir. Ct. No. 02CF000495**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL P. N.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Michael P.N. appeals a judgment convicting him of first-degree sexual assault of a child and repeated sexual assault of the same child. He challenges a number of evidentiary decisions made by the trial court and also asks this court to reverse his conviction in the interest of justice. For the reasons discussed below, we affirm the judgment.

BACKGROUND

¶2 The charges in this case were based on allegations made by Michael's seven-year-old stepdaughter, Cassie, that Michael had inserted his fingers and his penis into her vagina on multiple occasions. At trial, the State presented Cassie's videotaped statement of the abuse, and Cassie affirmed portions of her account on cross-examination. In addition to Cassie's testimony, the State elicited testimony from a number of people, over defense hearsay objections, regarding what Cassie or her mother had told them.

¶3 The defense theory was that Cassie fabricated the allegations because she did not like her stepfather. To support its theory, the defense attempted to elicit testimony from Cassie's mother regarding specific instances in which Cassie had lied or exhibited hostility toward her stepfather. The trial court excluded some of the testimony on hearsay grounds.

¶4 We will set forth the relevant testimony in more detail below as we discuss the grounds for admitting or excluding each disputed statement.

DISCUSSION

¶5 The admissibility of out-of-court statements pursuant to a hearsay exception lies within the trial court's discretion. ***State v. Huntington***, 216 Wis. 2d 671, 680-81, 575 N.W.2d 268 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). "[B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions." ***Id***. Even if the trial court has relied upon the wrong rationale, we may

affirm the decision if we can determine for ourselves that the facts of record provide a basis for the trial court's decision. ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999).

Testimony of Nicole C. and Rebecca M.

¶6 Nicole C. was a neighborhood playmate of Cassie. Nicole testified that one day when Cassie was over at Nicole's house, Cassie told Nicole she had a secret. Cassie said that her stepfather was "touching her down there," pointing to her vagina. Nicole left the room and related Cassie's allegations to Nicole's mother, then returned. When Nicole asked if Cassie wanted to talk to Nicole's mother about it, Cassie gripped her hands and started crying.

¶7 Nicole's mother, Rebecca M., testified that when she came out to the living room, Cassie was crying and squeezing her hands. When Rebecca questioned her, Cassie told Rebecca that her stepfather "would rub her down there," again indicating her vagina.

¶8 The court permitted Nicole and Rebecca to relate Cassie's out-of-court statements under the excited utterances hearsay exception. WISCONSIN STAT. § 908.03(2) (2001-02)[1] defines an excited utterance as "[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." The exception has been liberally construed when applied to young victims of sexual assault. ***Huntington***, 216 Wis. 2d at 682. "The theory behind such liberal interpretation of the excited

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

utterance exception is that the general psychological characteristics of children typically extend the period of time that is free from the dangers of conscious fabrication." ***State v. Gerald L.C.***, 194 Wis. 2d 548, 556-57, 535 N.W.2d 777 (1995). Thus, in ***Gerald L.C.***, the court recognized that a statement made by a child under ten to his or her mother within a week of an incident would generally qualify for the exception. ***Id***. at 557.

¶9 Here, Cassie's statements were first made spontaneously to a childhood friend, rather than to her own mother. However, it could well be easier for a child to disclose abuse to a friend than to an adult, particularly given the evidence in this case that Cassie's mother was very disapproving and unsupportive of her. Moreover, the statements to Nicole were made within hours of the most recent touching incident, discussing the issue caused Cassie to become visibly upset, and Cassie was only seven years old at the time. We are therefore satisfied that the trial court could properly determine that Cassie's statements to Nicole fell within the excited utterance exception. Once the trial court determined that Cassie's statements to Nicole were excited utterances, it was certainly reasonable to determine that the stress of excitement about the abuse was still in effect when Cassie repeated the statements to Nicole's mother shortly thereafter.

¶10 Nicole's statements to her mother about what Cassie had told her were not hearsay because they were offered, not for the truth of the statements, but for the purpose of explaining why Nicole's mother came out to the living room and questioned Cassie.

Testimony of Dr. Sharon Stake

¶11 Dr. Sharon Stake was Cassie's pediatrician. The court permitted Stake to testify that, before she examined Cassie, both a social worker and police

officer told her that Cassie had told a neighbor that she had been sexually assaulted by her stepfather. Stake further testified that Cassie said he had touched her in her private parts, indicating the genital region.

¶12 The statements of the social worker and police officer were not hearsay because they were not offered to show the truth of the matter asserted in any of the various layers of statements, but rather to help explain why the doctor was examining Cassie and why she asked certain questions. Cassie's statements to Stake about what had happened to her fall within the hearsay exception for statements made for the purpose of medical diagnosis or treatment. WIS. STAT. § 908.03(4).

Testimony of Jill Fisher and Tracy Hartman

¶13 Social worker Tracy Hartman took Cassie from Stake's office to a specially trained sexual assault nurse examiner, Jill Fisher. Fisher examined Cassie in the presence of Cassie's mother and Hartman, and found two scars in Cassie's hymen. Fisher testified that when the scars were discovered, the mother said to her daughter in a loud, angry voice something along the lines of, "Tell the truth. Say this didn't happen. You're lying." Hartman testified similarly that Cassie's mother said something along the lines of "You're making this up. You're a liar. Did you stick something up there yourself," in a loud, demeaning voice.

¶14 Once again, the statements Michael objects to were not hearsay because they were not offered for the truth of the matter asserted. That is, the State's position was *not* that Cassie was lying or making up the abuse or that she had injured herself. Rather, the State offered the testimony to show that Cassie's mother was hostile or biased against her, and to help explain why Cassie did not disclose the abuse to her mother.

¶15 Social worker Hartman was also permitted to testify on rebuttal that, shortly after the exam, Cassie's mother kept saying over and over that it all made sense now, and that Cassie had been trying to tell her something for a very long time about dad but was too afraid to tell. These statements were admissible as inconsistent prior statements because, on cross-examination during the defense case, Cassie's mother had denied telling people that Cassie had been trying to tell her a secret for over a year. WIS. STAT. § 908.01(4)(a)1.

Testimony of Cassie's Mother

¶16 The trial court excluded testimony from Cassie's mother about what Cassie had told her about wanting to get rid of Mike; that Cassie had told her and Cassie's biological father that a daycare owner had hit her in the face; and about what Cassie had told her mother about being at the railroad tracks. Michael does not deny that each of these statements was hearsay, and he does not assert that any were admissible under a hearsay exception. Rather, he claims that it violated his due process rights for the trial court to admit hearsay offered by the State but exclude hearsay he had offered. As we have explained, however, the statements offered by the State were properly admitted. We see no merit to Michael's arguments on this issue, which are unsupported by any references to legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider arguments which are undeveloped or unsupported by references to relevant legal authority.).

Discretionary Reversal

¶17 Finally, Michael contends that his conviction should be overturned in the interest of justice because social worker Hartman improperly testified that Cassie never lied to her.

¶18 WISCONSIN STAT. § 752.35 allows this court to reverse a judgment by the trial court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." There are separate criteria for analysis under the two grounds for reversal. ***State v. Wyss***, 124 Wis. 2d 681, 732, 370 N.W.2d 745 (1985). We may conclude that the controversy has not been fully tried when the jury was not given the opportunity to hear testimony relating to an important issue in the case, or when the jury had before it improperly admitted evidence which confused a crucial issue. ***Id***. at 735. The miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. ***Id***. at 741. In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶19 Even assuming that the social worker's statement could be taken as an inadmissible comment on Cassie's credibility, rather than a permissible comment on her character for truthfulness, we are not persuaded that the statement prevented the real controversy from being tried or resulted in a miscarriage of justice.

By the Court.—Judgment affirmed.

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