COURT OF APPEALS
DECISION
DATED AND RELEASED

January 18, 1996

No. 94-1955-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY G. BAKER,

Defendant-Appellant.

APPEAL from judgments of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Reversed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Stanley G. Baker appeals from judgments of conviction for first-degree reckless endangering safety, attempted sexual assault and false imprisonment.[1] The issues are whether the trial court erred by admitting a videotaped interview of the alleged victim and whether the error

[1] Respectively, §§ 941.30(1), 940.225(2)(a), and 940.30, STATS.

was harmless. We conclude the court erred and the error was not harmless. We reverse and remand for a new trial.[2]

The case was tried to a jury. Baker and the alleged victim Tracy[3] were the only eyewitnesses to the events at issue. Their testimony agreed in some respects, but not others. Both testified that the incident occurred late at night at a bridge over a creek. Tracy was walking alone and Baker approached her. Tracy testified that he tackled her, they rolled down a bank, wrestled on some rocks, and then went into the water. Baker held her head under water for a while and then left. Baker testified that he saw Tracy from a distance, thought it was somebody he knew from high school, and thought maybe he could "pick her up." He followed her to the creek area and tried to talk to her, and when he did she started swinging her arms at him. He grabbed her to calm her down, and they fell down the rocks into the water. He denied trying to hold her head under water. He tried to help her in the water but she wanted him to leave her alone. Baker left.

In addition to the charges named above, the jury was given an instruction on attempted first-degree intentional homicide, with the recklessly endangering safety charge given as a lesser included offense for that count. The jury found Baker not guilty of attempted murder but guilty of the lesser included offense.

During direct examination of Tracy, the State showed a videotape of a law enforcement officer interviewing her the following day at the scene. The tape lasts approximately eight minutes. In it, Tracy describes her version of the incident, including where in the water they were, how long she was under water, how long they fought in the water and where Baker's hands were. She says she was under water "long enough to think I wasn't going to make it," and thought he was not going to let her up. He was on top of her, forcing her down. She thought he was going to drown her.

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[2] In view of our disposition, we do not reach the question whether the court should have submitted a lesser-included offense to the jury.

[3] We use only Tracy's first name.

The trial court overruled Baker's hearsay objection to the tape. The court held it was admissible under the residual exception, § 908.03(24), STATS. The court said the tape would give the jury a clearer picture of the background in which the offense allegedly occurred and "indicia of reliability [were] built into the situation, particularly when [she would be] on the stand when this tape is being shown, and the defense will be given the opportunity to cross-examine her concerning the contents of that videotape."

After deliberating about ninety minutes, the jury sent out a note. As described by the trial court the note stated, "We would like to see the video of the victim explaining what and where the incident occurred." The tape was sent to the jury room, and after some twenty-five more minutes the jury returned with the verdicts.

Baker argues the videotape was inadmissible hearsay. Whether hearsay may be admitted under an exception in the rules of evidence is a question of law we review without deference to the trial court. ***State v. Sharp***, 180 Wis.2d 640, 649-50, 511 N.W.2d 316, 320 (Ct. App. 1993).

The State argues the videotape was admissible under the residual exception, § 908.03(24), STATS., which allows a hearsay statement to be admitted even though the declarant is available as a witness when the statement is one "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." This exception is for the novel or unanticipated category of hearsay that does not fall under one of the named categories, but which is as reliable as one of those categories. ***State v. Stevens***, 171 Wis.2d 106, 120, 490 N.W.2d 753, 760 (Ct. App. 1992). It is intended that the residual hearsay exception rule will be used very rarely, and only in exceptional circumstances. ***Id.*** This exception "focuses, as do all of the enumerated hearsay exceptions, on the character of the statements and the circumstances under which they are made...." ***Mitchell v. State***, 84 Wis.2d 325, 333, 267 N.W.2d 349, 353 (1978).

A videotaped statement to police is not novel, unanticipated, rare or exceptional. However, the State argues that four aspects of this particular videotape provide the required circumstantial guarantees of trustworthiness.

The State concedes that no factor by itself is grounds to admit the tape, but argues they are sufficient when taken together. We disagree.

The first guarantee of trustworthiness argued by the State is that the videotape was made only a short time after the events Tracy describes. We see no reason why, without more, a statement made shortly after an event is inherently trustworthy. The State does not argue, for example, that the tape is comparable to an excited utterance. A declarant is as capable of providing incorrect or false information a short time after an event as at any other time.

The second indicator of trustworthiness, the State argues, is that the videotape reveals Tracy's demeanor when she made the statements. The significance of this, according to the State, is that it dispenses with the usual intermediary involved in hearsay testimony and allows the jury to judge her demeanor directly.

We reject the demeanor argument. The residual exception in § 908.03(24), STATS., is "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." Our focus must therefore be on the circumstances surrounding the statement.[4] The jury's later ability to evaluate demeanor is not such a circumstance. For Tracy's statement to be admissible, the circumstances must be comparable to the other exceptions provided in § 908.03, STATS. In those other exceptions, the circumstances make it more likely that a declarant will be truthful. Videotaping a statement is not comparable to other circumstances that might impel truthfulness. Nothing about being videotaped makes one incline more to the truth.

The State's third indicator of trustworthiness is that Tracy's videotaped statements were made to a law enforcement officer, and she faced the possibility of prosecution if she lied. A declarant may have reasons to

[4] "In our view, the very words of the rule indicate that the key to using [a hearsay residual] exception is governed by the circumstances *surrounding the making of the hearsay statement*." ***State v. Stevens***, 171 Wis.2d 106, 120, 490 N.W.2d 753, 760 (Ct. App. 1992) (emphasis in original).

deceive an officer, in spite of the potential penalty. It is not a sufficient guarantee of trustworthiness under § 908.03(24), STATS., that a declarant spoke with a law enforcement officer. ***Mitchell***, 84 Wis.2d at 332-33, 267 N.W.2d at 353. The State's argument proves too much. If accepted, it would suggest that all statements to law enforcement officers should be admissible, whether by victims, witnesses or suspects.

The State's final indicator of trustworthiness is that Tracy was available for cross-examination regarding her statements on the tape. We reject this argument for two reasons. First, the declarant's availability is already assumed, since we are focusing on the enumerated and residual exceptions that apply "even though the declarant is available as a witness." *See* § 908.03(intro.), STATS. Second, as with the argument that the jury can judge demeanor from the videotape, the declarant's later availability for cross-examination is immaterial because it is not a circumstance surrounding the making of the statement itself.

The State next argues the videotape was admissible because it was a witness's prior consistent statement offered to rebut an express or implied charge of recent fabrication or improper influence, and therefore outside the definition of hearsay under § 908.01(4)(a)2, STATS. The State argues that defense counsel impliedly charged improper influence by asking Tracy about the extent of her contact with the prosecution before testifying.[5]

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[5] The State relies on the following exchange:

Q. You met with [the prosecutor] prior to testifying today?
A. No, I did not.
Q. You met with somebody in regard to preparation for testimony?
A. I'm not sure it's preparation for testimony. They were present.
Q. You haven't met with anybody from the District Attorney's office or the victim/witness--
A. Jane Mather.
Q. Okay.
A. --was down there.
....
Q. What I'm speaking of is just in general coming up to the time of trial you have met with the people from the District Attorney's office or the victim/witness coordinator to discuss your testimony today, correct?
A. No, we really didn't discuss my testimony, we just discussed being ready.

Defense counsel did not imply anything improper in his questioning of Tracy. The most reasonable reading of the questions is that the defense sought to show Tracy may have been prepared or rehearsed by the prosecution. There is nothing improper about preparation between counsel and a witness. However, the defense would want the jury to be aware of such activities when considering her credibility. The defense's questions here did not imply anything beyond ordinary preparation.

We conclude the trial court erred in admitting Tracy's videotaped statement.

We turn to whether the error was harmless. The test for harmless error is whether a reasonable possibility exists that the error contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Baker argues the error was not harmless because of the number of inadmissible statements Tracy made and the fact that the jury asked to see the tape shortly before reaching a verdict. The State argues admission of the tape was harmless because it was directed "all but exclusively" to the attempted homicide charge on which Baker was acquitted.

The State mischaracterizes the videotape. Tracy's videotape provided a complete description of her version of the episode, including allegations that Baker tackled her, struggled with her, and held her head under water. Her statements are relevant not only to the attempted homicide charge, but also to the charges on which Baker was convicted. In fact, the State itself argues on a different issue that these events support the first-degree endangering safety charge.[6]

(..continued)
Q. You discussed what happened?
A. No.
Q. You didn't?
A. Not really; just trying to -- they were there for me. It wasn't like we were going through what happened, though.

[6] On an issue related to the jury instructions the State wrote: "It is self-evident that one cannot hold a person's head under water under the circumstances described by the victim without `show[ing] utter disregard for human life.'" Respondent's brief at 11.

The trial was a credibility contest between Baker and Tracy. The videotape related to the most crucial parts of Tracy's testimony, and its admission may have improperly bolstered her credibility. In view of the jury's request for the tape during its deliberations, and the ease with which it reached a verdict after reviewing it, we conclude there is a reasonable possibility that the erroneous admission of the tape contributed to the conviction. If the jury were to reject Tracy's version of the episode, Baker would be acquitted of all three charges. For that reason, all three convictions must be reversed and a new trial ordered except, of course, on the attempted homicide charge.

By the Court.—Judgments reversed and cause remanded.

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