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DISTRICT IV

January 21, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1965-CR State of Wisconsin v. James E. Patton (L.C. # 2012CF70)
2014AP1966-CR State of Wisconsin v. James E. Patton (L.C. # 2012CF130)

Before Lundsten, Higginbotham and Sherman, JJ.

A jury found James Patton guilty of one count of first-degree sexual assault of a child under the age of 13 and one count of repeated sexual assault of the same child. *See* WIS. STAT. §§ 948.02(1)(e) and 948.025(1)(d) (2009-10).[1] On appeal, Patton argues that his constitutional right to confrontation was violated during the victim's testimony and that the circuit court erred

[1] All further references to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

when it permitted the jury to hear an audio recording of the victim's interview with a police detective. Patton also asks this court to order a new trial in the interest of justice. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

Patton was convicted of sexually assaulting C.M. on a single occasion on June 11, 2012, and repeatedly sexually assaulting C.M. between January 1, 2007, and June 10, 2012. C.M. was nine years old on June 11, 2012, and eleven years old at the time of trial. C.M. told her mother immediately after the June 11, 2012 incident, and Lana Bowers, a police detective, interviewed C.M. on June 12. That interview was audio recorded. Later that summer, C.M. told her mother about the repeated course of assaultive conduct, and Detective Bowers interviewed C.M. for a second time. The second interview, held on September 24, 2012, was both audio and video recorded.

C.M. testified at trial. Regarding the June 11 incident, C.M. testified that she went to Patton's house to return a dog toy that Patton and his daughter had left at C.M.'s house. Patton asked C.M. to come near him, and told C.M. to sit on his lap. When the prosecutor asked C.M. what happened next, she was largely unresponsive. After C.M. left the stand, Detective Bowers was recalled and briefly testified that she had taken the two statements from C.M. Both statements were played for the jury.

Patton's attorney cross-examined C.M. at length. Counsel questioned C.M. both about the repeated assaults which took place in a shed and about the June 11 incident. On some occasions, C.M. indicated that she could not remember what she had told Detective Bowers.

Many of C.M.'s responses were non-verbal, and are described in the transcript as "[i]ndicates negatively" or "[i]ndicates affirmatively."

Discussion

The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." In this case, C.M. testified at trial, and Patton had the opportunity to cross-examine her. Patton describes C.M. as "unresponsive" and argues that his cross-examination was not "meaningful." Patton argues that his constitutional right to confront witnesses was violated because C.M. was unable to answer some questions and only nodded affirmatively or negatively to other questions. We conclude that Patton's confrontation right was not violated.[2]

In ***United States v. Owens***, 484 U.S. 554, 555-56 (1988), a witness who had previously identified the defendant as his assailant was unable to make an identification at trial, due to memory loss. Owens argued that the witness's inability to remember precluded the witness from being cross-examined and constituted a denial of Owens's right to confront witnesses. *See* ***id.*** at 556-57. The Supreme Court held that no confrontation violation occurred. ***Id.*** at 559-60. "[T]he traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy" the Confrontation Clause. ***Id.*** at 560. The Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is

[2] The State argues that Patton forfeited his rights to object to the admission of the audio recording and to raise a confrontation argument because trial counsel did not object at trial to the admission of the audio recording, did not make a constitutional argument to the circuit court, and did not move to strike any of C.M.'s testimony as non-responsive. We choose to address the merits of both issues.

effective in whatever way, and to whatever extent, the defense might wish." ***Delaware v. Fensterer***, 474 U.S. 15, 20 (1985). As we stated in ***State v. Rockette***, 2006 WI App 103, 294 Wis. 2d 611, 718 N.W.2d 269:

> ***Fensterer*** and ***Owens*** teach us that the key inquiry for Confrontation Clause purposes is whether the declarant is present at trial for cross-examination, takes the oath to testify truthfully and answers questions asked of him or her by defense counsel. These cases also plainly inform us that the Confrontation Clause does not guarantee that the declarant's answers to those questions will not be tainted by claimed memory loss, real or feigned.

Id., ¶24.

C.M. was available for cross-examination at trial. The fact that she answered many, but not all, of Patton's questions by indicating that she did not remember does not impact our analysis. "'The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.'" ***Owens***, 484 U.S. at 558 (quoting ***Fensterer***, 474 U.S. at 21-22). Patton's right to confrontation was not violated.

Patton next contends that the circuit court erred when it permitted the audio recording of C.M.'s June 12 interview to be heard by the jury. Patton argues that the statement was not admissible under the "excited utterance" exception to the hearsay rule. *See* WIS. STAT. § 908.03(2).[3] And, relying on ***Irby v. State***, 60 Wis. 2d 311, 315, 210 N.W.2d 755 (1973), Patton argues that C.M.'s statement cannot be considered substantive evidence.

[3] WISCONSIN STAT. § 908.03(2) excepts from the scope of the hearsay rule 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."

We are not persuaded. A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. WIS. STAT. § 908.01(4)(a)1. Further, a prior inconsistent statement may be considered substantive evidence of guilt. *See* ***Vogel v. State***, 96 Wis. 2d 372, 386, 291 N.W.2d 838 (1980).

Here, C.M. testified at trial and was subject to Patton's cross-examination. She testified that she did not remember what Patton said to her after she sat on his lap, and did not remember talking to Detective Bowers about the incident. Compromised memory renders a prior statement inconsistent for purposes of WIS. STAT. § 908.01(4)(a)1. *See* ***State v. Harrell***, 2010 WI App 132, ¶21, 329 Wis. 2d 480, 791 N.W.2d 677. Thus, C.M.'s June 12 statement was properly admitted into evidence.

Lastly, Patton asks this court to order a new trial in the interest of justice. Under WIS. STAT. § 752.35, we have the discretion to reverse a judgment "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." Our power under this section should be "exercised sparingly and with great caution." ***State v. Tainter***, 2002 WI App 296, ¶23, 259 Wis. 2d 387, 655 N.W.2d 538. Because we have rejected both of Patton's claimed errors, it follows that a new trial in the interest of justice is not warranted. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) (adding arguments that have been rejected "together adds nothing. Zero plus zero equals zero.").

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals