



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

January 15, 2020

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Jeffrey W. Jensen
111 E. Wisconsin Ave., Ste. 1925
Milwaukee, WI 53202-4825

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP1970-CR State of Wisconsin v. Gregory J. Murry (L.C. #2015CF304)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gregory Murry appeals from a judgment convicting him of two crimes: repeated sexual assault of the same child and first-degree sexual assault of a child under the age of twelve. On appeal, Murry challenges the admission into evidence of a recorded video statement of the victim of the first-degree sexual assault (whom the appellant's brief identifies by the pseudonym

“Roger”).¹ 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 (2017-18).² We conclude that the record supports the circuit court’s discretionary decision to admit the video statement. We affirm.

Roger’s video statement described the sexual assault Murry committed against him. The admissibility of Roger’s video statement was governed by WIS. STAT. § 908.08. Upon notice that a party intends to offer a child’s video statement into evidence, the circuit court “shall conduct a hearing on the statement’s admissibility.” Sec. 908.08(2)(b). At that hearing, “the court ... shall rule on objections to the statement’s admissibility.” *Id.* The motion to admit Roger’s video statement alleged that Roger would be older than twelve when trial commenced. For a child older than twelve, the circuit court had to consider whether admission of the video statement was warranted by the interests of justice. Sec. 908.08(3)(a)2.

At the hearing on the admissibility of Roger’s video statement, Murry objected because the statement contained leading questions and evidence of manipulation and manipulative conduct. The State countered that the statement was given in a forensic setting to a trained forensic examiner in a reasonable time after the initial disclosure of the sexual assault.

The circuit court concluded that the video statement met almost all of the WIS. STAT. § 908.08(4) interests of justice criteria. The court specifically found that the statement was not

¹ Murry does not challenge any aspect of his conviction for repeated sexual assault of the same child.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

adulterated in any fashion and there was an adequate discussion with Roger about distinguishing truth from falsehood.

The admission of evidence was within the circuit court's discretion. See *State v. Jackson*, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). We look for reasons to sustain a discretionary determination. *State v. Wiskerchen*, 2019 WI 1, ¶18, 385 Wis. 2d 120, 921 N.W.2d 730.

Murry first argues that our review of the record must be confined to the record of the motion hearing. We do not agree. Murry's circuit court proceedings were lengthy, including extensive pretrial litigation that disclosed Roger's mental health issues. We consider the entire record as it existed at the time the circuit court made the evidentiary ruling challenged on appeal.

The WIS. STAT. § 908.08(4) interests of justice factors are:

- (a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
- (b) The child's general physical and mental health.
- (c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
- (d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.
- (e) The child's familial or emotional relationship to those involved in the underlying proceeding.
- (f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

The record as it existed at the time the circuit court admitted Roger's video statement contains evidence that satisfies many of the WIS. STAT. § 908.08(4) interests of justice factors. Roger's age is not in dispute.³ Sec. 908.08(4)(a). The State's offer of proof to admit the video statement addressed the factors. In a motion filed in May 2015, Murry presented matters relating to Roger's mental health issues and diagnoses. During a *Green*⁴ hearing addressing whether certain of Roger's confidential records would be disclosed, Dr. David Thompson, a clinical and forensic psychologist, testified that Roger's school records stated that he had long been

³ The record contains different years for Roger's date of birth: 2002 (State's motion to admit Roger's video statement and the amended information) and 2003 (second amended complaint). The second amended complaint alleged that the offenses against Roger occurred between December 2005 and December 2007, Roger gave his video statement in February 2015, the court admitted that statement into evidence in November 2015, and Roger testified at Murry's first trial in January 2016. Murry was convicted during his third trial in February 2017 after the first two trials (January 2016 and March 2016) ended in mistrials. Regardless of the correct year of Roger's birth, Roger was a very young child when Murry sexually assaulted him.

⁴ See *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298 (procedure for requesting access to an individual's mental health treatment or counseling records).

diagnosed with ADHD and ODD (oppositional defiant disorder). Thompson testified about the impact of these diagnoses on Roger's ability to be truthful and the challenges faced by a forensic interviewer. Sec. 908.08(4)(a), (b), (h). Murry, who committed a crime against Roger, was a family member. Sec. 908.08(4)(c), (e). The second amended complaint alleged that the sexual assault injured Roger. Sec. 908.08(4)(c).

We agree with the State that the record supports the circuit court's discretionary decision to admit Roger's video statement in the interests of justice. We further agree that Roger's diagnoses could impact his trial testimony such that the forensic interview, which was given in a controlled environment almost a year before Roger testified at the first trial, was important for the jury to hear in the interests of justice.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals