COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1506-CR **Cir. Ct. No. 2005CF101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE GREENE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Eugene Greene appeals a judgment convicting him of two counts of repeated second-degree sexual assault of the same child, contrary

to WIS. STAT. § 948.025(1)(b).[1] He also appeals an order denying his motion for postconviction relief. He contends the court erred by permitting a videotape of a victim's interview to be played before the jury, not suppressing an involuntary statement, and not giving a cautionary jury instruction regarding the fact that his statement was not videotaped. We reject Greene's arguments and affirm.

BACKGROUND

¶2 On August 11, 2005, an Ashland County Sheriff's deputy approached Greene at his place of employment and asked him to come to the sheriff's department for questioning about an ongoing investigation. Greene agreed to go, and the deputy gave Greene a ride, telling him he would be given a ride back afterward.

¶3 Greene was interviewed about alleged sexual misconduct with his stepdaughters. Based upon Greene's statements, a sheriff's deputy drafted a written statement, which Greene signed. After signing the statement, Greene was not given a ride back to work, but was instead arrested. Greene moved to suppress his written statement, contending it was involuntary. The court denied Greene's motion.

¶4 At Greene's jury trial, and over his objection, the court allowed the State to play a videotape of a victim's interview with a social worker, Latricia Dugger. Before playing the tape, the court gave the jury a cautionary instruction, stating in part:

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> The tape is not being presented for your consideration of what is actually said during the conversation; rather it is being presented so that you may observe the demeanor and behavior of the complaining witness while she speaks with Ms. Dugger. You're not to use what is said on the tape as proof that any event occurred, but you may consider how the complaining witness appears on the tape along with all the other evidence in the case to determine the credibility of the witnesses.

Dugger did not testify at Greene's trial. However, the victim did testify.

¶5 The jury found Greene guilty on April 13, 2006. Greene filed a motion for postconviction relief, challenging the court's decision to allow the videotape to be played to the jury and asserting a new trial should be granted in the interests of justice because the interview at which he signed his written statement was not videotaped. The court denied Greene's motion.

DISCUSSION

¶6 Greene first challenges the court's decision to allow the videotape of a victim's interview to be played to the jury. Circuit courts have discretion in determining the admissibility of evidence. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We uphold a circuit court's exercise of discretion if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶7 Greene asserts two bases for challenging the admission of the videotape. The first relies upon our supreme court's decision in ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), and our decision in ***State v. Maday***, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993), both relating to the admissibility of expert opinions regarding whether a victim's behavior is consistent with sexual

assault victims' behavior. His second basis relies upon WIS. STAT. § 908.08, which addresses the admissibility of child witnesses' recorded statements, and ***State v. Snider***, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784, which discusses § 908.08.

¶8 In ***Jensen***, our supreme court concluded that expert witnesses may be asked to describe the behavior of an alleged victim and of other victims of the same crime to help jurors understand the victim's behavior. ***Jensen***, 147 Wis. 2d at 257. In ***Maday***, we adopted a mechanism whereby defendants can seek the opportunity to have their own expert conduct a psychological examination of an alleged victim when the State has expressed its intent to have an expert testify under ***Jensen***. ***Maday***, 179 Wis. 2d at 359-60.

¶9 Wisconsin STAT. ch. 908 addresses the admissibility of hearsay, and WIS. STAT. § 908.08 addresses when an "audiovisual" recording of a child witness's oral statement may be admitted into evidence. The statute includes notice requirements and specifies factors for the court to consider when determining the recording's admissibility. *See* WIS. STAT. § 908.08. In ***Snider***, the court addressed whether a child witness's statement could be admitted under any applicable hearsay exception pursuant to WIS. STAT. § 908.08(7) if other requirements of the statute were not met. ***Snider***, 266 Wis. 2d 830, ¶12.

¶10 We conclude the court properly exercised its discretion when allowing the videotape to be played before the jury. The court considered ***Jensen*** for the proposition that evidence of a witness's behavior when describing a sexual assault is relevant to that witness's credibility. The court properly did not consider the ***Maday*** procedures because the State did not present expert testimony regarding the victim's behavior. *See* ***Maday***, 179 Wis. 2d at 359-60. Allowing the

jury to make its own judgments about the victim's behavior was not equivalent to presenting expert testimony about that behavior.

¶11 Further, regarding WIS. STAT. § 908.08 and ***Snider***, the court correctly concluded the videotape was admissible because it was not hearsay and was not being offered for the truth of the statements in the videotape. In other words, it was not being offered as a "statement" of the victim. Instead, it was shown to demonstrate the victim's behavior when describing the assaults, which was relevant because the victim's credibility was at issue. *See* ***Jensen***, 147 Wis. 2d at 249-50. To protect against the danger of the jury considering the videotape as a witness statement, the court used an instruction to inform the jury about its purpose in viewing the tape and to warn the jury that the statements in the tape should not be considered as testimony. The jury is presumed to have followed the instruction. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Overall, the record demonstrates the court considered the relevant facts, applied the proper law, and reached a reasonable conclusion. *See* ***Loy***, 107 Wis. 2d at 414-15.

¶12 We next address the court's ruling on Greene's motion to suppress his written statement. Greene contends his written statement was involuntary because he was promised a ride home after his interview at the sheriff's department. When reviewing rulings on suppression motions, we uphold a circuit court's findings of fact unless clearly erroneous. ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. Whether those facts require suppression of evidence is a question of law reviewed without deference. ***Id.***

¶13 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." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. "The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Id.***, ¶37. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***Id.*** Whether a defendant's statement is voluntary is determined based on the totality of the circumstances. ***Id.***, ¶38. The totality of the circumstances balances the personal characteristics of the defendant against pressures imposed upon the defendant by law enforcement officers. ***Id.***

¶14 Here, the alleged coercive or improper police conduct was promising Greene a ride back to his place of employment. Viewing the totality of the circumstances, this promise was not improper or coercive, and Greene's statement was not involuntary. Greene was approached at work, where he agreed to go to the sheriff's department for questioning. The sheriff's deputies were "pleasant" to him throughout the interview, which lasted about one and one-half hours. Greene was not uncomfortable during that time. A deputy wrote out Greene's statement based on his own words. While Greene testified he did not like the statement because "all that was in there was things that made it sound bad and nothing that made it sound good," he admits he could have made changes to the statement. Moreover, the specific circumstances surrounding the promise indicate it was not coercive, but instead accommodating to Greene. The trial transcript reveals that Greene needed transportation to and from the sheriff's department because he rode to work with his wife and did not have a vehicle there. There is no indication that Greene provided the statement because of the promise of a ride.

¶15 Finally, we address Greene's assertion that the court should have given a cautionary jury instruction regarding the fact that no recording was made of the interview in which he signed his written statement. Greene relies on statutes regarding the recording of interrogations, specifically WIS. STAT. §§ 968.073(2) and 972.115(2)(a). Section 968.073(2) states in part, "it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony…." Section 972.115(2)(a) states, in part:

> If a statement is made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant ... and unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing the instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case ....

¶16 However, Greene admits that these statutes were not effective until January 1, 2007, after Greene's trial. *See* 2005 Wis. Act 60, § 51. Greene nevertheless asserts that the court "should have determined that it was appropriate to allow for a cautionary instruction to be read to the jury regarding the recording of such statements." We disagree.

¶17 Because the above statutes were not effective until after Greene's trial, we conclude the court did not err by failing to apply them. Further, WIS. STAT. § 972.115(2)(a) contemplates the defendant proposing the instruction, which did not happen here. Additionally, the State argues that because Greene

failed to propose the instruction, he waived this claim. Because Greene does not respond to this argument, he concedes it. *See* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed conceded).

By the Court.—Judgment and order affirmed.

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