COURT OF APPEALS
DECISION
DATED AND RELEASED

February 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0961-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY TAYLOR,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Anthony Taylor appeals from a judgment of conviction, after a jury trial, for one count of second-degree sexual assault of a child, contrary to § 948.02(2), STATS. Taylor presents two issues for review—whether the trial court erroneously exercised its discretion by admitting into evidence three alleged hearsay statements; and whether he should be granted a new trial based on newly discovered evidence. We reject his claims and affirm.

I. BACKGROUND.

The State charged Taylor with sexually assaulting LaDonna B., a fourteen-year-old juvenile. The complaint alleged that the assault occurred on December 2, 1993. Two of LaDonna B.'s teenage friends, and her mother testified at trial that LaDonna B. had told each of them about the assault. One friend, Kanini M., testified that she was told sometime in December 1993, while talking to LaDonna B. on the telephone. LaDonna asked Kanini to guess what had happened to her and that the answer was a four-letter word, with two vowels and two consonants, the first vowel was "a" and the second was "e". Kanini correctly guessed that LaDonna was talking about "rape."

Another friend, Brandalynn C., testified that LaDonna told her about the incident sometime in December while they were at school. LaDonna told Brandalynn first via a coded letter, and second in a conversation. Brandalynn testified that LaDonna was crying when she described what happened. Finally, LaDonna B.'s mother testified that LaDonna told her about the incident via a January 21, 1994 letter, and then discussed it with her daughter. LaDonna's mother also testified that LaDonna was upset and crying while discussing what had happened.

The trial court admitted each statement pursuant to the excited utterance exception to the hearsay rule, *see* RULE 908.03(2), STATS., and the residual exception to the hearsay rule. *See* RULE 908.03(24), STATS. The jury convicted. Subsequent to the jury verdict, but prior to sentencing, Taylor discovered a medical report, which indicated that LaDonna B. had an intact, untorn and unscarred hymen. Taylor argued that the lack of injury to the hymen constituted newly discovered evidence that should be submitted to a jury. The trial court denied Taylor's motion. He now appeals.

II. ANALYSIS.

A. Admission of Statements.

Taylor argues that it was error for the trial court to admit the statements of LaDonna B.'s friends and mother because the statements do not fall into the excited utterance exception or the residual exception. We conclude that the statements were admissible pursuant to the residual exception of the hearsay rule.

RULE 908.03(24), STATS., which we refer to as the residual exception to the hearsay rule, provides: "OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." In ***State v. Sorenson***, 143 Wis.2d 226, 421 N.W.2d 77 (1988), our supreme court held that the residual exception is an appropriate method for admitting children's statements in sexual assault cases, if such statements are otherwise proved sufficiently trustworthy. The ***Sorenson*** case lists five factors which help to determine whether the statements are otherwise sufficiently trustworthy: (1) the attributes of the child, including his or her age, comprehension, verbal ability and motivations; (2) the person to whom the statements were made, his relationship to the child and his potential motivations to lie or distort; (3) the circumstances under which the statements were made, including the relation to the time of the incident, the availability of a person in whom the child might confide and other contextual factors relating to the statements' trustworthiness; (4) whether the statements contain any sign of deceit or falsity and whether they reveal a knowledge of matters not ordinarily attributable to a child of that age; and (5) the presence of other corroborating evidence. ***Id.*** at 245-46, 421 N.W.2d at 84-85.

In examining the three statements at issue in the instant case, we conclude that the ***Sorenson*** factors have been satisfied. Therefore, it was not error for the trial court to admit the three statements pursuant to the residual hearsay exception. Regarding the first factor—attributes of the child—the record does not indicate any credible reason for LaDonna B. to fabricate the incident. Second, she made the statements to her two best friends and her mother. Neither friend knew Taylor, so LaDonna B. had no reason to tell them that he had assaulted her unless it was the truth. Further, she told her mother only after she found out that her mother was going to have surgery and feared that her mother might die. LaDonna B. indicated she did not want her mother to die without knowing what had happened to her. Third, although LaDonna B. did not immediately disclose what had happened, other circumstances surrounding the statements indicate their trustworthiness—each statement was volunteered, and each time LaDonna B. seemed reluctant to talk

about the incident. Fourth, we agree that the statements do not contain any sign of deceit or falsity; and finally, other corroborating evidence existed—one witness testified that LaDonna B. looked different and acted like something was wrong right after the assault occurred. Hence, the statements possessed sufficient guarantees of trustworthiness to be admitted under the residual hearsay exception.

B. Newly Discovered Evidence.

Next, Taylor claims that he should be granted a new trial on the basis of newly discovered evidence. He discovered after the trial that LaDonna B. had undergone a physical examination and that this examination revealed no injury to her hymen. The trial court denied his motion.

A motion seeking a new trial based on newly discovered evidence is addressed to the sound discretion of the trial court. ***State v. Boyce***, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977). Therefore, we will reverse the trial court's decision only if it constituted an erroneous exercise of discretion. ***Id.***

A trial court should grant a motion for a new trial only if the newly discovered evidence meets all of the following five factors:

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Johnson, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993). We need address only the fifth factor to conclude that the trial court did not erroneously exercise its discretion in denying Taylor's motion.

The fact that LaDonna B.'s hymen was not injured does not create a reasonable probability that Taylor did not assault LaDonna, or that he would be acquitted based on this fact. *See* ***State v. Truman***, 187 Wis.2d 622, 626, 523 N.W.2d 177, 179 (Ct. App. 1994) (intact hymen is not inconsistent with penile penetration and therefore, evidence of an intact hymen does not raise a reasonable probability that defendant would be acquitted if jury heard such evidence). Accordingly, Taylor is not entitled to a new trial.

By the Court.—Judgment affirmed.

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