

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 3, 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(1), STATS.

NOTICE

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No. 96-1577-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GILBERT H. BUTZLAFF,

Defendant-Appellant.

APPEAL from an order of the circuit court for Marathon County:
RAYMOND F. THUMS, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Gilbert H. Butzlaff appeals an order finding probable cause and binding him over for trial on one count of first-degree sexual assault of a child, contrary to § 948.02(1), STATS. Butzlaff argues that the court erred when it declared the child unavailable to testify and admitted the hearsay testimony of social worker Suzanne Mathison at the preliminary hearing. We agree that Mathison's testimony was inadmissible hearsay, and therefore reverse.

The State charged Butzlaff with sexually assaulting his two-year-old granddaughter, H.R.T., sometime between February and September 1994, when Butzlaff babysat for her. The doctors who examined H.R.T. in February 1994 and September 1995 found no physical evidence of sexual abuse.

Mathison and the Wausau Police Department initiated a sexual assault investigation in response to a complaint by H.R.T.'s mother. Approximately one year after the alleged sexual assault, Mathison interviewed three-year-old H.R.T. on September 21, 1995, to determine whether she had been sexually assaulted by Butzlaff. During the interview, H.R.T. described two sexual acts that Butzlaff had performed on her.

At the preliminary hearing on January 31, 1996, H.R.T. testified as the State's witness. She provided inconsistent answers to the prosecutor's questions, and failed to identify Butzlaff as her grandfather or as the person who babysat for her or as the person who sexually assaulted her. H.R.T. did not testify that she told her mother about the assault. The defense did not cross-examine H.R.T.

At the continued preliminary hearing on March 5, 1996, Mathison testified about her interview with H.R.T. Butzlaff objected to Mathison's testimony as inadmissible hearsay evidence. The State asserted that Mathison's testimony was admissible as a prior inconsistent statement under § 908.01(4)(a)(1), STATS. The court decided that H.R.T. was unavailable to testify, and admitted Mathison's testimony as a prior inconsistent statement. The court neither referred to § 908.04, STATS., nor specified the subsection under which it found H.R.T. unavailable. Instead, it decided:

The problem is that you've got a ... child who's afraid to testify on the stand and has made comments to other people on previous occasions, and I can really declare her unavailable based on the testimony she gave me last time because of the fact she couldn't testify to any of the things directly.

....

I'm going to just declare that she is unavailable for the purposes of this hearing because of the fact based on her prior testimony that she was unable to testify.

....

I believe that [H.R.T.] is in fact unavailable because of the fact that she testified or attempted to testify earlier and was overwhelmed

Relying on Mathison's testimony, the court concluded that there was probable cause to believe Butzlaff committed the offense and bound him over for trial.

Butzlaff filed this interlocutory appeal to challenge the order.¹ He argues that the court erred when it declared H.R.T. unavailable and admitted H.R.T.'s statements to Mathison.² The State contends that the court properly admitted Mathison's testimony as an exercise of its discretion. In the alternative, the State argues that H.R.T.'s statements were admissible because of the residual hearsay exception in § 908.03(24), STATS.

We interpret the State's failure to advance a prior inconsistent statement argument on appeal as a concession by the State that the exception is inapplicable. We therefore deem the argument abandoned, and do not address it. See *Reiman Assoc., Inc. v. R/A Adver., Inc.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

The sole issue on appeal is whether Mathison's testimony at the preliminary hearing was admissible. If the testimony is inadmissible, there is no probable cause established to support the bindover for trial. We usually review the trial court's evidentiary rulings at a preliminary examination under an erroneous exercise of discretion standard. *State v. Gerald L.C.*, 194 Wis.2d 548, 555, 535 N.W.2d 777, 779 (Ct. App. 1995). If the record reflects that the trial

¹ Petition for leave to appeal was granted June 18, 1996.

² Butzlaff also argues on appeal that the excited utterance and prior inconsistent statement exceptions to the hearsay rule do not render H.R.T.'s statements admissible. Because these exceptions are not addressed in the State's brief and because we reverse on other grounds, we do not address them.

court erroneously exercised its discretion or applied the wrong legal standard, we will reverse the trial court's decision. See *State v. Sharp*, 180 Wis.2d 640, 649, 511 N.W.2d 316, 320 (Ct. App. 1993); *Heggy v. Grutzner*, 156 Wis.2d 186, 200, 456 N.W.2d 845, 851 (Ct. App. 1990).

When the court bases its discretionary choice on an erroneous view of the law, it has exceeded its discretion. *State v. Stevens*, 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992). In this case, the court did not consider the residual hearsay exception when it decided to admit Mathison's testimony. However, this is the argument presented by both parties on appeal. We therefore consider the merits of the residual hearsay exception as applied to the undisputed facts. The admissibility of hearsay evidence under particular hearsay exceptions is a question of law, which we review de novo. See *id.* at 111-12, 490 N.W.2d at 756.

The Wisconsin Rules of Evidence, found in chs. 901 through 911, STATS., apply to preliminary hearings. *State v. Moats*, 156 Wis.2d 74, 84, 457 N.W.2d 299, 304 (1990). A statement other than that made by the declarant while testifying at trial is hearsay when it is offered to prove the truth of the matters asserted. *State v. Britt*, 203 Wis.2d 25, 38, 553 N.W.2d 528, 533 (Ct. App. 1996); see § 908.01(3), STATS. Hearsay evidence is inadmissible unless a recognized hearsay exception exists. See *Britt*, 203 Wis.2d at 38, 553 N.W.2d at 533; see §§ 908.02, 908.03, STATS. Neither party disputes that H.R.T.'s statements to Mathison were made outside of court approximately one year after the alleged assault and that they were offered to prove the truth of the matter asserted.

The court declared H.R.T. unavailable as a witness at the preliminary hearing. The pertinent statute is the following:

- 908.04 Hearsay exceptions; declarant unavailable; definition of unavailability. (1)** "Unavailability as a witness" includes situations in which the declarant:
- (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

- (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or
- (c) Testifies to a lack of memory of the subject matter of the declarant's statement; or
- (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

After a review of the record, we disagree that H.R.T. was unavailable as a witness under § 908.04, STATS. See *State v. Dwyer*, 143 Wis.2d 448, 463, 422 N.W.2d 121, 126 (Ct. App. 1988), *aff'd*, 149 Wis.2d 850, 440 N.W.2d 344 (1989). The fact that H.R.T. may have had difficulty testifying in the courtroom setting does not render her unavailable. We determine that the court may have inappropriately evaluated the competency, rather than the availability, of H.R.T. when it decided that H.R.T. was unavailable. See *id.* at 461-62, 422 N.W.2d at 125. Nevertheless, because both parties present residual hearsay exception arguments on appeal, our conclusion that H.R.T. was available is not dispositive of Butzlaff's appeal.

Regardless of H.R.T.'s availability, we must consider whether there were comparable circumstantial guarantees of trustworthiness that made H.R.T.'s statements admissible pursuant to §§ 908.03(24) and 908.045(6), STATS. Although not addressed by the trial court, both parties advance this argument on appeal. Both subsections allow for the admission of "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." *Id.* The State has the burden to show guarantees of trustworthiness that are comparable to those existing in the enumerated hearsay exceptions. See *Stevens*, 171 Wis.2d at 120, 490 N.W.2d at 760. "It is intended that the residual hearsay exception rule will be used very rarely, and only in exceptional circumstances." *Id.*

Wisconsin courts have established various factors used to determine whether the statements of alleged child victims of sexual abuse are admissible under residual hearsay exceptions. *State v. Sorenson*, 143 Wis.2d

226, 245-46, 421 N.W.2d 77, 84-85 (1988); *State v. Jagielski*, 161 Wis.2d 67, 73-74, 467 N.W.2d 196, 198 (Ct. App. 1991). The court should consider the attributes of the child, the person to whom the child made the statement, the circumstances under which the statement was made, the content of the statement, and other corroborating evidence for consistency with the assertions made in the statement. *Jagielski*, 161 Wis.2d at 73-74, 467 N.W.2d at 198. Because no single factor is dispositive, "the court must evaluate the force and totality of all these factors to determine if the statement possesses the requisite 'circumstantial guarantees of trustworthiness'" *Sorenson*, 143 Wis.2d at 246, 421 N.W.2d at 85.

First, we consider the child's attributes, including the following:

[A]ge, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.

Id. at 245, 421 N.W.2d at 84; *see also State v. Padilla*, 110 Wis.2d 414, 422, 329 N.W.2d 263, 268 (Ct. App. 1982). The fact that H.R.T. was less than three years old at the time of the alleged incident and less than four years old when she made the statements to Mathison weighs against the likelihood that her statements were fabricated.

However, when she testified at the preliminary hearing, H.R.T. appeared to be very confused by the prosecutor's questions and exhibited an inability to give verbal responses. Additionally, H.R.T. did not recall making the statements about the alleged assault to anyone. H.R.T. told Mathison that she liked her grandfather, and Mathison reported that "[H.R.T.] seems to be more upset by her mother's current reaction to these disclosures than the overall impact and the behavior." These facts weigh against the trustworthiness of her statements to Mathison.

Second, we consider the "person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents." See *Sorenson*, 143 Wis.2d at 245, 421 N.W.2d at 84. Mathison is a social worker experienced in the investigation of child sexual assault allegations. Although nothing in the record suggests that she had any personal intention to distort H.R.T.'s statements, she acknowledged that she knew that Butzlaff was a suspect and she referred to Butzlaff during the interview. Mathison's involvement in the interview with H.R.T. weigh against the trustworthiness of her statements.

Third, we consider "the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person to whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness." See *id.* at 245-46, 421 N.W.2d at 85. H.R.T. made the statements approximately one year after the alleged assault occurred and in response to Mathison's questions. We recognize that "[c]ontemporaneity and spontaneity of statements are not as crucial in admitting hearsay statement of young sexual assault victims under the residual exception." *Id.* at 249, 421 N.W.2d at 86. However, in the absence of other indicia of reliability, the lapse of an extended period of time between the alleged assault and the statements weighs against trustworthiness. *Gerald L.C.*, 194 Wis.2d at 562-63, 535 N.W.2d at 782 (statements made by alleged victim two weeks after alleged assault were untrustworthy). The significant lapse of time strongly suggests that H.R.T.'s statements were untrustworthy.

Fourth, we review the content of the statements for "any sign of deceit or falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age." See *id.* at 561, 535 N.W.2d at 781 (quoting *Sorenson*, 143 Wis.2d at 245-46, 421 N.W.2d at 84-85). Mathison testified that H.R.T. used terminology expected from a child her age to accurately identify male and female body parts and to describe the sexual acts allegedly perpetrated by Butzlaff. She described Butzlaff and the acts, and demonstrated one of the acts with dolls. "A young child is unlikely to fabricate a graphic account of sexual activity because it is beyond the realm of his or her experience." *Sorenson*, 143 Wis.2d at 249, 421 N.W.2d at 86 (citation omitted). The specificity with which three-year-old H.R.T. described Butzlaff and

described and demonstrated the alleged acts lends some support to the statements' trustworthiness.

Finally, we consider any "other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant ... for consistency with the assertions made in the statement." *Id.* at 246, 421 N.W.2d at 85. The record indicates that H.R.T. was examined by physicians in February 1994 and September 1995 who found no physical evidence of sexual abuse, and the record discloses no other corroboration. The lack of corroborating evidence weighs against the statements' trustworthiness.

We conclude that H.R.T. was an available witness. Additionally, regardless of her availability, H.R.T.'s statements to Mathison did not possess sufficient circumstantial guarantees of trustworthiness to be admissible under the residual hearsay exception. Therefore, the court erred when it admitted Mathison's hearsay testimony and concluded there was probable cause to support the bindover.

By the Court.—Order reversed and cause remanded with directions to dismiss.

Not recommended for publication in the official reports.