COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1876-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

STEVEN GEORGE LILLO,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Douglas County: JOSEPH A. McDONALD, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. The State appeals from an order denying its motion to admit the videotaped statement of A.L.A., a nine-year-old alleged sexual assault victim. The State contends that the circuit court erroneously exercised its discretion when it failed to consider the videotape's admissibility under

§ 908.045(6), STATS.,[1] a residual exception to the hearsay rule. The State is correct; therefore, we reverse and remand the matter to the trial court with directions that it consider the videotape's admissibility under § 908.045(6), including whether the statement contains sufficient guarantees of trustworthiness, and if admissible, whether its admission satisfies the confrontation clause.[2]

In September 1997, the State charged Steven Lillo with three counts of sexual contact with a person under the age of thirteen contrary to § 948.02(1), STATS. The victim, A.L.A., gave a videotaped statement about the alleged assaults to a police detective. The State subsequently notified Lillo that it intended to offer the videotaped statement at the preliminary hearing pursuant to § 908.08, STATS., which provides that for a child's videotaped statement to be admissible at a criminal hearing, the child must be available.[3] The videotape was admitted at the preliminary hearing, but A.L.A. did not independently testify. Then in December, A.L.A. died in a house fire. The State filed a motion in limine to admit: (1) three statements A.L.A. made to her sister, her mother, and the investigating police officer under the excited utterance exception to the hearsay

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[1] The Wisconsin rules of evidence contain two residual hearsay exceptions. Section 908.045(6), STATS., provides as follows: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: … **(6) Other exceptions**. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." The other, § 908.03(24), STATS., is substantially similar to § 908.045(6) except the declarant's availability is immaterial. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE § 803.24 at 525-26 (1991).

[2] "[I]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST. amend. VI. Article I, § 7, of the Wisconsin Constitution similarly provides that "[i]n all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face …."

[3] Section 908.08(1), STATS., provides, in part, that in "any criminal trial or hearing … the court … may admit into evidence the videotaped oral statement of a child who is available to testify, as provided in this section."

rule, § 908.03(2), STATS., and (2) the videotaped hearsay statement pursuant to § 908.045(6), STATS.

The trial court admitted the three statements as excited utterances. In contrast, focusing its discussing on § 908.08, STATS., the hearsay exception for videotaped statements of children, the trial court denied the State's motion to admit A.L.A.'s videotaped statement:

> What we have in this case in regards to the video is similar to an unsworn … statement … found in any … police department-type of investigation, although it is on video. I believe the Legislature has … set out how those video depositions come in, and … what the procedure is. … [T]he reason why they put that different subsection in the statute, that the district attorney had the right to call a child at the preliminary examination, cannot have to, but they still had the right to, and if that was done and subject to cross-examination, there probably would be no … argument in regards to this motion. But the … proposed video statement of the child, the child being almost ten years old, it cannot be admitted under the statute as set out by the Legislature. It is, as I have indicated, an unsworn statement, and to allow it in, would deny the defendant his constitutional right to confront the accusation made in the video against him.

A trial court's decision on the admissibility of evidence is a matter within the trial court's sound discretion. *See* ***State v. Stevens***, 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992). We will not reverse unless the trial court erroneously exercises its discretion or bases its decision on an erroneous view of the law. ***Id***.; *see also* ***State v. Sorenson***, 143 Wis.2d 226, 240, 421 N.W.2d 77, 82 (1988). Put another way, we will sustain a trial court's discretionary determination if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a

conclusion a reasonable judge could reach. ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 W.2d 30, 36 (1998).

The parties here agree that the videotaped statement is hearsay and is inadmissible unless it falls under an exception to the hearsay rule. Sections 908.01(3) and 908.02, STATS. They disagree, however, whether the trial court indeed considered the statement's admissibility under the residual hearsay exception. Lillo claims the trial court considered the residual exception but rejected it because: (1) the parties discussed the residual exception in their briefs, and the court mentioned that it "considered the briefs of counsel"; and (2) the trial court stated that had cross-examination been allowed and recorded at the preliminary hearing, the court would have admitted the statement even though A.L.A. was unavailable. We are not persuaded.

The trial court's failure to discuss § 908.045(6), STATS., demonstrates that it did not consider the statement's admissibility under the residual exception, including whether the statement has sufficient guarantees of trustworthiness under the applicable ***Sorenson*** factors or whether admission under the residual exception satisfies the confrontation clause. *See* ***Sorenson***, 143 Wis.2d at 245-46, 421 N.W.2d at 84-85; *see also* ***State v. Kevin L.C.***, 216 Wis.2d 166, 179, 576 N.W.2d 62, 68 (Ct. App. 1997). Rather, while the trial court correctly concluded that the statement was inadmissible under § 908.08, STATS., because A.L.A. was unavailable, the court's reasoning, including its confrontation analysis, focuses solely on § 908.08.

Next, we turn to whether that narrow focus constitutes a misuse of discretion. Nothing in § 908.08, STATS., provides that if a videotaped statement of a child is inadmissible under that section, it cannot be admitted under a residual

exception. In contrast, our supreme court rejected such an argument in ***Mitchell v. State***, 84 Wis.2d 325, 332, 267 N.W.2d 349, 352-53 (1978) (evidence similar to an enumerated hearsay exception may be admitted under a residual exception). Also, the 1985 Judicial Council Notes to § 908.08(1) indicate that although § 908.08(1) is limited to situations in which the child is available to testify, "[o]ther exceptions may apply when the child is unavailable. See ss. 908.04 and 908.045." In addition, our courts have considered whether to admit a child's statements under the residual hearsay exceptions. *See* ***Sorenson***, 143 Wis.2d at 245-46, 421 N.W.2d at 84-85 (listing factors a court should consider regarding admissibility).[4]

Therefore, we conclude that the trial court erred when it failed to consider the admissibility of the videotaped statement under the residual hearsay exception, including whether it contains sufficient guarantees of trustworthiness

[4] To determine if the statement contains sufficient guarantees of truthworthiness to be admitted under § 908.045(6), STATS., a court should consider: (1) the attributes of the child making the statement, including among other factors, age, ability to communicate verbally, and to understand others' statements; (2) the person to whom the statement was made, focusing on the person's relationship to the child; (3) the circumstances under which the statement was made, including relation to the time of the alleged assault, (4) the content of the statement; and (5) other corroborating evidence. *See* ***State v. Sorenson***, 143 Wis.2d 226, 245-46, 421 N.W.2d 77, 84-85 (1988); *see also* ***State v. Kevin L.C.***, 216 Wis.2d 166, 180-81, 576 N.W.2d 62, 69-70 (Ct. App. 1997).

Statements admitted under § 908.045(6), STATS., "do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." *See* ***Kevin L.C.***, 216 Wis.2d at 179, 576 N.W.2d at 68 (quoted source and internal quotation marks deleted). Even if evidence is admissible under a hearsay exception, it may still violate the confrontation clause. ***Id***. at 173-74, 576 N.W.2d at 66. To satisfy the confrontation clause, the declarant must be unavailable, and the statement must bear an "indicia of reliability." ***Id***. Further, many of the same factors relevant to the trial court's determination of whether the statement contains sufficient guarantees of trustworthiness, an evidentiary issue, are likewise relevant to whether the admission contains the necessary indicia of reliability to satisfy the confrontation clause, a constitutional issue. *See* ***id***. at 179-80, 576 N.W.2d at 69. While a trial court may consider whether other evidence at trial corroborates to determine if the hearsay is trustworthy, it may not consider this factor in determining reliability for confrontation clause purposes. *See* ***id.*** at 180 & n.5, 576 N.W.2d at 69 & n.5

and whether its admission violates the confrontation clause. Accordingly, we reverse the order and remand this matter to the trial court for its determination of: (1) the admissibility of Angela's videotaped statements under the residual exception to the hearsay rule, § 908.045(6), STATS., including the applicable factors in ***Sorenson***, and if admissible; (2) its assessment of whether the admission violates the confrontation clause.

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

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