COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3167-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT LEE SUMMERS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Vincent Lee Summers has appealed from judgments convicting him of three counts of first-degree sexual assault of a child

in violation of WIS. STAT. § 948.02(1) (1999-2000),[1] and from an order denying his motion for postconviction relief. We affirm the judgments and the order.

¶2 Summers was charged with three counts of first-degree sexual assault based on allegations that he had sexual contact with his stepdaughter, J.L.F. Count one alleged that sexual contact occurred between May 1995 and October 1995, when the family lived on West 6th Street in the city of Racine. Count two alleged that sexual contact occurred on or about June 8, 1996, when the family lived on Clayton Avenue. Count three alleged that Summers had sexual contact with J.L.F. on or about April 5, 1997, when the family lived on Riverside Drive.

¶3 J.L.F. reported the incidents to her mother on April 12, 1997. She was eight years old when she reported the incidents, and nine years old at the time of trial. She testified at trial concerning the three incidents alleged in the complaint. In addition to testifying concerning the April 5, 1997 assault on Riverside Drive, J.L.F. was permitted to testify that Summers assaulted her on one additional occasion while the family lived at the Riverside Drive address. Her testimony concerning the fourth assault was received over the objection of the defense.

¶4 Michael Payne, an investigator for the City of Racine Police Department, also testified at trial. He testified that he arrested Summers the day after J.L.F. reported the assaults to her mother, and interviewed Summers concerning the charges. Payne testified that after he told Summers that he did not believe his denials, Summers admitted that he had assaulted J.L.F. Payne testified

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

that Summers told him that the first assault occurred while the family lived on West 6th Street, and that he also had sexual contact with J.L.F. when they lived on Clayton Avenue. Payne testified that Summers described the contact that occurred on April 5, 1997, and told Payne that he could recall four specific instances of sexual contact with J.L.F. Payne testified that Summers admitted that there could have been more times because he would do these things when he was intoxicated. During the interview, Summers also signed a written confession admitting that he had sexually assaulted J.L.F. at the West 6th Street, Clayton Avenue, and Riverside Drive addresses.

¶5 Summers' first argument on appeal is that he was denied his constitutional right to present evidence when the trial court excluded the testimony of his proposed expert witness, Dr. Ralph Underwager. Summers alleges that Underwager, a psychologist, should have been permitted to testify concerning factors in an individual's personality which might make that individual susceptible to coercive police interrogation and cause the person to make a false confession to police. Summers alleges that Underwager should also have been permitted to testify as to the susceptibility of young children.

¶6 Expert testimony is admissible only if it is relevant and will assist the trier of fact in understanding the evidence or determining a fact in issue. *See* ***State v. Watson***, 227 Wis. 2d 167, 186, 595 N.W.2d 403 (1999). "[I]f a witness is qualified as an expert and has specialized knowledge that is relevant because it will assist the trier of fact to understand the evidence or determine a fact in issue, the expert's analysis or opinion will normally be admitted into evidence." ***Id.*** at 187. Determining whether an expert's testimony will assist the trier of fact in understanding the evidence or determining a fact in issue involves the exercise of discretion by the trial court. *See* ***id.*** at 186. A trial court properly exercises its

discretion if it examines the facts of record, applies a proper legal standard, and, using a rational process, reaches a reasonable conclusion. *See* ***id.*** We will not reverse the trial court's exercise of discretion unless it is wholly unreasonable. *See* ***id.***

¶7 Unless an error in excluding evidence is self-evident based upon the nature of the proffered evidence, an offer of proof must be made in the trial court before this court will review the alleged error. *See* ***State v. Haynes***, 118 Wis. 2d 21, 28, 345 N.W.2d 892 (Ct. App. 1984); ***Milenkovic v. State***, 86 Wis. 2d 272, 284, 272 N.W.2d 320 (Ct. App. 1978). "An offer of proof need not be stated with complete precision or in unnecessary detail, but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt." ***Haynes***, 118 Wis. 2d at 28-29. The offer of proof must enable this court to conclude with reasonable confidence that the evidentiary hypothesis can be sustained. *See* ***State v. Salter***, 118 Wis. 2d 67, 74, 346 N.W.2d 318 (Ct. App. 1984).

¶8 In excluding Underwager's testimony, the trial court concluded that it was difficult to ascertain what the doctor was intending to say in his testimony, and that it could not find that the testimony would be useful to the jury. Based upon our review of the offer of proof made by Summers, we agree with the trial court's analysis and conclude that the offer of proof was inadequate to establish the relevance of the information sought to be elicited from Underwager.

¶9 In the offer of proof, Underwager testified that he had interviewed Summers as to his susceptibility to being coerced into giving a confession. He stated that his opinion would be that Summers was susceptible. He stated:

> Your honor, what I would do would be … indicate that there is scientific research on the level of degree of susceptibility to coercion or pressure. That the scientific research shows there are individual differences. Some people can resist fairly strongly, others cannot. That the scientific research does indicate that it's possible to assess and to measure that level or degree of susceptibility to coercion. That is the response of an individual, and that there is a procedure, the Gudjonsson Suggestibility Scale, which has been well validated, indicated that meets all of the scientific requirements for a valid and reliable procedure that meets all of the requirements as science under the Daulbert ruling, for example, and that we did give this specific instrument to Mr. Summers. We also just had well known, and again, valid and reliable scientifically sound assessment procedures, standardized tests. The Minnesota Multiphasic Personality Inventory, number two, and the Shipley Institute of Living Scale, and the Porteus Maze test, and these are all actuarial, scientifically sound procedures. And then I would say, based on the results of this, these are the kinds of factors that can be considered in terms of Mr. Summers' response to the situation that he found himself in, of being questioned, … and make it very clear that I am not saying anything whatsoever about the truthfulness of Mr. Summers, his credibility, … but only present the scientific research data and the factors that can be considered.

¶10 This offer of proof is insufficient to establish that Underwager had specialized knowledge which would help the jury decide whether Summers gave a false confession to the police. Through his testimony at trial, Summers contended that his confession was false and resulted from police coercion. However, Underwager's testimony was very vague as to what information or insights he could offer that would assist the jury in deciding whether Summers was truthful.

¶11 Although Underwager testified that scientific research has shown that there are individual differences in how susceptible people are to coercion, and that it is possible to measure the degree of susceptibility to coercion, he gave no details concerning this research. In addition, although he stated that he had tested Summers, he gave no understandable summary of what he found. He merely

stated that he would talk about factors that could be considered "in terms of Mr. Summers' response to the situation." While he also stated that it was his opinion that the tests demonstrated that Summers was susceptible to coercion, he added that his opinion "does not say anything about the truthfulness or accuracy of the confession itself."

¶12 Underwager did not identify any of the factors which allegedly made Summers susceptible to coercion. He did not explain what facts or factors he considered to be coercive in this case, nor did he provide any meaningful discussion of what he meant when he said that Summers was "susceptible" to coercion. Although he enumerated several psychological tests, he did not explain what they were or what they demonstrated concerning Summers' psychological makeup or personality. Furthermore, he failed to demonstrate in any meaningful way how the test results he allegedly obtained made it more or less likely that Summers' confession was false. Absent such a showing, the trial court reasonably concluded that Summers failed to demonstrate that Underwager's testimony on this subject would be useful in deciding whether his confession was false, or that it would otherwise assist the jury in deciding the issues in this case.

¶13 The offer of proof concerning the susceptibility of children contains similar deficiencies. Underwager testified that he would "report on the scientific research evidence relating to" the "suggestibility to social influence of children." He indicated that all human beings are subject to influence, and "[t]he younger the child, the greater the level of suggestibility." He testified:

> The most powerful influences on children are their parents. Then any authoritative adult, then, in effect, any adult who asks some questions, and that is the research evidence, for example, that demonstrates simply by asking a child a question about an event that didn't happen, you ask him once a week for ten weeks, by the second or third week,

> they're producing descriptions of events that never happened. And then, after that, their peer group, other children, and that's about it, I guess.

¶14 Underwager further testified that the accuracy of a child's statements or testimony could be influenced by such factors as

> [t]he number of times they're talked to, the number of times they're asked questions and frequency of the questions repeated, the way the questions are asked, if the questions are leading or suggestive themselves, and then there are many other factors.

¶15 Although Underwager enumerated factors affecting the accuracy of a child's statement or testimony, nothing in the offer of proof explained how this information related to this case. Although Summers' counsel speculated that J.L.F. may have been influenced by her mother, the doctors who examined her, the police or a social worker, when asked by the trial court whether he believed any factors existed which made J.L.F.'s testimony less than credible, Underwager stated: "I have nothing."

¶16 Nothing in the offer of proof provides a basis to conclude that Underwager possessed specialized knowledge which would assist the jury in understanding the evidence or determining whether J.L.F.'s accusations were truthful. It is commonly known that children can be influenced by their parents and other adults, or by leading questions. Nothing in the offer of proof indicated that Underwager had specialized knowledge concerning this subject which would have assisted the jury in considering these factors in a more sophisticated way than it could have done without his testimony.

¶17 Most importantly, Underwager's proposed testimony was relevant only if evidence existed to support a finding that J.L.F. was repeatedly questioned, that she was subjected to leading questions, or that some adult somehow suggested

to her that she make the sexual assault allegations. No such evidence was presented at the pretrial hearing on the admissibility of Underwager's testimony, nor did either Underwager or Summers' counsel indicate that any such evidence existed. Under these circumstances, the trial court properly determined that Underwager's proposed testimony regarding the suggestibility of children would be of no assistance to the jury in deciding the issues in this case. Because Summers failed to make an offer of proof demonstrating that Underwager possessed specialized knowledge that would assist the jury in understanding the evidence and deciding the issues in this case, the trial court properly excluded his testimony.

¶18 Summers' next argument is that the trial court erred when it permitted the prosecutor to ask J.L.F. whether Summers sexually assaulted her at the Riverside Drive address at any time other than April 5, 1997. In response to the prosecutor's question, J.L.F. testified as to an additional assault that occurred on a day when her mother went grocery shopping. Summers objected to the testimony, contending that because he was charged with only one count of sexual assault at the Riverside Drive address, evidence concerning an additional assault constituted inadmissible other acts evidence under WIS. STAT. § 904.04. He reiterates this argument on appeal. He also objects that the trial court failed to engage in the three-step analysis for admission of other acts evidence set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998), and contends that he was unfairly surprised by the testimony because the prosecutor told him before trial that he would not be introducing other acts evidence.

¶19 A trial court's decision to admit other acts evidence involves the exercise of discretion, and will not be disturbed absent an erroneous exercise of discretion. *See* ***State v. Hammer***, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d

629. If discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the trial court's determination, we will uphold the trial court's decision. *See* ***id.***

¶20 Although other acts evidence may not be admitted into evidence to prove the character of a defendant or his or her propensity to commit a crime, it is admissible if it is offered for an acceptable purpose, it is relevant to an issue at trial, and its probative value is not substantially outweighed by the danger of unfair prejudice. ***Id.*** at ¶22. "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

¶21 Under certain circumstances, other acts evidence may be admitted to assist the jury in evaluating the credibility of a witness or other evidence. *See* ***State v. Schaller***, 199 Wis. 2d 23, 43, 544 N.W.2d 247 (Ct. App. 1995). In this case, evidence regarding the fourth assault was properly admitted to prove that Summers' confession was credible. Summers' defense at trial was that the alleged sexual assaults never occurred. Investigator Payne testified that when Summers was arrested and interviewed, he admitted that he could recall four specific instances of sexual contact with J.L.F. J.L.F.'s testimony that a fourth act of sexual assault occurred was consistent with Summers' confession. It thus supported the credibility of the confession and undermined Summers' contention that his confession was false and that the sexual assaults never occurred. Because it supported the reliability and credibility of Summers' confession to four instances of assault, and undermined his denial of the assaults, J.L.F.'s testimony was properly admitted.

¶22 Evidence of other acts is also properly admitted for the purpose of providing the background or context of a case, or when it is necessary for a full presentation of the case. *See* ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995); ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd,* 119 Wis. 2d 788, 350 N.W.2d 686 (1984). Here, evidence regarding the fourth assault was part of the complete story of the relationship between Summers and J.L.F. The testimony did not involve a prior crime by the defendant involving a different victim, but instead related a fourth assault involving the same victim which occurred during the same time period as the charged crimes. As recognized by the trial court, it was thus relevant as part of the complete story between Summers and J.L.F. Because the evidence was relevant and material for a purpose other than showing bad character, and because its prejudicial nature clearly did not outweigh its probative value, the testimony was admissible, regardless of whether the trial court fully addressed the three-part analysis set forth in ***Sullivan***. *See* ***Shillcutt***, 116 Wis. 2d at 238.

¶23 In upholding the trial court's admission of J.L.F.'s testimony, we also reject Summers' argument that he was unfairly surprised when the State asked J.L.F. about it. At trial, the prosecutor indicated that the written report of Payne's interview with J.L.F. was provided to the defense prior to trial and included J.L.F.'s allegation concerning the fourth sexual assault. The trial court therefore properly determined that the allegation was not a surprise. Moreover, even accepting Summers' argument that prior statements of the prosecutor led his trial counsel to believe that no other acts evidence would be offered, no reasonable basis exists to conclude that the prosecutor's failure to inform Summers that he intended to introduce the evidence was prejudicial to Summers. The testimony simply indicated a fourth incident of sexual assault. Summers' own statement to

the police acknowledged four incidents and indicated that there could have been more. At trial, he denied that any sexual assault had occurred. His defense thus depended upon the jury's disbelieving J.L.F. as to all allegations of assault, and disbelieving his own confession. Under these circumstances, there is no reasonable possibility that the prosecutor's failure to inform Summers prior to trial that he intended to ask J.L.F. about the fourth assault affected his convictions. Summers' argument therefore provides no basis for relief from judgment. *See* ***State v. Stark***, 162 Wis. 2d 537, 547-48, 470 N.W.2d 317 (Ct. App. 1991).

¶24 Summers' next argument is that the trial court erroneously admitted hearsay evidence when it permitted J.L.F.'s mother to testify that the doctors at St. Mary's Hospital "stated that they had found evidence of [J.L.F.] was being, had been sexually assaulted." The trial court admitted the statement on the ground that it was offered not for the truth of the matter asserted, but merely to show the actions taken by J.L.F's mother after J.L.F. reported that she had been assaulted by Summers.

¶25 The trial court acted within the scope of its discretion. Hearsay is a statement "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). The testimony of J.L.F.'s mother was offered and admitted not to prove that the doctors who examined J.L.F. on April 13, 1997, found physical evidence that she had been sexually assaulted, but simply to set forth the series of events which occurred that date, culminating in the police being contacted and Summers being arrested. J.L.F.'s mother testified concerning the events which began on April 12, 1997, when J.L.F. told her that Summers had touched the private parts of her body. She testified that she took J.L.F. to the hospital the

following morning and, after being told by the doctors that they had found evidence of sexual assault, the police were called to the hospital.

¶26 Although Summers' trial counsel lodged a hearsay objection, she made no additional argument when the prosecutor stated that he was offering the testimony not for the truth of the matter asserted, but merely to show what happened next. Because the challenged testimony was not offered or admitted for its truth, it was not hearsay and the objection was properly overruled. *See* ***State v. Hines***, 173 Wis. 2d 850, 859, 496 N.W.2d 720 (Ct. App. 1993).

¶27 We also conclude that even if admission of the testimony was error, it was harmless. An error is harmless if there is no reasonable possibility that it contributed to the conviction. *See* ***Sullivan***, 216 Wis. 2d at 792. The only examining doctor who testified on behalf of the State in this case was Dr. Judy Guinn, a doctor at the Child Protection Center who specializes in child sexual assaults and who examined J.L.F. the day after she was examined at St. Mary's Hospital. Dr. Guinn's testimony and opinion indicated that J.L.F.'s condition was normal, and there was no physical evidence which either supported or contradicted her claim that Summers had sexually assaulted her. It was thus clear to the jury that the State was not alleging that physical evidence demonstrated that an assault

had occurred and, in fact, was acknowledging the absence of such evidence. Under these circumstances, any error in admission of the testimony was harmless.[2]

¶28 Summers' final argument is that the trial court improperly admitted hearsay evidence when it permitted J.L.F.'s mother to testify concerning a statement allegedly made to her by J.L.F. a week after the April 5, 1997 assault. We agree with the trial court that the statement was properly admitted as an excited utterance.

¶29 Deciding whether an out-of-court statement may be admitted into evidence under an exception to the hearsay rule involves an exercise of discretion by the trial court. *See* ***State v. Huntington***, 216 Wis. 2d 671, 680, 575 N.W.2d 268 (1998). This court reviews whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. *See* ***id.*** at 680-81. We will uphold the trial court's decision if we can discern a reasonable basis for it. *See* ***id.*** at 681.

¶30 The excited utterance exception to the hearsay rule is set forth in WIS. STAT. § 908.03(2). Wisconsin courts have liberally construed the excited utterance exception in child sexual assault cases. *See* ***Huntington***, 216 Wis. 2d at 682. In deciding whether to apply the excited utterance exception, courts must consider the child's age, the spontaneity of the statement, and the amount of time

[2] As pointed out by the State in its respondent's brief, the jury also received a written evaluation performed by Dr. Guinn. That document indicated that J.L.F. had been seen the previous day at St. Mary's Hospital, and that hospital personnel noted a reddening of the clitoral area and a laceration on the labia minora, and felt that the hymen was not present and that the posterior fourchette was reddened and bruised. The jurors would thus have been aware of other medical opinions, even if Summers' objection to the testimony of J.L.F.'s mother had been upheld. Nevertheless, they were also clearly aware that the opinion of the State, as expressed through its expert witness, was that J.L.F.'s physical condition was normal, and that the medical evaluation neither proved nor disproved that an assault had occurred.

that has passed between the statement and the alleged assault. *See* ***State v. Gerald L.C.***, 194 Wis. 2d 548, 557, 535 N.W.2d 777 (Ct. App. 1995). Generally, a statement will be admitted if the child is under the age of ten, the child reports the assault within one week of the last abusive incident, and the child first reports the abuse to his or her mother. *See* ***Huntington***, 216 Wis. 2d at 683.

¶31 J.L.F.'s mother testified that on Saturday, April 12, 1997, when she was getting ready for work, J.L.F. told her that Summers had touched the private parts of her body. J.L.F. was not responding to questions from her mother, but volunteered this information spontaneously. J.L.F. told her mother that the touching had happened "the morning that [J.L.F.'s mother] had went to work." Based upon this statement, J.L.F.'s mother determined that J.L.F. was talking about the previous Saturday, April 5, 1997. J.L.F. told her mother that the touching occurred in her parents' bedroom, and did not give any other details or mention any other instances.

¶32 J.L.F. was eight years old when she first mentioned the matter to her mother. Based upon her age, the one-week interval between the assault and the statement, and the spontaneity of the statement, we conclude that the trial court properly admitted the evidence under the excited utterance exception. *See* ***State v. Moats***, 156 Wis. 2d 74, 97-98, 457 N.W.2d 299 (1990).

By the Court.—Judgments and order affirmed.

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