COURT OF APPEALS
DECISION
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David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3159-CR **Cir. Ct. No. 2005CF217**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRY G. GABELBAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Harry Gabelbauer appeals from a judgment of conviction of two counts of repeated sexual assault of the same child. He argues that his statements were involuntary and so closely associated with a computerized voice stress analysis (CVSA) that they should have been suppressed and that a

pretrial ruling to limit other bad acts evidence was violated. He also seeks a new trial in the interests of justice on the ground that the real controversy was not fully and fairly tried. We reject his claims and affirm the judgment of conviction.

¶2 Gabelbauer is convicted of sexually assaulting his step-daughter in 1995-96 when the child was under thirteen years old and between April 2002 and February 2004. During those years the family lived in Washington County. In the years between the charged periods the family lived in Milwaukee and Waukesha counties. In February 2004 the child reported that Gabelbauer had touched her sexually. Within a week she told police she had lied because she was mad at Gabelbauer. In June 2005 federal agents with the postal inspection service sought to execute a search warrant at Gabelbauer's residence and in conjunction with that investigation the child was contacted at school. She confirmed that there had been sexual contact between herself and Gabelbauer. Gabelbauer was arrested. After Gabelbauer's arrest, the child revealed the entire history and nature of sexual assaults perpetrated by Gabelbauer, including oral sex and vaginal intercourse.

¶3 Gabelbauer was questioned at the sheriff's department about his contact with the child. At first he admitted there may have been incidental and unintended contact during horseplay with the child. He later admitted to touching the child on her undeveloped "top" and "personal parts." Because Gabelbauer adamantly denied oral sex or vaginal intercourse, a CVSA was discussed as a means of testing the truthfulness of his denials. Gabelbauer agreed to submit to a CVSA examination. He was taken to a separate room. A detective Gabelbauer had not yet had any contact with conducted the CVSA examination. The examination lasted approximately forty-five minutes. Gabelbauer was then taken back to the original interrogation room. The examining detective reviewed the results and had another detective review the results. That took approximately

fifteen minutes. The detective then discussed the results with Gabelbauer and told Gabelbauer that the results showed that he was being less than truthful on relevant questions. After further discussion, Gabelbauer became very emotional and made admissions about touching, masturbation, and some oral sex with the child. Gabelbauer was then allowed to speak with his wife. Thereafter, Gabelbauer dictated to the detective a written statement in which he confirmed the child's report of sexual contact, except for vaginal intercourse.[1]

¶4 "When a statement is so closely associated with the voice stress analysis that the analysis and statement are one event rather than two events, the statement must be suppressed." ***State v. Davis***, 2008 WI 71, ¶2, 310 Wis. 2d 583, 751 N.W.2d 332. Thus, "if the statement is given at an interview that is totally discrete from the voice stress analysis test and the statement is voluntarily given, the statement is admissible." ***Id.***, ¶21. Whether a statement is a totally a discrete event depends on whether the CVSA examination is over and the defendant knows the analysis is over. ***Id.***, ¶23. A totality of the circumstances approach is used and the relevant factors are:

> (1) whether the defendant was told the test was over; (2) whether any time passed between the analysis and the defendant's statement; (3) whether the officer conducting the analysis differed from the officer who took the statement; (4) whether the location where the analysis was conducted differed from where the statement was given; and (5) whether the voice stress analysis was referred to when obtaining a statement from the defendant.

Id.

[1] Gabelbauer only indicated that he rubbed his erected penis on the child's vagina.

¶5 We review the evidentiary and historical facts using the clearly erroneous test. ***Id.***, ¶18; ***State v. Greer***, 2003 WI App 112, ¶¶9, 13, 265 Wis. 2d 463, 666 N.W.2d 518. The application of constitutional principles and the statute, WIS. STAT. § 905.065 (2007-08),[2] present questions of law that we review de novo. ***Davis***, 310 Wis. 2d 583, ¶18.

¶6 Gabelbauer points out that he was not told that the CVSA was over, that no significant time elapsed between the CVSA and the interview resulting in his admissions, that the officer conducting the CVSA continued the post-examination interview, and that the CVSA was referenced during that interview. He contends that it is not enough that only one of the five relevant factors—that he was moved to a different room following the CVSA—suggest that his statement was a discrete event. No one factor is dispositive in determining whether the statement was a discrete event. *See* ***id.***, ¶¶23 (a totality of the circumstances is considered), 25-29 (discussing cases with outcomes based on differing emphasis on the applicable factors).

¶7 Although Gabelbauer was not told the CVSA examination was over, the circuit court found that "there is simply no way he could think he still was being tested." This finding is not clearly erroneous. Gabelbauer acknowledged that as part of the examination a tiny microphone was hooked to his shirt. That was removed when he was taken back to the original interrogation room. Gabelbauer was also told what the questions were going to be. When all the

[2] WISCONSIN STAT. § 905.065(2), provides: "A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject." All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

questions had been asked, nothing else was left to do and the examination was completed. Moreover, Gabelbauer's own testimony acknowledged that his removal to a different room signaled that the test was over: "After I was done with the test? We left right away.… [And went] back into the same room that I was." When the detective entered the interrogation room Gabelbauer was shown the printed off results of the examination. This is a case where the defendant knew that the CVSA examination was over.

¶8 The circuit court found that fifteen minutes expired between the end of the examination and when the detective entered the interrogation room and began to interview Gabelbauer. There is no bright-line rule of timing. ***State v. Johnson***, 193 Wis. 2d 382, 389, 535 N.W.2d 441 (Ct. App. 1995). In ***Johnson***, the statement was held to be a separate event even though a post-polygraph interview was temporally proximate to the actual test. ***Id.*** In ***McAdoo v. State***, 65 Wis. 2d 596, 608-09, 223 N.W.2d 521 (1974), the examination and interview were "virtually seamless," ***Davis***, 310 Wis. 2d 583, ¶31, and the statement was held to be admissible. ***Davis*** held that there was a discrete interview when the gap was merely five minutes. ***Id.***, ¶¶10-11, 31, 34. Fifteen minutes is enough time here because Gabelbauer was moved to a different room and left alone for that time making a distinct break from the examination.

¶9 That the same detective administered the CVSA and conducted the post-examination interview does not alone destroy attenuation. This is particularly true where, as here, the detective had not been involved in the pre-examination interviews and had only previously questioned Gabelbauer with limited questions of which Gabelbauer was given notice. The post-CVSA interview had an entirely different focus than the CVSA since it was the first time that the particular

detective was encouraging Gabelbauer to be truthful and expand on his previous statements.

¶10 The detective referred to the results of CVSA during the post-examination interview. In ***Greer*** we rejected the argument that a connection with the polygraph exam was created by the fact that the later interview began with reference to the defendant failing the polygraph exam because that failure was already implicit in the continued custody and interrogation of the defendant. ***Greer***, 265 Wis. 2d 463, ¶¶14-17. In Gabelbauer's case, the circuit court found that "the substance of the outcome of the test questions were referenced in further questioning." However, nothing suggests that this was anything more than the detective informing Gabelbauer that he did not believe Gabelbauer's denials on particular points because of the CVSA results. Reference to the CVSA results does not establish that the CVSA examination was on-going because there was temporal separation and spatial demarcation between the examination and the post-examination interview. *See* ***id.***, ¶16. We conclude that based on the totality of the circumstances the post-CVSA examination interview with Gabelbauer was a totally discrete event.

¶11 Gabelbauer also argues that his post-CVSA examination statements were involuntary based on the total length of interrogation he had been subjected to that day, the use of three separate interrogators throughout his time at the sheriff's department, his overwrought emotional state, an undeviating intent by detectives to secure an admission to oral sex and vaginal intercourse, the coerciveness of the CVSA, and that the content of his written statement recited the child's allegations. He also suggests that the failure to tape or video record the interview is suspicious as to the voluntariness of the statements.

¶12 In determining whether a statement was voluntary, this court must consider the totality of the circumstances, which includes balancing the personal characteristics of the defendant against the pressures applied by the police. ***State v. Hoppe***, 2003 WI 43, ¶38, 261 Wis. 2d 294, 661 N.W.2d 407. Among the factors to be considered are the suspect's age, education and intelligence, physical and emotional condition, prior experience with the police, whether the suspect was apprised of his or her rights, whether any request for counsel was made, the length and conditions of interrogation and any physical or psychological pressures, inducements, methods or strategies used by the police to obtain the confession. ***Id.***, ¶39. The State has the burden of proving by the preponderance of evidence that the statements were voluntary. ***Id.***, ¶40.

¶13 There is no suggestion on this record of any personal characteristics that place Gabelbauer in the category of being "uncommonly susceptible to police pressures." *See* ***id.***, ¶46. He complained of chest pain during the early part of the interrogation but a jail nurse examined him and found nothing wrong. After that Gabelbauer said he felt better and never indicated any problems with continuing the interrogation. Gabelbauer was very emotional and at times cried. This is not unusual under the circumstances. Gabelbauer's refusal to answer some select questions demonstrates his presence of mind during the interviews.

¶14 The circuit court found no coercive tactics were used. Gabelbauer was given ***Miranda***[3] warnings and provided every opportunity for food, drink, and bathroom breaks during his interrogation which ran from the afternoon into the evening. The circuit court found that when Gabelbauer made reference to an

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

attorney or advice from an attorney, he was specifically asked if he wanted an attorney and he declined. He was properly informed that the results of the CVSA could not be used in court against him. Although the CVSA may have served as subtle pressure to make admissions, its use is not coercive unless it exceeds Gabelbauer's ability to resist. *See* ***Hoppe***, 261 Wis. 2d 294, ¶46. The detectives undeviating intent to secure Gabelbauer's admission to conduct described by the child was simply the objective of the investigation. The absence of a recording of the interview, where none is required, is not indicative of improper police conduct.[4] *See* ***State v. Kramer***, 2006 WI App 133, ¶¶16-20, 294 Wis. 2d 780, 720 N.W.2d 459 (rejecting the claim that statements made in the two interrogations should have been suppressed because law enforcement failed to make electronic recordings of the interrogations). We conclude that Gabelbauer's statements were voluntary. Therefore, the circuit court was correct in ruling that statements made during the post-CVSA interview were admissible.

¶15 At the start of the jury trial Gabelbauer moved to prohibit the prosecution from eliciting testimony from witnesses concerning sexual assaults allegedly committed by Gabelbauer against the child when the family lived in Milwaukee and Waukesha counties. The circuit court determined that the sexual contact that occurred in the other counties provides context or background for a complete presentation of the progression of the assaultive behavior and to explain

[4] Although WIS. STAT. §§ 968.073(2) and 972.115(2)(a), declares 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," the statutes first apply to custodial interrogations of adults "conducted on January 1, 2007." 2005 Wis. Act 60, §51(2). They do not apply to Gabelbauer's June 2, 2005 interrogation.

the sequence of time.[5] It also concluded such evidence was appropriate to show preparation, opportunity, and planning. To avoid prejudice to Gabelbauer and confusion to the jury, the court ruled that the evidence could only be in generalities that when the family moved to other places the conduct didn't stop but progressed and was more than simple touching. The court prohibited evidence of any specific instances of conduct that occurred in the other counties.

¶16 In opening argument the prosecutor mentioned the family's move to another county and indicated that Amanda would explain that the sexual activity continued there. The prosecutor further stated that when the family moved to another county the type of sexual contact escalated. The prosecutor stated:

> She'll explain to you that it had progressed from the mere shoulder rubbing and breast rubbing that the defendant had engaged in previously to the point where the defendant was now starting to insert his fingers into her vagina, that the defendant would cause her, [child], to perform oral sex on the defendant, and at some point where the defendant had engaged in penile/vaginal intercourse with this child.

In conjunction with this argument, the prosecutor twice stated that the jury was not to consider Gabelbauer's guilt as to things that may have occurred outside Washington County. After opening arguments and without a break in the proceeding, the child's testimony was taken.

¶17 During the child's direct examination the prosecutor asked her whether sexual activity continued after the family's first move and whether the

[5] Despite Gabelbauer's characterization that sexual contact in the other counties was "other bad acts" evidence, it was not. *See* ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515 ("Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime.").

nature of the activity stayed the same or changed. The child testified that sexual contact continued and progressed from just touching. The circuit court interrupted indicating that residences in Milwaukee and Waukesha Counties were located outside of the county and acts there were not the subject of this case and it was enough to say that conduct progressed. The prosecutor then elicited the child's testimony that the sexual activity continued and progressed when the family moved a second time to a different county. At the conclusion of the child's testimony, Gabelbauer moved for a mistrial on the ground that the prosecutor's opening argument revealed details of sexual contact in other counties. The prosecutor responded that she did not think she ran afoul of the court's ruling. The circuit court pointed out that it had "stop[ped] the State from going into further details very quickly and swiftly," and it had pointed out to the jury that conduct in other counties was not under consideration. The motion for a mistrial was denied. Implicit in the circuit court's decision was that the prosecutor had not given prohibited details and the instruction to the jury was sufficient to cure any prejudice. The circuit court offered to give the jury further instruction at that point in the trial and Gabelbauer elected to have such an instruction given to the jury when the proceeding resumed. The circuit court then told the jury:

> Members of the jury, in this particular case there are two counts here that you're going to weigh and consider. They relate to two counts that allegedly occurred in Washington County. You've heard some rough information regarding events that may or may not have occurred in Wauwatosa or Sussex. You need to understand that this trial is not about any allegations in those jurisdictions.

¶18 This court reviews the circuit court's decision to deny a mistrial for an erroneous exercise of discretion. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The circuit court must determine whether the claimed error was sufficiently prejudicial to warrant a new trial with the guidepost

that the law prefers to employ less drastic alternatives, if available and practical. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶19 We are not persuaded that the prosecutor violated the circuit court's ruling in limine. The testimony elicited from the child was consistent with the circuit court's recognition that the progression of conduct when the family lived in other counties was relevant to the context and time sequence of the crimes charged. The child merely indicated that the conduct progressed and specific acts were not mentioned. Although the prosecutor's opening statement mentioned digital penetration as one form of progression, it was a single reference and illustrative of the progression of sexual contact. The remaining conduct mentioned by the prosecutor—oral sex and vaginal intercourse—was also part of the conduct charged and it was not improper to mention that specific type of conduct. Moreover, the circuit court's ruling was loosely worded to prohibit specific instances of conduct. The prosecutor did not make a list by date of each sexual contact perpetrated in the other counties.

¶20 Even if the prosecutor's opening statement violated the ruling in limine, the error was not sufficiently prejudicial to warrant a new trial.[6] The circuit court opted to employ the reasonable alternative of reminding the jury, as the prosecutor did in her opening statement and the circuit court did during the child's direct testimony, that acts in other counties were not under consideration in

[6] The State argues waiver because Gabelbauer failed to contemporaneously object during the prosecutor's opening argument and the child's testimony. Waiver, or forfeiture of the right to appellate review, ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612, occurred by the failure to object. ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. Despite waiver, we may address an issue. *See* ***State v. Harrell***, 182 Wis. 2d 408, 417, 513 N.W.2d 676 (Ct. App. 1994) (court may address issue in the interest of judicial economy).

this case. Any prejudicial effect from brief mention of digital penetration was cured by the instruction to the jury delivered as soon as the potential prejudice was called to the attention of the court. *See* ***id.*** We conclude that Gabelbauer was not denied a fair trial.

¶21 Gabelbauer argues that a new trial should be granted in the interests of justice under WIS. STAT. § 752.35, because the real controversy was not fully and fairly tried. To establish that the real controversy has not been fully tried, Gabelbauer must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). We exercise our discretion to grant a new trial in the interest of justice only in exceptional cases. ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

¶22 Gabelbauer argues that the prosecutor presented inaccurate evidence and argument when she argued in closing that Gabelbauer confessed to touching the child on her breasts when they first lived in Washington County. Gabelbauer relies on a selective portion of his written statement. The claim is disingenuous because other parts of the written statement admit touching the child on her breasts, clothed and unclothed, and a general statement that "I don't remember where and when these things happened." We summarily reject that the other conduct of the prosecutor of which Gabelbauer complains deprived him of a fair

trial.[7] Although the prosecutor employed aggressive trial tactics, the alleged misconduct did not preclude important testimony on an important issue and did not introduce improper evidence. Moreover, the alleged misconduct did not directly relate to the primary issue of the child's credibility. Even considering the cumulative effect of the alleged misconduct, Gabelbauer was not deprived of a full and fair trial. A new trial is not warranted.

By the Court.—Judgment affirmed.

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

[7] Gabelbauer suggests the prosecutor improperly returned to opening argument that the child should be given the benefit of the doubt when she was bad with dates even after the circuit court told her to move on, that the prosecutor flippantly replied that she would be happy to retry the case if the jury was exposed to information about conduct in other counties, that the prosecutor made meritless hearsay objections during defense counsel's direct examination of the sole defense witness, that the prosecutor repeatedly asked leading questions, and that the prosecutor twisted the testimony of one of the detectives.