

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2009AP920-CR

Cir. Ct. No. 2007CF5306

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JONATHAN ELAM,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. The State appeals an order suppressing an audiovisual statement of a child victim in this sexual assault prosecution. *See*

WIS. STAT. § 908.08(1) (2007-08)¹ (“In any criminal trial ... the court ... may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.”). The issue is whether the circuit court properly exercised its discretion in suppressing the statement. We affirm.

¶2 Jonathan Elam was charged with two counts of first-degree sexual assault of a child, involving victims who were eight and eleven years old when the assaults were reported. As required by WIS. STAT. § 908.08(2)(a), the State filed a notice that it intended to use the videotaped statement of the younger victim. Just before the final pretrial conference in this case, we held that audiovisual statements admitted at trial under § 908.08(1) are testimony, not exhibits, and, as such, must be transcribed by a court reporter. See *State v. Ruiz-Velez*, 2008 WI App 169, ¶¶1, 4, 314 Wis. 2d 724, 762 N.W.2d 449.

¶3 At the final pretrial conference, the circuit court addressed the effect of *Ruiz-Velez* on this prosecution. The court ruled that before the recorded statement of the child would be admitted pursuant to WIS. STAT. § 908.08, the State must provide the court and the defendant with a transcript of the statement. The court further ruled that because the State had not transcribed the recorded statement, the statement was not admissible. The State now appeals that order.

¶4 The admission of evidence is committed to the circuit court’s discretion. *State v. Warbelton*, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557. “This court will reverse such a decision only if the circuit court erroneously

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

exercised its discretion.” *Id.* “A circuit court erroneously exercises its discretion when it bases its decision on a misstated fact or an incorrect view of the law.” *Id.* The circuit court has discretion as to how to structure proceedings before it. *See* WIS. STAT. § 906.11(1)(a) (“The judge shall exercise reasonable control over the mode ... of ... presenting evidence so as to ... [m]ake the ... presentation effective for the ascertainment of the truth.”).

¶5 The circuit court’s ruling on the admission of the audiovisual statement tried to balance *Ruiz-Velez*, which held that audiovisual statements admitted under WIS. STAT. § 908.08(1) must be transcribed, with practical concerns—the difficulty of making a contemporaneous transcript of an audiovisual statement as it is being played in court before a jury. The circuit court explained its ruling at length:

I’m not going to ask that a court reporter try and make a transcript or take notes or transcribe the proceedings while the DVD is being played [in court] I have enough experience with court reporters and proceedings in court and have talked to court reporters, to know how difficult, if not impossible that would be. If a word is not heard, you can’t interrupt the witness as you could in an open court proceeding, and say, [c]ould you say that again? Or [h]ow do you spell that? Or something of that nature.

If you did that when a recording is being played, it would be in front of the jury and it would unduly emphasize something maybe they heard or didn’t hear and there might be discussion that, who would be there to take that discussion. Who would be there to take a record of what the parties said? Oh no, I heard them say this name or that.

So, certainly that is not a way to do a transcript, to have the court reporter struggle to prepare a contemporaneous transcript at the time its playing in front of the jury.

So, we look at the other options and we look at the analogy with the civil courts. In civil court, if you are offering a deposition of a doctor or typically a medical

expert, an audio visual recording is played to the jury and the court reporter does not make a transcript. That is because the parties, in preparing and presenting that audio visual recording, provide a written transcript of that testimony and the parties have had it and have an opportunity to see and make objections, if there are portions that shouldn't be played or irrelevant materials that, things of that nature.

In applying that reasoning, I think the same reasoning applies to this situation. The State here wants to present the statement of a child victim and wants that to be presented. There has to be a transcript at some point. The Court of Appeals has said so and it seems to me the most reasonable time to do that would be prior to the trial and the one basic and important reason for that would be that then both parties would have an opportunity to look at that transcript and if there are discrepancies, if there are arguments or concerns, then it could be discussed and dealt with ahead of time, before we proceed to trial. Because the other option is to prepare a transcript after the trial is over and someone who wasn't part of the trial and prepares it and that is another issue I'm not addressing at this time. But that person would be preparing it and if there are disagreements, it's too late, because then the argument is, [w]hat did the jury hear?

So, I think that the better rule would be to have the party who proposes to use an audio record of whatever nature; be it 908.02 statements, 908.08 statements. I'm sorry or 911 tapes, confessions, jail house phone calls, anything where a party is proposing to use that and play that, whether it be the State or defense, that the transcript has to be prepared ahead of time in a timely fashion, so that the party opposing that presentation can have a fair opportunity to review the tape recording and raise any objections that can be resolved prior to presenting the information to a jury and in this case the 908.08 is being offered by the State and therefore the burden is on the State.

¶6 As this excerpt of the circuit court's decision amply shows, the court applied the law, WIS. STAT. § 908.08, and *Ruiz-Velez*, to the circumstances of this prosecution and, in a thoughtful and thorough way, explained the rationale for its decision. The ruling follows the dictate of *Ruiz-Velez* that the audiovisual

statement be transcribed by a court reporter, while accommodating the practical difficulties inherent in real-time recordation of an audiovisual statement. In fact, a transcript prepared as directed by the circuit court would be more accurate than a real-time recordation. The State sees danger in the fact that a party, and not an official court reporter, would be preparing the transcript. The circuit court foresaw this problem and addressed it by requiring that the transcript be prepared before trial, which would provide both parties with an opportunity to look at the transcript and, if there are discrepancies, arguments, or concerns, those could be addressed ahead of time. The circuit court's decision applied the law to the facts of this case and was both reasoned and reasonable. Therefore, we conclude that the circuit court's decision was a proper exercise of discretion.²

By the Court.—Order affirmed.

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

² The Supreme Court Rules were changed, effective January 1, 2010, relieving the official court reporter of transcribing audio recordings either while they are played in court, or prior or subsequent to court proceedings.

