COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 17, 1996

No. 96-1162-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD C. DEVEREUX,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed.*

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

CANE, P.J. Richard Devereux appeals a judgment of conviction for second-degree sexual assault of a child, contrary to § 948.02(2), STATS.[1] Devereux contends that the court erred when it admitted prior acts evidence, admitted his inculpatory statement, failed to send an exhibit to the jury, and

[1] In order to convict under § 948.02(2), STATS., the state must prove beyond a reasonable doubt that the defendant had sexual intercourse with the victim, and that the victim had not attained the age of 16 years at the time of the sexual intercourse. The defendant's intent is not an element of the crime.

permitted testimony about his request for an attorney. We reject his arguments and affirm the judgment.

The facts are not disputed. In 1992, when she was thirteen, Cindy first met Devereux, his wife, and their two children. She was introduced to them by a friend who was a babysitter for the Devereux children. Between 1992 and 1994 Cindy went to the Devereux house approximately twenty-five times to visit the family, and she babysat for their children on several occasions.

At a Memorial Day party in 1994, Cindy asked Devereux for a ride in his Jeep, and he agreed. He drove to a secluded area near his residence and asked Cindy if she would "give him a little." She ignored the request. Devereux asked again, and Cindy refused. Devereux responded by driving his Jeep through the mud in an apparent attempt to splash Cindy. She climbed out of the Jeep. Devereux then offered to take her back to the party, and she accepted the ride.

In July 1994, Cindy went to the Devereux house to ask for spaghetti noodles. Devereux asked what he would get in return, and then grabbed her arm and tried to pull her toward the bedroom. She left, and Devereux later apologized.

Devereux sexually assaulted Cindy on August 4, 1994. She was babysitting at a house near Devereux's residence when she saw Devereux drive by in his Jeep and Cindy went to his house to ask him for a ride. Once inside, Devereux asked her in the kitchen if she would "give him a little." She ignored the request. He then unzipped his pants and said, "He's ready for you." When Cindy walked away, Devereux locked the front door and closed the patio door. He forced Cindy to the floor in the living room, and sexually assaulted her.

Oconto County Officer Judy Kadlec interviewed Cindy and then arrested Devereux at his home on August 4, 1994, for the sexual assault. At the time of his arrest, Devereux told Kadlec that he knew what the arrest was all about. Before interviewing him at the station, Kadlec read Devereux his

Miranda[2] rights. He agreed to talk about the case but refused to sign the waiver form.

Kadlec discussed with Devereux the availability of DNA testing in sexual assault cases, and told him that Cindy was being tested at the hospital at that time.[3] He said, "Oh, no, then you already know, what can I do?" Devereux asked for an attorney by name, and Kadlec stopped the interview. She later transcribed her interview notes into a police report, and destroyed the notes. Devereux did not make a written statement to the police.

The State filed a pretrial motion in limine to introduce evidence of Devereux's behavior toward Cindy on the two occasions prior to the sexual assault. The trial court granted the motion, noting that the evidence went to proof of motive, intent, preparation, plan and absence of mistake. The court described the evidence as highly relevant and determined that any prejudicial effect was substantially outweighed by the probative value of the evidence. Devereux opposed the motion and now challenges the admission of the other acts evidence.

The admission of evidence is a matter within the discretion of the trial court. ***State v. Friedrich***, 135 Wis.2d 1, 16, 398 N.W.2d 763, 770 (1987). This court will not disturb an evidentiary ruling of the trial court as long as the trial

---

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

[3] Devereux contends that Kadlec's comment about the DNA tests constituted trickery and deception by the police, and therefore rendered his statement involuntary. However, his failure to raise this issue at trial precludes him from raising it on appeal. *See* ***State v. Davis,*** 199 Wis.2d 513, 517-19, 545 N.W.2d 244, 245-46 (Ct. App. 1996).

Even if we were to consider the merits, Devereux's argument would fail. As stated by our supreme court, "[The] confrontation of a defendant with possible incriminating evidence is not sufficient to undermine the voluntariness of a waiver of the privilege against self-incrimination." ***Schilling v. State***, 86 Wis.2d 69, 87, 271 N.W.2d 631, 640 (1978).

Kadlec testified that although she told Devereux that Cindy was being tested at the hospital, she did not tell him that the tests being conducted were DNA tests. Further, the state crime lab test report came back negative for the presence of semen on any of the items of evidence sent by police and, therefore, the crime lab did not test any blood, hair, or saliva samples taken from the victim.

court exercised its discretion in accordance with accepted legal standards and the facts of record. *See* ***id.*** In the absence of an adequate explanation by the trial court of the reasons for its ruling, we will independently review the record to determine whether it provides a reasonable basis for the court's evidentiary ruling. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Whenever the trial court rules on the admissibility of evidence, a preliminary question is whether the evidence is relevant. ***State v. Roberson***, 157 Wis.2d 447, 453, 459 N.W.2d 611, 612 (Ct. App. 1990). When deciding whether to admit other acts evidence, the trial court applies a two-part test. ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the court considers whether the evidence is admissible under § 904.04(2), STATS. ***Id.*** According to the statute:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

If the evidence is admissible under one or more of the statutory exceptions, the trial court must then decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect. ***Id.*** at 746, 467 N.W.2d at 540.

Evidence of prior acts may not be used to show a defendant's criminal disposition or propensity to commit similar crimes. ***State v. Speer***, 176 Wis.2d 1101, 1115, 501 N.W.2d 429, 433 (1993). However, our supreme court applies a "greater latitude of proof as to other like occurrences" to the prosecution of sex crimes, particularly to those which victimize children. ***Friedrich***, 135 Wis.2d at 19-20, 398 N.W.2d at 771 (quoting ***Hendrickson v. State***, 61 Wis.2d 275, 279, 212 N.W.2d 481, 482 (1973)).

The trial court admitted the other acts evidence and instructed the jury at the close of evidence to consider it with regard to Devereux's motive,

intent, and preparation or plan, but not as proof of his character. Devereux is correct to point out on appeal that because intent is not an element of the offense of sexual intercourse with a child, the evidence of his other acts is not admissible to show proof of motive or intent. *See* ***State v. Rushing***, 197 Wis.2d 631, 646, 541 N.W.2d 155, 161 (Ct. App. 1995).

However, even though the evidence was not admissible on the question of intent, the trial court had sufficient grounds to admit the other acts as evidence of Devereux's preparation or plan to sexually assault Cindy. Evidence admissible to demonstrate preparation or plan shows that the act of sexual intercourse was "part of a definite, preconceived plan, design or scheme by the defendant" and also establishes "that the defendant created the opportunity and circumstances whereby the plan could be carried out." *See* ***Day v. State***, 92 Wis.2d 392, 405, 284 N.W.2d 666, 673 (1979).

Devereux's other acts show his preparation for the sexual assault. During Cindy's visits to the Devereux home in the year and a half preceding the sexual assault, Devereux complimented her on her physical appearance. His suggestive remarks and sexual advances escalated in the two months preceding the sexual assault. In the Jeep in May 1994, he asked Cindy twice to "give him a little." When she went to his house to ask for spaghetti noodles in July 1994, Devereux asked what she would give him in return, and pulled her by the arm toward the bedroom. These acts demonstrate the progression of events in his plan to have sexual intercourse with Cindy.

The trial court decided that the probative value of the evidence outweighed its prejudicial effect. When we review the court's determination of probative value, we consider the nearness in time, place, and circumstance of the other acts to the alleged crime. *See* ***Friedrich,*** 135 Wis.2d at 23, 398 N.W.2d at 773. The three events occurred within approximately two months. All three of the incidents occurred when Devereux and the victim were alone, once in his Jeep near his residence and twice in his house. Devereux made similar sexually suggestive remarks to the victim on all three occasions, and he responded aggressively each time she rejected his advances: he drove his Jeep through the mud to splash her, he pulled her by the arm toward the bedroom, and he pushed her to the floor and sexually assaulted her. We agree with the court's assessment of the probative value of the evidence.

Next, Devereux contends that the trial court erred when it denied his motion to suppress the inculpatory statement he made to Kadlec. When she told him of the use of DNA testing in sexual assault cases, he said, "Oh, no, then you already know, what can I do?" The statement was used against him at trial. Devereux argues that the court should have suppressed the statement because it was not voluntary. We disagree and affirm the trial court's ruling.

The state has the burden of proof to demonstrate that the defendant's statement was voluntarily and intelligently made. *See* ***Oregon v. Bradshaw***, 462 U.S. 1039, 1044 (1983). A voluntary statement is one which, under the totality of the circumstances surrounding the statement, was the "product of [the defendant's] free and rational choice." ***Greenwald v. Wisconsin***, 390 U.S. 519, 521 (1968). When we consider the voluntariness of a statement, we apply constitutional principles to the historical and evidentiary facts found by the trial court. ***State v. Moats***, 156 Wis.2d 74, 94, 457 N.W.2d 299, 308 (1990). Therefore, we independently review the record to determine whether Devereux's statement was voluntary. *See* ***id.***

In each case where voluntariness is at issue, the totality of the circumstances test requires us to consider the defendant's age, intelligence, education, physical and emotional condition, and experience with the police. ***State v. Turner***, 136 Wis.2d 333, 363, 401 N.W.2d 827, 841 (1987). These characteristics must be balanced against the methods used by the police during questioning, including "the length and condition of the interrogation, the psychological and physical pressures used by the questioner, and whether defendant was apprised of his ***Miranda*** rights to counsel and to remain silent." ***Id.***

Kadlec testified that after speaking with Cindy, she arrested Devereux at his home. She advised him that he was under arrest for the sexual assault, handcuffed him, and transported him to the sheriff's department. During transport, Devereux asked Kadlec more than once if he could talk about the incident. She told him that he would have a chance to talk about it after he was booked.

After booking, Kadlec met with Devereux at a visitation booth in the jail. She read him his ***Miranda*** rights, each of which he said he understood.

She asked him to sign the waiver of rights form, and he said, "What's the difference, you already know what I did." Kadlec asked Devereux if they could discuss the incident, and he agreed. Kadlec told him that DNA testing is used in sexual assault cases, and that Cindy was being tested or had been tested at the hospital. At that point, Devereux said, "Oh, no, then you already know, what can I do." He requested an attorney, and Kadlec stopped the interview.

Kadlec described Devereux as cooperative, coherent, of average intelligence, and not under the influence of drugs or alcohol during the interview, which lasted approximately twenty-five minutes. It was not videotaped or tape recorded. Kadlec took notes during the interview, which she later transcribed into a police report. The questioning ceased when Devereux requested an attorney.

After a "totality of the circumstances" review of the facts of this case, we are satisfied that Devereux's statements were voluntary. Kadlec described him as a man of average intelligence. Kadlec also testified that Devereux tried more than once to talk with her about the crime on the way to the jail, and she told him to wait until after he was booked. She read him the ***Miranda*** warnings, and he said he understood. The interview lasted for twenty-five minutes. Only Devereux and Kadlec were present, and the questioning session was not recorded. These facts demonstrate that Devereux voluntarily made the statements, and we affirm the ruling of the trial court.[4]

---

[4] In the alternative to his voluntariness arguments, Devereux presents two new arguments on appeal. He argues that his inculpatory statement was inadmissible because it was not an "admission by party opponent" within the contemplation of § 908.01, STATS., and that he was denied due process because Kadlec destroyed her notes after transcribing them into the police report. By not raising these arguments at trial, Devereux waived his right to raise them on appeal. *See* ***State v. Davis***, 199 Wis.2d 513, 517-19, 545 N.W.2d 244, 245-46 (Ct. App. 1996). We therefore need not address the merits of these arguments.

Even if we were to consider the merits regarding Kadlec's destruction of the notes, Devereux's argument fails. Kadlec testified that she took handwritten notes during her interview with Devereux, and destroyed them after transcribing them into a formal police report, in accordance with standard departmental procedures. In order to violate the defendant's due process rights, the police must either fail to preserve exculpatory evidence, or act in bad faith by failing to preserve potentially exculpatory evidence. ***State v. Greenwold***, 189 Wis.2d 59, 67, 525 N.W.2d

Next, Devereux argues that the trial court erred when it did not send the state crime lab report to the jury room, and when it permitted Kadlec to testify about Devereux's request for an attorney. However, Devereux did not object when the court excluded the report from the group of items to be sent to the jury room, and although the parties agreed to make the other exhibits available to the jury upon specific request, the jury did not request the report. Similarly, Devereux did not object to Kadlec's testimony, move to strike the testimony, move for a mistrial, or request a curative instruction when Kadlec testified about his invocation of the right to counsel.

Devereux's failure to object in both instances at trial precludes his right to raise these issues on appeal. *See* ***State v. Boshcka***, 178 Wis.2d 628, 642, 496 N.W.2d 627, 632 (Ct. App. 1992). As stated by the court, "[U]nobjected-to errors are generally considered waived, and the rule applies to both evidentiary and constitutional errors." ***Id.*** We therefore reject both of these arguments without reaching the merits.

Because the court properly admitted the other acts evidence and the inculpatory statement, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

(..continued)
294, 297 (Ct. App. 1994). Devereux failed to prove a due process violation because he neither showed that the handwritten notes contained exculpatory evidence, nor did he show that Kadlec acted in bad faith.