COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 4, 1997

No. 96-2100-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. MURPHY,

Defendant-Appellant.

APPEAL from a judgment and order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

PER CURIAM. William Murphy appeals a judgment convicting him of two counts of sexual assault of a child, contrary to § 948.02(2), STATS.;[1] one count of sexual exploitation of a child, contrary to § 948.05(1)(b), STATS.; and one count of possession of a firearm by a felon, contrary to § 941.29(1)(b), STATS., and an order denying postconviction relief. He argues that the trial court

[1] Count one of the information charged Murphy with sexual intercourse with a person not yet 16 years old; count two of the information charged sexual contact with a person not yet 16 years old.

erroneously (1) admitted testimony of seven witnesses regarding "other acts" evidence contrary to § 904.04(2), STATS.; (2) did not allow Murphy to be present at a pretrial motion in limine hearing; (3) denied his request for a continuance to obtain new counsel; (4) ruled that the State fully disclosed exculpatory evidence; and (5) sentenced him to an excessive sentence. We affirm the judgment and order.

At trial, C. testified that she was involved in sexual activity with Murphy, her stepfather, since 1986, when she was eleven or twelve years old. She testified that in 1986, her stepfather pretended to leave the house on an errand, but then entered her darkened bedroom when she was sleeping, feigning to be a stranger, and threatened harm if she did not follow certain directions. After the second such incident, Murphy gave C. letters that were allegedly from an unknown third party threatening that she would be harmed if she did not engage in sexual activity with her stepfather. The letters described specific sexual acts, and C. was required to give the letters back to Murphy after reading them. Incidents of kissing, fondling, and touching Murphy's penis followed. One of the letters required C. to dress up in her mother's underwear. Another letter, received years later, blamed C. for her great-grandmother's recent death for not following certain directions in the letters.

C. testified that in 1989, when she was thirteen or fourteen, a letter required C. to be photographed by Murphy in a partially unclothed manner. The letter required C.'s mother to stand behind C. and lift up C.'s shirt, exposing C.'s breasts. C. testified that Murphy took a polaroid photograph of C. in this manner. In May or June of 1989, Murphy required C. to put on his wife's underwear and to touch his penis; he touched C.'s breasts. C. testified that Murphy videotaped himself engaging in oral sex with C.

The State brought a motion to be permitted to introduce testimony of other crimes and "bad acts." At the motion hearing, the trial court denied the State's motion to permit evidence of Murphy's 1974 conviction for the crime of indecent liberties, reduced from the initial charge of aggravated rape. It concluded that without facts underlying the conviction, it did not have sufficient facts to determine whether the crime was relevant to prove plan, identity, intent or motive.

The trial court permitted the State to introduce evidence of other bad acts, stating that the other acts

> are dealing with minors, and they are dealing -- otherwise they deal with photographs, and that's the similarity, these are the numerous contact with minors for sexual purposes, and there is a series of acts involving photographs of a sexually explicit nature that exist in the past, and that these are relevant, at least on the issue of motive, plan, and intent, arguably on the issue of identity as well. ...
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> ... that this bears on the issue of the purpose for which he is doing that, that there was not an innocent purpose behind it, it was for sexual gratification.
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> [T]here is a steady stream of these things, there is a continuity of acts ... and they are over a fairly lengthy period of time, and fairly similar in nature to the type of act that occurred here --- sexual, improper sexual contact with a minor.

The seven witnesses who testified to "other acts" were as follows:

1. J.A. testified that in 1973, when he was ten or eleven years old, he visited Murphy at Murphy's residence. Murphy offered J.A. $5 to put on Murphy's wife's underwear. Murphy handed the underwear to J.A., who put it on. Murphy then pushed J.A. onto a bed, began kissing him and touching J.A.'s body.

2. M.B. testified that in 1977 or 1978, when he was approximately nine years old, while wearing women's underwear, he sat on Murphy's lap. Murphy kissed him and laid on top of him.

3. A.K. testified that in 1978, when she was twelve years old, she played "hang man," a word game, with Murphy while babysitting for his

children. She felt uncomfortable because he chose the word "kiss." On another occasion, he asked her for a kiss and chased her around a chair.

4. C.L. testified that in 1980 or 1981, when she was fourteen or fifteen, he kissed her on one occasion and asked if she ever had sex with a man. On another occasion he grabbed her when the lights were out. He also asked if she had ever been kissed by anybody with a mustache and kissed her with permission.

5. M.H. testified that in 1982, when she was sixteen, he asked her if she had ever had sex, called her into his bedroom, grabbed her by the wrist and tried to kiss her.

6. V.H., who was born in 1966, testified that in 1979 or 1980, when he was over at Murphy's house, Murphy showed him nude pictures and offered him $3 an hour to take nude photos of himself and his wife.

7. M.P., who apparently was an adult at the time of the "other acts," testified that she used to cut Murphy's hair. She testified that approximately seven years before trial, Murphy asked her to engage in sexual activity with him, such as helping him to masturbate. On another occasion he asked whether she had any dirty magazines, and if she would wear heels and a skirt the next time she cut his hair. The trial court instructed the jury that evidence has been received regarding other acts involving Murphy for which he is not on trial. Its instructions included the following: "You may not consider this evidence to conclude the defendant has a certain character or a certain character trait and that the defendant may have acted in conformity with that trait or character with respect to the events as charged in this case. The evidence was received on the issues of motive and identity. Motive, that is when the defendant had a reason to desire the result of the crime." The jury found Murphy guilty on all four counts charged. Murphy appeals.

Murphy argues that the trial court erroneously admitted "other acts" evidence. We conclude that the record supports the trial court's exercise of discretion with respect to the testimony of six of the "other acts" witnesses. We conclude that the admission of the testimony of the seventh witness was erroneous, but the error was not prejudicial.

Upon review of evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with legal standards and in accordance with the facts of record. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501-02 (1983). We must independently review the record for reasons to sustain the trial court's exercise of discretion, ***id***. at 343, 340 N.W.2d at 502, and we must uphold the trial court's ruling if the record shows a reasonable basis. ***State v. Rushing,*** 197 Wis.2d 631, 645, 541 N.W.2d 155, 161 (Ct. App. 1995).

Evidence of other crimes, wrongs, or acts is inadmissible to prove character or action in harmony with that character. Section 904.04(2), STATS. It is generally inadmissible because it distracts the jury and encourages improper inferences of the defendant's guilt, inviting punishment because he is a bad person. ***State v. Harris,*** 123 Wis.2d 231, 233-34, 365 N.W.2d 922, 924 (Ct. App. 1985).

Nonetheless, other acts evidence may be admissible for other limited purposes, "such as proof of motive, opportunity, intent, preparation, plan, identity, or absence of mistake or accident." Section 904.04(2), STATS. The court must determine whether the evidence is admissible under both §§ 904.04(2) and 904.03, STATS. ***Rushing,*** 197 Wis.2d at 645, 541 N.W.2d at 161. First, the trial court must decide whether the evidence of other acts fits within one or more of the statutory exceptions. ***Id***. Next, it must determine whether the danger of unfair prejudice in admitting the proffered evidence substantially outweighs the probative value, so as to warrant exclusion of the evidence. ***Id.*** The prejudice to be avoided is the potential harm of a jury reaching the conclusion that because the defendant committed a bad act in the past, the defendant necessarily committed the current crime. ***State v. Fishnick,*** 127 Wis.2d 247, 378 N.W.2d 247 (1985).

Implicit in this analysis is the determination that the other acts evidence is relevant. ***Id.*** Evidence of significantly similar criminal conduct establishes a definite method of operation and thus preparation, plan, motive and intent. ***State v. Rutchik,*** 116 Wis.2d 61, 68, 341 N.W.2d 639, 643 (1984). Also, in a prosecution for sexual contact with a child, we have held that because a defendant's purpose for the contact is an element of the crime, and because his motive impacts upon that purpose, the other acts evidence that tends to show the defendant's purpose or motive for sexual contact with the victim of the

crime charged is relevant. *See* ***State v. Mink,*** 146 Wis.2d 1, 15, 429 N.W.2d 99, 104 (Ct. App. 1988).

In ***State v. Jones,*** 151 Wis.2d 488, 444 N.W.2d 760 (Ct. App. 1989), the defendant denied any sexual contact with the victim whatsoever. We concluded that testimony that the defendant had similarly assaulted the victim on six or seven prior occasions "is relevant to motive, plan and the general scheme of the crime." ***Id***. at 493-94, 444 N.W.2d at 763. In ***Hendrickson v. State,*** 61 Wis.2d 275, 281-82, 212 N.W.2d 481, 483-84 (1973), our supreme court held that earlier incestuous acts by the defendant father with the complaining witness daughter or with her sisters were admissible to show the exception to § 904.04, STATS., of (1) a "general scheme or plan;" and (2) "proof of motive or intent."

With the exception of the seventh act, we conclude that the trial court reasonably exercised its discretion when it ruled that the evidence fits within one or more of the exceptions of § 904.04(2), STATS. The six acts were significantly similar to the crimes charged as to be relevant to (1) proof of preparation and plan; and (2) motive and intent.

As in ***Mink,*** all the contacts took place in or near the home, involved minors of approximately the same age group, with whom the defendant was related or well-acquainted, and, with the exception of the sixth incident that involved indecent photos, included similar sexual activities of kissing, fondling and touching. In the first two other acts, Murphy had the children dress in his wife's underwear, followed by kissing and fondling. Similarly, in the sexual assaults charged, Murphy had C. dress in his wife's underwear, followed by kissing and fondling. In the next four incidents, Murphy made inappropriate advances to children in the same approximate age group as the crime charged. We agree with the trial court's determination that these incidents disclose a specific plan, motive and intent to obtain sexual gratification from minors.

As in ***Mink,*** the difficult question is remoteness in time. "[R]emoteness in time does not necessarily render the evidence irrelevant, but it may do so when the elapsed time is so great as to negate all rational or logical connections between the fact to be proven and other acts evidence." ***Id***. at 16, 429 N.W.2d at 105. In ***Mink,*** the other acts evidence ranged thirteen to twenty-

two years prior to the commission of the crime charged. ***Id***. at 16, 429 N.W.2d at 105. The court balanced the remoteness in time against the similarities in events. This exercise of discretion was upheld. ***Id.*** at 16-17, 429 N.W.2d at 105.

Here, the six other acts range from sixteen to nine years before the commission of the crimes of which Murphy stands convicted. Nonetheless, they bear striking similarities to the crimes charged. "We find that the marked similarities among the prior incidents ... and the charged offenses overcome considerations arising due to remoteness in time." ***State v. Friedrich,*** 135 Wis.2d 1, 25, 398 N.W.2d 763, 774 (1987). We conclude the similarities overcome the considerations arising due to remoteness in time.[2]

We further conclude that their probative value is not outweighed by prejudicial effect. While the first two acts are the most prejudicial, they are also the most similar, in that they involve minors, of the same age group with whom Murphy was well acquainted or related by marriage, and whom Murphy had dress in his wife's underwear before the incidents of kissing and fondling ensued. The next four witnesses gave testimony of less probative value, in that they involved improper advances against minors that were rebuffed but, on balance, the evidence was also less prejudicial.

Also, the trial court gave limiting instructions. In ***Jones,*** we concluded that "[a]ny possible prejudicial effect of the `other acts' evidence was offset by the trial court's instructions, which explained to the jury that such evidence was `admitted solely on the issue of opportunity, preparation or plan." ***Id***. at 494, 444 N.W.2d at 763. The jury was further instructed that the alleged other contacts could not be used to evaluate the defendant's character. ***Id.***

The court similarly instructed the jury here. "This effort signals to us that the trial court was aware of the prejudicial danger of the State's evidence and took a rational step to alleviate the risk." ***State v. Wallerman***, 203 Wis.2d 158, 171, 552 N.W.2d 128, 134 (Ct. App. 1996). Because the trial court applied the correct legal standards, and its ruling has a reasonable basis in the record, we do not overturn its decision on appeal.

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[2] Time spent incarcerated is not calculated. *See* ***State v. Rutchik***, 116 Wis.2d 61, 75, 341 N.W.2d 639, 646 (1984). The record is not clear as to how much of the four-year prison sentence Murphy served on his 1974 indecent liberties conviction.

We conclude, however, that the testimony of the seventh witness, M.P., should not have been admitted. Because there is no suggestion that M.P. was a minor at the time in question, the evidence indicated only that Murphy suggested consensual sexual activity with an adult female. This evidence is not probative or relevant to the crimes charged. However, because this evidence was not a crime, and not inflammatory in nature, we conclude that the error was harmless.

Next, Murphy argues the court erred when it stated that someday the supreme court and the legislature is going to decide that "this evidence is exactly important because the way we judge people is on their behavior. The fact that he has done this for 10 years is darn good reason to believe he did it this time .... One day the Supreme Court is going to come to grips with that." We disagree with Murphy's characterization of the court's remarks. The trial court's remarks acknowledged that other acts evidence was not admissible to prove character. The remarks, when read in context, were not given as a basis or rationale for its decision. After this aside, the court indicated its familiarity with the applicable statute, the relevancy requirement, exceptions and balancing analysis required. In applying § 904.04, STATS., the trial court concluded that Murphy's 1974 conviction for indecent liberties should not be admitted. We conclude that the court's remarks do not demonstrate reversible error.

Next, Murphy argues that identity and motive were not at issue, because identity was not in dispute and he offered to stipulate that although he denied doing the act, if it was done, the motive was sexual gratification. We are unpersuaded. Murphy's proffered stipulation fell short of removing motive as an issue in the case.[3] The State was entitled to prove not only that the motive

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[3] ***State v. Wallerman***, 203 Wis.2d 158, 167, 552 N.W.2d 128, 132 (Ct. App. 1996), stated:

> To prevent the admission of bad acts evidence, a defendant's offer to concede knowledge and/or intent issues must do two things. First, the offer must express a clear and unequivocal *intention* to remove the issues such that, in effect if not in form, it constitutes an offer to stipulate. Second, notwithstanding the sincerity of the defendant's offer, the concession must cover the necessary substantive ground to remove the issues from the case.

(quoting ***United States v. Garcia***, 983 F.2d 1160, 1174 (1st Cir. 1993)).

for the sexual assault charged was one of sexual gratification with a minor, but also that Murphy had the motive to gratify himself sexually with a minor. *See* ***State v. Plymesser***, 172 Wis.2d 583, 594-95, 493 N.W.2d 367, 372 (1992). We conclude that the record supports the trial court's decision to admit the other acts with minors on the issues of motive and plan. Because the evidence was admissible on the issues of motive and plan, any error with respect to admitting the evidence on the issue of identity would be harmless.

Next, Murphy argues that the trial court violated his constitutional rights to due process when it did not require his presence at the hearing on the State's motion in limine to admit the prior bad acts evidence. We disagree. At the hearing, only the admissibility of evidence was discussed. A defendant's presence is not constitutionally required at a hearing in which the admissibility of evidence is discussed, admissibility being an issue of law. ***Leroux v. State,*** 58 Wis.2d 671, 691-92, 207 N.W.2d 589, 600 (1973); *see also* § 971.04, STATS. Because the hearing dealt only with the legal issue of admissibility, Murphy's absence did not render it unfair or unjust. In any event, Murphy fails to demonstrate how his absence at the pretrial motion in limine hearing affected the outcome. *See* ***State v. McMahon,*** 186 Wis.2d 68, 88, 519 N.W.2d 621, 629-30 (Ct. App. 1994).

Next, Murphy complains that the trial court erred when it denied his request to obtain new counsel. We disagree. The record discloses that the two-day jury trial was set for December 13, 1995. On December 11, 1995, the trial court held a hearing on defense counsel's request to withdraw as counsel for Murphy. Defense counsel's affidavit stated that Murphy felt that he was not well represented and insisted on an approach opposite to that defense counsel would take. Defense counsel stated that the working relationship has deteriorated to the point that he felt he could not be a completely zealous advocate for Murphy's interests and position. At the December 11 hearing, defense counsel stated that he was exasperated by the lack of participation from Murphy. Defense counsel also stated, however, that it was only that morning that Murphy indicated to him that Murphy wanted another attorney.

The trial court stated that the reasons proffered were inadequate, that the case involved serious felonies, that it had been pending for more than a year, and that the defendant made the last hour request without making any efforts for alternative representation. The trial court found that defense counsel "was an experienced trial counsel and can adequately represent the defendant."

The court noted that it was not appropriate to grant a continuance to obtain new counsel because defense counsel has been "intimately familiar" with the case, was involved in numerous motions and supplied with numerous items of discovery. The court noted that there was no reasonable prospect that the case could be tried in the near future, that there were numerous witnesses scheduled, and denied the motion.

A request to substitute counsel is addressed to trial court discretion. ***State v. Lomax,*** 146 Wis.2d 356, 359, 432 N.W.2d 89, 90 (1988). The trial court must balance the defendant's constitutional right to counsel with the community's interest in the prompt and efficient administration of justice. ***Id***. at 360, 432 N.W.2d at 91. Factors to be considered include (1) the timeliness of the request, (2) whether the alleged conflict results in a total lack of communication to prevent an adequate defense and frustrate a fair presentation of the case; and (3) the adequacy of the court's inquiry into the defendant's complaint. ***Id***. at 359, 432 N.W.2d at 90. Here, the record discloses that the trial court considered the competing issues and reached a reasonable conclusion. Because the record demonstrates a reasonable exercise of discretion, we do not overturn it on appeal.

Next, Murphy argues that at the postconviction hearing, the trial court erroneously found that the State fully disclosed exculpatory evidence. The trial court specifically found that the information in question was supplied on November 17, 1995, nearly a month prior to the December 13 trial date. It determined that officer Bob Rhiel's testimony was more credible than that of defense counsel as to the date when the material was supplied.

Rhiel testified that in the middle of November 1995, after a motion hearing, defense counsel walked down to the sheriff's office with the assistant district attorney. Rhiel stated that defense counsel browsed through the two or three large boxes of papers that were set out. Rhiel testified that although he did not specifically examine the materials, the boxes contained numerous notebooks. The motion hearing to which Rhiel referred was November 17. Defense counsel testified that the materials were made available to him sometime around that date but could not remember the specific date.

We do not reverse the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. We defer to the trial court's

assessment of weight and credibility. ***Mullen v. Braatz,*** 179 Wis.2d 749, 756, 508 N.W.2d 446, 449 (Ct. App. 1993). We conclude the record supports the trial court's factual determination that the discovery materials were available to the defense on November 17.

Murphy further argues that the withholding of the exculpatory materials until five days before trial was a violation of ***Brady v. Maryland,*** 373 U.S. 83 (1963). Because we sustain the trial court's finding of fact that discovery materials were provided to the defense on November 17, this argument is without merit.

Finally, Murphy argues that the trial court erroneously exercised its sentencing discretion. Murphy was sentenced to ten years on the first count of sexual assault, five years on the second count of sexual assault, and two years on the possession of a firearm count, to be served concurrently to count one. Sentence was stayed and ten years' probation was ordered on the sexual exploitation of a child conviction. Murphy argues that it was error for the trial court not to follow the recommendation of the presentence report of seven years in prison. We disagree.

The record reveals no misuse of sentencing discretion. *See* ***State v. Echols,*** 175 Wis.2d 653, 681, 499 N.W.2d 631, 640 (1993). The sentences were within the statutory maximums. The court considered the gravity of the offense, Murphy's prior record and character, and protection of the public. These are appropriate factors. *See* ***id***. at 682, 499 N.W.2d at 640. While the presentence report is a relevant factor, it is not binding. ***State v. Johnson,*** 158 Wis.2d 458, 469, 463 N.W.2d 352, 357 (Ct. App. 1990).

By the Court.—Judgment and order affirmed.

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