COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 17, 1997

NOTICE

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

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No. 96-3291-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

KELLY G. O'SHEA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dunn County: DONNA J. MUZA,[1] Judge. *Reversed and cause remanded with directions.*

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

CANE, P.J. The State appeals an order vacating the judgment convicting Kelly G. O'Shea of second-degree sexual assault and granting him a

[1] Reserve Judge John Bartholomew signed the order vacating the judgment in Judge Muza's absence.

new trial in the interest of justice, because of an accumulation of trial errors. On appeal, the State argues the court erred when it decided that the jury instruction on second-degree sexual assault was improper, used a de novo standard to review the "other acts" evidence and failed to make a required finding of a substantial probability of a different result on retrial. Because we conclude there was no "accumulation of errors" to support a new trial, we reverse the order.[2]

On March 23, 1995, J.J. and her friends, Kelly Ostrander and Jennifer Forseth, all college students, attended parties where they consumed alcohol, and later returned to Ostrander and Forseth's dormitory room. Shortly after midnight, J.J. felt tired and dizzy, went to her room, and fell asleep on a futon. When she awoke sometime later, O'Shea was on top of her having sexual intercourse with her. She told O'Shea she had to use the bathroom, and left the room. She went to a friend's room, crying and upset, and asked him to go to her room and tell O'Shea to leave. When he and his roommate did this, O'Shea, who was lying on the futon smoking a cigarette, put on his clothes and left.

Forseth testified that she went to J.J.'s room between 12:15 and 12:30 a.m. to see if she was awake. The door was closed, but unlocked. Forseth knocked, got no response, and entered the room to find J.J. sleeping on the futon. She tried to wake J.J. but was unsuccessful, so she left and closed the door behind her. She testified that she returned to J.J's room at 1:30 a.m., and the door was locked. She knocked and got no response. Another dormitory resident testified that he went to J.J.'s room at approximately 12:15 a.m. He knocked on the door

[2] Because the court based its decision on an accumulation of errors at trial, our conclusion that there was no error is dispositive. Therefore we do not address the State's argument that the court failed to make a required finding to grant a new trial in the interest of justice.

and got no response. The door was unlocked and he entered the room. J.J. was asleep on the futon, and he left when he was unable to wake her up.

Jessica Bruce, J.J.'s dormitory neighbor, testified that between 1:30 and 1:45 a.m., O'Shea entered her room and asked for a cigarette. She did not give him a cigarette and asked him to leave her room at approximately 1:45 a.m. She then observed O'Shea enter J.J.'s room.

O'Shea testified that after drinking with friends at several bars and a house party, he went to J.J.'s room at about 1:30 a.m. for a cigarette. He knew J.J. and her roommate in passing, had been to their room before, and thought they had given him cigarettes before. He entered the room and woke J.J. She gave him a cigarette and they talked. She began kissing him and they began to have consensual sexual intercourse. She asked O'Shea to stop because she had to go to the bathroom. She left the room. O'Shea lit a cigarette, J.J.'s friend came in and told him J.J. wanted him to leave, and O'Shea left.

O'Shea described J.J. as the more active partner in initiating the sexual activity. He also testified that after someone poked their head into the room during the sexual act, J.J. asked O'Shea to lock the door and he did so. Although O'Shea testified he believed it was his cousins, Patrick and Kieran O'Shea, they testified for the State and denied going to J.J.'s room.

Kelley Erickson, J.J.'s roommate, testified that on March 21, the Monday prior to the offense, O'Shea entered her room at approximately 1 a.m. She was asleep at the time but woke up when O'Shea entered and locked the door behind him. When she asked O'Shea what he was doing, J.J. knocked on the door. O'Shea asked Erickson for a cigarette and then opened the door. Erickson asked

O'Shea to leave, and he did so. Despite O'Shea's objection, Reserve Judge Robert Pfiffner admitted Erickson's testimony as other acts evidence.

The jury convicted O'Shea of second-degree sexual assault for having sexual intercourse with a person whom he knew was unconscious, contrary to § 940.225(2)(d), STATS. Judge Pfiffner presided at O'Shea's trial and sentencing because Judge Donna Muza was ill. O'Shea's postconviction motions for a new trial were heard by Judge Muza, who granted a new trial "in the interest of justice, that because of the accumulation of errors that did occur" at trial. The State now appeals the order.

We have determined, and the parties concede, that neither the written order nor the fourteen-page transcript of the court's decision clearly state the trial errors upon which Judge Muza based her decision. However, we will review the errors noted in the parties' briefs, upon which the trial court could have conceivably found an accumulation of errors warranting a new trial: the jury instruction and the admission of the other acts evidence.[3]

In reviewing an order granting a new trial, we look for reasons to sustain the order rather than evidence to support the jury verdict. ***Larry v. Commercial Union Ins. Co.***, 88 Wis.2d 728, 733, 277 N.W.2d 821, 823 (1979). An accumulation of errors may require a new trial. ***Fields v. Creek***, 21 Wis.2d 562, 573-74, 124 N.W.2d 599, 605 (1963).

[3] In its supplemental brief, the State suggests an additional error may have been the court's limitations on O'Shea's cross-examination of J.J. Because we do not find support for this alleged error in the transcript, we do not address it.

The State argues that Judge Muza erroneously exercised her discretion when she used a de novo standard to review Judge Pfiffner's decision to admit the other acts evidence. We recognize that different judges presided at O'Shea's trial and postconviction proceedings.[4] When more than one judge is involved,

> a successor judge may in the exercise of due care modify or reverse decisions, judgments or rulings of his predecessor if this does not require a weighing of testimony given before the predecessor and so long as the predecessor would have been empowered to make such modifications. The underlying rationale … is that the power to modify a judicial ruling resides in the court and not in the person of the individual judge, who is merely the personification of the powers of the court.

Starke v. Village of Pewaukee, 85 Wis.2d 272, 283, 270 N.W.2d 219, 224 (1978) (footnotes omitted). Here, because Judge Muza functioned as the trial court, and not an appellate court, it is inaccurate for the State to refer to Judge Muza as the "reviewing court judge," and to describe her role as deciding whether Judge Pfiffner erroneously exercised his discretion when he admitted the other acts evidence. Instead, on a postconviction motion, the successor judge must evaluate his or her predecessor's trial decisions for mistakes, just as if the successor judge had made those decisions herself, acting in the capacity of the judge presiding at trial.

Whether to admit or exclude evidence is addressed to the trial court's discretion, and that determination will not be upset on appeal absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262,

[4] Neither party requested, as permitted by § 751.03(4)(b), STATS., that Judge Muza not hear O'Shea's postconviction motions.

265 (Ct. App. 1992). When the trial court does not set forth its reasoning in exercising its discretion, as here, we "independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

Other acts evidence is admissible if it is offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of a mistake or accident, and its probative value is not substantially outweighed by any unfair prejudice to the defendant. Sections 904.04(2) and 904.03, STATS. Here, the other acts evidence was testimony that three days prior to the offense, O'Shea went into J.J.'s room at approximately 1 a.m., found Erickson, J.J.'s roommate, asleep, and locked the door behind him. Erickson awoke, J.J. knocked on the door because she was locked out, and O'Shea asked for a cigarette and then left.

O'Shea's prior act was admissible because it showed his plan and preparation to commit the offense. He planned to enter J.J.'s room, seeking the opportunity to sexually assault her when she was asleep. If she was not asleep or woke up when he entered, O'Shea would ask for a cigarette to explain his presence. The evidence showed O'Shea had observed J.J.'s room and locked the door. The evidence was consistent with O'Shea's testimony that he had been in J.J.'s room prior to the offense and believed he had borrowed cigarettes, and with Jessica Bruce's testimony that O'Shea walked into her room immediately before the sexual assault and asked her for a cigarette. The court gave no reasons to support its post-trial decision that the other acts evidence was inadmissible. Because our review of the evidence gives no basis for the exclusion of this evidence, we conclude the court abused its discretion when it decided the admission of the evidence was error.

Next, the parties dispute whether the jury instruction on second-degree sexual assault was proper. The parties concede that this issue was waived by trial counsel's failure to object to the instruction. *See* § 805.13(3), STATS. However, the trial court referred to the instruction as an error and used this as a basis for its conclusion that there was an accumulation of errors. Therefore, even if we were to consider the issue despite the waiver, we would conclude the jury instruction was appropriate.

"[T]rial courts have wide discretion in deciding what instructions will be given so long as they fully and fairly inform the jury of the principles of law applied to the particular case." ***Runjo v. St. Paul Fire & Marine Ins. Co.***, 197 Wis.2d 594, 602, 541 N.W.2d 173, 177 (Ct. App. 1995). If the instruction is not erroneous and adequately informs the jury of the law to be applied, the court's exercise of discretion will be affirmed on appeal. ***Steinberg v. Arcilla***, 194 Wis.2d 759, 774, 535 N.W.2d 444, 449 (Ct. App. 1995).

In response to the State's request to add "[u]nconscious includes loss of awareness caused by intoxication or heavy sleep" to WIS J I-CRIMINAL 1214,[5] the court added "[u]nconscious means loss of awareness" to the instruction. In ***State v. Curtis***, 144 Wis.2d 691, 695-96, 424 N.W.2d 719, 721 (Ct. App. 1988), we reviewed a similar modification to the same pattern jury instruction and decided that adding "unconscious includes the loss of awareness caused by sleep" to the instruction was appropriate:

> We conclude that "unconscious," as used in sec. 940.225(2)(d), Stats., is a loss of awareness which may be caused by sleep. We also conclude that the trial court

[5] The jury instruction was subsequently renumbered as WIS J I-CRIMINAL 1213.

> properly defined the element of unconsciousness and did not invade the jury's fact-finding function. The question of whether [the victim] was in fact "unconscious" remained for the jury's determination.

Id. (footnote omitted; emphasis deleted). As in ***Curtis***, we conclude the language used here to define "unconscious" was accurate and did not interfere with the jury's factfinding process. Therefore, we conclude the instruction was not erroneous.

By the Court.—Order reversed and cause remanded with directions for reinstatement of the judgment of conviction.

Not recommended for publication in the official reports.