COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP333-CR **Cir. Ct. No. 2002CF312**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD A. MAERTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: PETER GRIMM, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Chad A. Maertz appeals from a judgment of conviction of attempted forceful abduction of a child and from an order denying his motion for postconviction relief. He argues that the trial court erroneously exercised its discretion in admitting evidence of two prior child sexual assaults

convictions and by denying his motion for a change of venue. He also claims he was denied a fair trial when the prosecutor made improper remarks during closing argument. We reject his claims and affirm the judgment and order.

¶2 Maertz was convicted of attempting to abduct a sixteen-year-old girl as she was riding her bicycle on a secluded portion of a public highway.[1] He parked his truck and waited at a spot on the highway and when the girl passed him, he ran after her. He grabbed the bicycle seat and when the girl jumped off he demanded she come and speak with him. The girl fled, leaving her bicycle behind. Maertz told police that he wanted to speak with the girl about her swerving into the path of his vehicle. The girl testified that Maertz never indicated what he wanted to talk to her about and that she had seen his truck on prior occasions as she rode her daily route home from driver's education class.

¶3 At trial a stipulation of facts was read to the jury about two 1987 child sexual assaults and child enticement offenses committed by Maertz. The first involved a six-year-old child walking home from school when Maertz grabbed her and put her into his car. The victim indicated that she had seen Maertz twice before in the vincity of her babysitter's home. He took the victim to his bedroom and removed her pants and underpants. There was sexual contact before Maertz returned the victim to the neighborhood where he had picked her up. The second offense occurred three months after the first. Maertz enticed an eleven-year-old girl onto the roof of a school ostensibly to retrieve a baseball. When she got to the roof, Maertz grabbed her, removed her clothes, removed his

[1] The jury was unable to reach a verdict on charges of attempted kidnapping and attempted false imprisonment.

pants and underwear, and engaged in sexual contact. Certified copies of the judgments of conviction were admitted into evidence.

¶4 The admissibility of other acts evidence is governed by WIS. STAT. § 904.04(2) (2003-04).[2] The three-step framework for deciding the admissibility of other-acts evidence is: (1) Whether the evidence is offered for an acceptable purpose under § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury or needless delay. ***State v. Hunt***, 2003 WI 81, ¶32, 263 Wis. 2d 1, 666 N.W.2d 771. We consider whether the trial court exercised appropriate discretion in admitting such evidence. ***Id.***, ¶34. An erroneous exercise of discretion does not exist if there is a reasonable basis for the trial court's ruling. ***Id.***, ¶42.

¶5 In sexual assault cases, particularly those involving a child, courts permit a "greater latitude of proof as to other like occurrences." ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606 (citation omitted). The trial court applied the greater latitude rule. Maertz contends the greater latitude rule doesn't apply because he was not charged with sexual assault. We need not decide if the greater latitude rule applies because the other acts evidence was properly admitted without applying the rule.

¶6 The trial court found that the other acts evidence was admissible for the purposes of demonstrating intent, motive, preparation and plan. Maertz concedes that the evidence was admissible as to intent on the charge of attempted

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

kidnapping and attempted false imprisonment and motive or purpose on the charge of attempted forcible abduction of a child. We agree that the evidence was admitted for acceptable purposes. The evidence was admissible for the purpose of defeating Maertz's assertion that he was trying to talk to the victim to scold her for erratic bicycling.

¶7 Determining the relevancy of the evidence includes an examination of whether the other acts evidence has probative value. ***State v. Veach***, 2002 WI 110, ¶79, 255 Wis. 2d 390, 648 N.W.2d 447. The probative value of other acts evidence depends on the similarity between the charged offenses and the other acts. ***Id.***, ¶81. The prosecution's theory was that Maertz learned the victim's regular route home from her driver's education class each day and waited for her on the secluded hilltop portion of the route. As a pretense he tried to get her to come close enough to talk to him. The occurrence has similarities with both the other offenses described to the jury. Maertz had staked out the six-year-old's walking route to her babysitter's house before grabbing her. Maertz used a false pretense to entice the eleven-year-old to the rooftop of the school. The past offenses need not be identical to the charged offense in order to be probative and relevant. ***Davidson***, 236 Wis. 2d 537, ¶72.

¶8 The fifteen year gap between the other acts and the charged offenses does not eliminate the probative value of the evidence. Maertz was incarcerated and on parole for the majority of that time. The charged offense occurred only three years after Maertz's release from supervision for the prior convictions.

¶9 Despite the difference in ages of the victims, the trial court found similarity by comparing the age of the victims with Maertz's age at the time of the offenses and his ability to overcome his victims in terms of height, weight and

size. Finally, the probative value of the other acts was strong since they constituted convictions entered on Maertz's guilty pleas. This was not just evidence of unproven allegations. The trial court correctly concluded that the other acts evidence was relevant.

¶10 Finally, we agree that the probative value was not outweighed by the danger of unfair prejudice. The evidence came in by a stipulated statement of facts and the judgments of convictions. There was not live testimony that unduly occupied trial time or graphically portrayed the other crimes to the jury. A cautionary instruction minimizing the potential for unfair prejudice was given. *See* ***State v. Hammer***, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629. The defense also used the information about the 1987 offenses to argue to the jury that the police jumped to conclusions about Maertz's intentions in trying to talk to the victim. The defense suggested that the jury should not engage in the same type of speculation that the police had. The other acts evidence was properly admitted.

¶11 Maertz next contends that the prosecutor made improper "golden rule" arguments to the jury during closing argument. A golden rule argument asks the jurors to place themselves in the victim's shoes and is generally impermissible because it appeals to the jury's sympathy for crime victims. ***State v. Delain***, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562, *aff'd*, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484. The failure to contemporaneously object to alleged improprieties in the closing argument and move for a mistrial constitutes waiver. ***State v. Goodrum***, 152 Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989).

¶12 Maertz first points to two instances in which the prosecutor asked the jury to put themselves in Maertz's position with respect to his reaction to hearing that police were searching for an individual who he knew had to be him

and to perceived dangerous roadway behavior.[3] There was no contemporaneous objection to these two arguments. The request for a mistrial before the prosecutor's rebuttal argument cannot revive the issue already waived by the failure to contemporaneously object. The claims of error are waived.

¶13 Maertz claims the following argument by the prosecutor was improper:

> Ask yourself also what lawful purpose could he have stopped her for. Even if stopped her to chew her out, he doesn't have any legal authority to do that. Certainly, he could have yelled at her, something like that, but he had no authority, no legal authority whatsoever, none, to stop her and detain her. *And I'd ask you to think about this if that were your daughter on Highway 67.*

¶14 Immediately after the last quoted statement, Maertz asked for a side bar. Anticipating the objection, the trial court remarked, "Well, just sustained,"

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[3] The statements identified are:

> The reactions of the defendant himself, what would you do if you realized at five o'clock when you watched the evening news that the police were looking for somebody who thought they were involved in an attempted abduction and you knew the real truth about that?
>
> …
>
> I think also about the number of times somebody has committed a traffic infraction in front of you, somebody on a bike, some pedestrian. Experience in the everyday affairs of life. Did you ever stop? Did you ever go up to the top of a hill, wait for them to continue riding up a hill, standing there so you could do whatever it was you wanted to, talk to them, chew them out, I suppose? Doesn't happen. That just—It just doesn't happen.

We do not consider these arguments to violate the golden rule since they ask to jury to think what they would do in the situation facing Maertz and speak to the principle that jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life.

and told the prosecutor to move on. Outside the presence of the jury, on a break after the defense closing argument and before the prosecution's rebuttal argument, Maertz moved for a mistrial based on the argument objected to and at least one of the prior arguments deemed objectionable. At the postconviction hearing, the trial court found that the claim of error was waived because it was not contemporaneously pursued.

¶15 Without the contemporaneous motion for a mistrial, the trial court was unaware that Maertz considered the mere sustaining of the objection to be insufficient. The purpose of the contemporaneous objection rule is to allow the trial court to correct any alleged error with minimal disruption. ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. The failure to timely move for a mistrial failed to signal that the argument was deemed troublesome enough to support a mistrial and foreclosed the trial court from giving a corrective instruction to address the alleged error. *See* ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, ¶ 88 (in the absence of a contemporaneous motion for mistrial all the court can do is assume that the defendant was satisfied with the court's ruling and that he had no further objections). The absence of a contemporaneous motion for mistrial to the prosecutor's argument waives the claim.

¶16 We accept that the prosecutor's argument that jurors should put themselves in the shoes of the victim's parents was an improper golden rule argument. Disregarding waiver, the trial court decided that a new trial was not warranted. The trial court exercises discretion in determining whether to grant a motion for mistrial. ***Delain***, 272 Wis. 2d 356, ¶25. The trial court considers the whole proceeding and determines whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** The trial court noted the offenses were not emotionally charged and did not involve any gruesome details since the victim

came away unharmed. It also noted that the comment placing jurors in the shoes of the victim's parents was not likely to trigger emotions beyond what the jurors naturally bring to deliberations. The argument was one statement in a lengthy closing argument. The jury was instructed that the arguments of counsel are just argument and not evidence. We presume the jury follows this instruction. *See* ***State v. Olson***, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998). The trial court properly exercised its discretion in determining that the remark was not prejudicial and that a new trial was not warranted.

¶17 The final issue is whether the trial court erroneously exercised its discretion in denying Maertz's motion for a change of venue. *See* ***Tucker v. State***, 56 Wis. 2d 728, 733, 202 N.W.2d 897 (1973) (a motion for change of venue is addressed to the sound discretion of the trial court). Maertz sought to move the trial to a different county under WIS. STAT. § 971.22, or to select a jury from another county under § 971.225, because of extensive pretrial publicity about the facts of the offense and his past record. Maertz supported his motion with twelve newspaper articles from the local newspaper that began coverage on the day the offense was reported, August 13, 2002. An article appeared each day but one between August 13 and August 19, 2002, and four more articles appeared with the last one published September 22, 2002. The articles included quotes from the investigating officers that the attempted abduction was a "bold act of aggression," that vouched for the victim's credibility, that the unknown suspect was a "dangerous individual," and theorizing on the suspect's intent. When Maertz was arrested the newspaper reported that he was a registered sex offender and included comments from the victim's parents regarding relief that he had been arrested. Maertz's version of the occurrence was recounted in one article, along with a picture of him in a jumpsuit in custody. An article published August 19, 2002,

recounted local history of child crimes, including a 1973 murder and other child abductions. Maertz's status as a registered sex offender was repeated in several articles that included a picture of Maertz. The final article on September 22, 2002, included details about Maertz's prior convictions. Maertz's trial commenced on December 16, 2002.

¶18 A change of venue should be granted if there is a reasonable likelihood that the defendant will not receive a fair trial. ***Hoppe v. State***, 74 Wis. 2d 107, 110, 246 N.W.2d 122 (1976). Although we defer to the trial court's determination of public sentiment, we independently evaluate the circumstances to determine "whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or impaneled jurors." ***Id.*** at 110-111. *See also* ***State v. Fonte***, 2005 WI 77, ¶12, 281 Wis. 2d 654, 687 N.W.2d 548. The following factors are considered in evaluating the pretrial publicity:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id., ¶31.

¶19 The trial court found that the newspaper coverage was not inflammatory. We agree that for the most part the articles imparted factual renditions of the offense, the investigation, Maertz's arrest, and his prior record. It was all information that jury would otherwise hear. However, it cannot be ignored that some of the coverage was designed to incite fear in the community about this

type of crime and potential ramifications. Moreover, that coverage was exacerbated by investigator's comments feeding directly into the press coverage.

¶20 The bulk of the publicity occurred four months before trial. The trial court found that the newspaper was not widely read with a subscription level under 30,000 in a county of 90,000 people. The trial court determined that there would be little difficulty in picking a jury. That proved to be the case when only nineteen of the thirty-one jurors questioned had been exposed to pretrial publicity. We consider it key that the trial court was cautious with jury selection and carefully explored the potential prejudice of any prospective juror that indicated having read pretrial articles. Seven prospective jurors were struck for cause, four because of their exposure to pretrial publicity. The six jurors who had read pretrial articles and remained on the panel assured the court that they could remain fair and impartial. Although Maertz now claims that he utilized his preemptory strikes to remove only jurors who had read pretrial articles, he never presented a challenge for cause or renewed his motion for a change of venue during or after jury selection.

¶21 The nature of the crime was not itself inflammatory or gruesome. The jury deliberated over two days and was unable to reach a verdict on two of the charged offenses. The divided verdict indicates that the jury was not influenced by pretrial publicity. As the trial court recognized during the postconviction hearing, if pretrial publicity influenced jurors against Maertz, the verdict would have been different. We are confident that the impressions from pretrial publicity had dissipated. Considering the relevant factors, we conclude that the trial court properly exercised its discretion in denying the motion for a change of venue.

By the Court.—Judgment and order affirmed.

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