COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2194-CR **Cir. Ct. No. 2005CF2329**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL LEMONT OTIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Darrell Otis appeals a judgment convicting him of multiple sexual assault counts and an order denying his postconviction motion. We affirm for the reasons discussed below.

BACKGROUND

¶2 Otis was charged in an amended information with two counts of sexual assault of the same child, two counts of sexual intercourse with a child sixteen years or older, and two counts of second-degree sexual assault by use of force or violence, involving one of his stepdaughters and one of his nieces. The trial court denied a motion to sever the charges.

¶3 There was no physical evidence produced at trial. Instead, the State relied primarily on the account of the two teenaged victims, Latifah and Laquanda, supported by the testimony of the girls' mothers about when and how the girls reported the abuse and expert testimony from a social worker about delayed reporting. Each girl testified to repeated sexual encounters with Otis beginning when they were twelve or thirteen years old, including instances of vaginal intercourse, attempted anal intercourse, fellatio, cunnilingus, masturbation and groping.

¶4 Otis took the stand and denied the allegations, pointing out what he considered to be some inherent implausibility in the girls' stories. In addition, his wife Yvette (who was Latifah's mother) testified that the abuse allegations occurred two days after she had told her sister Moneek (who was Laquanda's mother) that Moneek needed to move her family out of the house the Otises had been renting to them. Yvette suggested that the motive for the abuse allegations was retaliation for the impending eviction, although she conceded that she had not actually filed the eviction notice until after the allegations had been made.

¶5 Defense counsel also attempted to ask Latifah about whether she used drugs, but withdrew the question after an objection and off-the-record sidebar discussion. [47:52] Otis learned after the trial that Latifah had been arrested on a

drug charge shortly after she testified, while the trial was still pending. According to the postconviction motion, the arrest occurred in the waiting room of the district attorney's sensitive crimes office, and Latifah lied to police about whether she lived in the apartment where drugs had been recovered.

DISCUSSION

Sufficiency of the Evidence

¶6 Since a reversal on sufficiency grounds will typically result in an acquittal rather than a new trial, it is our general practice to consider a sufficiency of the evidence claim before other issues and we will do so here. Otis contends that the evidence presented at trial was insufficient to support the verdicts because the girls' accounts "were impeached with their prior inconsistent statements, their inability to recall, and the physical impossibility that some of the incidents could have occurred as Laquanda testified."[1] We reject this argument.

¶7 In considering the sufficiency of the evidence, this court must consider all of the evidence submitted, including erroneously admitted evidence. ***Lockhart v. Nelson***, 488 U.S. 33, 40-42 (1988). We will sustain the verdict "'unless the evidence, viewed most favorably to the state and the conviction, is so

[1] The section of the appellant's brief dealing with the sufficiency of the evidence does not specify what any purported "physical impossibilities" were. From other sections of his brief, however, we infer Otis is referring to explanations he gave in his own testimony about why certain incidents were inherently implausible. For instance, with regard to an allegation that he had assaulted his niece on one occasion shortly after flipping the mattress on his bed where she had fallen asleep watching a movie with one of her cousins, Otis testified that it usually took several people to turn the king-sized mattress due to its size and the low ceiling area over the raised bed. With regard to an allegation that on another occasion he had forced his niece to perform oral sex on him in a truck while they were waiting to snowplow a church parking lot, he claimed it would be difficult while sitting to get his penis out from the double-layer overalls outfit he always wore to shovel snow.

lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted); WIS. STAT. § 805.14(1) (2005-06).[2] This means we will uphold a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of witnesses and drawing of inferences to the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

¶8 In other words, it was for the jury to resolve any discrepancies in the girls' accounts and to decide if it was possible that the assaults could have occurred in the way they described. Our review is limited to determining whether, if the jury believed the girls, their testimony was sufficient to prove each element of the charged crimes. Otis does not identify any element of any count which he believes was not covered by the testimony of one of the girls, and we are satisfied that the girls' descriptions of multiple assaults over a period of several years was sufficient to support each of the verdicts.

Severance

¶9 Otis argues the trial court should have granted his motion for severance. WISCONSIN STAT. § 971.12 provides in relevant part:

> (1) JOINDER OF CRIMES. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> or transaction or on 2 or more acts or transactions connected together or constituting part of a common scheme or plan.…
>
> ….
>
> (3) RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant … is prejudiced by a joinder of crimes … the court may order separate trials of counts ….

Our review of this issue involves a two-step process in which we determine first whether the charges could be properly joined under sub. (1), and second whether the trial court properly exercised its discretion in refusing to order separate trials under sub. (3). ***State v. Locke***, 177 Wis. 2d 590, 596-97, 502 N.W.2d 891 (Ct. App. 1993). Otis does not present any argument on appeal that the counts could not be properly joined in the first instance under sub. (1), and we are satisfied that all of the charged crimes were "of the same or similar character." Most of the assaults occurred in the same residence, during an overlapping time frame to victims about the same age who each shared a familial relationship with the defendant. We turn then to the prejudice issue.

¶10 The parties agree that evaluating the potential prejudice to the defendant in this case will turn upon whether evidence of each charge would be admissible in the trial of the other charge or set of charges. The admissibility of evidence is subject to multiple layers of analysis. First, evidence is not admissible unless it is relevant—meaning that it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." WIS. STAT. §§ 904.01 and 904.02. Next, evidence which has some relevance may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03. In addition, regardless of relevance

or probative value, evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person to show that the person acted in conformity therewith," although such other acts evidence may still be used to show proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2)(a); *see also* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

¶11 The record shows that the trial court engaged in a thorough ***Sullivan*** analysis before making its severance determination. Otis moved to sever the original charges for each victim on the grounds of unfair prejudice, arguing that because the incidents did not arise from the same transactions, there would not be any overlapping evidence aside from other acts evidence. At the severance hearing, he argued that the other acts evidence would be inadmissible, even with the amended charges, because motive and intent would not be a contested issue at trial—that is, the defense conceded that if the alleged conduct occurred, the purpose would have been for sexual gratification. The court reasoned, however, that even if uncontested, intent was still an element of the crime the State needed to prove. It concluded that the other acts evidence would have considerable probative value due to similarities between the assaults, which would outweigh its prejudicial effect under the greater latitude rule described in ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447 and it denied the severance motion.

¶12 Otis does not challenge on appeal the trial court's determination that the evidence was offered for a proper purpose. Instead, he claims that the trial court's analysis of the relevance of the other acts evidence was flawed because the State had not first met its threshold burden of showing that each of the incidents had actually occurred.

¶13 Although it is not necessary that a prior crime result in a conviction before it may be admitted as other acts evidence, uncharged offenses cannot be considered relevant unless "a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act." ***State v. Gray***, 225 Wis. 2d 39, 59, 590 N.W.2d 918 (1999). Whether a jury could find by a preponderance of the evidence that a defendant committed a prior act is a question of law the trial court decides without weighing credibility or determining whether the government proved the defendant committed the act. ***State v. Bustamante***, 201 Wis. 2d 562, 570, 549 N.W.2d 746 (Ct. App. 1996). In other words, the trial court does not have to make a factual finding that the conduct actually occurred, but merely evaluate as a question of law whether the proffered evidence is such that a jury *could* find that the alleged prior act had occurred.

¶14 For instance, in ***State v. Arredondo***, the State proffered testimony from a witness who said the defendant had raped her in a manner similar to that being alleged in the instant trial, even though the defendant had been acquitted of that charge at an earlier trial. ***State v. Arredondo***, 2004 WI App 7, ¶45, 269 Wis. 2d 369, 674 N.W.2d 647. This court examined the transcript from the first trial and concluded that testimony about the prior incident was properly admitted as other acts evidence because—despite the failure to persuade the first jury that the incident had occurred beyond a reasonable doubt—the earlier victim's account was not directly contradicted by other witnesses and was sufficient to allow another jury to reasonably conclude by a preponderance of the evidence that the prior incident had occurred. ***Id.***, ¶48.

¶15 Here, the court relied upon the girls' statements to police and their preliminary hearing testimony as the basis for its other acts analysis. Otis points out that the burden of proof at the preliminary hearing was only probable cause,

rather than a preponderance of the evidence. He then argues that the allegations the girls made "standing alone"—that is, each without the testimony of the other girl and without corroborating physical evidence—and given the impeachment evidence also elicited at the preliminary hearing "cannot, as a matter of law, meet the preponderance of evidence burden of proof." We disagree.

¶16 Each victim described only those incidents pertaining to her. It is therefore not the case that the testimony of one girl was necessary to establish the occurrence of any incident pertaining to the other girl, although the pattern that emerged from the girls' combined testimony could certainly increase the probability that a jury would be convinced that all of the incidents had occurred. Furthermore, the mere fact that the burden of proof was lower at a preliminary hearing than it would be at trial does not preclude the possibility that the evidence produced there would not also have been sufficient to meet a higher standard.

¶17 We have already held that the girls' subsequent trial testimony, if believed by the jury, was sufficient to establish all of the elements of each count beyond a reasonable doubt. We are similarly convinced that the statements the girls had given to police and testimony they had given at the preliminary hearing were sufficient for the trial court to make its initial determination that a jury would be able to find the preponderance of the evidence standard had been satisfied as to each incident if it believed the girls. Although the trial court did not explicitly state that a jury could find by a preponderance of the evidence that the prior acts had occurred, it may be reasonably inferred that the trial court had reached that

decision based on its comments that the girls had described "extensive sexual activity" in the police reports and preliminary hearing.[3]

¶18 In sum, Otis has not persuaded us that the trial court erroneously exercised its discretion in evaluating the proffered other acts evidence. Since the trial court reasonably concluded that the other acts evidence for each victim would have been admissible at separate trials, the trial court also did not erroneously exercise its discretion in refusing to sever the counts.

Victim's Drug Arrest

¶19 Otis raises related claims that the State's failure to disclose his stepdaughter's drug arrest during trial constituted a due process violation, and that the arrest information was new evidence warranting a new trial. He further asserts that the trial court should at least have held an evidentiary hearing to resolve any disputed facts about Latifah's drug use, her arrest and what the prosecutor knew when before denying these claims.

¶20 In order to obtain a hearing on a postconviction motion, a defendant must allege sufficient material facts to entitle him to the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9 and 36, 274 Wis. 2d 568, 682 N.W.2d 433. We review

[3] It is unclear from Otis's brief whether he is also claiming that he should have had an evidentiary hearing to decide whether the other acts had, in fact, occurred. Since a trial court is not supposed to weigh the credibility of proffered other acts evidence, we are not certain what the purpose of an evidentiary hearing would have been, and Otis has not cited any case in which an evidentiary hearing was required in similar circumstances. In any event, we conclude that Otis waived any claim to an evidentiary hearing on the other acts evidence at issue in the severance analysis by failing to explicitly ask the trial court to hold one. *See* ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence that the trial court understands that it is called upon to make a ruling.").

the sufficiency of a postconviction motion de novo, based on the four corners of the motion. ***Id.***, ¶¶9 and 27. We conclude that the facts alleged in Otis' postconviction motion were insufficient to warrant a hearing on either his due process or newly-discovered-evidence claims because, even if true, they would not entitle him to a new trial.

¶21 Due process requires the prosecution to turn over "evidence favorable to an accused upon request … where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Thus, to establish a ***Brady*** violation, a defendant must show that: (1) the State suppressed evidence within its possession at the time of trial; (2) the evidence was favorable to the defendant; and (3) the evidence was material to a determination of the defendant's guilt or punishment. ***Id.*** at 87. Evidence is material when there is a reasonable probability that its disclosure would have led to a different result in the proceeding. ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991).

¶22 For the purposes of this appeal, we accept Otis' assertions that the prosecutor had at least imputed knowledge of Latifah's arrest and failed to advise the defense. We cannot, however, conclude that the evidence was material because we agree with the State that it would have been largely inadmissible, and even that portion which might have been admitted would not reasonably have led to a different result at trial.

¶23 Otis's briefs appear to mention two potential theories of admissibility at trial—as other acts evidence or as impeachment evidence. Neither Latifah's arrest nor the drug use it might imply would survive even the first step of the ***Sullivan*** other acts analysis we have already discussed above, however,

because the evidence would not relate to a permissible purpose such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2)(a). Therefore, if the evidence were to be admissible at all, it would be under an impeachment theory.

¶24 Otis specifies three ways in which Latifah's arrest could have been used to impeach her credibility if the State had turned over the information during trial. First, he argues that the arrest would give Latifah a motive to cooperate with the prosecution as leverage in reducing the drug charge. The problem with this theory is that Latifah was not arrested until after she testified, and there is nothing in the postconviction materials to suggest that she would or could have known the arrest was imminent. Therefore, we are not persuaded that the arrest would have been relevant to show any pro-prosecution bias during her testimony.

¶25 Second, Otis argues that, since Latifah was charged with mere possession, it could be reasonably inferred that she herself used drugs. He then reasons that drug use during the trial could explain the difficulty that she had recalling details of the alleged assaults.[4] Again, however, Otis is making an unsupported leap of logic. Even if it could be reasonably inferred that Latifah had used drugs at some point in the past or was likely to use the drugs found in her possession in the near future, there was no evidence that she was actually under the influence of drugs at the time she was testifying or at the time of any of the alleged assaults. In short, we are not convinced that the inference of drug use at

[4] Parenthetically, it is not even clear that this particular inference would be helpful to the defense. To suggest that inconsistencies in Latifah's testimony were the result of impaired memory from drug use would seem to undermine the defense position that the inconsistencies were the result of fabrication. In other words, the drug-use theory could help to explain how Latifah could be telling the truth and still be mistaken about details.

some unspecified point in time would have been relevant to Latifah's credibility during trial about whether she had been sexually assaulted. And, even if her potential drug use was marginally relevant, it was reasonable for the trial court to conclude that any potential probative value was substantially outweighed by the danger of unfair prejudice under WIS. STAT. § 904.03.

¶26 Finally, Otis contends that the police reports show that Latifah lied to the police about whether she lived in the apartment where drugs were found, and that this lie goes directly to her character for truthfulness. Under WIS. STAT. § 904.05(2), proof of a character trait such as truthfulness may be shown by "specific instances of the person's conduct" when the character trait is an essential element of a defense. However, under § 906.08(2), aside from criminal convictions, instances of the past conduct of a witness offered to attack the witness's credibility may only be shown through cross-examination, and not through extrinsic evidence.

¶27 We agree with Otis that Latifah's truthfulness, or rather, her lack thereof, was an essential element of the defense in a credibility case such as this. Therefore, assuming Latifah first testified that she was truthful, it would have been permissible for Otis to recall Latifah and ask her whether it was true that she had once lied to the police about where she lived upon being arrested. If she said no, however, the defense would not have been permitted to present any additional evidence on this topic. Therefore, the sum total effect of all the withheld evidence about Latifah's arrest would essentially have boiled down to one additional question or a short series of related questions on cross-examination or rebuttal about whether she had lied to police about her own culpability in a matter entirely unrelated to the abuse allegations.

¶28 We are not persuaded there is any reasonable probability that questioning Latifah about a single lie she told police would have led to a different result in the proceeding. There was a four-day trial in this matter, during which both Latifah and Otis testified, giving the jury ample opportunity to evaluate their demeanor and relative credibility. In addition to Latifah's own account of the abuse and how she came to report it to authorities years after it began, both her mother Yvette and her aunt Moneek testified that Latifah had actually come forward with initial accusations when she was twelve years old, around the time she was sent to Las Vegas to live with her father. Since Yvette plainly took her husband's side in the dispute—testifying that she thought the allegations were made in retaliation for Yvette telling her sister Moneek that her family would need to move out—there was no apparent motive for Yvette to have fabricated testimony that Latifah had first made abuse allegations against Otis when she was twelve. In turn, there was also no apparent reason why Latifah would have fabricated allegations when she was twelve, years before the rental dispute between her aunt and Otis occurred. We therefore conclude that the arrest information was not material, and the State's failure to turn it over during trial did not constitute a ***Brady*** violation.

¶29 We next consider Otis's claim that the arrest information constituted newly discovered evidence. The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453

N.W.2d 186 (Ct. App. 1990). If the new evidence serves only to impeach the credibility of witnesses who testified at trial, it is insufficient to warrant a new trial as a matter of due process, because it does not create a reasonable probability of a different result. *See* ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989). We agree with the State that evidence of Latifah's drug arrest has nothing to do with the sexual assault charges themselves, and goes solely to the impeachment of a witness. As such, the information does not warrant a new trial under the ***Kimpel*** standard.

By the Court.—Judgment and order affirmed.

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