COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP555-CR
2007AP556-CR

Cir. Ct. Nos. 2004CF53
2003CF407

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN J. E. LUCHINSKI,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Shawn J. E. Luchinski appeals from judgments convicting him after a jury trial of three counts of the repeated sexual assault of a

child in violation of WIS. STAT. § 948.025(1) (2003-04).[1] He also appeals from an order denying his motion for postconviction relief. We affirm the judgments and the order.

¶2 Luchinski was convicted of the repeated sexual assault of J.L.L., H.A.L., and S.R.K. J.L.L. was Luchinski's nephew, and was eight or nine years old at the time of the assaults. H.A.L. was the daughter of Luchinski and his live-in girlfriend, Kelly G. S.R.K. was Kelly G.'s daughter, and resided with Luchinski and Kelly G. on alternate weekends. H.A.L. and S.R.K. were between four and six years old at the time of the assaults.

¶3 Luchinski contends that he is entitled to a new trial on the basis of one or all of the following: (1) evidence was withheld by the prosecution in violation of his constitutional and statutory rights; (2) he was denied effective assistance of trial counsel; (3) hearsay evidence was improperly admitted at trial; (4) other acts evidence was improperly admitted at trial; (4) he is entitled to a new trial based on newly discovered evidence; and (5) he is entitled to a new trial in the interest of justice. Luchinski's arguments were addressed at multiple evidentiary hearings, which included testimony from his trial counsel as required by ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). We conclude that the trial court properly rejected all of Luchinski's arguments.[2]

[1] All references to the statutes under which Luchinski was convicted are to the 2003-04 version of the Wisconsin statutes. All other references are to the 2007-08 version of the statutes.

[2] We also commend the trial court for its meticulous and well-reasoned oral decision denying postconviction relief. The thoroughness of the trial court's discussion and analysis was of great assistance in reviewing Luchinski's arguments on appeal.

¶4 Luchinski's arguments about the withholding of evidence and ineffective assistance of counsel are interrelated. The first arguments arise from a statement made by H.A.L. to Michael Nalley, a city of Fond du Lac police officer, indicating that she had seen homemade digital nude photographs of adult and minor family members and friends on a computer in Luchinski's home office. Based on this information, search warrants were executed for the seizure of two computers. One was seized from Luchinski's home, and the other was turned over by Kelly G. The latter computer was retrieved after having been sold to Daniel Ott and Raye Ann Koenigs.

¶5 While Luchinski was in jail awaiting trial, telephone conversations between Luchinski, Kelly G., and the buyers pertaining to the second computer were recorded on audiotapes. Nalley subsequently prepared a report discussing the recorded conversations and a statement by Ott discussing the conversations. Prior to trial, Luchinski's trial counsel knew that the conversations had been recorded, was aware of Nalley's report summarizing the conversations, and had been told by Luchinski that Nalley's summary of the conversations was inaccurate.

¶6 After the two computers were retrieved by the police, they were subjected to a forensic examination. The forensic examination revealed no evidence of child pornography or digital camera nude sexual photos on either computer. It revealed no evidence that the computers had been tampered with or wiped clean. At the postconviction hearing, Luchinski's trial counsel acknowledged that the prosecutor told him before trial that nothing had been found on the computers, but testified that he did not know that a forensic examination had been conducted.

¶7 The State presented no evidence regarding the computers or the taped conversations at trial. However, on appeal, Luchinski contends that he is entitled to a

new trial based on the State's pretrial failure to provide him with the results of the forensic examination of the computers or with a copy of the audiotapes of the telephone conversations recorded in the jail. He contends that the State's failure to provide this material before trial violated his constitutional right to be provided with exculpatory evidence and violated WIS. STAT. § 971.23(1). He also contends that his trial counsel rendered ineffective assistance by failing to pursue these matters prior to trial and failing to present evidence to the jury regarding the forensic examination of the computers and the audiotapes.

¶8 In support of these arguments, Luchinski reasons that the absence of evidence of child pornography and homemade sex photos on the computers, and the lack of evidence that the computers had been tampered with and wiped clean, proved that H.A.L. lied when she described seeing such things, or that Nalley lied when he reported what H.A.L. said. He contends that the computer evidence would thus have cast doubt on the testimony of Nalley or H.A.L., or both. In regard to the recorded jailhouse conversations about the second computer, he contends that the discrepancies between the content of the audiotapes and Nalley's description of the conversations in his report would have shown that Nalley was not a credible witness. He contends that playing the audiotapes for the jury would have demonstrated Nalley's lack of credibility.

¶9 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on the reliability of the proceedings. ***Thiel***, 264 Wis. 2d 571, ¶20.

¶10 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. ***Id.***, ¶24.

¶11 In analyzing an ineffective assistance claim, a court may choose to address either the deficient performance prong or the prejudice prong. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. If the court concludes that the defendant has made an inadequate showing with respect to one component, it need not address the other. ***Id.***

¶12 In denying Luchinski's ineffective assistance of counsel claim, the trial court concluded that he failed to prove he was prejudiced by trial counsel's performance. In reaching this conclusion, it determined that evidence regarding the computer forensic report and the audiotapes would not have been admitted at trial because they constituted inadmissible extrinsic evidence on a collateral matter. We agree.

¶13 With some exceptions that are inapplicable here, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence." WIS. STAT. § 906.08(2). This statute prohibits the use of extrinsic evidence to impeach a witness's credibility on a collateral matter. ***State v. Rognrud***, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990). Extrinsic evidence is evidence admitted other than through examination of the witness whose impeachment is sought. ***State v. Sonnenberg***, 117 Wis. 2d 159, 168, 344 N.W.2d 95 (1984). "A matter is collateral if the fact as to which error is predicated could not be shown in evidence for any purpose independently of the contradiction." ***Rognrud***, 156 Wis. 2d at 787.

¶14 As discussed by the trial court, the computer and audiotape issues raised by Luchinski relate to collateral matters. The issue at trial was whether Luchinski engaged in the repeated sexual assault of J.L.L., H.A.L., and S.R.K. Whether H.A.L. saw child pornography or homemade sex photos on one of Luchinski's home computers was collateral to this issue, as was evidence that the forensic examination revealed no child pornography or homemade sex photos and no evidence that the computers had been wiped clean. Whether Luchinski or Kelly G. badgered or threatened Ott or Koenigs about the computer that had been transferred to them was similarly collateral. The introduction of extrinsic evidence on these collateral issues would have been for the purpose of attacking the credibility of H.A.L. and Nalley. Because WIS. STAT. § 906.08(2) prohibits the use of extrinsic evidence to impeach a witness's credibility on a collateral matter, the computer report and audiotapes of the recorded jail conversations would have been inadmissible.

¶15 An attorney's failure to pursue a meritless motion does not constitute deficient representation. ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Because the forensic computer report and the audiotapes would have been inadmissible at trial, counsel did render deficient performance by failing to pursue these matters.[3] Similarly, since the computer report and audiotapes would have been inadmissible, Luchnski was not prejudiced by his trial counsel's failure to pursue them.

¶16 We also agree with the trial court that Luchinski could not circumvent the limitations of WIS. STAT. § 906.08(2) by claiming that the evidence went to bias rather than credibility. The bias of a witness is not a collateral issue, and extrinsic evidence may be presented to prove that a witness has a motive to testify falsely. ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978). However, not every attack on credibility rises to the level of demonstrating bias. Bias describes the relationship between a party and a witness that might lead the witness, unconsciously or otherwise, to slant his or her testimony in favor of or against the party. ***State v. Long***, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884. Bias may be induced by a party's like, dislike or fear of a party, or by self-interest. ***Id.***

¶17 While Luchinski argued at trial and in the postconviction proceedings that Nalley had an "agenda" to get him convicted, he presented no evidence that Nalley was actually biased or had reason to be biased. Similarly, no

[3] Because the computer report and audiotapes would have been inadmissible, trial counsel's performance cannot be deemed ineffective, despite his concession at the postconviction hearing that he should have pursued presenting additional evidence. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752.

"bias" on the part of H.A.L. was shown. Consequently, Luchinski failed to prove that his trial counsel was ineffective in his handling of the computer report or the audiotapes of the recorded jail conversations.

¶18 For these same reasons, Luchinski's contention that the prosecutor violated his constitutional and statutory rights by failing to disclose the forensic report and audiotapes fails. A prosecutor violates the due process rights of a defendant if he or she fails to disclose evidence favorable to the accused. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. Evidence favorable to the accused encompasses both exculpatory and impeachment evidence. ***Id.*** However, the evidence must also be material. ***Id.***, ¶13. Evidence is material only if there is a reasonable probability that, if the evidence had been disclosed to the defense, the result of the proceeding would have been different. ***Id.***, ¶14. The "reasonable probability" test is the same as the test for ineffective assistance of counsel, and requires a probability sufficient to undermine confidence in the outcome. ***Id.*** The mere possibility that undisclosed information might have helped the defense does not establish materiality. ***Id.***, ¶16.

¶19 Evidence that H.A.L. lied or was mistaken about what she saw on Luchinski's computer, and evidence that Nalley misrepresented what H.A.L. told him she saw or misrepresented the content of Luchinski's taped conversations, was not evidence exculpating Luchinski of the charges that he engaged in the repeated sexual assault of J.L.L., H.A.L., and S.R.K. Moreover, while it implicated credibility, it was not material.

¶20 Undisclosed evidence is not material if it was inadmissible and therefore would not have affected the outcome of the trial. ***State v. Chu***, 2002 WI App 98, ¶36, 253 Wis. 2d 666, 643 N.W.2d 878. As already discussed, evidence

that the forensic examination of two of Luchinski's computers revealed no child pornography, no homemade sex photos, and no tampering or wiping clean, was inadmissible because it was extrinsic evidence on a collateral matter. For the same reasons, extrinsic evidence of discrepancies between the audiotapes and Nalley's report summarizing Luchinski's telephone conversations from the jail was inadmissible. Because the evidence was inadmissible, there is no reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different.

¶21 Luchinski's contention that a statutory violation occurred also fails. The prosecutor was not required to disclose the forensic computer report and audiotapes under WIS. STAT. § 971.23(1)(h) because they were not exculpatory. He was not required to disclose the audiotapes of Luchinski's jail conversations under § 973.23(1)(a) because they were not statements of the defendant concerning the crime. Finally, the prosecutor was not required to disclose the computer report under § 971.23(1)(e) because he did not intend to offer the result of the forensic examination in evidence at trial.

¶22 Luchinski also argues that his trial counsel rendered ineffective assistance by failing to pursue information contained in a police report prepared by Nalley and provided to trial counsel in pretrial discovery (the Nalley report), indicating that H.A.L. and S.R.K. had been involved in inappropriate sexual acts with S.C., a neighbor girl who was seven years old when the complaint involving H.A.L. and S.R.K. was filed. Luchinski further contends that, prior to trial, the prosecutor should have disclosed a November 2003 report by Fond du Lac County Department of Social Services social worker Sharon Burns (the Burns report), indicating that she had interviewed S.C. regarding sexual contact between S.C. and other neighborhood children, and that the contacts involved five other children

close to S.C.'s age, one of whom had been a victim of sexual abuse by an adult who was awaiting trial.[4]

¶23 Luchinski contends that his trial attorney should have pursued the information in the Nalley report, and the prosecutor should have disclosed the Burns report at an earlier date. He contends that the information indicating that H.A.L. and S.R.K. had prior sexual contact with S.C. provided an alternative basis for their sexual knowledge. He also contends that this information was relevant because it reflected the bias of Nalley and Burns.

¶24 Luchinski's arguments fail for multiple reasons. Initially, we note that Nalley's report was based on the information in the Burns report, and the Burns report did not specify that S.C. had sexual contact with H.A.L. or S.R.K. At the postconviction hearing, Luchinksi presented no proof that S.C. admitted having sexual contact with H.A.L. and S.R.K.

¶25 Most importantly, as determined by the trial court, even if the defense could have presented evidence of sexual contact with S.C. to show another source of sexual knowledge by H.A.L. and S.R.K., there was no prejudice from trial counsel's failure to pursue the information in the Nalley report, or the prosecutor's failure to disclose the Burns report earlier. The jury heard abundant other evidence that could have provided an alternative source of sexual knowledge for the victims. The jury heard evidence that H.A.L. had been sexually assaulted by Luchinski's brother, Leslie. It heard testimony that H.A.L. and S.R.K. had repeatedly seen a movie containing a simulated scene of a male performing oral

[4] The Burns report was provided to the defense during the course of the trial.

sex on a female. It heard testimony from Nalley indicating that there was an investigation into children sexually touching each other, and that when S.R.K. was asked which of the children had the worst problem of placing their hands on the privates of other children, S.R.K. listed H.A.L. as the worst, followed by S.C., A.V., and herself. The jury was thus clearly informed that H.A.L. and S.R.K. had other sources of sexual knowledge than Luchinski.

¶26 In considering this issue, it is also noteworthy that Nalley testified that H.A.L. and S.R.K. provided drawings of Luchinski's penis, and described it as getting larger and smaller.[5] This was clearly not information that H.A.L. and S.R.K. would have derived from having sexual contact with another little girl.

¶27 For these reasons, the prosecutor's pretrial failure to disclose the information regarding S.C. in the Burns report, and trial counsel's failure to pursue the information regarding S.C. in the Nalley report, do not undermine our confidence in the outcome of the trial. There is no reasonable probability that the result of the proceeding would have been different had the jury been presented with evidence regarding sexual contact between S.C., H.A.L., and S.R.K.

¶28 Luchinski also argues that he is entitled to a new trial because, prior to trial, the prosecutor failed to provide the defense with information indicating that J.L.L. might have falsely alleged that Luchinski assaulted him because J.L.L. was concerned that he would be charged with having sexual contact with his sister, M.L. In support of this argument, Luchinski relies on postconviction testimony

[5] Luchinski objects to the trial court's reference to the girls' description of the changes in Luchinski's penis, contending that it reveals trial court error since the girls did not so testify at trial. However, Nalley testified to the girls' description. The trial court was clearly entitled to consider that description.

given by Laurie Nichols, a therapist who provided therapy to J.L.L. and M.L. In her testimony, Nichols referred to a note she had made of a November 4, 2003 conversation she had with Nalley regarding J.L.L.'s disclosure to Nalley that he had been sexually assaulted by Luchinski. In the note, Nichols indicated that Nalley described J.L.L. as having made a "dramatic disclosure" after initially "just not disclosing." Nichols' note indicated that in her conversation with Nalley, she asked Nalley whether he knew of sexual contact between J.L.L. and M.L. Her note indicated that Nalley acknowledged that he did know of the contact, but chose not to charge J.L.L.

¶29 Nalley was questioned about this matter in postconviction proceedings. He acknowledged telling Nichols that he was aware of an allegation that J.L.L. had had sexual contact with M.L. He testified that he made this statement based on an assumption that M.L. had alleged sexual contact with J.L.L. because, in an interview in which M.L. was asked who she had sexual contact with, she listed a person named "Joe." Nalley indicated that he assumed, but did not know, that this referred to J.L.L.[6]

¶30 As determined by the trial court, Nichols' testimony regarding her note and conversation with Nalley provides no basis for a new trial. As noted by the trial court, nothing in the record proved that J.L.L. actually sexually assaulted M.L. Most importantly, Nalley's interview of J.L.L. took place before October 1, 2003, when the initial complaint charging Luchinski with the repeated sexual

[6] Postconviction testimony also indicated that Nalley passed the list derived from the interview with M.L. to the social services department, but that social workers did not assume that "Joe" referred to J.L.L. and never investigated an allegation of sexual contact between J.L.L. and M.L.

assault of J.L.L. was filed. Nothing in the postconviction testimony provides a basis to conclude that, at the time of the pre-October 1, 2003 interview with Nalley, J.L.L. knew that anyone had alleged that he had sexual contact with M.L., that J.L.L. was concerned that he would be charged with the sexual assault of M.L., or that anyone had talked with J.L.L. about whether he would be charged with that conduct. As determined by the trial court, the facts of record do not support a hypothesis that J.L.L. told Nalley that Luchinski sexually assaulted him because J.L.L. was afraid that he would be charged with the sexual assault of M.L. Consequently, no basis exists to conclude that, if evidence of the November 2003 conversation between Nalley and Nichols had been presented at trial, the result of the proceeding would have been different.

¶31 Because the evidence does not provide a basis to conclude that J.L.L. was afraid he would be charged with the sexual assault of M.L. and therefore told Nalley that Luchinski sexually assaulted him, lack of pretrial disclosure of information regarding Nalley's November 2003 conversation with Nichols does not undermine confidence in the outcome of the trial. As with Luchinski's arguments regarding the computer report, the audiotapes, and the evidence regarding S.C., this argument provides no basis to conclude that Luchinski was denied his constitutional or statutory right to exculpatory material.

¶32 Luchinski also argues that his convictions were premised upon inadmissible hearsay in violation of his right to confrontation. Specifically, he objects that the trial court improperly allowed Nalley and Burns to testify as to statements H.A.L. and S.R.K. made to them.

¶33 A trial court's decision regarding the admissibility of a hearsay statement involves the exercise of discretion, and its decision will not be reversed

absent an erroneous exercise of discretion. ***State v. Weed***, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485. Whether admission of a hearsay statement violates a defendant's right to confrontation is a question of law that this court reviews de novo. ***Id.***, ¶10.

¶34 H.A.L., who was six at the time of trial, and S.R.K., who was seven at the time of trial, both testified. However, their testimony was confused and contradictory, including many statements indicating that they did not remember or know what Luchinski did to them or what they had told investigators, and statements denying that Luchinski assaulted them in certain ways. The trial court subsequently allowed Nalley and Burns to testify as to statements made by H.A.L. and S.R.K. to them.

¶35 To the extent the statements made by H.A.L. and S.R.K. to Nalley and Burns were inconsistent with their testimony at trial, such statements did not constitute hearsay and were admissible pursuant to WIS. STAT. § 908.01(4)(a)1. Section 908.01(4)(a)1 provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony.

¶36 To the extent that statements made by H.A.L. and S.R.K. which were admitted at trial were not inconsistent with their prior statements to Nalley and Burns, the trial court performed the analysis required by ***State v. Huntington***, 216 Wis. 2d 671, 575 N.W.2d 268 (1998) and ***State v. Sorenson***, 143 Wis. 2d 226, 421 N.W.2d 77 (1988), and held that the statements were properly admitted under the residual hearsay rule provided in WIS. STAT. § 908.03(24). Nothing in

Luchinski's argument on appeal provides a basis to conclude that the trial court erroneously exercised its discretion in its analysis.[7]

¶37 Luchinski's primary argument is that admission of the statements of H.A.L. and S.R.K. violated his right to confrontation under ***Crawford v. Washington***, 541 U.S. 36 (2004). In support of this argument, he relies on the fact that H.A.L. and S.R.K. testified before their statements to Nalley and Burns were admitted.

¶38 Luchinski's confrontation argument fails because H.A.L. and S.R.K. testified at trial and were subject to cross-examination about their statements to Nalley and Burns. *See* ***State v. Nelis***, 2007 WI 58, ¶¶44-46, 300 Wis. 2d 415, 733 N.W.2d 619. It is irrelevant that they testified before Nalley and Burns. *See* ***id.*** Moreover, nothing in the record provides a basis to conclude that H.A.L. and S.R.K. were unavailable for recall after Nalley and Burns testified, further defeating Luchinski's confrontation clause argument. *See* ***id.***, ¶¶47-48.

¶39 Luchinski also argues that the trial court erroneously exercised its discretion by admitting other acts evidence. The other acts evidence involved testimony that, between the ages of thirteen and nineteen, Luchinski engaged in sexual contact with a four-year-old nephew and three nieces, who were approximately nine and ten years old at the time of the assaults.

[7] In fact, Luchinski did not challenge this portion of the trial court's rationale at the postconviction hearings, and does not do so on appeal, except to suggest that the trial court's analysis would have been different if other evidence had not been impermissibly withheld and the newly discovered evidence had been available. Since we are rejecting Luchinski's arguments on these issues in other portions of this decision, no basis exists to consider them in reviewing the trial court's admission of the statements of H.A.L. and S.R.K. under the residual hearsay rule.

¶40 "[E]vidence 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." WIS. STAT. § 904.04(2). However, other acts evidence may be admitted when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

¶41 The admission of other acts evidence must be evaluated under the three-step analysis discussed in ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 576 N.W.2d 30 (1998). The trial court must consider: (1) whether the evidence is offered for an acceptable purpose under WIS. STAT. § 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 issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ***Sullivan***, 216 Wis. 2d at 772-73.

¶42 In assessing relevance, the court must consider whether the other acts evidence relates to a fact or proposition that is of consequence to the action, and whether the evidence has probative value. ***Id.*** at 772. The probative value of other acts evidence depends on the similarity between the charged offense and the other acts. ***State v. Gray***, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999). Similarity is demonstrated by nearness in time, place and circumstance between the charged crime and the other acts. ***State v. Scheidell***, 227 Wis. 2d 285, 305, 595 N.W.2d 661 (1999).

¶43 "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise

causes a jury to base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis. 2d at 789-90. "The inquiry is not whether the other acts evidence is prejudicial but whether it is *unfairly* prejudicial." ***Gray***, 225 Wis. 2d at 64 (emphasis in original).

¶44 A trial court's decision to admit other acts evidence involves the exercise of discretion, and will not be disturbed absent an erroneous exercise of discretion. ***State v. Hammer***, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629. If discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the trial court's determination, we will uphold the trial court's decision. ***Id.*** "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

¶45 Based upon these standards, we conclude that the trial court properly admitted the other acts evidence in this case. The trial court carefully and properly exercised its discretion, concluding that the evidence was offered for the acceptable purposes of proving motive, intent, and the absence of mistake or accident. It concluded that the evidence was probative of Luchinski's motive and intent in touching J.L.L., H.A.L., and S.R.K., and was thus relevant to the issue of whether Luchinski engaged in the charged conduct for the purpose of sexual gratification, an element that the State was required to prove for conviction. *See* WIS. STAT. §§ 948.01(5)(a) and 948.025(1). It concluded that the similarities between the other acts and the charged offenses established the probative value of the other acts evidence, and that its probative value substantially outweighed any danger of unfair prejudice. Consistent with these determinations, it instructed the

jurors at trial that if they found that the other acts occurred, they should consider those acts only in evaluating motive, intent, and the absence of mistake or accident.

¶46 The trial court's reasoning is supported by the facts of record and law. Evidence that Luchinski had previously sexually assaulted a four-year-old nephew and his prepubescent nieces was relevant to whether his motive and intent in touching the young victims in these cases was for the purpose of sexual gratification.[8] In addition, as discussed by the trial court, there were many similarities between the charged crimes and the other acts. The victims all ranged from ages four to ten, they were all relatives of Luchinski or in a quasi-family relationship with him, and all of the assaults occurred at the home of Luchinski, the victims, or other relatives. The nature of the acts were also similar, and involved both boy and girl victims.

¶47 The other acts and charged crimes demonstrated a consistent pattern of directing sexual conduct toward minor children with whom Luchinski shared a familial relationship. The other acts therefore made it more probable that Luchinski engaged in sexual contact with H.A.L., S.R.K., and J.L.L. for the purpose of sexual gratification. *See* ***State v. Opalewski***, 2002 WI App 145, ¶¶17-

[8] Luchinski's reliance on ***State v. McGowan***, 2006 WI App 80, 291 Wis. 2d 212, 715 N.W.2d 631, is misplaced. In that case, this court questioned whether evidence of a prior sexual assault was admissible as evidence of motive or intent "where intent is not at issue." ***Id.***, ¶17. Here, Luchinski was charged with repeated acts of sexual contact, and the jury was instructed that it had to find that he acted with the intent to become sexually aroused or gratified. *See* § 948.01(5)(a). Intent was therefore clearly at issue. Moreover, the other acts in ***McGowan*** involved a single assault by a ten-year-old child on another child, eight years before the alleged repeated assaults by the adult defendant of another child. ***McGowan***, 291 Wis. 2d 212, ¶20. Unlike the present case, a pattern of behavior establishing the similarity of the other acts and the adult charges was not present in ***McGowan.***

18, ¶22, 256 Wis. 2d 110, 647 N.W.2d 331. They were not so remote in time as to be inadmissible. *See* ***id.***, ¶21.

¶48 In upholding the trial court's decision, we reject Luchinski's argument that the other acts evidence was not probative because he was a juvenile when he committed some of those acts.[9] Like the trial court, we conclude that ***State v. Barreau***, 2002 WI App 198, 257 Wis. 2d 203, 651 N.W.2d 12, is distinguishable. In ***Barreau***, this court considered the difference between a thirteen-year-old and a twenty-year-old when determining that evidence of a prior burglary was inadmissible at a later burglary and robbery trial. ***Id.***, ¶38. However, ***Barreau*** does not support a conclusion that the intent to obtain sexual gratification from children changes between a perpetrator's teens and twenties. In addition, as noted by the trial court, the greater latitude rule applies to child sexual assault cases, but not burglary cases.

¶49 Based upon the record, the trial court reasonably concluded that the other acts evidence was relevant and admissible for a proper purpose. Because the trial court also minimized or eliminated the risk of unfair prejudice by giving an appropriate cautionary instruction, *see* ***Hammer***, 236 Wis. 2d 686, ¶36, no basis exists to disturb its decision admitting the evidence.

¶50 Luchinski next contends that he is entitled to a new trial based on newly discovered evidence. A motion for a new trial based on newly discovered evidence is entertained with great caution. ***State v. Terrance J.W.***, 202 Wis. 2d

[9] As noted above, the evidence indicated that Luchinski was between thirteen and nineteen when he committed the other acts. He was between twenty-three and twenty-seven when he committed the charged acts.

496, 500, 550 N.W.2d 445 (Ct. App. 1996). To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) he was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590, *review denied*, 2008 WI 40, 308 Wis. 2d 612, 749 N.W.2d 663 (No. 2007AP933). If the defendant proves these four criteria, then the trial court must determine whether a reasonable probability exists that a different result would be reached at trial. ***Id.***

¶51 When applying the "reasonable probability of a different outcome" criterion, the standard is whether there is a reasonable probability that a jury, looking at both the old and new evidence, would have a reasonable doubt as to the defendant's guilt. ***Id.,*** ¶22. This court reviews the trial court's decision on the motion under an erroneous exercise of discretion standard. ***Id.***, ¶8.

¶52 Luchinski contends that he is entitled to a new trial based on postconviction testimony from Nichols indicating that some children and parents had raised concerns about alleged coercive techniques used by Nalley and the Fond du Lac County Department of Social Services in interviewing children, including conducting overly long interviews, threatening a child with a lie detector test, and yelling. Even assuming arguendo that such evidence would be admissible at a new trial, Luchinski's argument fails.

¶53 In his postconviction testimony, Nalley denied threatening a lie detector test, yelling, or conducting inordinately long interviews with children. Most importantly, Nichols admitted that she had received no information from any source indicating that improper interviewing techniques were used with any of the

three victims in these cases. She further testified that even though she provided therapy to J.L.L., he provided no information indicating that the Fond du Lac police or social services employees engaged in improper interviewing.

¶54 Because no evidence was presented establishing that Nalley, the Fond du Lac police department, or the Fond du Lac County Department of Social Services used coercive interviewing techniques when interviewing the three victims in these two cases, it is not reasonably probable that the evidence proffered by Luchinski would lead to a different result at a new trial. The trial court therefore properly denied Luchinski's motion for a new trial based on newly discovered evidence.

¶55 The final argument raised by Luchinski is that he is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35. A new trial in the interest of justice may be ordered: (1) when the real controversy has not been fully tried; or (2) it is probable that justice has for any reason miscarried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 16, 456 N.W.2d 797 (1990). The real controversy has not been fully tried if the jury has not been given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial. ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436. To grant a new trial under the "justice has miscarried" prong, there must be a substantial probability of a different result on retrial. ***Id.***

¶56 Luchinski premises his demand for a new trial in the interest of justice on the same arguments that underlie his other claims. For the reasons already provided in rejecting those arguments, no basis exists to order a new trial under WIS. STAT. § 752.35.

By the Court.—Judgments and order affirmed.

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