COURT OF APPEALS
DECISION
DATED AND FILED

Mach 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1019-CR **Cir. Ct. No. 00CF3738**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER R. ARMSTRONG,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Alexander R. Armstrong appeals from a judgment of conviction entered after a jury convicted him of two counts of second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(a) (2001-02).[1] He also

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

appeals from the trial court's order denying his postconviction motion. Armstrong claims: (1) his trial counsel was ineffective for failing to file a motion to sever the two counts; (2) the trial court erroneously admitted ***Whitty*** evidence of a prior sexual assault by Armstrong;[2] and (3) the trial court erroneously exercised its sentencing discretion. We conclude that Armstrong's trial counsel was not ineffective and the trial court properly exercised its sentencing discretion. Further, while we agree that the trial court erroneously admitted evidence of the prior sexual assault, the error was harmless. Accordingly, we affirm.

I. BACKGROUND.

¶2 On July 12, 2000, Armstrong showed up at the house of the first victim, N.B., at 2:30 in the morning. N.B. and Armstrong had maintained a sexual relationship in the past. N.B. ended the relationship because she felt that Armstrong lied too much. When Armstrong arrived at her door, she let him in and asked him what he wanted. He stated, "I'm going to mess with you because you haven't called me." She told him that he could stay for a few minutes. Armstrong began performing oral sex on her, but she told him to stop when he started biting her. He became more aggressive, and again, she told him to stop. Armstrong then took her down to the floor and held her there with the weight of his body. He then grabbed her arms and held them above her head while he had penis-to-vagina intercourse with her. The victim freed an arm and punched him, pinched him, and grabbed his pubic hair, but he wouldn't stop. Eventually she freed a leg and

[2] *See* ***Whitty v. State***, 34 Wis. 2d 278, 292-97, 149 N.W.2d 557 (1967) ("[E]vidence of prior crimes is not admitted in evidence for the purpose of proving general character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged.").

kicked him. He finally got off of her. She called the rape crisis center the next day and went to the sexual assault treatment center.

¶3 On July 24, 2000, Armstrong paged the second victim, M.P., on her cellular phone. She had met Armstrong a few days earlier at an eyeglass store and they had spoken once on the phone. When she received his page, she was leaving choir practice. She called him back and hesitantly agreed to meet Armstrong at his house. After she arrived and a few moments had passed, Armstrong asked if she would give him a massage. She declined. Then Armstrong asked if he could give her a massage. She again declined. Finally, Armstrong asked her if she wanted to listen to some music in the bedroom. She followed him to the bedroom where he immediately started to kiss her. M.P. pushed him away and said, "No." Armstrong then began taking off her shirt and kissing her breasts. She tried to push him away, but he became more forceful, pushing her underwear to the side and performing oral sex. When he began biting her, she begged him to stop and told Armstrong that she was scared by his size. Moments later, he forced her onto the bed, got on top of her, and held her hands above her head. He then proceeded to have penis-to-vagina intercourse with the victim while she lay crying. After the incident, M.P. victim called the police and went to the sexual assault treatment center.

¶4 Although he claimed these sexual relations were consensual, Armstrong was charged with two counts of second-degree sexual assault. During the trial, the State presented the testimony of both victims, the police officer who responded to the second victim's call, a nurse from the sexual assault treatment center, and a police detective investigating the sexual assaults. The State also called a victim of a prior sexual assault at the hands of Armstrong that occurred in 1999.

¶5 After a jury convicted Armstrong on both counts, he claimed in his postconviction motion that his second trial counsel, James Toran, was ineffective for failing to renew a severance motion filed by his previous counsel, Curt Rogers.[3] In his postconviction motion, Armstrong also alleged that the trial court erroneously admitted evidence regarding the prior sexual assault, and he claimed that the trial court erroneously exercised its sentencing discretion.[4]

¶6 The trial court disagreed. Concluding that the two charges were properly joined, the trial court reasoned that the charges concerned the same or similar circumstances. The trial court ruled that although the evidence regarding the prior sexual assault was erroneously admitted, it also ruled that any error was harmless. Finally, the trial court also concluded that Armstrong's sentence was not unduly harsh or unreasonable.

II. ANALYSIS.

A. Armstrong's trial counsel was not ineffective.

¶7 The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). To prove deficient performance, a

[3] Attorney Rogers filed a severance motion on September 22, 2000. Attorney Toran took over Armstrong's case on September 25, 2000, but did not pursue the motion. Toran later stated that he did not pursue the motion because he believed that the two second-degree sexual assault charges were properly joined for trial.

[4] Armstrong received concurrent thirty-year sentences on each count, twenty years of initial confinement followed by ten years of extended supervision, to run consecutively. Armstrong also received a thirty-year sentence on a conviction for second-degree sexual assault of a child filed in a separate case that was joined with these charges for sentencing.

defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687.

¶8 However, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Id.*** at 691. In other words, "[t]he 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." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶9 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687.

¶10 Armstrong claims his trial counsel was ineffective for failing to file a motion to sever the two counts pursuant to WIS. STAT. § 971.12(3). WISCONSIN STAT. § 971.12 states, 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 or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.
>
> ….
>
> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

¶11 "Whether crimes were properly joined in a complaint is a question of law. The joinder statute is to be construed broadly in favor of initial joinder." ***State v. Hoffman***, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982) (citation omitted). "[T]wo or more crimes may be joined in one information and 'tried together' if they 'are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.'" ***State v. Hall***, 103 Wis. 2d 125, 138-39, 307 N.W.2d 289 (1981). "Crimes are of the same or similar character if they are 'the same type of offenses occurring over a relatively short period of time, and the evidence as to each count overlaps.'" ***Hoffman***, 106 Wis. 2d at 208.

¶12 Therefore, in order to obtain relief from joinder, Armstrong would have had to prove that the crimes were not of "the same or similar character." ***Hall***, 103 Wis. 2d at 138. In denying his postconviction motion, the trial court concluded that Armstrong's trial counsel was not ineffective because the two

charges were "of the same or similar character." We agree; the charges are identical, the incidents occurred only twelve days apart, and the incidents involved a similar *modus operandi*. Because of the similarities between the incidents and the timing of the incidents, we conclude that both counts against Armstrong were of the same or similar character and, thus, properly joined. *See* ***State v. Locke***, 177 Wis. 2d 590, 502 N.W.2d 891 (Ct. App. 1993) (holding that a defendant was not entitled to severance of two counts of sexual abuse involving an eight-year-old girl from three counts of sexual abuse involving three other minor children occurring approximately two years later); ***State v. Gollon***, 115 Wis. 2d 592, 340 N.W.2d 912 (Ct. App. 1983) (holding that a trial court's refusal to sever two counts of first-degree sexual assault was not an abuse of discretion where the incidents occurred within one day of each other, in same place, and involved similar contact with six-year-old girls). Accordingly, we conclude that his trial counsel was not ineffective for failing to seek severance.

B. The error in admitting evidence of the prior sexual assault was harmless.

¶13 Armstrong contends that the trial court erred in admitting the testimony of the victim of a prior sexual assault by Armstrong. The victim testified that, in the summer of 1999, Armstrong forced her to have sex against her will in a manner that was significantly similar to the facts of the case at hand. Although we agree that the testimony was inadmissible under WIS. STAT. § 904.04(2), we nevertheless conclude that any error was harmless.

¶14 "The issue in this case is whether the trial court erroneously exercised its discretion when it admitted the other acts evidence. We will sustain an evidentiary ruling if the trial court examined the relevant facts, applied the pertinent law, and reached a rationale conclusion." ***State v. Cofield***, 2000 WI App

196, ¶7, 238 Wis. 2d 467, 618 N.W.2d 214. Thus, the trial court's decision to admit or exclude evidence is discretionary and will not be upset on appeal absent an erroneous exercise of discretion. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶15 WISCONSIN STAT. § 904.04(2), which governs the admission of other acts evidence such as that objected to by Armstrong, states:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence 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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶16 Whether this testimony should have been admitted requires the application of a three-part test:

> (1) is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) is the other acts evidence relevant; that is, is the evidence of consequence to the determination of the action, and does it have probative value; and (3) is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.

Cofield, 2000 WI App 196 at ¶9.

¶17 Admitting the evidence of the prior sexual assault, the trial court ruled that the prior victim's testimony was admissible, under WIS. STAT. § 904.04(2), to establish motive, intent and opportunity. We disagree and caution that "[c]onsent is unique to the individual." ***Id.*** at ¶10 (citations omitted). "The fact that one woman was raped ... has no tendency to prove that another woman did not consent." ***Id.*** (citations omitted).

¶18 However, we also conclude that any error in admitting the testimony was harmless. WISCONSIN STAT. § 805.18(2) provides:

> **Mistakes and omissions; harmless error.**
>
> ….
>
> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of .... improper admission of evidence .... unless .... it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

If a trial court has improperly admitted evidence, the harmless error statute "prohibits the court from reversing unless an examination of the entire proceeding reveals that the admission of the evidence has affected the substantial rights of the party seeking reversal." ***State v. Armstrong***, 223 Wis. 2d 331, 368, 588 N.W.2d 606 (1999) (citation omitted). "Under this test, we will reverse only where there is a reasonable possibility that the error contributed to the guilty verdict." ***State v. Doerr***, 229 Wis. 2d 616, 626, 599 N.W.2d 897 (Ct. App. 1999). "The test of harmless error is whether the appellate court in its independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt." ***State v. Givens***, 217 Wis. 2d 180, 193, 580 N.W.2d 340 (Ct. App. 1998).

¶19 In the instant case, the error was harmless for several reasons. First, very little time was spent questioning this witness in comparison with the entire length of the trial. Second, the record reflects that the two victim-witnesses gave very strong testimony detailing the issue of consent and the use of force by Armstrong to overpower them and force penis-to-vagina intercourse. Third, and finally, medical records and testimony corroborated the victim-witnesses' testimony. Thus, we conclude that there was sufficient evidence, other than and

uninfluenced by the inadmissible evidence, to convict the Armstrong beyond a reasonable doubt.

C. The trial court properly exercised its sentencing discretion.

¶20 Armstrong next claims that the trial court erroneously exercised its sentencing discretion. Specifically, Armstrong argues that the trial court "based his sentence on improper considerations[,] erred in not considering the State's [sentencing] recommendation[,] [erred in] not giving Mr. Armstrong credit for accepting some responsibility[, and] erred in failing to consider the nature of the offenses." We disagree.

¶21 Sentencing is left to the discretion of the trial court, and our review is limited to determining whether the trial court erroneously exercised that discretion. *See* ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). There is a strong public policy against interfering with the sentencing discretion of the trial court. ***Id.*** Therefore, the burden is on the defendant to show some unreasonable or unjustified basis in the record for the sentence imposed. *See* ***id.*** at 622-23.

¶22 The trial court should consider three primary factors when sentencing: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for public protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The trial court may also properly consider the following factors, *inter alia:* the defendant's past criminal offenses, any history of undesirable behavior patterns, the defendant's need for rehabilitative control, the defendant's age and educational background, the results of a presentence investigation, and the right of the public. *See* ***Harris***, 119 Wis.2d at 623-24.

¶23 In sentencing Armstrong, the trial court properly applied these factors:

> [B]ecause of the horrific acts that you imposed on – on these women. That's the reason, or the reasons, why you are going to prison, the betrayal of their trust….
>
> ….
>
> When the Court … sentences you, sir, the Court takes into consideration the gravity of the offense, your character, [and] the risk that you pose to the community.
>
> The Court doesn't approach a sentencing with the inflexibility that bespeaks a made-up mind, and the Court always tailors a sentence that fits the particular circumstances of the case and the individual characteristics of the person….
>
> ….
>
> The Court looks at any past history of undesirable patterns. [T]he Presentence Reports are certainly replete with those histories regarding your age, educational background, employment record, [ ] your social traits, [and] your personality….
>
> The Court will make the Presentence Reports part of the sentencing records.
>
> ….
>
> Here's what the Presentence Reporter writes. Both of the victims have been deeply traumatized by Mr. Armstrong's actions. They are in counseling. Their offenses are surprisingly similar in nature to each other, as well as the Defendant's probation offense. While Mr. Armstrong may attempt to explain this as a – merely a coincidence, this agent finds it evidence of a pattern of extremely deviant behavior. Then it goes on to say that you were on probation at the time [ ] you committed these offenses….
>
> It goes on to say the most significant and troubling factors in regards to Mr. Armstrong is his chronic and unresolved sexual deviancy issues. There's no doubt in this agent's mind that Mr. Armstrong is a sexual predator….

> During the Defendant's conviction for three sexual assault offenses he tends to maintain a complete unshakeable denial of any – any wrongdoing or deviance. He has minimized his actions in his previous sexual conviction. He's demonstrated an ability to easily, consistently blame the victims for his involvement in sexual deviant offenses.
>
> Due to his denial, as well as his failure to take any responsibility for his involvement in these offenses, [ ] he poses a grave and significant risk to the community.
>
> ….
>
> [O]n the two counts of second[-]degree sexual assault of both of those young ladies, the Court is going to impose a maximum sentence of 30 years on each count, 20 years of confinement on each count, 10 years extended supervision on each count. Um, the Court will run that concurrent to each other.
>
> As to the other case and the other count … the Court's going to impose, ah, 30 years on … that count, 10 years[']confinement, 20 years['] extended supervision, and that's consecutive to anything else the Defendant is going to serve.

¶24 The trial court properly weighed the sentencing factors and Armstrong has failed to otherwise establish any unreasonable or unjustified basis in the record for the sentence imposed. Accordingly, we affirm both the judgment and the trial court's denial of his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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