COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 02-2738-CR

Cir. Ct. No. 02-CF-01

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DARIN C. ANDERSON,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Taylor County: PATRICK BRADY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. The State of Wisconsin appeals orders dismissing charges and excluding evidence regarding its case against Darin Anderson. The State argues the child enticement charges were erroneously dismissed because they were transactionally related to the other felonies for which Anderson was

bound over for trial. We agree and reverse this order. The State also argues that the court erroneously excluded other acts evidence because the acts established a common scheme or plan. We disagree and affirm this order.

BACKGROUND

¶2 The criminal complaint charged Anderson with two counts each of child enticement, sexual assault of a student by school staff, exposing genitals, and causing a child to view sexual activity. Anderson is a teacher at Rib Lake High School, and the charges in this case arise from his contact with two students, Noah and Danny.

¶3 At the preliminary hearing, Noah testified that he became friends with Anderson during his junior year in high school, and that he saw Anderson socially two to three times per week. In November 2001, Noah and Danny stayed overnight at Anderson's home.

¶4 Noah had no sleepwear with him so Anderson said he would lend Noah something to wear. They went into Anderson's bedroom, and Anderson pushed Noah onto the bed. Anderson laid next to Noah and partially on top of him. Anderson tried to kiss Noah, but Noah stated he thought Anderson was joking. Anderson also pointed out some pornographic videotapes and showed Noah what he called "motion lotion."

¶5 The boys then went into the guest room to sleep. Anderson invited them into his bedroom so they could talk. Anderson said if they would not go into his bedroom, he would stay in the guest room. The boys decided to go to Anderson's bedroom because the bed was bigger.

¶6 Danny eventually left the bedroom. Noah stated that while still in bed with Anderson, Anderson reached under Noah's clothing and touched his buttocks. Noah left and went back to the guest room. Anderson later went into the guest room where he stood naked and masturbated next to the bed. He asked Noah to perform various sex acts, which Noah refused. Anderson then got into the bed and again put his hand under Noah's clothing and touched his buttocks. He again asked Noah if he wanted to participate in sex acts. Anderson left the guest room, after which Danny came into the room and told Noah that Anderson had tried to touch him.

¶7 Danny also testified at the preliminary hearing. He said that when they were in Anderson's bed, Anderson rolled over and put his hands under Danny's clothing and touched Danny's genitals. Danny went into the living room and laid down on the floor until he fell asleep. He awoke to find Anderson naked, attempting to put his hand down Danny's boxer shorts and masturbating. Anderson asked Danny to perform sex acts, but Danny refused and went back to the guest room.

¶8 The court found there was probable cause to believe Anderson committed a felony and bound him over for trial. The State filed an information containing the same charges as the complaint.

¶9 After a judicial substitution, Anderson moved to dismiss the child enticement charges, arguing that the testimony at the preliminary hearing did not show that he caused the boys to go into a room with the intent to expose a sex organ. Anderson argued that the boys were never forced to go anywhere in the house. The State argued that no force was necessary but that Anderson only had to motivate the boys to do something they would otherwise not do. The trial court

dismissed the child enticement charges, finding that the State could not satisfy the causation element.

¶10 The State also filed a series of motions seeking admission of other acts evidence. Three of the acts were sexual assaults similar to incidents charged here. The trial court granted the motion as to one other act only. The State appeals both this order and the dismissal of the child enticement charges.

DISCUSSION

A. Child Enticement Charges

¶11 The State argues the court erred by dismissing the child enticement charges because they were transactionally related to the other felonies alleged and for which Anderson was bound over for trial. We agree.

¶12 The purpose of a preliminary hearing is to determine whether there is probable cause to believe that a felony has been committed by the defendant. *See* WIS. STAT. §§ 970.03(1).[1] It is not a full evidentiary hearing but rather is intended to be a summary hearing where the magistrate considers if the State has presented sufficient evidence establishing a reasonable probability that the defendant committed a felony. *See* ***Cranmore v. State***, 85 Wis. 2d 722, 734-35, 271 N.W.2d 402 (Ct. App. 1978).

¶13 However, in a preliminary hearing, the State is not required to establish probable cause for each felony charged. ***State v. Williams***, 198 Wis. 2d

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

516, 536, 544 N.W.2d 406 (1996). When counts are transactionally related, the purpose of the preliminary hearing is to determine whether there is probable cause to believe the defendant has committed a felony. ***Id.*** "Each of the particular felonies charged need not be proved." ***Id.*** Consequently, the State may include any count in an information that is transactionally related to a count for which the defendant is bound over. ***Id.*** at 536-37.

¶14 Here, the trial court found there was probable cause to believe that Anderson had committed a felony. Anderson does not challenge that finding. The State then filed an information. On appeal, the State contends all the charges in the information are transactionally related. Anderson does not disagree. The State therefore concludes the trial court erred by dismissing the enticement charges. Anderson nevertheless contends that after arraignment, a trial court may dismiss charges for which there was no proof at the preliminary hearing. Anderson cites no authority for this proposition. In fact, his argument stands ***Williams*** on its head. The whole point of ***Williams*** is that proof need not be offered at the preliminary hearing for every single felony. This case presents a classic application of the ***Williams*** principles. Therefore, the trial court erred by dismissing the enticement charges on the grounds that the proof at the preliminary hearing did not support the charges.

¶15 Apparently the basis for the trial court's dismissal was its interpretation of the enticement charge's cause element. Because this issue will likely arise again, we will briefly address the element. This issue involves statutory interpretation, which is a question of law we review independently. ***State v. Isaac J.R.***, 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct . App. 1998).

¶16 In relevant part, WIS. STAT. § 948.07 states:

> Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony:
>
> ….
>
> (3) Exposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10.

¶17 Anderson argued that "at no time were the two alleged victims forced to go into any room," and "there was no forcing or causing by the defendant." The court made a statement effectively adopting Anderson's implied argument that the cause element required the defendant to overcome by use of force that which the child would not otherwise do.

¶18 However, the statute does not require force to show causation. For example, in ***State v. Gomez***, 179 Wis. 2d 400, 405, 507 N.W.2d 378 (Ct. App. 1993), we upheld a conviction for child enticement under an earlier version of the statute where a stepfather told his stepdaughter to go to her room. Similarly, we upheld a child enticement conviction in ***State v. Parr***, 182 Wis. 2d 349, 356, 513 N.W.2d 647 (Ct. App. 1994), where the defendant requested the victim to get into the shower with him purportedly to assist the defendant. In neither of these cases was there any force, yet the child enticement convictions were upheld.

¶19 Additionally, the notes to the pattern jury instruction further show that force is not necessary. *See* WIS JI—CRIMINAL 2134 n.3. Note three discusses a change in 1987 of the wording of the child enticement statute from "persuades or entices" to "causing or attempting to cause." The note states that the legislature's intent was to "eliminate[] as an element of the crime the state of mind of the child being enticed." ***Id.*** To require proof of force would require the jury to look into

the mental state of the victim to determine that the victim's will was overborne, which is contrary to the statute's intent. A charge of child enticement, then, cannot be dismissed simply based on the absence of force.

B. Other Acts Evidence

¶20 The State argues the trial court erred by excluding evidence that Anderson sexually assaulted other students under similar circumstances. The State maintains the evidence was offered to show a plan or scheme and should therefore be admissible. Although the State presented numerous examples of other acts, it only appeals the court's decision regarding three incidents.

¶21 The first incident was in September or October 1994. A former student, who was not a minor, was at Anderson's home. The student became intoxicated so Anderson said he could use the guest room. During the night, Anderson went into the guest room and laid naked on top of the student. The student objected, and when Anderson left he stated he was in the wrong room.

¶22 The second incident occurred in May 1997, when Anderson had sexual contact with a minor. Anderson invited him to watch pornographic videotapes but the minor declined. The minor said that because he was intoxicated he slept on Anderson's couch that night. Anderson invited him to sleep with him in Anderson's bedroom because he was lonely and wanted to perform a sex act on him.

¶23 The third incident occurred in 1997 or 1998. Anderson invited a minor student to spend the night at his home. Anderson suggested the student sleep in Anderson's bedroom. The student awoke to find Anderson fondling his genital area.

¶24 The trial court determined that all three of these incidents were relevant to motive and intent, which are acceptable purposes. However, because of the risk of unfair prejudice the court only allowed the State to introduce one of the incidents, which the State could elect. The State filed a motion for reconsideration arguing the repetition increases the probative value relative to the prejudicial effect. The court denied the motion.

¶25 The admission or exclusion of evidence is committed to the sound discretion of the trial court. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A reviewing court will sustain a discretionary ruling if the trial court examined the relevant facts, applied the proper standard of law and, using a rational process, reached a conclusion a reasonable judge could reach. ***Id.*** at 780-81. In assessing the admissibility of other acts evidence, the trial court must apply the three-step analytical framework set forth in ***Sullivan***.

¶26 First, the trial court must determine whether the evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2) to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. ***Sullivan***, 216 Wis. 2d at 772. Second, the trial court must determine whether the evidence is relevant. In assessing relevance, the court must first determine whether the evidence "relates to a fact or proposition that is of consequence to the determination of the action," and second, determine whether the evidence has probative value such that it tends to make the consequential fact or proposition more probable or less probable than it would be without the evidence. ***Id.*** Finally, the trial court must determine whether the probative value of the other acts 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 preparation of cumulative evidence. ***Id.*** at 772-73.

¶27 The trial court employed the proper analysis. It determined that the three acts satisfied the first two requirements: they were offered for an acceptable purpose and were relevant. However, the court was concerned with the prejudicial effect of admitting all three scenarios. The court stated that "to offer three prior acts would–I would be concerned about the likelihood of inflaming the jury emotions or improperly influencing the jury." The court was also of the opinion that a cautionary instruction would not be sufficient to reduce the danger of prejudice. We see nothing in the court's discretionary decision that would warrant its reversal. It examined the relevant facts, applied the proper standard of law, and reached a reasonable conclusion.

¶28 The State also argues for reversal because the trial court's prejudice analysis should be different with reinstatement of the child enticement charges. Indeed, the trial court's analysis may be different. However, that is a discretionary decision for the trial court, not this court. The State may address that argument in a motion to the trial court to reconsider its earlier ruling.

By the Court.—Orders affirmed in part; reversed in part, and cause remanded with directions.

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