COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3107-CR **Cir. Ct. No. 2008CF666**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN A. MEENEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Jonathan Meenen appeals a judgment of conviction for first-degree sexual assault of a child. Meenen argues the circuit court erroneously admitted other acts evidence. We disagree and affirm.

BACKGROUND

¶2 Kerri F. reported on June 14, 2008 that her five-year-old daughter Hannah F. had been sexually abused. Shortly thereafter, a specially-trained social worker interviewed Hannah. During the interview, Hannah explained she was home sitting on the couch watching television with Meenen when he "made" her lick his "private." Hannah did not indicate how he "made" her do so. She stated she licked it with her tongue on his skin and described it as round, pointing, and coming out of a hole in his pants. Hannah said her mother was shopping, but her brothers and sister were home at the time. A video recording of the interview was played at trial.

¶3 At trial, Hannah repeated her allegation. On cross-examination, Hannah admitted she wanted to go shopping with her mother that day and got really mad when told she could not. She testified that while her mother was gone everyone was watching a movie in the living room and that she was never alone with Meenen while watching the movie. However, she also testified she was alone with Meenen in the middle of the movie while the other kids went next door to her aunt's house, and that was when she licked his penis. Hannah was unable to articulate how Meenen "made" her lick his penis. When her mother returned home, Hannah told her never to go shopping without her again.

¶4 Meenen also testified at trial. He stated he was twenty years old when he moved in with his cousin, Kerri, on approximately June 9, 2008, while he looked for a better job. He testified that on June 14 when Kerri indicated she was going shopping without Hannah, Hannah became very upset, stomped about the house, and told Kerri she hated her. While Kerri was away, the kids watched a movie in the living room. Meenen testified there was never a time when all the

children except Hannah left the room. However, he stated that during the movie he left to go to the bathroom. He closed the door, but Hannah came in saying she needed to use the bathroom. Meenen stated she might have seen his groin area at that time. Meenen testified he was never alone with Hannah in the living room while Kerri was away, never intentionally showed his penis to Hannah, and never asked or forced her to lick it.

¶5 Based on a pretrial ruling that other acts evidence was admissible, the parties entered into a stipulation. Accordingly, the court informed the jury: "On October 21, 2003, Jonathan A. Meenen, then age [fifteen], was found delinquent in Milwaukee County juvenile court of sexual contact with an eight-year-old female. The incident occurred on March 16, 2003. The Court found that Mr. Meenen rubbed and licked the vaginal area ... of the eight-year-old female."

¶6 The jury found Meenen guilty. He now appeals, arguing the circuit court erroneously admitted evidence of the prior child sexual assault.

DISCUSSION

¶7 The admissibility of other acts evidence is governed by WIS. STAT. § 904.04(2),[1] which provides:

> [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. 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.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

When determining the admissibility of proffered other acts evidence, a circuit court must address three questions: (1) whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2); (2) whether the other acts evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or delay. ***State v. Davidson***, 2000 WI 91, ¶35, 236 Wis. 2d 537, 613 N.W.2d 606 (citing ***State v. Sullivan***, 216 Wis. 2d 768, 771, 576 N.W.2d 30 (1998)).

¶8 In child sexual assault cases, the entire three-step ***Sullivan*** analysis is subject to the greater latitude rule. ***Id.***, ¶51. The greater latitude rule is a "long-standing principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***Id.***, ¶36 (quoting ***State v. Plymesser***, 172 Wis. 2d 583, 597-98, 493 N.W.2d 367 (1992)). Although the greater latitude rule "permits more liberal admission of other crimes evidence, such evidence is not automatically admissible." ***Id.***, ¶52.

¶9 A circuit court's admission of other acts evidence is reviewed for the erroneous exercise of discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold the circuit court's determination if it "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Id.*** If a court fails to adequately articulate its reasoning, we "independently ... review the record to determine whether it provides an appropriate basis for the circuit court's decision." ***Id.***

¶10 Here, the State concedes that the circuit court failed to adequately articulate its reasoning. Therefore, we will independently examine the record and determine whether it reasonably supports admission of the evidence.

¶11 Under the first prong of the ***Sullivan*** analysis, the State argues the other acts evidence was admissible for four acceptable purposes:

> To corroborate [Hannah]'s testimony and to rebut Meenen's defense that [she] lied because she was angry at her mother for leaving her home ... instead of taking her shopping.
>
> To establish the absence of mistake or accident and to rebut Meenen's defense that [Hannah] walked in on him in the bathroom and may have accidentally seen his penis.
>
> To establish Meenen's motive.
>
> To rebut Meenen's defense that he was never alone with [Hannah].

We agree the evidence was properly offered under WIS. STAT. § 904.04(2) to demonstrate Meenen's motive.[2] The motive was that he was sexually attracted to, and desired sexual gratification from, prepubescent girls.

¶12 Next, under the second prong of the ***Sullivan*** analysis, we conclude the other acts evidence was relevant. Other acts evidence is relevant if two criteria are satisfied. First, the evidence must relate to a fact or proposition that is of consequence to the determination of the action. ***Sullivan***, 216 Wis. 2d at 772 (citing WIS. STAT. § 904.01). Second, the evidence must also have probative value, that is, it must have a tendency to make the consequential fact or

[2] Because other acts evidence need only be admissible for a single permissible purpose, we need not address the State's other rationales. *See* ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832.

proposition more probable or less probable than it would be without the evidence. ***Id.***

¶13 Meenen's motive to seek oral sex from Hannah is of consequence to the determination of the action. Sexual attraction to, and the desire for sexual gratification from, a five-year-old girl is abnormal. Thus, jurors might be unwilling to believe that such an attraction and desire exist in the absence of any evidence to that effect. Indeed, our supreme court has recognized:

> To a person of normal, social and moral sensibility, the idea of the sexual exploitation of the young is so repulsive that it's almost impossible to believe that none but the most depraved and degenerate would commit such an act. The average juror could well find it incomprehensible that one who stands before the court on trial could commit such an act.

State v. Friedrich, 135 Wis. 2d 1, 27-28, 398 N.W.2d 763 (1987).

¶14 We reject Meenen's argument that motive was an improper reason for admitting the other acts evidence because sexual gratification was not an element of the crime. Motive is certainly relevant when it is an element of the charged crime. *See* ***Friedrich***, 135 Wis. 2d at 22; ***Davidson***, 236 Wis. 2d 537, ¶35. But that is not the extent of motive's relevance. "Motive is related to [the] purpose for committing the crime," and relevant to "'the doing of the criminal act.'" ***Friedrich***, 135 Wis. 2d at 22-23 (citing ***State v. Fishnick***, 127 Wis. 2d 247, 260-61, 378 N.W.2d 272 (1985) (quoting McCormick, *Evidence*, 559, § 190 (Hornbook series, 3rd ed. 1984)). Because here Meenen denied that the act occurred, motive was relevant. Furthermore, Meenen acknowledges that "[o]ther crimes evidence may be admitted to establish motive for the charged offense if there is a relationship between the other acts and the charged offense ... *or* if there is a purpose element to the charged crime." ***State v. Cofield***, 2000 WI App 196,

¶12, 238 Wis. 2d 467, 618 N.W.2d 214 (emphasis added). Meenen merely asserts, however, that there was no connection between the incidents, without further discussion.

¶15 The second component of relevance, probative value, is also satisfied here. That is, the other acts evidence tends to make it more likely that Meenen had motive to sexually assault Hannah. Probative value is typically demonstrated by a closeness of time and circumstances. *See* ***Davidson***, 236 Wis. 2d 537, ¶75; ***State v. Gray***, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999) ("The measure of probative value in assessing relevance is the similarity between the charged offense and the other act."). Meenen assaulted the eight-year-old girl approximately five years prior to the alleged assault of Hannah. This is a relatively short period of time, thus increasing the probative value of the evidence. Additionally, both victims were girls and were close in age, with their birthdates less than three years apart. Meenen was not close in age to either victim. Even more significant, both girls were very young and, consequently, prepubescent. The assaults were also similar, as both involved oral sex. Further, Meenen's delinquency adjudication for the prior act rendered the evidence highly reliable. *See* ***Davidson***, 236 Wis. 2d 537, ¶77 (conviction gave other acts evidence a "high degree of reliability" that "increased its probative value"). In light of these considerations, the other acts evidence was highly probative of Meenen's attraction to, and desire for sexual gratification from, Hannah.

¶16 Finally, under the third prong of the ***Sullivan*** analysis, we conclude the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice, confusion, or delay. While the State had the burden to demonstrate the first two prongs, the burden switches to Meenen on the final prong. *See* ***State v. Payano***, 2009 WI 86, ¶¶63, 68 n.14, 80, 320 Wis. 2d 348, 768

N.W.2d 832. Because Meenen argues only that unfair prejudice would result, we do not address the other factors.

¶17 Unfair prejudice can result if 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. Meenen argues there is a real danger that the jury could use the other acts evidence to conclude that he was a bad man and that if he did it once he probably did it this time. This is undoubtedly true, as it is in most cases involving other acts evidence, particularly in those involving prior sexual assaults of children. However, that danger must be weighed against the evidence's probative value. We have already determined the evidence was highly probative of Meenen's motive and, ultimately, the occurrence of the disputed assault.

¶18 Meenen also argues the danger of unfair prejudice was increased because credibility was the primary issue in the case, observing that there were no witnesses or physical evidence. It is precisely these factors, however, that highlight both the evidence's probative value and the propriety of applying the greater latitude rule. Our supreme court has recognized that "[b]ecause of immaturity, fear and embarrassment, sexually abused children find it difficult to testify" and that "the defense may raise the possibility of fantasy, unreliability, or vindictiveness." ***Friedrich***, 135 Wis. 2d at 30; ***Fishnick***, 127 Wis. 2d at 257 n.4. Indeed, Hannah had difficulty articulating how Meenen "made" her do the act and how she came to be alone with him, and Meenen argued the allegation resulted from Hannah's anger at being unable to go shopping. Thus, it is only fair that the State be allowed to demonstrate Meenen had motive to sexually assault Hannah.

That motive made the State's case much stronger, independent of any improper considerations. The motive made the assault more conceivable and, therefore, made the allegation more believable.

¶19 Furthermore, the potential for unfair prejudice was reduced by the use of both a stipulation and a limiting instruction to the jury informing them of the acceptable and unacceptable uses of the other acts evidence in their deliberations. *See* ***Davidson***, 236 Wis. 2d 537, ¶78. The stipulation reduced the quantity of facts concerning the prior assault and eliminated the potential that the prior victim would testify. For example, the circuit court observed that Meenen had assaulted the prior victim multiple times before he was caught, that Meenen had also attempted sexual intercourse and to have the victim give him oral sex, and that in the final assault she felt as if Meenen was trying to kill her.

¶20 Therefore, under the three-step ***Sullivan*** analysis, and consistent with the greater latitude rule, the trial court's decision to admit evidence of Meenen's prior child sexual assault adjudication did not constitute an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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