COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3168-CR **Cir. Ct. No. 00-CF-415**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT P. HINCHEY,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed and cause remanded with directions*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. A jury convicted Robert P. Hinchey of two counts of first-degree sexual assault of a child and one count of exposing a child to harmful materials. On appeal, Hinchey argues that the circuit court erroneously

admitted evidence of previous child sexual assaults and erroneously declined to accept his proposed ***Wallerman***[1] stipulation which would have eliminated the need for this other acts evidence. Hinchey also challenges the trial testimony of the lead investigator, whom Hinchey claims improperly vouched for the victim's truthfulness. Hinchey also contends that the prosecutor's opening statement made improper reference to the other acts evidence. We are not persuaded by any of these arguments, and we affirm. However, because the judgments of conviction do not accurately recite the convictions, we remand to the circuit court for the entry of amended judgments of conviction.

¶2 The amended information charged Hinchey with two counts of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1) (2001-02).[2] The child was six years old at the time of the first sexual contact in 1991 and eleven years old at the time of the second sexual contact in 1996. The information also alleged that Hinchey exhibited harmful material to the same child in 1997 when she was twelve years old contrary to WIS. STAT. § 948.11(2)(a) (1997-98).[3]

¶3 Prior to trial, the State moved to admit other acts evidence in the form of Hinchey's 1978 conviction for second-degree sexual assault of a child (he fondled four young girls aged five to seven in 1977), evidence of 1991 sexual

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[1] ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), *overruled on other grounds by* ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

[2] Although the charges arose in 1991 and 1996, we cite to the 2001-02 version of the statute for ease of reference. The 1991-92 and 1995-96 versions of the relevant portions of the statute are identical to the 2001-02 version. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] We cite to the 1997-98 version of the statute because the felony classification was subsequently changed.

contact with a three-year-old girl, and evidence of 1994 sexual contact and digital penetration involving a five-year-old girl. The State argued that the evidence was relevant to Hinchey's motive and intent to have sexual contact with young girls for purposes of sexual gratification. *See* WIS. STAT. §§ 948.02(1) (sexual contact with child is unlawful) and 948.01(5)(a) (sexual contact defined as intentional contact for the purpose of sexually gratifying or arousing the defendant). The State also argued that the evidence was relevant to plan.

¶4 Hinchey opposed the State's motion on the grounds that the other acts evidence was not relevant to motive, plan or intent. Hinchey contended that the need for other acts evidence would be obviated by his proposed ***Wallerman*** stipulation relating to the intentional contact for purposes of sexual gratification element of the sexual assault charges. Hinchey offered to stipulate that "if the jury finds that the acts occurred under the first element of WIS JI—CRIMINAL 2101A [sexual contact by intentional touching], it is stipulated that such actions were for the purpose of sexual gratification and/or humiliation under the second element of WIS JI—CRIMINAL 2101A [defendant acted with intent to become sexually gratified or to humiliate the victim]." Hinchey also indicated he would not contest the age requirement of the statute.

¶5 The State objected to the proposed ***Wallerman*** stipulation because the stipulation was insufficient to concede the intent element of the sexual assault offense.

¶6 The circuit court determined that the evidence was offered for the permissible purposes of motive, intent and plan, particularly in light of the similarity between the prior acts and the charged offenses. The evidence was relevant because of these similarities, and while prejudicial, not unduly so. The

court admitted the other acts evidence. The court also rejected the ***Wallerman*** stipulation.

¶7 We first address the circuit court's decision to admit the other acts evidence. We will affirm the circuit court's decision to admit evidence if the court properly exercised its discretion. ***State v. Webster***, 156 Wis. 2d 510, 514, 458 N.W.2d 373 (Ct. App. 1990). In exercising its discretion, the circuit court must apply accepted legal standards to the facts of record and, demonstrating a rational process, it must reach a reasonable conclusion. ***Id.*** at 515.

¶8 WISCONSIN STAT. § 904.04(2) excludes evidence of other crimes or acts when such evidence is offered "to prove the character of a person in order to show that the person acted in conformity therewith." ***State v. Shillcutt***, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984). However, the statute does not bar evidence which is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Sec. 904.04(2). A circuit court considering whether to admit other acts evidence must consider whether the evidence is offered for an acceptable purpose under § 904.04(2), whether the evidence is relevant and whether the probative value of the other acts evidence is outweighed by the danger of unfair prejudice. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Where the underlying case involves allegations of child sexual assault, courts may permit a "greater latitude of proof as to other like occurrences" when considering each prong of the ***Sullivan*** test. ***State v. Veach***, 2002 WI 110, ¶¶51, 53, 255 Wis. 2d 390, 648 N.W.2d 447.

¶9 On appeal, Hinchey argues that the State did not establish that the evidence was germane to a purpose specified in WIS. STAT. § 904.04(2) or that the

evidence was relevant. Hinchey also draws distinctions between the details of the other acts and the charged crimes and argues that the former incidents were too remote from the charged incidents.

¶10 We disagree with Hinchey. The other acts evidence involved Hinchey fondling the genital areas of young girls in situations that otherwise seemed benign: playing in the water at a beach, babysitting the victim or otherwise visiting with the victim. Two of the other acts involved family members, as do the allegations in this case. One of the charges in this case occurred when the victim was six years old; the other acts occurred when those victims were six years old or younger. In all of the earlier instances, Hinchey assaulted vulnerable children when the opportunity presented itself. There is no general rule governing "[t]he required degree of similarity between the other act and the charged offense …." ***State v. Opalewski***, 2002 WI App 145, ¶16, 256 Wis. 2d 110, 647 N.W.2d 331, *review denied*, 2002 WI 111, 256 Wis. 2d 64, 650 N.W.2d 841 (Wis. July 26, 2002) (No. 01-1864-CR). The other acts were relevant to whether the sexual contact in this case was intentional and for a motive of sexual gratification. *See* ***id.***, ¶18. The evidence was also relevant to Hinchey's opportunity to sexually assault young girls.

¶11 The other acts were not too remote in time. Considerations of "remoteness in time 'must be balanced against the uniqueness of the prior act of which evidence is offered.'" ***Id.***, ¶20. Additionally, a court is to be mindful of the greater latitude applied to each step of the ***Sullivan*** other acts analysis in child sexual assault cases. ***Veach***, 255 Wis. 2d 390, ¶53. The other acts from 1991 and 1994 occurred in reasonable proximity to the charged assaults in this case, which occurred in 1991 and 1996. As for the 1978 sexual assault conviction, that assault was sufficiently similar in other ways so as to be relevant to intent and motive (age of the victims and the benign circumstances preceding the assault).

¶12 The other acts evidence had probative value, and we cannot conclude that its probative value was outweighed by the danger of unfair prejudice. ***Id.***, ¶91. We note that the circuit court gave the jury three cautionary instructions limiting the purpose of the other acts evidence. Such instructions can "go 'far to cure any adverse effect attendant with the admission of the [other acts] evidence.'" ***Sullivan***, 216 Wis. 2d at 791 (citation omitted).

¶13 We conclude that the court properly exercised its discretion in admitting the other acts evidence.

¶14 We turn to whether the circuit court erred in rejecting Hinchey's ***Wallerman*** stipulation which he offered to obviate the need for other acts evidence. The court determined that the other acts evidence was necessary to the State's case in light of its burden to prove the elements of the sexual assault crimes beyond a reasonable doubt. The court reasoned that the other acts evidence was necessary to assist the jury in determining whether the sexual assaults actually occurred, and that permitting Hinchey to stipulate to intent to circumvent the other acts evidence would deprive the State of its ability to prove that the assaults occurred. Hinchey's motive also went to the heart of the State's contention that Hinchey committed the sexual assaults. Because proof of motive and intent were intertwined with whether Hinchey engaged in the conduct, the court declined to accept Hinchey's ***Wallerman*** stipulation.

¶15 Whether to accept a ***Wallerman*** stipulation is within the circuit court's discretion. ***Veach***, 255 Wis. 2d 390, ¶119. A circuit court is not required to accept such a stipulation, particularly in child sexual assault cases. ***Id.***, ¶¶120, 123. In ***Veach***, the defendant offered to stipulate that if he sexually assaulted the

child, he did so intentionally and for the purpose of sexual gratification. ***Id.***, ¶100. The ***Veach*** court summed up the problem with the proposed stipulation:

> By contrast, the stipulation that Veach in retrospect would have offered was conditional. Veach did not offer to stipulate that "the touching of Becky's vagina and buttocks was intentional and for the purpose of sexual gratification." He offered only to stipulate that "The touching of Becky's intimate parts, if it occurred, was intentional and for the purpose of sexual gratification."
>
> The stipulation proposed by Veach was also to elements of the offense that were directly in issue. He wished to stipulate away evidence relating to whether he committed the prohibited acts that made up the crime with which he was charged.

Id., ¶¶129-30 (emphasis omitted).[4]

¶16 Hinchey's stipulation suffers from the same infirmity. Hinchey denied engaging in the unlawful conduct but was willing to agree that if the jury found that he committed the assaults, he did so with the requisite intent. The circuit court properly exercised its discretion in rejecting Hinchey's ***Wallerman*** stipulation.

¶17 Hinchey next argues that the prosecutor's opening statement improperly referred to the other acts evidence as proof of Hinchey's bad character and propensity to assault young girls.[5] We disagree with Hinchey's view of the opening statement. The prosecutor clearly stated that Hinchey's prior acts of sexual assault were not character evidence. Rather, the prosecutor stated that the

[4] Veach's claims arose in the context of an ineffective assistance of trial counsel claim for failing to offer a ***Wallerman*** stipulation. ***Veach***, 255 Wis. 2d 390, ¶109.

[5] Although the State argues that Hinchey's failure to object to the prosecutor's opening statement waives the issue on appeal, we choose to address the merits of the issue.

evidence was relevant to intent and motive. Because the other acts evidence was admitted for this purpose, the prosecutor's remarks were appropriate.

¶18 Hinchey next argues that the prosecutor's examination of the lead investigator, Lt. Ruff, led the investigator to improperly vouch for the victim's truthfulness contrary to ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." Such credibility questions are for the jury.) Whether the investigator's testimony constituted impermissible comment on the credibility of another witness presents a question of law which we decide independently of the circuit court. ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996).

¶19 As a preliminary matter, we note that Hinchey erroneously claims that the challenged testimony occurred during the prosecutor's direct examination of Lt. Ruff. Rather, the testimony occurred during the prosecutor's redirect examination, a critical distinction. The redirect testimony of which Hinchey complains had its genesis in Hinchey's cross-examination of Lt. Ruff.

¶20 Lt. Ruff testified on direct examination about her investigation of the allegations against Hinchey. On cross-examination, Hinchey attempted to imply that a pending divorce within the Hinchey family might have played a role in the victim's sexual assault claims because the victim's mother wanted to gain leverage in the divorce. Hinchey also elicited testimony that the investigator had been involved in cases where children experiencing divorce have made false allegations of sexual assault at the prompting of one of the parents. Hinchey also elicited testimony from the investigator that even children who fabricate sexual assault claims appear believable and most child accusers are reluctant to talk about the

incident with the investigator, whether the allegations are truthful or ultimately prove to be false. Hinchey questioned the investigator about her approach to obtaining information from alleged child sexual assault victims and the influences on children from authority figures when it comes to divulging information about an alleged sexual assault.

¶21 On redirect examination by the prosecutor, Lt. Ruff was questioned and answered as follows:

> Q. Now, you indicated that you've had a number of investigations where, I guess, for lack of a better term, your antenna go up because you think that maybe the child is being improperly coached or influenced by a parent or someone else who is close to the child, right? You've had that experience?
>
> A. Yes.
>
> Q. But you've also indicated that it doesn't matter what the situation is, when you're talking to kids about these things, it's in the nature of kids, at least from your training and experience, that doesn't matter what the situation is, they really don't want to talk about it?
>
> A. When it comes to these kind [sic] of investigations, they don't normally want to talk to you.
>
> Q. But you kind of gave me the impression that you sort of either have a gut feeling or instinct that you've got when you conduct these kinds of investigations, when you say, boy, I think there's something here, where it looks to me like this kid is being influenced by something and that's affecting the information I'm getting. Have you said that?
>
> A. There are things that put up red flags.
>
> Q. Is there sort of a characteristic that you know of from conducting these investigations and from your training that you've seen where those red flags go up?

A. There are times in the investigation where certain things happen that you get very concerned on whether this actually happened or not.

Q. Can you tell us about what some of those red flags are?

A. Probably one of the main ones is rehearsed, you can tell that something is rehearsed, that these people have gone over this story, every little detail is there, everything is exact, that something is wrong, somebody either told them this. It's like if you read a book and you're reciting out of that book exactly what happened, that would have been one of them. Another thing would be is if they gave me too many details, if I'm investigating a sexual assault, they can say he grabbed my right wrist with his left hand, and then immediately turned it over. They are telling you exactly detail to detail to detail exactly what happened. You start to get some more red flags, because normally they focus on the trauma incident, and some of those outside incidents that happen, they don't remember that. They don't remember that much detail. They remember the trauma of what happened to them, but not those outside details.

Q. Okay. So, for example, if someone is talking about where something happened and what happened, they can tell you to some degree about what happened, but they might not be able to give you play-by-play, for lack of a better term?

A. Some can give you a play-by-play, but it's very few.

Q. When they are talking about their surroundings, they can be wrong about whether or not, for example, a wall has a garage door in it or a service door?

A. The actual specifics of – It's kinds [sic] of like anything. If you walk out of this courtroom right now and then I ask you questions about where everything was, was there a picture on the wall, was there a door on this side, where was the clock in the room, how many lights were there, where was everybody sitting, and you've sat in here for a week, you might not remember. So, yes, some of those details, depending how long they have been

> there and exactly what they were concentrating on, their memory might be vague.
>
> Q. Did you have any of these red flags go up during the time you were talking with [the victim]?
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> A. I would say I had red flags go up before I talked to [the victim], when I met the mother .... But in talking to [the victim] about the actual incidents, no.

¶22 The investigator's testimony on redirect examination was a fair response to the cross-examination which sought to imply that the victim had been improperly influenced to accuse Hinchey. On redirect examination, the detective testified about what her training and experience suggest to her are indicia that the alleged victim might not be reliable. The response was in proportion to the testimony on cross-examination.

¶23 The judgments of conviction incorrectly state that Hinchey was convicted of one count of first-degree sexual assault and two counts of exposing a child to harmful material. The amended information charged two counts of first-degree sexual assault contrary to WIS. STAT. § 948.02(1) and one count of exposing a child to harmful material contrary to WIS. STAT. § 948.11(2)(a). The jury's verdict forms reflect that Hinchey was convicted on these charges and the transcript of the presentation of the jury's verdicts indicates that Hinchey was convicted on these charges. On remand, the clerk of circuit court shall enter amended judgments of conviction reflecting the offenses of conviction.

¶24 We affirm and remand to the circuit court for entry of amended judgments of conviction.[6]

By the Court.—Judgments affirmed and cause remanded with directions.

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

[6] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").