COURT OF APPEALS DECISION DATED AND FILED

September 14, 2004

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. 03-2997 **Cir. Ct. No. 02JV000724**

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

IN THE INTEREST OF IZELL W.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

IZELL W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

¶1 FINE, J. Izell W. appeals from a dispositional order adjudging him delinquent for having committed three acts of first-degree sexual assault of a child, *see* WIS. STAT. § 948.02(1), and from the trial court's order denying his motion for post-adjudication and post-disposition relief. After a bench trial, *see* WIS. STAT. §

938.31(2) (trials in juvenile-delinquency matters shall be to the court), the trial court found Izell W. guilty of the crimes alleged in the petition, *see* § 938.31(4) (trial court must make findings of fact). Specifically, the trial court found Izell W. guilty of three instances of penis-to-anal sexual contact with a girl with whom he was related and who was then some three months short of her ninth birthday. Izell W. was fourteen when he assaulted the girl. The trial court's findings were based largely on its assessment of the victim's credibility, the credibility of Izell W.'s young male relative who saw Izell W. and the victim together under a blanket, and the trial court's determination that Izell W.'s denials were not credible. At disposition, the trial court ordered that Izell W. be placed in the serious juvenile offender program under WIS. STAT. § 938.538. *See* WIS. STAT. § 938.34(4h).

¶2 Izell W. claims that the trial court erred in: (1) receiving evidence under WIS. STAT. RULE 904.04(2) of an earlier sexual assault by him of a young girl; (2) receiving expert testimony concerning the reporting-mechanism of young sexual-assault victims; and (3) placing him in the serious juvenile offender program. We affirm.

1. *WISCONSIN STAT. RULE 904.04(2).*

¶3 Admission or exclusion of evidence rests in the trial court's discretion, and we will not reverse unless the trial court's ruling reflects an erroneous exercise of that discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983).

> There are three hurdles that evidence of a person's other acts must clear: (1) the evidence must be "relevant," WIS. STAT. RULES 904.01 & 904.02; (2) the evidence must not be excluded by WIS. STAT. RULE 904.04(2); and (3) the "probative value" of the evidence must not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or

> by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence," WIS. STAT. RULE 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998). Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." RULE 904.01. This is not a high hurdle; evidence is relevant if it "'tends to cast any light'" on the controversy. ***Zdiarstek v. State***, 53 Wis. 2d 420, 428, 192 N.W.2d 833, 837 (1972) (quoted source omitted).

State v. White, 2004 WI App 78, ¶14, 271 Wis. 2d 742, 752, 680 N.W.2d 362, 366. RULE 904.04(2) provides:

> 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.

The probative value of evidence offered under RULE 904.04(2) depends in large measure on its temporal proximity to the event at issue. ***Sullivan***, 216 Wis. 2d at 786, 576 N.W.2d at 38.

¶4 Here, the trial court received into evidence Izell W.'s prior adjudication for the sexual assault of a young girl that also involved penis-to-anal contact that had occurred a little more than one year before the assaults for which Izell W. was being tried. The State proffered the file in that earlier case and asked the trial court to take judicial notice of it. As in the assaults being tried, Izell W.'s prior adjudication entered on his guilty plea involved a young relative, a girl who was between six and seven years old when he assaulted her. The trial court admitted the evidence, noting that it was admissible to show that whatever penis-to-anal contact Izell W. had with the young girl in the case being tried was not a "mistake or accident." These are permitted reasons under WIS. STAT. RULE

904.04(2), and, given the temporal proximity between the earlier crime and the crimes for which Izell W. was being tried, and the similarity in his method of assault as well as the population of victims upon whom he preyed, we cannot say that the trial court erroneously exercised its discretion in concluding that the evidence passed muster under that rule.

¶5 As a second aspect of his complaint that the trial court improperly received evidence of his earlier assault of a young female relative, Izell W. contends that the trial court should not have taken judicial notice of the earlier court file. But under WIS. STAT. RULE 902.01 such judicial notice is permissible. *See* ***Teacher Ret. Sys. of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 540 n.3, 556 N.W.2d 415, 418 n.3 (Ct. App. 1996); ***S.E. v. Waukesha County***, 159 Wis. 2d 709, 712 n.1, 465 N.W.2d 231, 232 n.1 (Ct. App. 1990). Although Izell W. cites ***Perkins v. State***, 61 Wis. 2d 341, 212 N.W.2d 141 (1973), for the proposition that such judicial notice was improper, that case was not only decided before the effective date of the Wisconsin Rules of Evidence, January 1, 1974, Wisconsin Rules of Evidence 59 Wis. 2d Rp. 1, but also the circuit court file in ***Perkins*** was not given to the court asked to take judicial notice. ***Perkins***, 61 Wis. 2d at 346–347, 212 N.W.2d at 143–144. Here, as noted, the State gave both the trial court and Izell W. the court file of the earlier action. Although the transcript of Izell W.'s admission to the earlier sexual assault was not made part of the record until his post-adjudication motion, there is no dispute but that he admitted committing the crime for which he was adjudicated delinquent. Thus, any error made by the trial court in accepting the prosecutor's description of what happened at the earlier plea hearing was harmless beyond a reasonable doubt, *see* ***State v. Dyess***, 124 Wis. 2d 525, 540–543, 370 N.W.2d 222, 230–232 (1985), because the transcript is now part of the record and bears out the basis for the trial court's

decision to receive the evidence. Izell W.'s claim of error in connection with receipt of that evidence is without merit.

2. *Expert Testimony.*

¶6 The trial court received testimony of Elizabeth Ghlardi to testify on the mechanics of how children report sexual abuse. As the trial court noted in its decision on Izell W.'s motion for post-adjudication relief, Ghlardi neither interviewed the child-victim nor opined as to whether the child-victim was telling the truth.

¶7 Expert testimony may be received into evidence if the witness has the requisite degree of expertise and the testimony is "helpful" to the fact-finder. WIS. STAT. RULE 907.02. Again, the decision whether to admit or exclude evidence is within the trial court's discretion. ***Pharr***, 115 Wis. 2d at 342, 340 N.W.2d at 501. Izell W. does not dispute the level of Ghlardi's expertise. Rather, he argues that her testimony was not admissible because she did not either examine or talk to the child-victim. We disagree. Wisconsin recognizes that expert testimony on mechanics of sexual-assault-victim behavior can be helpful to the fact-finder's assessment of the evidence. ***State v. DeSantis***, 155 Wis. 2d 774, 794–795, 456 N.W.2d 600, 609 (1990). The trial court did not erroneously exercise its discretion in receiving Ghlardi's testimony for that purpose.

3. *Disposition.*

¶8 In a largely undeveloped argument spanning less than one page and a half, Izell W. contends that his placement in the serious juvenile offender program was "unduly harsh in light of the fact that [the trial court] received, improperly, information from the State concerning other unproven allegations of

sexual assault, which the [trial] court seems to rely on in its finding of delinquency." First, as we have already noted, the trial court did not erroneously exercise its discretion in receiving and considering Izell W.'s earlier sexual assault, and, indeed, contrary to Izell W.'s representation in the sentence we have quoted, he pled guilty to the earlier sexual assault, and thus that assault (the trial court received only the one to which he pled guilty) was not an "unproven allegation[]." We have read the trial court's prescient statements on disposition and they amply support Izell W.'s placement in the serious juvenile offender program.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.