

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 23, 2011

A. John Voelker
Acting 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. 2010AP2502-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2005CF121

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEPHEN HOWARD KOHL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Stephen Howard Kohl appeals a judgment of conviction following a jury trial in which he was convicted of four counts of child sexual assault. We affirm the judgment of the circuit court.

BACKGROUND

¶2 On April 16, 2008, Kohl was convicted after a jury trial of four counts of first-degree sexual assault of a child under the age of thirteen, contrary to WIS. STAT. § 948.02(1) (2009-10).¹ The charges arose from conduct that took place between June 1, 1996, and September 1, 1996, when Kohl had sexual contact with two girls under the age of thirteen who were at his residence visiting his daughters.

¶3 The State filed a motion in limine requesting permission to introduce other acts evidence at trial in the form of testimony from seven individuals, all of whom claimed to have been sexually assaulted by Kohl when they were young girls. The prior conduct took place within a time period of eleven to twenty-eight years prior to the conduct charged. One of the seven prior incidents resulted in a conviction of fourth-degree sexual assault, but Kohl was never charged for the remainder of the incidents. The circuit court excluded two of the seven incidents from being introduced by the State at trial, but allowed five. The State introduced evidence of the five allowed other acts incidents at trial.

¶4 The State also introduced at trial a written statement made by Kohl to police, in which Kohl admitted that he had sexual desires for young females for which he had not received enough counseling, that he continued to feel “a sexual urge to touch young females in a sexual way,” and that he allowed himself to do so with respect to the two victims he was charged with sexually assaulting.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 After a jury trial, Kohl was convicted of all four counts, and sentenced to forty years of imprisonment followed by ten years of probation. Kohl now appeals the judgment of conviction and requests that this court order a new trial.

STANDARD OF REVIEW

¶6 The standard of review on appeal of a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will sustain an evidentiary ruling if we conclude that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion of law that a reasonable judge could reach. *Id.*

DISCUSSION

¶7 The only issue before this court on appeal is whether the circuit court erroneously exercised its discretion when it allowed the State to introduce other acts evidence against Kohl at trial. Kohl asserts that the other acts evidence was not relevant and, thus, should not have been admitted at trial.

¶8 Under Wisconsin law, 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." WIS. STAT. § 904.04(2). However, § 904.04(2) is not a bar to the admission of other acts evidence when the evidence is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

¶9 Courts are to apply the three-step analytical framework set forth in *Sullivan*, in order to determine the admissibility of evidence offered as other acts.

Sullivan, 216 Wis. 2d at 772-73. The first step under *Sullivan* is whether the other acts evidence is 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. *Sullivan*, 216 Wis. 2d at 772.

¶10 The second step is whether the other acts evidence is relevant, considering the two facets of relevance set forth in WIS. STAT. § 904.01. *Id.* at 772. The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. *Id.* The second consideration in assessing relevance is whether the other acts evidence has probative value, that is, whether the “evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.” *Id.*

¶11 The third step in the *Sullivan* framework is to assess 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 presentation of cumulative evidence. *Id.* at 772-73.

¶12 Kohl does not challenge the circuit court’s application of the first step of the *Sullivan* analysis. However, he does challenge the court’s application of the second and third steps of the *Sullivan* analysis. As to the second step, relevance, Kohl asserts that the intent element of his crime was proved by his written statement to police that he had sexual urges toward young girls. Thus, he argues, the State did not need to introduce evidence of prior incidents of sexual assault in order to prove that Kohl possessed intent to gratify himself sexually.

¶13 We disagree with Kohl’s argument. The State is required to prove to a jury all of the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements. *State v. Davidson*, 2000 WI 91, ¶65, 236 Wis. 2d 537, 613 N.W.2d 606. If the State must prove an element of a crime, then evidence relevant to that element is admissible even if the element is not disputed. *Id.* The circuit court concluded that the evidence of prior sexual assaults met the relevance standard as described in *Sullivan* and was admissible for a proper purpose: to show Kohl’s intent and sexual gratification in engaging in the behavior he was alleged to have engaged in. We agree. As noted above, WIS. STAT. § 904.04(2) provides that the general bar on evidence of other crimes, wrongs, or acts does not apply when such evidence is offered, as it was in this case, for “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

¶14 Kohl specifically argues that the other acts evidence should not have been admitted because the prior acts were not recent enough to be relevant to the conduct at issue in this case. The incidents of prior sexual assault took place within eleven to twenty-eight years before the conduct charged. The circuit court concluded that the lack of nearness in time was not so great as to warrant exclusion of the other acts evidence. The circuit court’s conclusion is consistent with Wisconsin law. It is within a circuit court’s discretion to decide whether other acts evidence is too remote to be relevant. *State v. Hunt*, 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771.

¶15 There is no exact point under Wisconsin law at which a prior act is considered too remote to be admissible. *Id.* Even when evidence may be considered too remote in time under certain circumstances, the evidence may be relevant in a particular case if the remoteness is balanced by the similarity of the

other act to the incident at issue. *Id.* The circuit court engaged in this balancing analysis on the record and came to the reasoned conclusion that the similarity of the other acts outweighed their remoteness. Other Wisconsin appellate courts have upheld the admissibility of evidence of prior acts evidence when the acts occurred within similarly remote timeframes. *See State v. Kuntz*, 160 Wis. 2d 722, 467 N.W.2d 531 (1991) (upholding the admissibility of other acts evidence that occurred sixteen years before the conduct charged); *State v. Mink*, 146 Wis. 2d 1, 16-17, 429 N.W.2d 99 (Ct. App. 1988) (admitting evidence of prior sexual contact with a child that occurred thirteen to twenty-two years prior to the conduct charged).

¶16 Kohl further argues that the other acts evidence is not similar enough to the charged conduct to be considered relevant. The circuit court analyzed each of the seven prior incidents that the State sought to introduce into evidence, and discussed the similarities and dissimilarities of each instance as compared to the conduct charged. The court concluded that two of the incidents of prior acts were too dissimilar to the charged conduct to be relevant. The court concluded that the other five incidents were similar in that they each stemmed from Kohl's initial contact with a family member of a victim and Kohl's separation of the victim from the family member.

¶17 Relevant to our analysis is the "greater latitude rule." Within the *Sullivan* analytical framework, Wisconsin courts apply this rule to sexual assault cases, particularly those that involve sexual assault of a child, under which proof of other like occurrences are admitted more liberally. *Davidson*, 236 Wis. 2d 537, ¶¶36-44. In *State v. Marinez*, 2011 WI 12, ¶20, 331 Wis. 2d 568, 797 N.W.2d 399, the supreme court recently reiterated that the greater latitude rule applies in child sexual assault cases, and stated that the rule supports the admission of other

acts evidence in such cases if “it can be used for a purpose not prohibited under WIS. STAT. § 904.04(2)(a).” This rule further supports our conclusion that the circuit court did not erroneously exercise its discretion when it concluded that the other acts evidence was relevant.

¶18 With respect to the third step of the *Sullivan* framework, Kohl asserts that the prejudicial effect of the other acts evidence outweighed its probative value, such that the evidence should have been excluded. *See Sullivan*, 216 Wis. 2d at 772-73; *see also* WIS. STAT. § 904.03. Kohl argues that there is a great likelihood that the jury found him guilty on all four counts of child sexual assault because the jury did not understand the distinction between other acts evidence presented for an acceptable purpose versus character evidence.

¶19 We are satisfied that the circuit court properly exercised its discretion when considering the issue of prejudice. The circuit court discussed the issue of prejudice on the record, and concluded that the danger of confusing or misleading the jury could be addressed sufficiently by the jury instructions.

¶20 Unfair prejudice, as the term is used in *Sullivan*, does not result from simple harm to the opposing party’s case. *Sullivan*, 216 Wis. 2d at 789-90. Rather, unfair prejudice results when the other acts evidence has a tendency to influence the outcome of the case 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 relevant facts established in the case. *Id.* at 790. We are not persuaded that unfair prejudice resulted here. To prevent the other acts evidence from being used improperly, the circuit court gave a cautionary instruction to the jury. Kohl’s counsel referenced the cautionary jury instruction during closing argument, which further emphasized

to the jury that it was not to consider the other acts evidence to conclude that Kohl acted in conformity with a character trait.

¶21 In *Marinez*, another case involving sexual assault of a child, the circuit court gave a similar cautionary jury instruction after it allowed the State to introduce evidence in the form of a videotaped interview of the victim, in which the victim described a prior incident in which Marinez burned her hands with hot water. *Marinez*, 331 Wis. 2d 568, ¶¶37, 44. The supreme court upheld the decision of the circuit court to admit the evidence of the hand-burning incident, and concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Id.*, ¶46. In *Marinez*, the difference between the prior conduct and the charged conduct was far greater than in the present case, since the prior conduct in *Marinez* did not relate to sexual assault. Therefore, we reject Kohl's argument that the probative value of the other acts evidence in this case was so low that it was outweighed by the danger of unfair prejudice.

¶22 Moreover, we separately conclude that, even if one or more of Kohl's prior incidents of sexual contact with young girls was improperly admitted, the admission would have constituted harmless error, given the fact that Kohl admitted in his statement to police that he touched the victims with a sexual purpose. Given this highly incriminating series of admissions, we are satisfied that a rational jury would have found the defendant guilty absent the admission of the other acts evidence, even if one or more of the incidents was admitted improperly. See *State v. Harvey*, 2002 WI 93, ¶¶47-49, 254 Wis. 2d 442, 647 N.W.2d 189.

By the Court.—Judgment affirmed.

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

