COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

NOTICE

No. 94-0396-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. DUQUETTE, JR.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. James A. Duquette, Jr. has appealed from a judgment convicting him of first-degree intentional homicide in violation of § 940.01(1), STATS.; second-degree sexual assault in violation of § 940.225(2)(e), STATS., 1985-86; false imprisonment in violation of § 940.30, STATS.; and kidnapping in violation of § 940.31(1)(b), STATS. He challenges the trial court's denial of his motions to change venue and suppress evidence, and its admission of other acts evidence. He also argues that the trial court denied him a fair trial when it refused the jury's request to examine handwriting evidence during its deliberations and when it denied his request for discovery of certain

documents. We conclude that the issues lack merit and affirm the judgment of conviction.

These convictions stem from charges that on June 30, 1987, Duquette abducted fourteen-year-old Tara K. as she was riding her bicycle along a road, forced her into his van, had sexual intercourse with her and killed her. Duquette's first argument is that he was denied his right to a fair trial when the trial court refused to change venue based on adverse pretrial publicity.

We review the trial court's denial of a motion for a change of venue under the erroneous exercise of discretion standard. ***State v. Albrecht***, 184 Wis.2d 287, 306, 516 N.W.2d 776, 783 (Ct. App. 1994). Although our review is deferential to the trial court, we must also independently evaluate the circumstances of the case. ***State v. Messelt***, 178 Wis.2d 320, 327, 504 N.W.2d 362, 364 (Ct. App. 1993), *aff'd,* 185 Wis.2d 254, 518 N.W.2d 232 (1994).

Change of venue is only one method of guaranteeing a fair trial; another is voir dire. ***McKissick v. State***, 49 Wis.2d 537, 545, 182 N.W.2d 282, 286 (1971). The trial court's responsibility is to make inquiries of the jurors to determine whether there is prejudice and to take such steps as may be necessary to ensure a fair trial. ***Id.*** Factors to be considered in determining whether a change of venue is necessary are: (1) the inflammatory nature of the publicity; (2) the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; (3) the timing and specificity of the publicity; (4) the degree of care exercised and the amount of difficulty encountered in selecting the jury; (5) the extent to which the jurors were familiar with the publicity; (6) the defendant's utilization of challenges, both peremptory and for cause, on voir dire; (7) the State's participation in the adverse publicity; and (8) the severity of the offenses charged and the nature of the verdict returned. ***Id.*** at 545-46, 182 N.W.2d at 286.

While significant pretrial publicity was shown in this case, that fact alone does not require a change of venue. *See* ***Turner v. State***, 76 Wis.2d 1, 27, 250 N.W.2d 706, 719 (1977). Most of the reporting was primarily informational and did not create a risk of unfair prejudice. *Cf.* ***id.*** at 27-28, 250 N.W.2d at 719-20; ***Messelt***, 178 Wis.2d at 328-30, 504 N.W.2d at 365-66. While some reported Duquette's prior convictions, such information did not alone

compel a change of venue. *See* ***Hoppe v. State***, 74 Wis.2d 107, 113, 246 N.W.2d 122, 127 (1976); ***Messelt***, 178 Wis.2d at 329-31, 504 N.W.2d at 365-66.

In addition, most of the publicity was remote in time from the jury selection, which occurred in February 1993. This was long after most of the pretrial media coverage, which was heaviest in the summer of 1987 when Tara's body was discovered and an autopsy report was released, in December 1991 when Duquette was charged, and in August 1992 when the preliminary hearing was held. While some statements reported at the time of Duquette's charging could be deemed inflammatory, including statements made by the police and the prosecutor from Outagamie County, the significant time lapse between the periods of heavy coverage and the trial ameliorated concerns about community prejudice, creating a "cooling off" period which contributed to the ability of the State to conduct a fair trial. *See* ***Turner***, 76 Wis.2d at 28, 250 N.W.2d at 720; ***Hoppe***, 74 Wis.2d at 114, 246 N.W.2d at 127. Moreover, while some publicity occurred again shortly before trial, it was not inflammatory and did not prevent the trial court from concluding that an impartial jury could be drawn.

The trial court's conclusions were borne out by the actual jury selection process. The trial court experienced no significant difficulty in selecting a jury, an important factor in determining whether pretrial publicity necessitated a change of venue. *See* ***Turner***, 76 Wis.2d at 28, 250 N.W.2d at 720. Of the fifty prospective jurors questioned about their awareness of this case, only ten were excused in part based on concerns about their partiality—a number which does not indicate that adverse publicity had impaired Duquette's ability to obtain an impartial jury. *Cf.* ***id.*** at 28-29, 250 N.W.2d at 720; ***Hoppe***, 74 Wis.2d at 115, 246 N.W.2d at 127-28. Moreover, as pointed out by the State, Duquette had no objection to nine of the twelve jurors who decided the case.

While the three jurors to whom Duquette objected were aware of his prior convictions and two of them were aware of some evidence in the case, all three indicated that they could decide the case impartially based on the evidence. A juror need not be ignorant of the facts and issues involved and may not be challenged because he or she has obtained information on the case through media coverage unless he or she has become biased as a result. ***Holland v. State***, 87 Wis.2d 567, 578, 275 N.W.2d 162, 168 (Ct. App.), *rev'd on other grounds,* 91 Wis.2d 134, 280 N.W.2d 288 (1979), *cert. denied*, 445 U.S. 931 (1980); *see also* ***McKissick***, 49 Wis.2d at 547, 182 N.W.2d at 287. It is sufficient if a

juror can set aside any preconceived notions about the defendant's guilt or innocence and decide the case based on the evidence. ***Holland,*** 87 Wis.2d at 580, 275 N.W.2d at 169. Because the challenged jurors all indicated that they could decide the case impartially based on the evidence, the trial court was not required to strike them for cause or to determine that their answers during voir dire demonstrated a need to change the trial's venue.

Duquette also contends that the pretrial publicity deprived him of a fair trial because it compelled him to use peremptory strikes to remove jurors that he believed were biased. However, Wisconsin's long-standing rule is that where a fair and impartial jury is impaneled, no basis exists to challenge the judgment on the ground that the defendant was wrongly required to use his peremptory challenges. ***State v. Traylor***, 170 Wis.2d 393, 400, 489 N.W.2d 626, 629 (Ct. App. 1992). There is no constitutional right to peremptory challenges, only to an impartial jury. ***Id.*** Since the record in this case establishes that pretrial publicity did not prevent the impaneling of a fair and impartial jury, no basis exists to conclude that the trial court erroneously exercised its discretion by denying a change of venue.

Duquette's next argument is that the trial court erroneously denied his request to suppress evidence derived from a search of his wallet by Massachusetts police following his arrest there on June 11, 1988. He contends that the officer who opened his wallet while booking him exceeded the scope of a proper inventory search by opening up a folded newspaper article contained in the wallet. The newspaper article reported Tara's murder. After viewing it, the Massachusetts police contacted Wisconsin authorities. An affidavit provided by a Wisconsin detective then formed the basis for a warrant for the search and seizure of evidence from Duquette's Massachusetts apartment.

An inventory search is a well-defined exception to the requirement that a search be conducted pursuant to a warrant. ***State v. Weber***, 163 Wis.2d 116, 132, 471 N.W.2d 187, 194 (1991). An inventory search has three distinct objectives: (1) the protection of the owner's property while in police custody; (2) protection of the police against disputes over lost or stolen property; and (3) the protection of police from potential danger. ***Id.***[1] The justification for an

[1] While the parties stipulated at trial that the legality of the search of the wallet was governed by Massachusetts law, they do not dispute on appeal that the permissible objectives of an inventory

inventory search does not rest upon probable cause because it is administrative, not a search for evidence. ***Id.*** To determine the reasonableness of an inventory search, courts must balance its promotion of legitimate governmental interests against its intrusion on a defendant's Fourth Amendment rights. ***Id.*** at 132-33, 471 N.W.2d at 194. This process requires an examination of the reasonableness of the intrusion, followed by an examination of the reasonableness of the scope of the intrusion. ***Id.*** at 133, 471 N.W.2d at 194. Reasonableness must be based on the facts and circumstances of each case. ***Id.***

Since Duquette does not dispute the reasonableness of examining his wallet as part of an inventory search, the pertinent inquiry on appeal is whether the scope of the search was unreasonable. Whether the facts in this case satisfy the constitutional requirement of reasonableness is a question of law which we review *de novo*. ***State v. Whitrock***, 161 Wis.2d 960, 973, 468 N.W.2d 696, 701 (1991). The underlying findings of fact of the case must be upheld unless they are contrary to the great weight and clear preponderance of the evidence. ***Id.***

The scope of an otherwise valid inventory search is limited by the purpose for which it was undertaken. ***Weber***, 163 Wis.2d at 133, 471 N.W.2d at 194. Here, the booking officer testified that the purpose of looking through Duquette's wallet was to protect the officer and the police department from any false accusations of theft or missing currency and to ensure a complete and accurate account of the prisoner's property. The officer testified that he found cash and approximately one-quarter inch of assorted papers, which he thumbed through looking for hidden money, checks and "items of that sort." He testified that one of the items he found was the newspaper article. He testified that he could not recall whether he had to unfold the article to see the headline, which discussed the discovery of a missing teenager's body.[2] However, after seeing the headline, he read the article and called the Mequon police. He further testified that he did not individually specify this particular newspaper article on the property inventory because it was not an article of value like currency or a credit card. Instead, he included it generally on the inventory card in the category of "assorted papers."

(..continued)

search are the same under Massachusetts, Wisconsin and federal law.

[2] The trial court found that the article was folded in Duquette's wallet and was unfolded during the inventory search.

We conclude that it was reasonable for the booking officer to separate and unfold the large number of papers found in Duquette's wallet, including the newspaper article, to identify them and determine whether they were of value. The Wisconsin Supreme Court has held that officers conducting an inventory search of a car reasonably listened to a cassette tape in order to identify it and document it in the property inventory. ***Id.*** at 134, 471 N.W.2d at 195. The court held that because the tape was one of several found by police, it was reasonable for them to listen to it to identify it in the same manner the other labeled tapes were identified. ***Id.***

Here, the booking officer had a similar legitimate interest in examining the numerous papers in Duquette's wallet—to identify them, provide an accurate account of his property and ensure that they were not items of economic value. To adequately identify each item, the officer was entitled to separate the papers and scrutinize each one sufficiently to identify it, including unfolding the challenged newspaper article. The fact that he did not separately catalogue each piece of paper as the officers did with the tapes found in ***Weber*** did not render his examination of the separate papers unreasonable, since he was entitled to look at each paper to identify it and determine that it was not an item warranting separate documentation on the property card. In addition, while the booking officer perhaps could have adequately identified the newspaper article without unfolding it, an inventory search is not rendered invalid merely because an officer could have identified the property by a less intrusive means. *See* ***id.*** at 136, 471 N.W.2d at 195.[3]

Duquette next contends that the trial court committed prejudicial error by admitting evidence concerning the sexual assault of M.C. in October

[3] ***Commonwealth v. Sullo***, 532 N.E.2d 1219 (Mass. Ct. App. 1989), does not compel a different result. As pointed out by Duquette, the Massachusetts court suppressed evidence obtained when police opened a plastic business card holder, took out thirty business cards and a piece of paper, and closely inspected writings and markings on the backs of the cards for evidence of gambling offenses. *See* ***id.*** at 1220, 1222-23. The Massachusetts court indicated that although the police are entitled to inventory the contents of an arrestee's wallet and scrutinize particular items sufficiently to identify them for an inventory list, they could not hunt for information by sifting and reading materials taken from the arrestee which did not declare their nature at sight. ***Id.*** at 1221-22. Here, a separation and limited examination of the mass of papers in Duquette's wallet was appropriate to identify them. In conducting the limited examination appropriate to identify the papers, the newspaper article headline became apparent and properly led to further investigation.

1983 and the sexual assault and kidnapping of N.L. in June 1988 (the other acts evidence). Duquette was criminally convicted based on both of those incidents.

Duquette contends that the other acts evidence was not relevant to any statutory exception under § 904.04(2), STATS., and even if relevant was unduly prejudicial. Section 904.04(2) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. However, it does not exclude such evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

The trial court's admission of evidence under § 904.04(2), STATS., involves the exercise of discretion and will not be disturbed where it has acted in accordance with accepted legal standards and the facts of record. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). In determining whether to admit other acts evidence, a trial court must apply a two-pronged test. ***State v. Johnson***, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994). First, the court must determine whether the other acts evidence fits within one of the exceptions in § 904.04(2). ***Johnson,*** 184 Wis.2d at 336, 516 N.W.2d at 466. It must then determine under § 904.03, STATS., whether any prejudice resulting from the admission of such evidence substantially outweighs its probative value. ***Johnson***, 184 Wis.2d at 337, 516 N.W.2d at 466. A threshold question implicit within the two-pronged analysis is whether the other acts evidence is relevant to an issue in the case. ***Id.*** at 337, 516 N.W.2d at 466-67. The probative value of other acts evidence is partially dependent on its nearness in time, place and circumstance to the alleged act sought to be proved. ***Id.*** at 339, 516 N.W.2d at 467.

The trial court admitted the other acts evidence in this case on the grounds that it was relevant to issues of opportunity, preparation, plan and identity, and was not unduly prejudicial. We agree with the trial court that the evidence was relevant to plan, preparation and identity, and that its probative value was not outweighed by the danger of unfair prejudice. In fact, because this evidence is directly relevant to *modus operandi*, we believe it offers a classic example of when other acts evidence is properly admitted.

"Plan" within the meaning of § 904.04(2), STATS., has been defined to include a "system of criminal activity" comprised of multiple acts of a similar nature, not all aimed at culminating in the charged crime or crimes. ***State v. Friedrich***, 135 Wis.2d 1, 24, 398 N.W.2d 763, 773 (1987).[4] This *modus operandi* concept of "plan" closely resembles the use of other acts evidence to prove identity, which is warranted when the similarities between the charged crimes and the other acts reflect an "imprint" of the defendant. ***State v. Speer***, 176 Wis.2d 1101, 1118, 501 N.W.2d 429, 434 (1993).

In this case, the circumstances underlying the other acts evidence and the charged crimes were very similar and were relevant to both plan and identity. All three incidents involved girls in early adolescence.[5] In each case, the victim was walking or biking alone in a relatively private area when she was accosted and sexually assaulted by a man in a vehicle.[6] In the cases of N.L.

---

[4] Prior to ***State v. Friedrich***, 135 Wis.2d 1, 398 N.W.2d 763 (1987), this court defined "plan" as a "scheme to accomplish a particular purpose that includes doing the act charged." ***State v. Harris***, 123 Wis.2d 231, 238, 365 N.W.2d 922, 927 (Ct. App. 1985). Because ***Friedrich*** is the later pronouncement of the law and because it is a decision of our supreme court, we follow ***Friedrich*** and reject Duquette's attempts to limit "plan" to the definition in ***Harris.***

[5] M.C. and N.L. were thirteen years old; Tara was fourteen years old.

[6] M.C. testified that she was walking home from school and noticed a man in a van watching her as he drove past her twice. She testified that after she turned down a street which was bordered on one side by back lots and bushes, the man from the van rushed up behind her, grabbed her in a "bear hug" and "fondled" her breasts. She testified that when she screamed loudly, he fled. She identified Duquette as her assailant and testified that he was convicted of a crime arising from this incident.

N.L. testified that she was riding her bike in an area with no houses when a man in a car, who was later identified as Duquette, drove past her and then turned around and came back. She testified that Duquette pulled her into his car and took her to a wooded area where he threatened to tie her up if she did not cooperate, struck her in the face and forced her to have sexual intercourse with him. She testified that Duquette told her that "this is not the first time this has happened" and that he intended to keep her for awhile to make sure that she did not tell anyone. She testified that he was arrested when a police car drove up and she reported the assault.

In the present case, the evidence indicated that Tara was abducted off her bicycle at one location and driven to a farm field hidden from roadside view where her body was found. A van resembling one owned by Duquette was seen parked along a road on which Tara was thought to have traveled, away from residences. Tara's body was found nude, with sperm in the vagina, indicating that she had been sexually assaulted. In addition, she had multiple wounds.

and Tara, the assailant also abducted them and took them to secluded spots where he employed violence against them.

Based on the similarities between the other acts and the charged crimes, the trial court reasonably concluded that they bore the imprint of Duquette and thus were relevant to establish his identity as the assailant in this case. *Cf.* ***id.*** at 1117-18, 501 N.W.2d at 434. Based on the similarities, the other acts evidence was also relevant to show Duquette's plan to obtain sexual gratification from adolescent girls by abducting them in his vehicle. *Cf.* ***Friedrich***, 135 Wis.2d at 24, 398 N.W.2d at 773. In addition, since the assault of M.C. occurred only four years before the assault and murder of Tara, it was not so remote in time as to be irrelevant, particularly in light of Duquette's incarceration during a portion of the intervening years. *See* ***Clark***, 179 Wis.2d at 494-95, 507 N.W.2d at 176. Moreover, the assault and kidnapping of N.L. occurred only one year after the assault and kidnapping of Tara, and therefore clearly was not so remote as to be irrelevant. *See* ***id.***[7]

While the other acts evidence was clearly prejudicial to Duquette's defense, the test for admission of relevant other acts evidence is whether it causes unfair prejudice. ***Johnson***, 184 Wis.2d at 340, 516 N.W.2d at 468. Evidence is unfairly prejudicial when it tends to influence the outcome of the case by improper means. ***Id.*** In the context of other crimes evidence, prejudice refers to the potential harm in a jury concluding that because a defendant committed other bad acts, he or she necessarily committed the crime charged. ***Clark***, 179 Wis.2d at 496, 507 N.W.2d at 177.

Here, the trial court instructed the jury that it could use the other acts evidence in considering plan, preparation and identity, but could not use it to conclude that Duquette was of bad character and acted in conformity therewith to commit the crimes charged. When an admonitory instruction of this nature is given, prejudice to a defendant is presumably erased from the jury's mind. ***State v. Shillcutt***, 116 Wis.2d 227, 238, 341 N.W.2d 716, 721 (Ct.

[7] While other acts evidence generally involves acts committed before the charged crimes, prior commission of the other acts is not a prerequisite to their admission. *See* ***State v. Roberson,*** 157 Wis.2d 447, 455, 459 N.W.2d 611, 613 (Ct. App. 1990). In this case, it is immaterial that the kidnapping and assault of N.L. occurred after the crimes against Tara, since Duquette was free and had not been arrested for the crimes against Tara at the time of the assault on N.L.

App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Based on this instruction and the obvious probative value of the evidence, the trial court properly exercised its discretion in admitting the evidence. *See* ***id.***

Duquette's next argument is that the trial court erroneously exercised its discretion and deprived him of due process when it denied the jury's request to examine handwriting exhibits during deliberations. The jury requested several exhibits, including a letter purportedly written by Duquette admitting to the murder of Tara, and handwriting samples used at trial to make comparisons. When the State objected that the exhibits of Duquette's known handwriting contained admissions of unrelated criminal activity, Duquette suggested that such parts could be redacted. When the trial court indicated that redaction would distort the evidence on which the handwriting analyses were made, Duquette waived any objection to submitting the exhibits in unredacted form. The trial court ultimately denied the jury's request based on its concern that extraneous and prejudicial information would come to the jury's attention if it were permitted to examine the exhibits in the jury room, and its concern that the jury would conduct its own experiments with the exhibits.

Submission of exhibits to a jury during deliberations rests in the discretion of the trial court. ***State v. Jensen***, 147 Wis.2d 240, 259, 432 N.W.2d 913, 921 (1988). While Duquette argues that § 909.015(3), STATS., authorizes jurors to make comparisons of authenticated handwriting specimens, nothing in that statute, standing alone, confers a right to have the jury inspect handwriting specimens during deliberations.

In exercising its discretion to determine whether exhibits should be sent to the jury room, the trial court is required to consider whether the exhibits will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibits and whether the exhibits could be subjected to improper use by the jury. ***Jensen,*** 147 Wis.2d at 260, 432 N.W.2d at 921-22. We will not disturb the trial court's decision if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the decision. ***State v. Hines,*** 173 Wis.2d 850, 858, 496 N.W.2d 720, 723 (Ct. App. 1993).

Based on these standards, we conclude that the trial court acted within the scope of its discretion in refusing to send the handwriting exhibits to the jury room. As noted by the trial court, redacting would have materially altered the exhibits, and, absent redacting, the exhibits would have revealed extraneous and prejudicial information regarding other criminal activity by Duquette. While Duquette's trial counsel indicated that he would waive any objection to the prejudice arising from submission of the unredacted exhibits, the trial court reasonably rejected this offer, expressing an additional concern that the jurors would experiment with the exhibits. This was a legitimate concern because even if § 909.015(3), STATS., permitted the jurors to compare the handwriting samples, doing so during deliberations after the closing of the evidence and outside the presence of the trial judge and the attorneys raised the specter that the jurors would use the evidence improperly. In addition, the trial court could reasonably conclude that the exhibits had been adequately presented to the jurors for their consideration during the trial, particularly since key exhibits were presented in enlarged form, permitting the jurors to make comparisons during the course of the testimony. Because the trial court therefore properly exercised its discretion and Duquette has failed to demonstrate that he had a due process right to submission of the exhibits, this issue provides no basis for relief.

Duquette's final argument is that he is entitled to a new trial because the trial court erroneously refused to release documents in the prosecutor's file to him prior to trial. Duquette may prevail on this claim only if the documents sought by him contain information material to the defense which probably would have changed the outcome of his trial. ***State v. Mainiero***, 189 Wis.2d 80, 87, 525 N.W.2d 304, 307 (Ct. App. 1994). Evidence is material only if there is a reasonable probability that had it been disclosed to the defense, the result of the proceeding would have been different. ***Id.*** at 88, 525 N.W.2d at 307. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.***

We conclude that this standard is not satisfied here. Duquette contends that the documents were material because they would have led him to investigate the possibility that third persons perpetrated the crimes. However, before evidence is admissible to prove that a third person committed a crime of which the defendant is accused, the defendant must show that the third person had the motive and opportunity to commit the crime and some evidence directly connecting the third person to the crime charged which is not remote in

time, place or circumstances. ***State v. Denny,*** 120 Wis.2d 614, 624, 357 N.W.2d 12, 17 (Ct. App. 1984).

Nothing in the documents relied on by Duquette provides a basis for concluding that any third person had a motive or opportunity to commit these crimes or that any evidence directly connected a third person to the crimes. Since Duquette has also failed to demonstrate that disclosure of the documents prior to trial would have led to the discovery of admissible evidence which would have affected the trial's outcome, no basis exists to conclude that the documents were material to Duquette's defense.

By the Court.—Judgment affirmed.

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