COURT OF APPEALS
DECISION
DATED AND RELEASED

August 15, 1995

No. 94-2892-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RHEUBEN McCLAIN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Rheuben McClain appeals from a judgment of conviction, following a jury trial, for two counts of second-degree sexual assault and one count of kidnapping while possessing a dangerous weapon. McClain also appeals from an order denying his postconviction motion to vacate the weapons penalty enhancer to his kidnapping conviction. McClain claims that the trial court erroneously admitted evidence of: (1) the victim's religion contrary to § 906.10, STATS.; (2) McClain's alleged burglary of the house where

the victim was residing; and (3) "other acts" evidence of a previous sexual assault he committed. McClain also argues that his due process rights were violated when the trial court failed to instruct the jury that there must be a "nexus" between possession of the weapon and the kidnapping charge. We affirm.

I. BACKGROUND[1]

According to Crista D.'s trial testimony, on May 11, 1991, she was living at the house of Karen Tolomei, one of her mother's friends. She fell asleep in her room at about 10:30 p.m. and was woken at approximately 12:07 a.m. by a man she later identified as McClain. Crista D. testified that McClain grabbed her by the throat, put a knife to her face, and led her out of the house. She stated that they went to her car and he forced her to drive to his apartment where he sexually assaulted her. After McClain drove her back to where she was staying, she woke her mother's friend and they called the police. Crista D. stated that she did not know McClain's name, but she gave the police a description and picked his photo from an array.

McClain testified that he originally met Crista D. on April 3, 1993, at a gas station. He said that they began dating and having sexual relations and that on May 11, when he went to Tolomei's house, Crista D. asked to go to his apartment. McClain testified that they went in her car without any force or threats, and that they had sexual relations. McClain stated that after he told Crista D. that a different girlfriend would be moving in with him and that he had promised the other girlfriend that he would be monogamous, Crista D. became very upset, picked up a baseball bat and threatened him with it. McClain stated that Crista D. was falsely accusing him of rape in retaliation for his relationship with the other girlfriend.

II. ANALYSIS

[1] The charges of which McClain was convicted in this case were first tried to a jury that "deadlocked," resulting in a mistrial. In this decision we summarize the evidence from the second trial.

A. Testimony about the Victim's Religion.

McClain first claims that the trial court erroneously allowed testimony about the victim's religion, contrary to RULE 906.10, STATS. RULE 906.10 provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced." Although evidentiary rulings are generally reviewed under a deferential standard, we independently review a trial court's evidentiary ruling where the issue involves construction or application of a statute to a given set of facts. *See* ***State v. Mason***, 132 Wis.2d 427, 431, 393 N.W.2d 102, 104 (Ct. App. 1986).

McClain testified on direct and cross-examination about the intimate nature of the relationship he had developed with Crista D. during the weeks preceding the date of the assaults. On cross-examination, however, McClain could not recall discussing anything about Crista D.'s religious activities, her interest in horses, her travel to foreign countries, or her volunteer work. McClain could only recall that he and Crista D. talked a little bit about religion, her alleged waterskiing injuries, and her previous residency in Waukesha.

On rebuttal, Crista D. testified that she had never seen McClain before the night of the assaults and that there were many unique personal aspects of her life that she would normally discuss with someone with whom she was having an intimate relationship. Crista D. further testified:

> Q.Miss [D.], if you were to go out with a person and spend some time with them and talk about yourself, what sort of personal information would you give the person?
>
> A.That I was going to school for social work/criminal justice, that my parents lived in Chippewa Falls, that I had a horse and his name was Chester, that I rode competitively and won lots of trophies.

Q.If the person you were talking with was religious, is that a topic you might bring up?

[Defense Counsel]: I'm going to object on two bases. A, it's leading; B, it's irrelevant; C, it asks this witness hypothetical situations. It's clearly improper.

[The Prosecutor]: Your Honor, this is rebuttal. It's going to what was stated by Mr. McClain.

[Defense Counsel]: I'll object. The way the question is formed it's hypothetical.

THE COURT: I'll sustain the objection.

[Defense Counsel]: Thank you.

BY [The Prosecutor]:

Q.Miss [D.], are you involved in any religion?

A.Yes.

Q.Marginally? Extensively?

[Defense Counsel]: Judge, I'm going to object on relevance grounds.

THE COURT: I'll permit her to answer her religious affiliation.

BY [The Prosecutor]:

Q.You want to explain affiliation, the extent of it then.

A.I belong to the Episcopal Church, and up until college— I'm still active in it, but up until college I was very active in the church. I've

> visited Haiti twice for missionary purposes. I work through a meal program, through The Gathering, it's called Saint John's Episcopal Church on the South Side. I've done lots of workshops and youth gatherings, called Happenings—
>
> [Defense Counsel]: Judge, at this point this is all very interesting, but how is it in any way, shape or from relevant or proper rebuttal?
>
> THE COURT: Sir, I let you bring a bible to the stand for your witness talking about the same thing.
>
> [Defense Counsel]: Judge, we're talking about rebuttal here.
>
> THE COURT: Sir, it's all credibility.
>
> [Defense Counsel]: In rebuttal, sir.
>
> THE COURT: I'll permit the answer.

The record clearly indicates that Crista D.'s references to religion did not include "beliefs or opinions ... for the purpose of" enhancing Crista D.'s credibility. Rather, Crista D.'s testimony was relevant to rebut McClain's testimony that he and Crista D. had an intimate relationship in which they discussed many personal matters, including religion, and that the sexual relations were consensual. Therefore, admission of Crista D.'s testimony was not improper.[2]

[2] On appeal, McClain also makes a one-paragraph argument that admission of evidence regarding Crista D.'s religion was contrary to the Free Exercise and Establishment clauses of the United States and Wisconsin constitutions. Despite having had a fair opportunity to object on these bases as demonstrated by the lengthy quoted exchange between the trial court and counsel on the admissibility of Crista D.'s testimony about religion, McClain, did not make this objection before the trial court and, therefore, we need not address it. *See* § 805.11(2), STATS.; *see also* §

B. Evidence of McClain's Alleged Involvement in a Burglary at Tolomei's House Approximately Four Years Earlier.

The trial court allowed Tolomei to testify how and why she came to name McClain as a suspect in the sexual assaults of Crista D., leading the police to include McClain's photo in the array. McClain claims that Tolomei's testimony regarding McClain's alleged prior burglary of her house was erroneously admitted over a hearsay objection and that such testimony was irrelevant.

On the day of the assaults, Crista D. was living in the bedroom of Tolomei's daughter Tricia. Crista D. testified that during the assaults, McClain asked her if she knew Tricia and Tolomei's other daughter. When the prosecutor asked Tolomei how and why she came to name McClain as a suspect in the sexual assaults of Crista D., Tolomei testified that as she was attempting to figure "who could have done such a thing," Crista D. "described him as a black man knowing my daughter." Tolomei stated that her daughter had previously identified McClain "as the man who was in my house and took my belongings" approximately four years prior to the assaults of Crista D. Tolomei also testified that no one had ever been charged with the 1989 incident, and that she did not have personal knowledge of that alleged offense.

Over McClain's objection, the trial court allowed Tolomei's testimony ruling that it was "not offered for proof of the matter asserted," and that she could testify regarding "how she came up with [McClain's] name, it was due to a prior incident, which is allegedly apparently a trespasser or burglary." The trial court did not make an explicit relevancy determination.

On appeal, McClain concedes: "That this testimony wasn't admitted for the truth of the matter asserted might take care of the potential hearsay problem." He argues, however, that Tolomei's testimony regarding why she named him as a suspect was irrelevant. The State argues that absent an explanation of how Tolomei came to name McClain, "the jury was likely to assume that Mrs. Tolomei knew [McClain] because he had some sort of

(..continued)
901.03(1)(a), STATS.

personal relationship with the family thereby bolstering the defense claim that he also had a personal relationship with [Crista D.]." Thus, the State argues that evidence of the 1989 incident was properly admitted to "establish the context of the crime or to fully present the case." The State relies on the following language from ***State v. Chambers***, 173 Wis.2d 237, 496 N.W.2d 191 (Ct. App. 1992)., in arguing that Tolomei's testimony fell within an unspecified "other purpose[ ]" under RULE 904.04(2), STATS.[3]:

> In ***State v. Schillcutt***, ... we determined that, in addition to the enumerated exceptions found in sec. 904.04(2), another valid basis for the admission of other crimes evidence is to furnish the context of the crime if necessary to the full presentation of the case. We stated:
>
> > Section 904.04(2), Stats., does not prohibit the admission of other crimes evidence if "*offered for other purposes, such as* proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (Emphasis added.) We hold, as did the courts interpreting Rule 404(b) of the Federal Rules of Evidence, that the listing of circumstances under sec. 904.04(2) for which the evidence is relevant and admissible is not exclusionary but, rather, illustrative. Also, as did the federal courts, we hold that an "accepted basis for the admissibility of evidence of other

[3] RULE 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. 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.

> crimes arises when such evidence 'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case."

Chambers, 173 Wis.2d at 255-256, 496 N.W.2d at 198 (quoting ***State v. Schillcutt***, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd on other grounds*, 119 Wis.2d 788, 350 N.W.2d 686 (1984)).

To determine the admissibility of evidence under RULE 904.04(2) STATS., "the trial court must apply a two-prong test. First, the trial court must determine whether the evidence falls within a sec. 904.04(2) exception. 'Second, the trial court must exercise its discretion to determine whether any prejudice resulting from such evidence outweighs its probative value.'" ***State v. Clemons***, 164 Wis.2d 506, 513-514, 476 N.W.2d 283, 286 (Ct. App. 1991) (footnotes omitted). In this case, however, the trial court did not explicitly apply any such analysis. Still, assuming, *arguendo*, that Tolomei's testimony was irrelevant or that its probative value was outweighed by its unfairly prejudicial effect, any error in its admission was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-232 (1985).

At the trial, McClain's counsel clarified that he had no objection to Tolomei's testimony *that* she gave McClain's name to the police. He stated:

> I have no objection to that, I think that's perfectly appropriate. What seems to me is we get far afield when we start talking about why it was and how she knows from '89, and we start to lose focus of what the issues are. The fact that she ID'd him as a potential suspect I think it perfectly relevant.

The record establishes, however, that Tolomei's testimony about "why and how" she was able to name McClain was a relatively insignificant, additional point in this trial. In fact, immediately after eliciting the challenged Tolomei testimony, the State further elicited Tolomei's testimony that she was not present during the 1989 incident and that no one was ever charged as a result of the incident. Thus, even assuming error, we are convinced "that there is no

reasonable possibility that the error contributed to the conviction." ***Id.*** at 543, 370 N.W.2d at 232.[4]

C. Admission of McClain's Prior Sexual Assault of Denise M.

McClain claims that the Denise M. sexual assault evidence was improperly admitted under RULE 904.04(2), STATS. We reject this argument.

To impeach McClain's claims that he knew Crista D. prior to the assault, that he did not use force against her, and that she was making a false accusation, the prosecution brought a motion in limine seeking to introduce evidence that four years prior to his sexual assaults of Crista D., McClain had falsely denied using force to sexually assault Denise M. and had falsely claimed that he knew Denise M. prior to the assault. The trial court[5] concluded that the evidence from the Denise M. attack was relevant and admissible under RULE 904.04(2), STATS.

Whether to admit or exclude "other acts" evidence is within the discretion of the trial court. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We will not interfere with the trial court's discretionary evidentiary ruling so long as is was based on the applicable legal standards and in accordance with the facts of record. ***Id.***

---

[4] The record also suggests that if the trial court had sustained McClain's objection to the Tolomei testimony, the same evidence apparently would have been introduced through the testimony of Tolomei's daughter. In the chambers arguments on the admissibility of the Tolomei testimony, we note the following exchange:

> [The prosecutor]: ... I think then the jury's just left with why, out of a million names she's going to end up testifying she doesn't know this man personally, they end up saying, why did you say Rheuben McClain.
>
> [Defense counsel]: Then you tie it up through her daughter, who testified in the first trial.

[5] The State's motion was decided by the Honorable Patricia D. McMahon. Reserve Judge Gieringer reaffirmed Judge McMahon's ruling at a subsequent pretrial hearing.

The trial court properly exercised its discretion in admitting McClain's sexual assault of Denise M. The trial court stated that there was "a clear pattern of conduct and strong similarities between the incidents." Concluding that the evidence was admissible as "a plan for a scheme," the trial court noted: both victims alleged that a stranger abducted them and forced them to accompany him to another location; McClain detained both victims for significant periods of time; both victims claimed McClain asked them numerous personal questions and kept written information about them; both victims identified McClain; and McClain claimed that he knew both victims before the assaults, that the assaults were consensual, and that both victims had falsely accused him.

Further, the trial court properly concluded that the probative value of this evidence substantially outweighed any unfair prejudice. In weighing the probative value of the evidence against its prejudicial effect, the trial court must examine the other acts for nearness in time, place, and circumstance to the crime or element to be proved. *See* ***State v. Speer***, 176 Wis.2d 1101, 1114, 501 N.W.2d 429, 433 (1993). Here, in addition to the similarities already noted, both abductions and subsequent assaults took place in the same geographic area. Additionally, although the incidents were separated by four years, they were sufficiently near, in time, given that McClain had spent a substantial portion of those four years in custody for the Denise M. assault.

Further, any risk of unfair prejudice was diminished by the two cautionary instructions the trial judge gave the jury regarding the limited purpose for which the RULE 904.04(2) evidence could be used. *See* ***Clark***, 179 Wis.2d at 497, 507 N.W.2d at 177. The trial court did not erroneously exercise its discretion in admitting testimony of the Denise M. sexual assault.[6]

[6] McClain also argues that the trial court improperly admitted "other crimes" evidence to collaterally impeach him under RULE 906.08, STATS. This argument, however, was waived. McClain objected to the Denise M. evidence based on relevancy and inadmissibility under Rule 904.04(2), STATS. McClain did not raise the RULE 906.08 objection before the trial court. *See* RULE 901.03(1)(a), STATS.

D. Nexus Between the Weapon Enhancement and the Kidnapping Charge.

McClain's final claim is that a new trial must be ordered on the weapons enhancement charge under ***State v. Peete***, 185 Wis.2d 4, 16-24, 517 N.W.2d 149, 153-156 (1994), because the jury instruction did not tell the jury to find the necessary nexus that McClain possessed a weapon to facilitate the kidnapping. *See also* ***State v. Avila***, ___ Wis.2d ___, ___, 532 N.W.2d 423, 430-432 (1995).

McClain failed to object to the jury instructions as given and thus waived this issue. *See* ***State v. Marcum***, 166 Wis.2d 908, 915-916, 480 N.W.2d 545, 549-550 (Ct. App. 1992). McClain points out that in ***Peete*** the supreme court considered the defendant's claim despite his failure to object to the instruction. In ***Peete***, however, the State agreed that the instruction should be reviewed in relation to the issue of whether § 939.63, STATS., established a penalty enhancer for both actual and constructive possession of a weapon. Further, in ***Peete*** there was an issue of whether the defendant constructively possessed a weapon while committing a crime. Here, by contrast, there was no issue of constructive possession or nexus. The victim testified that McClain put a knife to her face as he led her out of the house. The trial court instructed that before answering "yes" to the question, "Did the defendant commit the crime of kidnapping while possessing a dangerous weapon?", the jury "must be satisfied beyond a reasonable doubt that the defendant committed the crime while possessing a dangerous weapon." The instruction adequately addressed the issue and properly stated the law consistent with the evidence in this trial and consistent with ***Peete***. Therefore, the judgment of conviction and the order denying McClain's motion for postconviction relief are affirmed.

By the Court. – Judgment and order affirmed.

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