

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP868-CR

Cir. Ct. No. 2009CF270

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER D. JACOB,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Christopher Jacob appeals from a judgment entered upon a jury verdict convicting him of physical abuse of a child and causing a child to expose her genitals/pubis area. He argues that the trial court erroneously

exercised its discretion by admitting other-acts evidence and that the prosecutor engaged in misconduct by presenting it in the first place. We disagree and affirm.

¶2 The charges against Jacob arose from an incident involving fourteen-year-old Shawwna, the daughter of his upstairs tenant. Twenty-five-year-old Jacob texted Shawwna on her cell phone, asked her to visit him and told her to bring along a particular necklace. Jacob had given Shawwna both the cell phone and the necklace. When she arrived, Jacob told Shawwna that she had “special power” and to develop it she had to undergo “training” by learning to withstand pain, embarrassment and extreme temperature. Jacob told Shawwna that if she did not, or if she told anyone, her mother, one of her friends and her seventeen-year-old sister Melissa’s critically ill newborn baby all would die.

¶3 Jacob told Shawwna to strip to her panties, bra and T-shirt and made her lay across his lap. He struck the bottoms of her feet and her buttocks with a PVC pipe, leaving a baseball-sized bruise on her buttocks. He then struck her palms with the pipe and made her kneel, now fully naked, while he put the necklace on her, touched her shoulders lightly with the pipe, and called her “Nicara.” He then ordered her to dress, except for her shoes and socks, and made her walk barefoot through the snow to his car. As he drove, Shawwna had to keep her bare feet out of the car window which Jacob rolled up tightly against her ankles so she could not free them.

¶4 Shawwna related the events to her sister, Melissa, who had been friends with Jacob for several years. Melissa visited Jacob to check out Shawwna’s story. Jacob told Melissa that she, too, had special powers that could save people, that her baby was owned by a “guild” and was a “prophecy” who could save the world, and that if she also did not undergo training, her baby would

die by age ten. Jacob straddled Melissa's back, pushed up her shirt, undid her bra and massaged her back and her sides near her breasts, while trying, unsuccessfully, to persuade her to have sex with him. Shawna and Melissa went to the police a few weeks later, shortly after Jacob gave their mother an eviction notice for nonpayment of rent.

¶5 The State charged Jacob with child enticement, two counts of physical abuse of a child and one count of exposing genitals or pubic area. Trial was set for August 11, 2009. On August 6, the State moved to adjourn the trial. The motion asserted that the day before, Jacob was arrested for first-degree sexual assault of a child involving a seven- and an eight-year-old and that potential charges involving a twelve-year-old still were being investigated. The motion indicated that Jacob had engaged in acts with the newly alleged victims similar to those with Shawna, "including having them get naked, watching them and engaging in ritualistic[-]type behavior, before progressing to touching their private parts." The State wanted to examine the allegations more thoroughly for possible use as other-acts evidence in Shawna's case because a material question was whether Jacob caused Shawna to expose her genitals or pubic area for the purpose of his sexual arousal or gratification. The State intended to argue that Jacob pressured Shawna into reenacting rituals and fantasies from "Guild War," his online gaming world, for the purpose of his sexual gratification. Over Jacob's objection that the State's motion to adjourn was untimely, the court granted the motion and set a jury trial date of October 6, 2009.

¶6 The State filed an other-acts motion on October 2, seeking permission to introduce evidence of the Melissa episode and of allegations

involving seven-year-old Noriah.¹ The trial court granted the State's motion. It reasoned that the acts were close in time and location and thus were probative of motive, plan, context, intent and absence of mistake, *see* WIS. STAT. § 904.04(2) (2009-10)²; that the other acts were relevant; that greater latitude in admitting other acts is permitted in crimes involving children; that the similar acts demonstrated "distinctive traits"; and that the defense had not met its burden of demonstrating that admitting the other acts would be unfairly prejudicial. The court allowed Melissa and Noriah to testify at trial. The jury found Jacob not guilty of child enticement and guilty of physical abuse of a child and of exposing genitals or pubic area.

Alleged Misuse of Discretion

¶7 On appeal, Jacob challenges only the use of the Noriah other-acts evidence. He alleges that the trial court erred in admitting it because it was not offered for a permissible purpose and any probative value was outweighed by its prejudicial effect.

¹ According to the motion, Jacob brought Noriah to his apartment ostensibly to do some cleaning after taking her to Wal-Mart to purchase rags and a small fan that sprayed water. Jacob told Noriah to remove her clothes so they would not get dirty while cleaning. Jacob placed one rag under her bottom and one rag on her stomach and told Noriah to put a rag over her head and spread her legs apart. He then used his finger to tickle her and made a circle slowly around her private area "where she goes pee" and then put his finger inside of her "private." Marsha Landskron, a tenant doing laundry in the basement, said she heard a small child laughing and giggling in Jacob's apartment, heard Jacob ask, "Why do you look scared of me?" and heard the child respond, "I'm not scared of you, Christopher." Landskron stated that she then heard Jacob say something about a foot massage and then say, "I'll make you a deal, if you massage me all day and itch my back whenever I say, I'll ..." but heard no more because she had to leave for an appointment.

² All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶8 A trial court’s decision to admit other-acts evidence involves the exercise of discretion, and will not be disturbed absent an erroneous exercise of discretion. *See State v. Hammer*, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629. We will uphold the trial court’s decision if discretion was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the court’s determination. *Id.*

¶9 The admissibility of other-acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2); (2) whether it is relevant under WIS. STAT. § 904.01; and (3) whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay under WIS. STAT. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998). Section 904.04(2) favors admissibility of other-acts evidence except when offered to prove the propensity of the defendant to commit similar acts. *See State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). In a sex crime case, especially one involving a child victim, the admissibility of other-acts evidence must be viewed in light of the “greater latitude” rule, which “helps other acts evidence to come in under the exceptions stated in § 904.04(2).” *Hammer*, 236 Wis. 2d 686, ¶23.

¶10 Jacob first asserts that the trial court erroneously exercised its discretion in applying the greater latitude rule. He argues that the rule’s application is limited to situations where the child was sexually assaulted and has difficulty testifying. *See, e.g., State v. Hunt*, 2003 WI 81, ¶87, 263 Wis.2d 1, 666 N.W.2d 771, *reconsideration granted on other issues*, 2003 WI 140, 266 Wis. 2d 68, 671 N.W.2d 853. To the contrary, the greater latitude of proof long has been permitted in Wisconsin in cases dealing with “sex crimes, particularly those involving incest and indecent liberties with a minor child.” *See Hendrickson v.*

State, 61 Wis. 2d 275, 279, 212 N.W.2d 481 (1973). Although “indecent liberties” no longer is a part of WIS. STAT. ch. 948 statutory language, when it was it meant “such liberties as the common sense of society would regard as indecent and improper.” *State v. MacArthur*, 2008 WI 72, ¶36, 310 Wis. 2d 550, 750 N.W.2d 910. The court properly applied the rule here.

¶11 Jacob next argues that the other-acts evidence was not proper for any acceptable purpose. An element of the exposing-genitals charge is that it be done for the purpose of the defendant’s sexual arousal or sexual gratification. *See* WIS. STAT. § 948.10. Besides noting the suspect timing of the report to police and that Shawna had a reputation for untruthfulness, Jacob’s defense was that viewing Shawna totally unclothed was not for the purpose of sexual gratification.

¶12 An inference can be drawn that Jacob’s touching of Noriah’s genitals was for the purpose of sexual gratification. The ritualistic aspect of garbing Noriah in white cloths and tracing circles on her skin, culminating in the sexual contact, went to proving that the ritualistic, albeit more elaborate, role-playing with a fully naked Shawna likewise was for his sexual gratification. “Criminal intent is the state of mind that negates accident or inadvertence. Evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused’s charged criminal conduct.” *Sullivan*, 216 Wis. 2d at 784. The more often a like act has been done, the less probable it is that it was done innocently. *State v. Evers*, 139 Wis. 2d 424, 437, 407 N.W.2d 256 (1987). Thus, the Noriah evidence tends to weaken any non-sexual explanation for the charge involving Shawna.

¶13 The trial court reasonably could have concluded, as it did, that the other-acts evidence was admissible for the purpose of establishing motive, plan,

intent, and absence of mistake, and to put the charged offenses in context. Once the court found that the evidence had a permissible purpose, it properly moved to the second step, relevancy. *See State v. Marinez*, 2011 WI 12, ¶25, 331 Wis. 2d 568, 797 N.W.2d 399 (stating that as long as one acceptable purpose for other-acts evidence is identified, the first *Sullivan* prong is satisfied).

¶14 To be relevant, the evidence must be of consequence to the determination of the action and must have a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. *Marinez*, 331 Wis. 2d 568, ¶19 n.14; *see also* WIS. STAT. § 904.01. The evidence also must have relevance apart from its tendency to shed light on the defendant's character. *See State v. Payano*, 2009 WI 86, ¶67, 320 Wis. 2d 348, 768 N.W.2d 832. There is a strong presumption that proffered evidence is relevant. *State v. Richardson*, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997).

¶15 “The measure of probative value in assessing relevance is the similarity between the charged offense and the other act.” *State v. Gray*, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999). Similarity is demonstrated by showing the “nearness of time, place, and circumstance” between the alleged crime and the other act. *State v. Scheidell*, 227 Wis. 2d 285, 305, 595 N.W.2d 661 (1999). The trial court found that the Noriah evidence was relevant to the Shawna charges because it had a tendency to make the consequential fact at issue here—whether the crime against Shawna was sexually motivated—more probable than without it. Indeed, the court was persuaded that the Noriah evidence was relevant precisely because of the “similarity of acts. Distinctive traits. This is an unusual set of circumstances that seems to be continuing with the same and similar thread. So—and time also, place, circumstances, it's all the same.”

¶16 We agree that the circumstances of the two events are sufficiently similar. In both cases, the incidents occurred just months apart with girls far younger than Jacob. Jacob knew the girls, invited them to his apartment and then used an unusual pretext to get them naked. The Noriah evidence thus was relevant to prove that the Shawna crimes were committed for sexual gratification. Because an aspect of Jacob's defense theory was that Shawna concocted the episode in retaliation for Jacob's plan to evict her family, the evidence also was relevant and probative as to Shawna's credibility. One reason behind the greater latitude rule is the need to corroborate the victim's testimony against credibility challenges. *State v. Davidson*, 2000 WI 91, ¶40, 236 Wis. 2d 537, 613 N.W.2d 606.

¶17 The third admissibility prong for other-acts evidence asks whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or confusion of the issues. *See* WIS. STAT. § 904.03.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome 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 the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. As the opponent of the evidence, it was Jacob's burden to establish disproportionate prejudice. *See Payano*, 320 Wis. 2d 348, ¶80 n.18.

¶18 We agree with the trial court that the probative value of Noriah's testimony substantially outweighed any danger of unfair prejudice. The probative value has been explained. As to undue prejudice, a proper cautionary instruction was given to the jury. Any danger of unfair prejudice or jury confusion was cured.

See State v. Grande, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). We reject Jacob's claim that he was unfairly prejudiced because the court denied his request to give the instruction when Noriah's testimony was admitted and gave it instead with the rest of the jury instructions at the close of the case. Whether to give a contemporaneous other-acts instruction lies within the trial court's discretion. *See Payano*, 320 Wis. 2d 348, ¶100 n.21. The acquittal on the child-enticement charge demonstrates that the jury was not improperly swayed.

Alleged Prosecutorial Misconduct

¶19 Jacob first asserts that the prosecution engaged in misconduct in its presentation of the other-acts evidence in its motion in violation of his due process rights. *See Marinez*, 331 Wis. 2d 568, ¶45 (allegation that prosecutor used evidence so as to exceed purposes for which evidence admitted may be considered as allegation of prosecutorial misconduct). We review allegations of prosecutorial misconduct in light of the entire record of the case. *State v. Lettice*, 205 Wis. 2d 347, 353, 556 N.W.2d 376 (Ct. App. 1996).

¶20 Jacob first claims that the timing of the State's other-acts motion involved "sleight of hand." We disagree. The State hardly had control over the fact that Jacob accrued the Noriah charges just two weeks before his August 11 trial date. On August 6, as soon as it learned of the possibly similar charges, the State moved to adjourn the trial, outlining the other acts it intended to introduce in the Shawna trial, including Jacob's sexual contact with Noriah and his ritualistic activities with the rags. Jacob therefore was on notice since August 6. That the State did not file a formal motion until October 2 did not compromise his ability to adequately investigate and prepare a defense.

¶21 Jacob next argues that the prosecutor significantly misrepresented the scope and content of Noriah’s proposed testimony by emphasizing the other act’s ritualistic nature because she had no intent to present the evidence in the State’s case-in-chief. The real aim, Jacob contends, was to hoodwink the court into allowing the evidence, and then to zero in at trial on the sexual contact solely to show his depravity and that he acted in conformity with his bad character.

¶22 We disagree once again. Seven-year-old Noriah testified that she had been to Jacob’s apartment before and knew him because he used to baby-sit at her aunt’s house, that she was at Jacob’s apartment to do some cleaning and that she and Jacob went to Walmart and purchased four “pure white rags” and a “spray fan bottle.” After returning to Jacob’s apartment, Noriah took a bath and, while naked, Jacob tied one cloth around her “front private part,” another around her back, and one “up by my chest.” She testified that Jacob then began touching her “[l]ike around in circles on my back,” and then touched her “front private” and began “circling around my front private part.”

¶23 The State had to prove that Jacob acted for the purpose of sexual gratification. The Noriah evidence provided the jury with a greater understanding of the allegations. Jacob invited both Shawwna and Noriah to his apartment under some pretext and soon thereafter gave them peculiar reasons to remove their clothes. Each situation featured Jacob’s control and a bizarre ritualism, and each was tailored to a particular end. The jury reasonably could conclude that, like the sexual contact with Noriah, viewing a fourteen-year-old girl fully naked was done for the purpose of Jacob’s sexual gratification.

¶24 Jacob also argues that the prosecutor purposefully inflated the importance of the other-acts evidence by proffering Landskron as a possible

rebuttal witness, knowing it would not call her. Landskron was not a bona fide rebuttal witness, however. A bona fide rebuttal witness is one whose testimony becomes necessary and appropriate only after the defense presents its case-in-reply. See *Lunde v. State*, 85 Wis. 2d 80, 91-92, 270 N.W.2d 180 (1978). It was reasonable for the prosecutor to anticipate that Landskron would be called to testify; when Jacob did not take the stand to refute Noriah's testimony, it became unnecessary. Rebuttal evidence is determined by what comes out at trial. How a trial unfolds cannot be precisely predicted.

¶25 Prosecutorial misconduct violates a defendant's due process rights when it poisons the entire atmosphere of the trial and deprives the defendant of a fair trial. See *Lettice*, 205 Wis. 2d at 352. Jacob's allegations do not come close to establishing that this court should take the "drastic step" of reversing his conviction on the basis of prosecutorial misconduct. See *id.*

By the Court.—Judgment affirmed.

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

