

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 Nos. 2011AP809-CR
2011AP810-CR**

**Cir. Ct. Nos. 2009CF1966
2009CF2064**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILL HAYWOOD,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Will Haywood appeals judgments of conviction, entered following a jury trial, for three counts each of kidnapping, second-degree

sexual assault, and first-degree sexual assault, and two counts of child enticement.¹ He argues that the trial court erroneously exercised its discretion when it allowed the State to introduce other acts evidence relating to a sexual assault charge of which he was acquitted. We conclude that there was no error in the admission of the challenged evidence and that even if there was error, it was harmless. Therefore, we affirm.

BACKGROUND

¶2 Haywood was initially charged in Milwaukee County Case No. 2009CF1966 with one count of kidnapping, one count of child enticement, two counts of second-degree sexual assault of a child, and two counts of first-degree sexual assault, relating to Eugene L. Haywood was later charged in Milwaukee County Case No. 2009CF2064 with one count of kidnapping, relating to Quentin K., and one count of kidnapping, one count of child enticement, one count of second-degree sexual assault, and one count of first-degree sexual assault, relating to Joshua C. The events on which the charges were based took place in 2009.

¶3 Prior to trial, the State sought to introduce other acts evidence in the form of testimony from Danny J., who claimed that Haywood had sexually assaulted him in 2007. The State had charged Haywood with the assault and a

¹ The charges against Haywood stem from two separate lower-court cases, which were consolidated for trial. On Haywood's motion, this court consolidated his appeals for briefing and dispositional purposes.

jury had acquitted him. Notwithstanding, the State argued that other acts evidence relating to Danny should be admitted because it demonstrated Haywood's modus operandi and his intent.

¶4 Over Haywood's objection, the trial court ruled that the evidence was admissible as other acts evidence. The cases proceeded to trial where the following testimony was presented.

Joshua

¶5 On February 24, 2009, seventeen-year-old Joshua was in the eleventh grade. After school that day, he walked to his bus stop. It was around 4:00 p.m. when a dark-colored car stopped and the man inside asked him to come over to the vehicle. The man told Joshua that he knew him from somewhere, and Joshua thought he looked like a boy who had gone to school with him. The man asked Joshua if he wanted a ride home, and Joshua got into the car. Once inside, the man told Joshua he needed help finding his phone, which he believed he had dropped nearby.

¶6 The man directed Joshua to a garage. Inside was what appeared to be an abandoned car. Joshua and the man began looking in the car for the misplaced cell phone. The man then "came back to [Joshua's] side and he asked me if ... he brought a girl in here what would I do to her." The man proceeded to push Joshua up against the garage door. When Joshua resisted, the man said "don't make me shoot you." At that point, the man unbuckled Joshua's pants and performed oral sex on him. Joshua protested but was afraid he might get shot.

¶7 Next, the man “threw” Joshua in the back seat of the car and anally raped him. The man ejaculated on Joshua’s back, took the \$20 Joshua had in his wallet and his state identification card and ran out.

¶8 Joshua walked to his friend’s house and reported the assault. DNA swabs taken from Joshua’s lower back and from his boxer shorts were a match to Haywood.

¶9 Joshua testified that he had never seen the man who raped him before the day of the assault. Two months after the assaults, Joshua identified Haywood’s car as the car of his assailant. At trial, he identified Haywood as the man who assaulted him.

Quentin

¶10 On April 21, 2009, sixteen-year-old Quentin was in the ninth grade. He was at a bus stop on his way to school shortly before 8:00 a.m. when a man pulled up in a four-door black car. The man asked Quentin if he knew where Tech was and when Quentin responded, the man pulled out a gun and told him to get in the car. Quentin did what he was told and got into the car. When the car stopped at a stop light, Quentin hit the man in the jaw. Quentin then jumped out of the car and ran to the bus stop where he got on a bus and went to school. At school, he went to a security guard and reported what had happened.

¶11 Quentin identified Haywood in a lineup and in court. He testified that he did not know Joshua or Eugene. The incident involving Quentin resulted in a single charge of kidnapping against Haywood.

Eugene

¶12 Shortly after the incident involving Quentin, fifteen-year-old Eugene, an eighth grader, was walking down the street on his way to school when a man sitting in a parked car asked him if he wanted a ride. Eugene declined and kept walking, but the man drove his car up to him and told him to get into the car or he would shoot him. Eugene got into the car and the man drove off.

¶13 The man drove Eugene to a garage and told him he wanted help looking for a phone. Inside the garage was a broken-down car. The man instructed Eugene to look for the phone in the car. As Eugene was doing so, the man came behind him “touching on [him]” and “said what if a girl come up to you and do this.” At that point, the man started to unzip Eugene’s pants despite Eugene telling him to stop. The man performed oral sex on Eugene, and when Eugene tried to get away, the man hit him in the face. He then pushed Eugene into the car on his stomach and anally raped him. After the man left, Eugene ran to school and told the school secretary what had happened.

¶14 DNA swabs taken from Eugene’s penile shaft were a match to Haywood. In both a photo array and in court Eugene identified Haywood as the man who assaulted him. Eugene testified that he did not know or recognize Joshua or Quentin.

Danny

¶15 Danny was allowed to testify about Haywood’s alleged sexual assault of him on October 30, 2007. On that date, he was an eighteen-year-old high school student. He was waiting at a bus stop on his way home from school when a man came up to him, said he looked familiar, and asked what school

Danny went to. Danny told the man that he went to Bradley Tech and the man told him he had just graduated from there. The man invited Danny to his apartment to smoke marijuana and told Danny that two women would be coming over. Danny accepted the invitation and walked with the man to a nearby apartment complex.

¶16 When they got to the apartment, the man told Danny to close his eyes so that he could show him what the women were going to do when they arrived. Danny consented to the man performing oral sex on him. The man then heard something, so he told Danny to get his stuff and they went to an abandoned apartment across the hall.

¶17 Once there, the man told him to pull down his pants for anal sex. Danny refused, but the man motioned as if he had a gun. The man then picked Danny up and slammed him against the wall and onto the floor, which caused Danny to lose consciousness. When he came to, the man was anally raping him. When it was over, Danny went home and saw his mother, who asked what happened. Danny did not tell her the truth. He told his mother that a man came up behind him at gunpoint and raped him. He told the police this same untruthful story and then later told the police the truth.

¶18 Danny identified Haywood in court as the man who had assaulted him.

Haywood's testimony

¶19 Haywood testified on his own behalf and denied all of the allegations.

¶20 He testified that he knew Joshua as Michael and that the two met on a gay chat line. Haywood testified that he and Joshua first saw each other on February 6, 2009. On that date, Haywood picked Joshua up and they drove around and talked. Two days later, Joshua took a bus to Haywood's house, where the two had consensual sexual contact.

¶21 According to Haywood, he and Joshua talked on the phone regularly until Haywood saw Joshua again on February 24, 2009. On that date, Haywood was ill and Joshua came over to take care of him. They again had consensual sexual contact and Haywood ejaculated on Joshua's back. Haywood testified that he felt bad afterward because he was in a relationship with another man named Darius. When Haywood told Joshua he wanted to be with Darius, Joshua kicked the door and went home. That was the last time that Haywood saw Joshua until court.

¶22 Haywood testified that he first met Eugene on April 21, 2009. According to Haywood, on that date, Eugene tried to break into Haywood's prior residence. Haywood was driving past the house and happened to see Eugene there. Haywood approached Eugene and asked him what he was doing at the house. When he did not get a response, Haywood threatened to call the police. Haywood testified that he was then grabbed from behind by another young man. As Eugene and the other man were dragging Haywood, he kicked Eugene in the face.

¶23 Haywood then saw Quentin with a fourth man. The fourth man had a gun. Haywood was pushed into the garage and was forced to give oral sex to each of the four men, including Eugene and Quentin. He was then anally raped by

one of the men. Haywood did not report the assault to anyone because he was embarrassed. He did not tell the police about the assault after he was arrested.

¶24 Haywood’s testimony regarding Danny mirrored his testimony pertaining to Joshua in a number of ways. Haywood testified that he knew Danny as “Love” and that the two met on the same chat line where Haywood met Joshua. According to Haywood, he and Danny had a consensual sexual relationship. One day when Haywood was ill, Danny went to Haywood’s home and the two had sex. Haywood felt bad afterward because he was in a relationship with Darius. When Haywood told Danny about his feelings for Darius, Danny got upset and falsely accused him of sexual assault. The jury heard that Haywood was acquitted of the charges involving Danny.

¶25 Despite Haywood’s testimony, a jury convicted him of all of the charges.

DISCUSSION

¶26 The sole issue on appeal is whether the trial court erred when it admitted other acts evidence related to Danny. Haywood asserts that the facts of the incident involving Danny were dissimilar to the allegations at issue and any probative value of the other acts evidence was substantially outweighed by the undue prejudice. We disagree.

A. Legal Principles

¶27 The admissibility of evidence rests within the trial court’s discretion and the decision to admit other acts evidence is reviewed for an erroneous exercise of discretion. *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d

399. We will sustain the ruling if we find that the trial court “‘examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.’” *Id.* (citation omitted). “Even if a [trial] court fails to set forth the basis for its ruling, we will nonetheless independently ‘review the record to determine whether it provides an appropriate basis for the [trial] court’s decision.’” *Id.* (citation omitted).

¶28 “[E]vidence 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)(a) (2009-10).² However, § 904.04(2)(a) permits 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.*

¶29 When deciding whether to allow other acts evidence, Wisconsin courts apply the three-step analytical framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). See *Marinez*, 331 Wis. 2d 568, ¶19. Under *Sullivan*, courts must consider: (1) whether the evidence is offered for a proper purpose under § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

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

Sullivan, 216 Wis. 2d at 772-73. The proponent of the other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. *Marinez*, 331 Wis. 2d 568, ¶19. Once the first two prongs of the test are satisfied, the burden shifts to the opposing party “to show that the probative value of the [other acts] evidence is substantially outweighed by the risk or danger of unfair prejudice.” *Id.* In cases involving sexual assault, particularly those where the victim is a child, greater latitude is permitted in applying the *Sullivan* framework, and other acts evidence is admitted more liberally. *See State v. Davidson*, 2000 WI 91, ¶¶36-44, 236 Wis. 2d 537, 613 N.W.2d 606; *see also Marinez*, 331 Wis. 2d 568, ¶20.

B. Admissibility of the evidence in this case.

1. Permissible Purpose

¶30 In the first step of its *Sullivan* analysis, the trial court concluded that the other acts evidence was offered for the proper purposes of showing Haywood’s motive, plan, and preparation. The State further asserts that the evidence was offered as proof of intent. In the interest of brevity, we discuss only the proffered purposes of intent and plan. *See Marinez*, 331 Wis. 2d 568, ¶25 (“As long as the State and [trial] court have articulated at least *one* permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the *Sullivan* analysis is met.”).

¶31 Evidence of intent “tends to undermine the defendant’s innocent explanation for his act. The reasoning of this argument is that the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent.” *State v. Roberson*, 157

Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990) (citations omitted). Here, as the State points out, the incident involving Danny undermined Haywood's explanation that he had a consensual relationship with Joshua and that he was forced to perform oral sex on Quentin, Eugene, and two other men.

¶32 We further conclude that the evidence was properly admitted as proof of Haywood's plan based on the strikingly similar nature of the crimes. *See Davidson*, 236 Wis. 2d 537, ¶60 ("Evidence of other crimes may be admitted for the purpose of establishing a plan or scheme when there is a concurrence of common elements between the two incidents."). The trial court noted the similarities:

The similarities in all of these matters, especially the Danny J. case, in relation to the two other cases that are being tried are strikingly similar, both in time, place and circumstance; it appears to be around the same general times of day when school is letting out or school is starting; the places appear to be somewhat similar; and the circumstances in the long run turn out to be extremely similar. The fact that there was a cooperative sexual encounter in the Danny J. case to begin with doesn't in any way negate the fact that there was a violent sexual rape that ... allegedly had gone on, after that fact.

¶33 Because of the similarities, and in light of the greater latitude rule, the trial properly concluded that the other acts evidence was offered for proper purposes. *See Marinez*, 331 Wis. 2d 568, ¶25 ("This first step in the *Sullivan* analysis is not demanding. Identifying proper purposes for the admission of other-acts evidence is largely meant to develop the framework for the relevancy determination.") (citation omitted).

2. Relevance

¶34 We next examine whether the evidence was relevant. “Relevance of other acts evidence has two components: The evidence must relate to a fact or proposition of consequence to the determination of the action; and it must have probative value—a tendency to make a consequential fact more or less probable than it would be without the evidence.” *State v. Veach*, 2002 WI 110, ¶59, 255 Wis. 2d 390, 648 N.W.2d 447. The probative value of other acts evidence depends on “the similarity between the charged offense and the other act.” *Davidson*, 236 Wis. 2d 537, ¶67 (citation omitted). There is, however, no general rule governing “[t]he required degree of similarity.” *State v. Opalewski*, 2002 WI App 145, ¶16, 256 Wis. 2d 110, 647 N.W.2d 331 (citation omitted).

¶35 Haywood focuses on the differences between Danny’s allegations and the allegations of the other victims. Namely, Danny went with Haywood freely; Haywood did not have a vehicle at the time he met Danny whereas the vehicle featured prominently in the other victims’ descriptions of what happened;³ and Danny consented to oral sex. We are unpersuaded by the distinctions Haywood draws.

¶36 In trying to differentiate the other acts evidence, Haywood overlooks numerous commonalities. As the State explains:

Without being identical to the other incidents, the Danny J. case fit in with the common plan seen in the other cases. First, in his scheme to entrap teen-aged boys, Haywood

³ Trial testimony revealed that Haywood purchased a four-door black vehicle after Danny’s assault.

trolled bus stops at times students would be going to or leaving school. Second, Haywood would (in the first three cases) feign a school-based social connection with his targets; he would later (in the last two cases) use a gun instead. Third, Haywood took the boys to a closed space within his knowledge and control. Fourth, he would begin his sexual advances by alluding to hypothetical females. Fifth, he would perform oral sex on the boys. Finally, he would anally penetrate them forcibly and without consent.

¶37 We agree with the State that the other acts evidence was relevant to proving Haywood’s intent because it undermined his innocent explanations for knowing the victims. In addition, the other acts evidence was relevant to proving that Haywood had a plan when it came to orchestrating these crimes.

3. Prejudice

¶38 After considering the third prong of the *Sullivan* analysis, the trial court concluded Haywood failed to meet his burden of showing that the probative value of Danny’s testimony was substantially outweighed by the risk or danger of unfair prejudice. The trial court explained that the fact that Haywood had been acquitted in the case involving Danny might not be prejudicial to Haywood’s case, stating: “[T]here is a 50 percent chance that the defense can use it to their benefit by saying, you know, he was acquitted of this before and a jury did the right thing before and many other different arguments can be made.” We agree with the trial court’s conclusion that the other acts evidence was not unfairly prejudicial given the possibility that it could be used to Haywood’s benefit. *See generally State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (“Nearly all evidence operates to the prejudice of the party against whom it is offered. The test is whether the resulting prejudice of relevant evidence is *fair* or *unfair*. In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect.”) (citations omitted).

¶39 Moreover, the trial court’s decision to give the jury a limiting instruction “serve[d] to eliminate or minimize the risk of unfair prejudice.” *See State v. Landrum*, 191 Wis. 2d 107, 122, 528 N.W.2d 36 (Ct. App. 1995). Here, the instruction explained that if a juror found that Haywood kidnapped and sexually assaulted Danny, that conduct should be “consider[ed] ... only on the issues of motive, intent, preparation or plan. You may not consider this evidence to conclude that the defendant has a ... certain character trait and that the defendant acted in conformity with the trait or character with respect to the offense charged in this case.”

¶40 We are satisfied, in light of *Sullivan* and *Marinez*, that the trial court examined the relevant facts, applied the proper legal standard, and reached a conclusion of law that a reasonable judge could reach. Accordingly, we conclude that the trial court properly exercised its discretion in allowing Danny to testify.

C. Harmless Error

¶41 However, even if Danny’s testimony was improperly admitted, reversal is not automatic. Instead, we must evaluate whether admission of the other acts evidence was harmless error. “The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction.” *Sullivan*, 216 Wis. 2d at 792.

¶42 The evidence of guilt presented during Haywood’s trial was overwhelming. Among other things, the jury heard: Haywood’s DNA was found on Joshua’s back and Eugene’s penis; Joshua and Eugene suffered painful anal penetration, as confirmed by the testimony of sexual assault nurse examiners; and numerous factually consistent details provided by Joshua, Quentin, and Eugene,

despite their testimony that they did not know one another. Haywood's elaborate accounts regarding how he knew each of the victims left many of these details unexplained. For instance, Haywood's account did not explain how it was that Joshua knew so much about the inside of the garage where he was assaulted and how Quentin was able to describe the interior of Haywood's car, which according to Haywood, Quentin had never entered.

¶43 This is not an exhaustive list of the evidence against Haywood. It is, however, sufficient for us to conclude that there is no reasonable possibility that Danny's testimony contributed to the verdicts against Haywood.

By the Court.—Judgments affirmed.

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

