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August 14, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1879-CR

State of Wisconsin v. Vonell L. Shaw (L.C. #2016CF410)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Vonell L. Shaw appeals a judgment of conviction. He contends that the circuit court erroneously exercised its discretion by admitting other-acts evidence of Shaw's prior crime for purposes of establishing Shaw's identity. We reject this contention and affirm. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹

Shaw was charged, all as a repeater, with (1) impersonating a peace officer, (2) burglary, (3) second-degree sexual assault, (4) aggravated battery of an elder adult at risk, (5) misdemeanor theft, (6) unauthorized use of an individual's personal identifying information or documents, and (7) misdemeanor bail jumping. The charges arose from a 2016 incident in which Shaw entered the residence of an elderly woman, L.M.F., by advising her that he was a police officer, and he then sexually assaulted her. Shaw denied that he had ever met L.M.F. before trial or ever entered her home.

Prior to trial, the State moved to admit other-acts evidence regarding a crime in 2015 involving Shaw and J.S., an elderly woman, to show plan and motive. The court denied the motion but told the parties that it would revisit its other-acts evidence decision "depending on the nature of the case that goes in by the State and the defense as presented."

The State renewed the motion midtrial, at which time the court granted the motion to admit the other-acts evidence in order to show identity. The trial continued, and the jury found Shaw guilty on all seven counts. This appeal follows.

On appeal, Shaw again contends that the court erroneously exercised its discretion by admitting the other-acts evidence against him. He argues that the similarities between the 2016

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

and 2015 incidents were not sufficiently specific to prove identity.²

Shaw argues that evidence that he was involved in the other, unrelated incident served only to prove Shaw's bad character and that he acted in conformity with that character in this case. Shaw also argues that the evidence was irrelevant because, he contends, whether he previously entered the home of another elderly woman sheds no light on whether he entered L.M.F.'s home in this case. Shaw contends that any minimal probative value of the other-acts evidence was substantially outweighed by the danger of the unfair prejudice arising from the jury speculating that Shaw was likely to have entered L.M.F.'s home if he did so before in an unrelated incident and by the possibility that the evidence might provoke the jury's instinct to punish Shaw for his past acts. We are not persuaded.

A 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 circuit court's decision if the court reviewed the relevant facts, applied a proper legal standard, and reached a reasonable conclusion. *State v. Gribble*, 2001 WI App 227, ¶39, 248 Wis. 2d 409, 636 N.W.2d 488.

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), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) whether it is relevant under WIS. STAT. § 904.01; and (3) whether its

² At trial, defense counsel conceded that "identity is at issue as to the person that did break into [L.M.F.'s] apartment," but objected that Shaw's 2015 crime was "different in the type of ruse," and thus "the act was not similar."

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, 772-73, 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).

The circuit court found that the State offered the evidence for an acceptable purpose: identity. For other-acts evidence to be admitted for the purpose of identity, there should be “such a concurrence of common features and so many points of similarity between” the other act and the crime charged that it reasonably can be said that each bears the “imprint of the defendant.” *State v. Fishnick*, 127 Wis. 2d 247, 263-64, 378 N.W.2d 272 (1985). Similarity is demonstrated by showing the events’ “nearness of time, place, and circumstance.” *State v. Hunt*, 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted).

The evidence at trial established the following: L.M.F. was sixty-six years old and lived alone. On March 18, 2016, at about 9:00 p.m., L.M.F. was sleeping when she heard the apartment doorbell. She buzzed the person into her apartment building. The man L.M.F. identified as Shaw came to her door and knocked. Shaw said he was a police officer and entered her apartment.

Shaw asked L.M.F. if she had a credit card, asked for the PIN number, and took her purse. He led L.M.F. into her bedroom and told her to take her pants down. L.M.F. laid on her stomach and Shaw entered her anus with his finger. When Shaw left L.M.F.’s apartment he took her purse. Subsequently, Shaw used L.M.F.’s ATM debit card.

The State's proffer of other-acts evidence involved sixty-eight-year-old J.S. Shaw's aunt was her caretaker. The court correctly summarized the evidence, which was later addressed in trial testimony, as follows: J.S. told police that at "approximately 3:45 a.m. someone buzzed her door. Thinking it was a friend of hers [J.S.] said she opened the door." When she did, there was a man who said he was a local college student and was in trouble. The man asked to use her phone. J.S. said that the man "brushed past her, went into her apartment," and she then allowed the man to use her bathroom. The man "kept telling [J.S.] his leg was hurt, asked her to come in and look at it." The man exited the bathroom "with his pants down and underwear off and his genitals exposed," J.S. believing that "this was intentional."³

The court undertook the *Sullivan* analysis, beginning by correctly determining that the State offered evidence of the 2015 crime for the proper purpose of proving identity. The court noted that there were questions concerning who the perpetrator might have been, since Shaw denied going to L.M.F.'s apartment, and there were discrepancies associated with L.M.F.'s description of Shaw, such as her testimony that she saw no tattoos, when Shaw does have tattoos. Shaw does not contest that identity was at issue and is a proper purpose.

We also conclude that the circuit court conducted a proper relevancy analysis. Other-acts evidence is relevant if it is of consequence to the determination of the action and has probative value. *See Sullivan*, 216 Wis. 2d at 772; *see also* WIS. STAT. § 904.01. Probative value is

³ Although Shaw was charged with lewd and lascivious behavior in the case involving J.S., that charge was dismissed pursuant to a plea agreement where Shaw pled no contest to disorderly conduct.

measured by the similarity between the charged offense and the other act. *Hunt*, 263 Wis. 2d 1, ¶64. Similarities that “tend to identify the defendant as the proponent of an act also tend to ensure a high level of probativeness in the other-acts evidence.” *Fishnick*, 127 Wis. 2d at 263.

State v. Wagner, 191 Wis. 2d 322, 528 N.W.2d 85 (Ct. App. 1995), is instructive. In that case, the defendant attacked a victim in a laundromat by approaching her from behind, pointing a gun at her, and trying to force her into a bathroom. *Id.* at 327. Eight months later, the defendant attacked another victim in a laundromat, approaching her from behind and putting a gun to her side. He also tried to force her into the laundromat’s bathroom. *Id.* We affirmed the circuit court’s decision to admit other-acts evidence of a third victim who was attacked in a laundromat one year after the second victim was attacked, but without a gun, and forced into the bathroom and sexually assaulted. *Id.* at 330-31. The similarity of the incidents was probative of identity.⁴ *Id.* at 331.

Here, the court noted that the incidents involving L.M.F. and J.S. shared numerous common features and similarities, as well as a nearness of time, place, and circumstance. The court found that both circumstances involved “false pretense[s],” “an older lady” victim, the crimes occurred “within a year” of each other, and “some indication of ... sexual connotation involved in gaining the entry, either for satisfaction and/or embarrassment of the individual upon whom entry is gained.” Noting the similarities between these two crimes, the court held that the

⁴ Shaw’s reliance on *State v. Scheidell*, 227 Wis. 2d 285, ¶¶11-18, 595 N.W.2d 661 (1999), is not helpful, as that case addressed the admissibility of other-acts evidence committed by an unknown third-party that was proffered by the defendant on the issue of identity. Here, the comparison is with an incident in which the victim identified Shaw and a prior incident in which Shaw was identified by the victim and was convicted.

other-acts evidence was relevant to the charges for which Shaw was being tried and constituted the same criminal “imprint.” See *Fishnick*, 127 Wis. 2d at 263-64.

We agree with the court’s analysis. Shaw’s modus operandi and purpose were similar in both cases and probative of his identity. Shaw targeted a specific type of victim: elderly women living alone. He committed his crimes late at night. He gained entry to the victims’ homes using a ruse. He committed acts apparently for sexual gratification. The crimes occurred over a short, nine-month period.⁵

Lastly, the probative value of the evidence must not be “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.” *Sullivan*, 216 Wis. 2d at 772-73. “The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence.” *State v. Marinez*, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. “Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice.” *Id.*

Here, the record shows that the court was aware of, and applied, the correct standard in admitting the other-acts evidence. It properly recognized that the high level of probative value—because of the great similarity between the two crimes—outweighed the danger of unfair

⁵ The offer of proof also provided that Shaw subsequently took J.S.’s debit card and attempted to use it multiple times, although J.S. did not confirm this at trial. The court did not rely on this information in its ruling, and we need not either.

prejudice. The court noted that J.S. would be subject to cross-examination, reasoning that that Shaw’s ability to cross-examine J.S. about the other-acts evidence would help limit the danger of unfair prejudice, insofar as it would give Shaw the opportunity to try and undermine the identity connection.

Notably, the court gave a limiting instruction to the jury, WIS JI—CRIMINAL 275, advising the jury to consider the other-acts evidence only for identity purposes. We presume that a jury follows the instructions given to it. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Any unfair prejudicial effect caused by the admittance of the other-acts evidence thus was mitigated by those instructions. *See Hunt*, 263 Wis. 2d 1, ¶73.

Shaw has not shown that the court erroneously exercised its discretion when it determined that the probative value of the other-acts evidence was not substantially outweighed by the risk or danger of unfair prejudice or confusion. “Simply put, the circuit court’s decision regarding the prejudicial effect was *not* a decision that no reasonable judge could make.” *State v. Hurley*, 2015 WI 35, ¶92, 361 Wis. 2d 529, 861 N.W.2d 174.

Because the circuit court reasonably recognized that the evidence was admitted for a proper purpose, was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice, it properly exercised its discretion in admitting the other-acts evidence.⁶

Upon the foregoing reasons,

⁶ Given our decision, we need not address the parties’ harmless error arguments. *See State v. Salinas*, 2016 WI 44, ¶47, 369 Wis. 2d 9, 879 N.W.2d 609.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to
WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals