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DISTRICT IV

January 14, 2021

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

2019AP760-CR

State of Wisconsin v. Duane A. Jurgenson (L.C. # 2013CF18)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

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).

Duane Jurgenson appeals a judgment of conviction. 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 We affirm.

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

After a jury trial, Jurgenson was convicted of one count of first-degree sexual assault of a child. The allegation was that in 2002 Jurgenson had sexual contact by placing his mouth on the victim's genitals. Before trial, the circuit court granted the State's motion to admit evidence of sexually oriented text messages that Jurgenson exchanged in 2012 with a different child. At the time of the messages, that child was approximately the same age that the victim in this case was at the time of the charged crime in 2002, and was the same gender.

Jurgenson argues that the court erred by admitting that evidence. The parties generally agree on the applicable law. The admissibility of other-acts evidence is to be decided using the test described in *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). In a case involving sexual assault of a child, the court is to give greater latitude to admission of evidence. *State v. Davidson*, 2000 WI 91, ¶¶36-44, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. We review admission of the evidence for an erroneous exercise of discretion. *Sullivan*, 216 Wis. 2d at 780-81.

The circuit court admitted the text message evidence on the issue of motive. Jurgenson argues that the messages were not admissible to show motive because the text messaging conduct was not sufficiently similar to the charged conduct in this case. In essence, he is relying on the difference between sexually oriented communication and actual sexual contact.

However, Jurgenson does not clearly explain how that distinction impairs the admissibility of the evidence as to motive. Despite that difference, there remain significant similarities as to the sexual nature of the interaction and the age of the child involved. We conclude that it was reasonable for the circuit court to decide that the text messaging conduct was sufficiently similar to the charged conduct to be relevant.

Jurgenson also argues that the text messaging conduct was too remote in time to be admissible. However, he does not clearly explain how the passage of time between the charged crime and the later other-acts evidence substantially diminishes the value of that evidence to prove his motive at the time of the charged crime, to the degree that it lacks relevancy. We are not persuaded that the passage of time made the evidence inadmissible.

Jurgenson next argues that the circuit court failed to consider the possibility that the jury would misuse the evidence for propensity purposes that are prohibited by WIS. STAT. § 904.04(2)(a). However, the circuit court gave a closing instruction that the evidence could be used only for motive and not to “conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the events charged in this case.” See *State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992) (“The jury is presumed to follow all instructions given.”).

Jurgenson also argues that the circuit court increased the risk that the jury would misuse the evidence by giving that instruction only after the testimony. However, he does not cite any authority for the proposition that more is required, and it is also not clear that Jurgenson actually requested that an instruction be given at the time of the testimony.

Finally, Jurgenson argues that the probative value of the evidence was outweighed by the danger of unfair prejudice due to the lack of similarity, remoteness in time, and potential for the jury to misuse the evidence for propensity purposes. While it may be true that the other-acts evidence here would have greater probative value if there was more similarity and closeness in time to the charged conduct, we conclude that the probative value remained high enough so that

it was reasonable for the circuit court to admit it, when combined with an instruction that reduced the potential for unfair prejudice.

IT IS ORDERED that the judgment appealed from is summarily affirmed under 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