COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP326-CR
2015AP327-CR
2015AP328-CR

Cir. Ct. Nos. 2012CM311
2012CM1450
2012CF552

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER A. SHEPLER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Christopher Shepler appeals a judgment of conviction for first-degree sexual assault, child enticement, possession of a dangerous weapon, and obstructing an officer, and an order denying his

postconviction motion to withdraw his guilty pleas. Shepler argues the circuit court erroneously granted the State's motion to admit other-acts evidence. We reject Shepler's argument and affirm.

BACKGROUND

¶2 In August 2012, Shepler was charged with two counts of first-degree sexual assault of a child under twelve, one count of second-degree sexual assault, and two counts of child enticement. The complaint alleged the assaults occurred between April 1 and July 23, 2012, when Shepler was just under age eighteen. The victims were T.Y., a seven-year-old girl, and her brother B.Y., a six-year-old boy.

¶3 According to an interview of T.Y., she was camping in the woods with her brother, her brother's friend, and Shepler. Shepler told B.Y. and his friend to stay in the woods and then took T.Y. to another place in the woods. Shepler took T.Y.'s clothes off and wrapped her shirt around her eyes, telling her not to take it off. She felt him take his pants off, and he covered her mouth with his hand as she was screaming and asked her to be quiet. She also said he put his lips on hers so she could not scream. Shepler then put his penis in her butt and was moving it in and out. He told her he was checking for ticks in case they crawl in there. He told her to put her clothes on, but then said to wait because he needed to check for ticks and inserted his fingers in her butt before letting her get dressed.

¶4 B.Y. was interviewed twice. He described Shepler as his friend and explained where Shepler lived. They sometimes played together in the woods. He said that he, his sister, his friend, and Shepler went into the woods and made a fort. He saw his sister and heard her get scared, but he could give no other details. He

stated that in a different woods, when his sister and his friend were in the house, Shepler put two fingers in B.Y.'s butt. B.Y. then went home angry.

¶5 Prior to trial, the State moved to introduce other-acts evidence concerning an allegation of sexual assault of a four-year-old boy by Shepler in October 2005, when he was eleven. At the time, Shepler was participating in programming as a victim of sexual abuse, and Shepler's mother was instructed to report any unusual behavior. She observed Shepler straddling a neighbor boy and lifting up his shirt, so she reported the incident. Upon questioning by program staff, Shepler stated he touched the boy's privates.

¶6 A detective had interviewed Shepler about the October 2005 incident, and Shepler explained he and a neighbor boy were playing together near one of their houses. While playing together, he touched the boy in the "private spot," and Shepler's mom came over and asked what he was doing. Shepler told the detective he did this because he was practicing to be a doctor when he grew up. When asked how he played doctor with a private spot, Shepler said he was checking for ticks.

¶7 Shepler further told the detective he unsnapped and unzipped the boy's pants while they were behind some bushes where they could not be easily seen. He pulled down the boy's underwear, removed all his clothing and shoes, and the boy was completely naked. Shepler checked the boy's "butt crack" for ticks, and Shepler began to kiss the boy all over his body. Shepler said he kissed the boy's "wiener, butt cheeks, butt crack, stomach, back, feet, mouth, boobs, and nipples." Shepler further stated he

> took [the boy] from his hiding spot and went down the hill on a trail. He said he kissed [the boy] all over his body again and [the boy] was still naked and his clothes were left

> by the bushes. He said he carried [the boy's] clothing with them down the hill, but later said he went back up the hill to retrieve [the] clothing by himself.

¶8 The detective then reminded Shepler he was only to tell the truth. Shepler then stated he

> unzipped and unsnapped [the boy's] pants while playing with him by the bushes. He said he pulled … [the boy's] pants and underwear down, but did not remove his clothing. He stated he began kissing [the boy's] wiener and butt, but thought his mom and [the boy's] babysitter [saw] him. He stated he became scared and pulled [the boy's] pants and underwear back up and snapped his pants. He said his mom came over and noticed [the boy's] pants were unzipped and asked what was going on.

¶9 Shepler's mother asserted there was not enough time for the alleged sexual contact to have occurred because she was present during the alleged incident and was watching; when she saw Shepler straddling the neighbor boy, she went right over. The boy denied anyone had touched his "peepee," and stated Shepler checked him over for ticks, but the only place Shepler touched was his back.

¶10 A petition for delinquency was filed for sexual assault of a child under age thirteen, but Shepler was found not competent and instead was determined to be a juvenile in need of protection or services. At that time, the evaluator found the eleven-year-old Shepler to have social skills equivalent to a four or five year old. Additionally, his IQ has ranged from sixty to seventy-three, and he "has a long history, a lifelong history of developmental disability and delay …."

¶11 Following two hearings in the instant case, the circuit court determined the other-acts evidence was admissible under the ***Sullivan*** test.[1] The State then presented a plea offer, which Shepler accepted as recommended by his attorney. Charges of first-degree sexual assault of B.Y., second-degree sexual assault of T.Y., and child enticement of T.Y. were dismissed and read in, and Shepler pled guilty to first-degree sexual assault of T.Y. and child enticement of B.Y.[2]

¶12 Shepler subsequently filed a postconviction motion seeking to withdraw his plea on the basis that trial counsel was ineffective for making an inadequate ***Sullivan*** argument. Primarily, he argued counsel should have presented an argument based on ***State v. McGowan***, 2006 WI App 80, 291 Wis. 2d 212, 715 N.W.2d 631, asserting the facts there were substantially similar to his case. The circuit court denied the motion without taking evidence, observing it would have come to the same determination even if it had considered ***McGowan*** initially. Shepler now appeals.

DISCUSSION

¶13 Shepler argues the circuit court erroneously determined the State's other-acts evidence was admissible at trial.[3] The decision whether to admit other-

[1] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

[2] Shepler also pled guilty to possession of a dangerous weapon and obstructing an officer, apparently from an unrelated incident.

[3] As the State observes, Shepler waived his evidentiary argument by his guilty pleas, and he has forfeited his ineffective assistance of counsel claim by failing to raise it now on appeal. Shepler's appellate counsel is mistaken in her belief that the evidentiary issue may be raised directly based merely upon comments made by the circuit court. Nonetheless, as the State has responded to Shepler's evidentiary argument, we exercise our discretion to reach the merits.

acts evidence rests within the circuit court's sound discretion, and is reviewed for an erroneous exercise of discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). Therefore, the question on review is not whether this court would have allowed admission of the evidence, but whether the circuit court examined relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Hurley***, 2015 WI 35, ¶28, 361 Wis. 2d 529, 861 N.W.2d 174.

¶14 The admissibility of other-acts evidence is governed by WIS. STAT. § 904.04(2),[4] which provides as follows:

> 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.

¶15 In ***Sullivan***, our supreme court set forth a three-step analysis for courts to follow when determining the admissibility of other-acts evidence. First, a court must consider whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. Second, the court must determine whether the evidence is relevant. ***Id.*** Third, the court must decide whether the evidence's probative value is "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[.]" ***Id.*** at 772-73. The party seeking to admit the other-acts

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

evidence bears the burden of establishing that ***Sullivan***'s first two prongs are met. ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. However, once those prongs are established, the burden shifts to the opponent to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice. ***Id.***

¶16 "[A]longside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606 (citations omitted). The greater latitude rule applies to all three steps of the ***Sullivan*** analysis. *See* ***id.***, ¶51. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Id.***

¶17 The State contended the evidence was offered to show Shepler's motive, intent, and modus operandi. Shepler concedes the State met the first prong of the ***Sullivan*** analysis by showing a permissible purpose for introduction of the other-acts evidence at trial.

¶18 However, Shepler argues that, given the similarity to the facts in ***McGowan***, the proffered evidence was not relevant, and that its probative value would be outweighed by the danger of unfair prejudice. The single prior act in ***McGowan*** occurred when the victim was age five and McGowan was age ten, whereas the charged acts spanned two and one-half years and commenced when the victim was age eight and McGowan was age eighteen. ***McGowan***, 291 Wis. 2d 212, ¶¶2, 9. Holding the prior act was not relevant, we explained:

> [W]e conclude that a single assault, by one young child on another young child, eight years before repeated assaults by an adult on a different child who was three years older than the first victim, together with significant differences in the nature and quality of the assaults, does not tend to make the latter frequent and more complex assaults … more probable. Nor does such testimony make [the] testimony about the later events more credible because of the significant differences in the details involving the earlier event and the later events. Nor does the conduct of a ten-year-old child give "context" to, or provide evidence of the motive or intent of, an adult some eight or more years later. *See* [***State v. Barreau***, 2002 WI App 198, ¶38, 257 Wis. 2d 203, 651 N.W.2d 12] ("Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult.").

Id., ¶20.

¶19 We reject Shepler's argument that the facts of ***McGowan*** are so similar as to preclude a determination of relevance here. There, the prior act involved two children five years apart, while the charged acts involved a child ten years younger than the eighteen to twenty-year-old adult defendant. Here, the prior act involved two children who were seven years apart, while the charged acts involved children ten and eleven years younger than the nearly eighteen-year-old defendant. Additionally, Shepler has a developmental disability and delay and below-average IQ, and still played with younger neighborhood children at the time of the charged assaults. Thus, unlike in ***McGowan***, the facts here do not involve a prior child-on-child assault contrasted with a clear adult-on-child assault. There is also a less substantial difference here in the developmental age gap between victims and offender in the prior and charged acts.

¶20 Moreover, the ***McGowan*** decision recognized substantial dissimilarities between the prior and charged acts. Here none of the acts involved

threats, and all involved neighborhood friends of Shepler, involved the victims' "butt crack"/anus, and occurred outdoors in areas concealed from view. Significantly, Shepler also told both the victim of the prior act and one of the victims in the charged acts that he was checking them for ticks. In addition, Shepler's victims were all relatively close in age and prepubescent, further increasing the relevance of the prior act.

¶21 After discussing the facts, the circuit court observed:

> The similarities here are pretty strong. I seldom see them this strong. And in light of the fact that this is a sexual assault case involving minor children, there is even greater leeway. But even without that, I think these similarities are enough that the other acts evidence is probative, very probative and material evidence here.

The circuit court additionally determined that the high probative value of the other-acts evidence was not substantially outweighed by any unfair prejudice, and it stated it would give a limiting jury instruction to try to minimize the risk of unfairness. In ***McGowan***, the prior act was deemed highly prejudicial because it involved urinating in a child's mouth. *See* ***McGowan***, 291 Wis. 2d 212, ¶23. In contrast, Shepler's prior act was substantially less shocking than the charged acts. The prior act involved sexual contact, while the charged acts involved digital and/or penile anal penetration.

¶22 We cannot conclude the circuit court's determinations regarding relevance or risk of unfair prejudice were unreasonable, particularly in light of the greater latitude rule. Consequently, we must affirm. *See* ***Hurley***, 361 Wis. 2d 529, ¶¶28, 54. While Shepler contends the court did not adequately explain its rationale in the postconviction proceeding for distinguishing ***McGowan***, the record supports the court's exercise of discretion. *See* ***id.***, ¶29 ("Regardless of the extent

of the trial court's reasoning, [we] will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion.") (citation omitted).

By the Court.—Judgment and order affirmed.

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