COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP478-CR **Cir. Ct. No. 2013CF466**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCO M. GIVENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Marco Givens appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child by sexual contact with a person under the age of thirteen. Givens also appeals the order denying his postconviction motion for a new trial. Givens argues he is entitled to

a new trial on the basis of newly discovered evidence. We reject this argument and affirm both the judgment and order.

BACKGROUND

¶2 The charge in this case arose from allegations that Givens had sexual contact with R. G., the then ten-year-old daughter of Givens' former girlfriend, G. G. At trial, R. G.'s grandmother, I. B., testified that at the time of the alleged assault, she lived with R. G., G. G., and Givens, and R. G. shared a bedroom with her mother and Givens. I. B. further testified that on the night in question, G. G. was at work when R. G. ran out of the bedroom screaming that she hated Givens and that he touched her between her legs. According to I. B., R. G. also claimed Givens showed R. G. a movie with naked people on his cell phone. I. B. stated she called G. G. to tell her something was "not right" and then called the police.

¶3 During R. G.'s testimony, she denied that Givens showed her movies or pictures on his phone. She testified, however, that Givens touched her "tatas," clarifying that she meant "breasts," and that Givens showed her his "no-no spot." R. G. further testified that Givens touched her "crotch," and that the touch kind of hurt. R. G. stated that after this happened, she ran to her grandmother because she was scared.

¶4 Olga Spichenok, a senior forensic scientist in the State Crime Laboratory, testified that male DNA consistent with Givens' DNA was found on the exterior waistband, exterior surface, and interior surface of R. G.'s underwear. Spichenok also testified that DNA found on the front and bottom edges of R. G.'s t-shirt was consistent with Givens' DNA. On cross-examination, Spichenok conceded it was not possible to tell how the DNA was transferred to the items and agreed there were a number of possible cross-contamination scenarios.

¶5 G. G. testified for the defense, relating that R. G. had recently taken a "stranger danger warning class" in which she was taught "if somebody touches you, tell somebody." On cross-examination, G. G. confirmed that when her mother first called her, R. G. "got on the phone in tears" asking if G. G. could come home and stating that Givens "touched her inside her private parts, … rubbed her up and down his chest, … and tried to lick her chest" before R. G. "got up and ran out of the room."

¶6 Givens testified that when R. G. went to take a shower, she threw the t-shirt and underwear she would later wear on the bed. Givens further testified that after R. G. fell asleep, she sat up in bed and fell toward him. He reached under her armpits and put her back to the head of the bed, at which point she got up and ran into the living room. Givens theorized that his DNA transferred to R. G.'s clothes either when they were on the bed or when he earlier moved clean laundry, including R. G.'s clothes, to a basket.

¶7 A jury found Givens guilty of the crime charged, and the trial court imposed an eighteen-year sentence consisting of nine years' initial confinement and nine years' extended supervision. Givens' postconviction motion for a new trial was denied after a hearing, and this appeal follows.

DISCUSSION

¶8 Givens argues the trial court erroneously exercised its discretion by denying the motion for a new trial. Givens sought a new trial on the basis of newly discovered evidence, which he claims would have impeached I. B.'s credibility. A trial court may grant a new trial based on newly discovered evidence if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the

evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). "If the newly-discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial." ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997).

¶9 Givens claimed that days after his conviction, G. G. recovered a memory that when she was six or seven years old, her mother, I. B., told her in a courthouse hallway to tell a judge that her father touched her. G. G. also remembered testifying in a courtroom that her father touched her. G. G. claimed the testimony was false because her father never touched her in an inappropriate way. The State appears to concede G. G.'s recovered memory is newly discovered evidence. However, as the State correctly argues, the new evidence upon which Givens relies is inadmissible propensity evidence.

¶10 The court must engage in a three-step analysis to determine the admissibility of other acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2),[1] such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.*** at 772-73. Section 904.04(2) precludes proof of other crimes, acts, or wrongs for purposes of showing that a person acted in

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

conformity with a particular disposition on the occasion in question. The rule prohibiting the use of other acts evidence to show propensity is applicable to witnesses as well as parties to a case. ***State v. Johnson***, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994). After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant and, finally, whether its probative value outweighs the danger of unfair prejudice. ***Id.***

¶11 Givens contends the new evidence shows a plan of I. B. to falsely and unfairly accuse Givens of a crime and influence R. G. to testify in conformity with the false accusation. A plan, however, must be a design or scheme formed to accomplish some particular purpose, *see* ***State v. Gray***, 225 Wis. 2d 39, 53, 590 N.W.2d 918, and there must be a link connecting the prior act and the present act. *See* ***State v. Balistreri***, 106 Wis. 2d 741, 757, 317 N.W.2d 493 (1982). Givens cannot convincingly disguise his evidence of propensity as evidence of a plan. These were two separate incidents that are simply similar in nature. Ultimately, Givens fails to establish that I. B.'s alleged actions are part of a single plan that spanned twenty-five years from the first alleged act to the second and only other supposed act.

¶12 Even assuming the evidence was offered for an acceptable purpose under WIS. STAT. § 904.04(2), we must assess whether it is relevant and whether its probative value outweighs the danger of unfair prejudice. In assessing relevance, we must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. ***Sullivan***, 216 Wis. 2d at 772. The second consideration in assessing relevance is whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

Id. The State appears to concede the proffered evidence is relevant, noting that the test for relevance is whether the evidence tends to shed any light on the subject of the inquiry. *See* ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997). The State, however, correctly argues that the evidence has so little probative value that any possible relevance would be outweighed by the danger of unfair prejudice.

¶13 Reliability is a factor that intrinsically affects the probative value of evidence. ***State v. Spring***, 48 Wis. 2d 333, 336, 179 N.W.2d 841 (1970). The reliability of G. G.'s assertions is diminished by her failure to recall specific details about the incident. Additionally, G. G.'s father, F. D., submitted an affidavit averring that several years after his divorce from I. B., he was informed his daughter accused him of sexually molesting her. F. D. further averred, however, that he was questioned but never charged with a crime related to those allegations. Based upon that affidavit, G. G., therefore, can have no recollection of her mother coaching her outside a courtroom and falsely testifying against her father when no court proceedings regarding the allegations occurred.

¶14 Moreover, G. G.'s assertions themselves are inherently unconvincing, as it is unlikely I. B. coached R. G. to falsely accuse Givens of sexual contact just because she once coached G. G. to falsely accuse her father of sexual contact twenty-five years ago. The existence of only a single prior act tends to limit the probative value of the evidence. *See* ***State v. Roberson***, 157 Wis. 2d 447, 455-56 n.1, 459 N.W.2d 611 (Ct. App. 1990). Despite the State's concession, the new evidence, therefore, has little, if any, tendency to make it more probable that I. B. coached R. G. to falsely accuse Givens. Further, the evidence's limited probative value is outweighed by the danger of unfair

prejudice, as this propensity evidence would likely confuse the issues and mislead the jury.

¶15 Even were the evidence admissible, we are not convinced there is a reasonable probability that the recovered memory would cause a jury to have a reasonable doubt about Givens' guilt. *See* ***State v. Plude***, 2008 WI 58, ¶¶32-33, 310 Wis. 2d 28, 750 N.W.2d 42. As noted above, the evidence has little probative value, and if Givens were to introduce G. G.'s recovered memory, the State could introduce rebuttal evidence that the court hearing or trial G. G. claimed to remember could not have happened. Moreover, given the evidence of Givens' guilt, we are not convinced the proffered evidence would change the trial outcome. R. G.'s actions on the night of the assault were spontaneous, and her testimony of the events was supported by I. B.'s testimony and the DNA evidence. Even Givens' testimony confirmed that R. G. ran into the living room screaming and that he heard R. G. say Givens touched her. Because it is not reasonably probable that a different result would be reached at a new trial based on G. G.'s testimony, we conclude the trial court properly exercised its discretion by denying the motion for a new trial.

By the Court.—Judgment and order affirmed.

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