COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3102-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GASPAR S. MONTOYA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Gaspar Montoya appeals from a judgment of conviction. The issues are whether the court properly excluded evidence of the victim's earlier allegation of sexual assault, and whether the court properly admitted evidence of an other act by the defendant. We affirm on both issues.

¶2 Montoya was charged with several felonies, including sexual assault and kidnapping, based on an incident in which he was alleged to have offered a ride to a woman at a Madison park and then assaulted her in his van several times. The jury found him guilty on all counts.

I. ADMISSION OF VICTIM'S PRIOR ALLEGATION

¶3 Montoya first argues that the circuit court erred by denying his motion to admit, under WIS. STAT. § 972.11(2)(b)3 (1997-98),[1] what he argues was a prior untruthful allegation of sexual assault by the victim. In denying the motion, the circuit court first concluded that even if some evidence of the prior allegation was admissible, Montoya would not be permitted to use extrinsic evidence, but would be confined to cross-examination of the victim. Relying on published case law, the court believed extrinsic evidence would be barred by the prohibition in WIS. STAT. § 906.08(2) against the use of extrinsic evidence to attack a witness's credibility with a specific instance of conduct.

¶4 On appeal, Montoya's opening brief describes this conclusion by the court, but does not argue that it was erroneous. In his reply brief, Montoya argues that the court of appeals opinions which prevent extrinsic evidence are flawed and violate a defendant's right to present a defense. This argument is made for the first time in the reply brief, and therefore we do not address it. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

¶5 To determine whether Montoya would be permitted to cross-examine the victim, the court then applied the three-part test to determine whether

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

a prior untruthful allegation of sexual assault should be admitted, as set forth in ***State v. DeSantis***, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990), and WIS. STAT. § 971.31(11). The parties agree that this is a discretionary decision.

¶6 The first part of that test is whether a reasonable person could conclude that the complainant previously made an untruthful allegation of sexual assault. *See* ***DeSantis***, 155 Wis. 2d at 787-88. In this case, the parties dispute whether the prior allegation was untruthful. However, the court found that a reasonable person could conclude it was untruthful. The second part of the ***DeSantis*** test is whether the prior incident is material to a fact at issue in this case, ***id.*** at 785, and here the court determined that it was. It was on the third part of the test that the court ruled against Montoya. That part is whether the probative value of the evidence was outweighed by its potential for prejudice. ***Id.*** The court concluded that the evidence was not admissible, in part based on the potential for the jury to be confused and distracted by the prior incident.

¶7 The potential to confuse or distract the jury is not explicitly a component of the analysis under ***DeSantis*** or WIS. STAT. § 971.31(11), which is directed more to consideration of the inflammatory and prejudicial nature of the evidence. However, a circuit court has general authority to exclude relevant evidence if its probative value is substantially outweighed by, among other things, the danger of confusion of the issues or by consideration of waste of time. WIS. STAT. § 904.03. We conclude that this was a sufficient basis for the court's exercise of discretion, for the following reasons.

¶8 In discussing the probative value of the evidence, Montoya argues that the circuit court found that the victim's prior allegation was false. He further argues that this finding should be deferred to on appeal. However, Montoya

overstates the circuit court's finding. The circuit court was required only to find, and did only find, that a *reasonable person could* conclude that the allegation was untruthful. This is not the same as the court finding untruthfulness. In fact, the court expressly stated, "I am not saying I conclude it is false."

¶9 We agree with the circuit court's conclusion that a reasonable person could find untruthfulness. However, that is not the only reasonable conclusion. Because the lack of truthfulness of the prior allegation was reasonably in dispute, its probative value to Montoya's defense was diminished. It is also difficult to determine the probative value of cross-examining the victim because Montoya did not present an offer of proof as to how the victim would testify about the prior incident, if asked. We do not know whether the victim would have admitted that the prior allegation was false.

¶10 The dispute over the truthfulness of the prior allegation is also what creates the potential for confusion of the issues. If Montoya had been permitted to cross-examine the victim about the truthfulness of the prior allegation, it would have created a danger of confusion of the issues. Therefore, we conclude that the court properly denied Montoya's motion.

¶11 Montoya also argues that the exclusion of evidence about the prior incident was a violation of his constitutional rights of confrontation and compulsory process, as set forth in ***State v. Pulizzano***, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). Montoya argues that the evidence should be admitted because it satisfied the five-part test described in ***Pulizzano***. ***Id.*** at 651-52, 656. We note that this constitutional argument was not raised in the trial court. Although Montoya's motion to admit the evidence made reference to these constitutional rights, the trial court was not asked to apply the test described in

Pulizzano, and Montoya did not cite that case at the time. We generally do not review issues raised for the first time on appeal, and we decline to do so here. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Furthermore, as to the evidence that might have been introduced by cross-examination of the victim, Montoya did not make the required offer of proof. *See* ***Pulizzano***, 155 Wis. 2d at 651.

II. ADMISSION OF DEFENDANT'S OTHER ACT

¶12 Montoya's second argument is that the circuit court erred by admitting evidence of an other act by Montoya. The evidence consisted of testimony by a friend of the victim that, during the morning before the incident for which Montoya was on trial, the friend overheard Montoya telling others about a different sexual assault Montoya committed in his van the preceding week, on a victim he picked up from the same Madison park as alleged in this case. In addition, the friend testified that he saw Montoya show another person a bag in his van which Montoya claimed contained the previous victim's underpants. A police officer testified that a search of Montoya's van turned up a pair of women's underpants in a bag.

¶13 Montoya argues that this evidence was inadmissible under WIS. STAT. § 904.04(2) because it was offered only to show that he acted in conformity with his character as shown by the other act. The circuit court admitted the evidence on the ground that it was for acceptable purposes under that statute, including identity, motive, and plan. The parties agree that this was a discretionary determination, and that the appropriate analytical framework is provided in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

¶14 Applying ***Sullivan***, the first question is whether the evidence was offered for an acceptable purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. The State argues that it was admissible for the purpose of proving identity. To be admissible on this ground, the evidence should have such a concurrence of common features and so many points of similarity with the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant. ***State v. Rushing***, 197 Wis. 2d 631, 647, 541 N.W.2d 155 (Ct. App. 1995). The threshold measure for similarity is the nearness of time, place, and circumstance of the other act to the crime alleged. ***Id.***

¶15 We agree with the State that it was reasonable to admit this evidence on the issue of identity. As to time, the earlier assault was committed in the preceding week. There was also a similarity of place, in that both assaults occurred in Montoya's van. Finally, there was a similarity of circumstance, because in both cases Montoya offered the victim a ride from the same Madison park.

¶16 Montoya argues that it was not necessary for the State to prove identity in this case. He appears to be suggesting that identity was not at issue because Montoya conceded that the victim rode with him in his van at the alleged time, and therefore the only question was whether he actually did the acts alleged to have occurred during that time. This argument is directly contrary to the position Montoya took in the trial court when the State moved for admission of the evidence. At that time the court asked Montoya's attorney: "[Y]ou don't dispute identity is an issue? You hope to show if [the victim] was sexually assaulted, it was by somebody else or you hope the State can't prove it was your client?" Defense counsel responded: "That's right, Your Honor."

¶17 Furthermore, the record does not support a conclusion that Montoya conceded the issue of identity—that is, whether Montoya was the person driving the van and doing the deeds the victim alleged. In his opening statement, Montoya's counsel said that "perhaps [the victim] got into a van with Mr. Montoya, that they arrived at the Ho-Chunk Casino close to Baraboo. It was on a certain day, but then after that you are going to see evidence that is just totally mutually exclusive." This passage contains only a concession that "perhaps" the victim took a ride with Montoya. In his closing argument, we find no similar statement, and Montoya made a general attack on the victim's credibility. Montoya has not provided a sufficient basis to conclude that he conceded identity to a degree that precluded the State from offering evidence to prove identity beyond a reasonable doubt.

¶18 The second part of the ***Sullivan*** test is whether the evidence of the prior act is relevant to this case. ***Sullivan***, 216 Wis. 2d at 772. Based on the above discussion of identity, it was reasonable to conclude that the evidence was relevant. The final issue under ***Sullivan*** is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. ***Id.*** at 772-73. Montoya disputes the probative value of the evidence, and argues that the potential for unfair prejudice was high because the jury might attempt to punish him for the earlier episode. However, we agree that the trial court reasonably decided that this danger did not substantially outweigh the evidence's probative value.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).