COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2527-CR **Cir. Ct. No. 2007CF569**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA L. WELLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joshua Wells appeals his judgment of conviction for one count of second-degree sexual assault, and an order denying his postconviction motion. Wells argues the circuit court erred by allowing the State to introduce prohibited "other acts" evidence at his trial. We affirm.

BACKGROUND

¶2 On August 6, 2007, Wells met Melissa N., who is learning-disabled, on a Wausau city bus. She agreed to meet Wells the following day and spend time with him at his apartment. When she arrived, Wells carried her into his bedroom, removed her clothes and forced her to perform oral sex on him. Afterwards, Wells changed into purple pants, which Melissa found unusual. She testified that when she asked him why he had purple pants, he "said that there was a girl that he had taken in previously, and she left some things there after she called the cops on attempted rape from him." Melissa testified this made her "scared, because I knew what had happened basically, and it made me fear that this could be happening to me." She testified that from that point on, out of fear, she made "a conscious choice not to resist" him. Wells made Melissa dinner and then again forced her to engage in sexual conduct with him. Wells was charged with two counts of second-degree sexual assault and one count each of false imprisonment and misdemeanor battery.

¶3 At the trial, Wells objected to Melissa's testimony that he told her another girl accused him of rape. He argued the testimony was other acts evidence. The circuit court permitted the testimony. It concluded the testimony was not other acts evidence, that it was relevant to Melissa's state of mind, and that its probative value substantially outweighed its prejudicial effect.

¶4 The jury found Wells guilty of one count of second-degree sexual assault and acquitted him on the remaining charges. Wells then moved for postconviction relief, arguing the circuit court erred by admitting Melissa's testimony about why she was afraid of him. The court denied the motion.

DISCUSSION

¶5 The only issue in this appeal is whether the court erred by permitting Melissa to testify that Wells told her he had previously been accused of rape. We review a circuit court's decision to admit evidence for the erroneous exercise of discretion. *See* ***State v. Bellows***, 218 Wis. 2d 614, 627, 582 N.W.2d 53 (Ct. App. 1998). Whether the court properly exercised its discretion "depends upon whether the trial court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process in reaching its conclusion." ***Id.***

¶6 Wells argues Melissa's testimony about his statement to her should not have been admitted because it was prejudicial other acts evidence. The State counters that the testimony was not other acts evidence, but that even if it was, the court properly exercised its discretion in admitting it. We agree.

¶7 WISCONSIN STAT. § 904.04(2)[1] bars "evidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show that the person acted in conformity therewith." Melissa's testimony that Wells told her he had been accused of rape is not evidence he committed another crime, wrong, or act. Therefore, it is not barred by § 904.04(2).

¶8 But even if Melissa's testimony were evidence of other acts, it would still be admissible. Evidence of other crimes, wrongs or acts is admissible "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2). This list is illustrative, not exhaustive. ***State v. Schillcutt***, 116

[1] References to the Wisconsin Statutes are to the 2007-08 version.

Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984). If other acts evidence is offered for a proper purpose, the court must determine whether it is relevant and whether its probative value is substantially outweighed by its prejudicial effect. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

¶9 Here, the circuit court concluded Melissa's testimony was offered for a proper purpose: to show her state of mind. "What the State seeks to introduce isn't that the defendant raped another woman ... [but that] a statement made allegedly by the defendant during the course of events ... impacted the witness' state of mind and influenced the decisions that she made subsequent to the statement." *Cf.* ***State v. Hunt***, 2003 WI 81, ¶55, 263 Wis. 2d 1, 666 N.W.2d 771 (other acts evidence permissible to show victim's state of mind). The court also concluded the testimony was relevant to, and probative of, why Melissa did not feel she could leave Wells' apartment after the first assault and why she did not resist the later conduct. It acknowledged the testimony was prejudicial, but concluded the "significant probative value [of] that evidence," outweighed its prejudicial effect. The court therefore properly exercised its discretion when it permitted Melissa to testify that Wells told her another girl accused him of rape.

¶10 The State further argues that even if the circuit court erred, any error was harmless because Wells' acquittal on three of the four charges indicated the jury did not construe Melissa's testimony as evidence of his bad character. We could also affirm on this basis because Wells failed to file a reply brief refuting that argument. He therefore concedes the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.— Judgment and order affirmed.

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