COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP189-CR **Cir. Ct. No. 2010CF764**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOEL STEINHAUER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. The State appeals two orders denying its motions to introduce other acts evidence at John Steinhauer's trial for two counts of repeated sexual assault of a child. The proffered evidence related to repeated sexual

assaults Steinhauer allegedly committed against two other children. The circuit court concluded the State had not identified the specific other acts testimony it wanted to introduce in order for the court to apply the three-step analysis required by ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).[1] Consequently, the court denied the State's motions without conducting a ***Sullivan*** analysis.

¶2 The State argues the court could not deny its motions without first performing a ***Sullivan*** analysis. We disagree. Whether to admit other acts evidence lies within the circuit court's discretion. Here, the court reasonably concluded that the State failed to articulate enough specific other acts testimony for it to conduct a ***Sullivan*** analysis. Consequently, the court properly exercised its discretion by denying the motions without applying ***Sullivan***'s three-part test. We therefore affirm.

BACKGROUND

¶3 A complaint charged Steinhauer with two counts of repeated sexual assault of a child. With respect to Count 1, the complaint alleged that, in July 2010, Steinhauer's niece reported that Steinhauer touched her inappropriately approximately five times between March 4, 1995 and 1997. She stated that, beginning when she was six years old, Steinhauer had her participate in games that

[1] ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998), sets forth a three-step analytical framework for assessing the admissibility of other acts evidence. A court first asks whether the evidence is offered for an acceptable 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 asks 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.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

were sexual in nature. In one of the games, the "underwear game," the object was to see who could pull the other's underwear off the fastest. During this game, "Steinhauer touched her and had her touch him." In another game, called "tickle spot," Steinhauer had her touch the area between his scrotum and anus. Steinhauer's niece also told authorities Steinhauer liked to give and receive back rubs, and when he massaged her, "he'd always rub her all over, including her upper buttocks."

¶4 Count 2 stemmed from allegations made by Steinhauer's fourteen-year-old daughter. She told investigators that Steinhauer repeatedly made her come into bed with him in the evening to say goodnight. Wearing only his underwear, Steinhauer would lie next to her, put one arm around her waist, put one of his legs over her body, and "scoot[] her closer to him" so that she could feel his penis against her. She also reported that, on more than ten occasions, Steinhauer rubbed his hand up and down her bare back and then moved his hand into her pants, touching the upper part of her buttocks.

¶5 Before trial, the State moved to introduce other acts evidence regarding prior sexual assaults Steinhauer allegedly committed against two of his cousins. The State offered the following description of the incidents:

> [Steinhauer] is reported to have engaged in sexual assault incidents with two of his cousins, BAB … and LJM …. Both BAB and LJM separately reported that when each was approximately 10 years of age [Steinhauer] began conditioning them for sex by having them touch and rub his genitals, having them masturbate him and his brother, and eventually having non-consentual [sic] sexual intercourse with LJM and attempting to complete non-consentual [sic] intercourse with BAB. BAB was able to prevent [Steinhauer's] penis from entering her vagina by resisting. Both BAB and LJM described [Steinhauer] grinding his penis on each of them, simulating intercourse.

The State argued these incidents were probative of Steinhauer's motive and intent to obtain sexual gratification by engaging in sexual contact with his niece and daughter.

¶6 The circuit court denied the State's motion following a hearing. The court acknowledged that ***Sullivan*** sets forth a three-step analysis for the admissibility of other acts evidence. However, it reasoned a court cannot conduct a proper ***Sullivan*** analysis unless the State clearly identifies each piece of other acts evidence it wishes to introduce. In this case, the State provided only a general summary of the incidents with Steinhauer's cousins and did not adequately describe what happened, when and where the incidents took place, or the surrounding circumstances. Without this information, the court stated it could not "get a handle on what piece of sexual impropriety the State wants to introduce." The court later reiterated that "[w]hen we have other acts evidence motions, we can't have summaries. We have to have a description of the specific sexual act that the defendant is alleged to have performed in order to do a ***Sullivan*** analysis." Consequently, the court concluded, "I'm not going to do the three-step analysis required by [***Sullivan***] because there's not enough information before me which would enable me to even properly exercise my discretion to determine whether or not any of these accusations are, in fact, appropriate other acts evidence."

¶7 The State then submitted a "Renewed Motion to Introduce Other Acts Evidence." In support, the State attached a nine-page police report based on investigators' interviews with Steinhauer and his cousins. The State asserted the police report "specifically identif[ied] the acts that [Steinhauer] committed[.]" The State also offered to produce the two cousins for questioning by the court.

¶8 The court denied the State's renewed motion, explaining the State had again failed to specify the other acts evidence it wished to introduce:

> The renewed motion to introduce other evidence contains and has appended to it nine pages of what I'll call raw law enforcement data acquired by I believe the Eau Claire County Sheriff's Department from interviews of [Steinhauer's cousins] which set forth I think decades and decades of salacious information alleging gross sexual improprieties by [Steinhauer] and his brother. All of which may be true. But that isn't the point.
>
> The point is, as I said before and as [defense counsel] pointed out, we have to know specifically which—each piece of other acts evidence the state wants to consider.

The court also rejected the State's offer to have it question Steinhauer's cousins, reasoning that doing so was the State's responsibility, not the court's. Again, the court stressed that "[i]t's the proponent's job to set forth and specifically articulate each and every other acts evidence that … the proponent wants to introduce." Because the State failed to meet that threshold, the court reasoned it had no responsibility to conduct a ***Sullivan*** analysis. The State now appeals, arguing the court erroneously exercised its discretion by refusing to apply ***Sullivan***'s three-part test.

DISCUSSION

¶9 "[E]vidence 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." WIS. STAT. § 904.04(2)(a). However, other acts evidence is admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

¶10 In ***Sullivan***, our supreme court set forth a three-step analysis for courts to follow when determining the admissibility of other acts evidence. *See*

Sullivan, 216 Wis. 2d at 771-73. Specifically, courts must consider: (1) whether the evidence is offered for a proper purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) 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.

¶11 Whether to admit other acts evidence lies within the circuit court's discretion,[2] and we will not reverse the court's decision absent an erroneous exercise of discretion. *See* ***id.*** at 780. A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion a reasonable judge could reach. ***Id.*** at 780-81.

¶12 Here, the court properly excluded the proffered other acts evidence without first performing a ***Sullivan*** analysis. In its original motion, the State offered only a general summary of the evidence it sought to introduce. According to the State's summary, when Steinhauer's cousins were ten, he began "conditioning" them for sex by "having them touch and rub his genitals" and "having them masturbate him and his brother." At some point, he had nonconsensual intercourse with one cousin and attempted to complete nonconsensual intercourse with the other. Both cousins also reported Steinhauer "grinding his penis" on them at some unspecified time.

[2] The threshold issue of whether proffered other acts evidence is sufficient for the court to apply the ***Sullivan*** analysis may arguably be a question of law, rather than a discretionary determination. The parties have not directed us to any authority addressing this issue, nor could we find any in our independent research. We need not decide the issue, though, because whether it is a question of law or a discretionary determination, we arrive at the same conclusion.

¶13 The circuit court concluded the State's descriptions of these incidents were too vague and did not sufficiently identify the sex acts the State wanted to introduce as other acts evidence. The court also noted the State did not provide any details about where and when the incidents occurred, or the circumstances surrounding them. Without this information, the court concluded it could not conduct a proper ***Sullivan*** analysis. We agree.

¶14 Under the second step of the ***Sullivan*** analysis, a court must determine the relevance of the proffered other acts evidence. ***Id.*** at 785. To do so, it must consider the evidence's probative value—that is, "whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." ***Id.*** at 786. Here, the State asserted the incidents with Steinhauer's cousins were probative of his intent to obtain sexual gratification during the incidents with his niece and daughter. When other acts evidence is offered to prove intent, its probative value depends on its "nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *See* ***id.*** at 786-87. Due to the lack of detail in the State's summary of the other acts evidence, the court reasonably concluded it did not have enough information to make this determination. Consequently, the court properly denied the State's motion without conducting a ***Sullivan*** analysis.

¶15 We also agree with the court's denial of the State's renewed motion. In support of its renewed motion, the State submitted a nine-page police report describing a myriad of incidents spanning at least a decade. Faced with a nine-page narrative reciting numerous instances of sexual contact, the court reasonably concluded it could not determine which acts the State was actually seeking to introduce. To conduct a ***Sullivan*** analysis based on the State's renewed motion, the court would have had to sift through the allegations in the police report,

separate the conduct it described into individual acts, and then—without aid from the State—apply the three-step ***Sullivan*** analysis to each individual act. A court is not required to undertake this task.

¶16 The State notes that, in sexual assault cases, particularly those involving children, Wisconsin 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 (quoting ***State v. Plymesser***, 172 Wis. 2d 583, 597-98, 493 N.W.2d 367 (1992)). The State argues the circuit court failed to apply the greater latitude rule when considering the other acts evidence in this case. However, the effect of the greater latitude rule is that, when applying ***Sullivan***'s three-step analysis, a court must permit a greater latitude of proof at each step. *See* ***State v. Veach***, 2002 WI 110, ¶53, 255 Wis. 2d 390, 648 N.W.2d 447. In this case, the court never performed a ***Sullivan*** analysis because it reasonably concluded it did not have enough information. Thus, the court had no occasion to apply the greater latitude rule, and it did not err by failing to do so.

By the Court.—Orders affirmed.

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