COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP167-CR **Cir. Ct. No. 2010CF253**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD W. ARENDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Donald W. Arendt appeals from a judgment of conviction entered after a jury found him guilty of four felony counts involving two incidents of sexual assault against his young daughter, H.A. Arendt contends that the trial court erroneously admitted evidence that he sexually assaulted

another daughter in the early 1990s, when she was still a child. Arendt also appeals from an order denying his postconviction motion which asserted that trial counsel was ineffective for failing to fully impeach two witnesses. We conclude that the trial court properly exercised its discretion in admitting the other acts evidence and that trial counsel did not perform deficiently. We affirm.

¶2 H.A. reported that in 2005 and 2006, when she was about eight years old, Arendt sexually assaulted her on two separate occasions. In each incident, H.A. fell asleep watching television in her parents' bedroom and woke up to find herself on her stomach with her pants and underwear pulled down. Both times, Arendt was panting and humping H.A.'s body, with his penis in her anus. Arendt was charged with two counts each of first-degree sexual assault of a child and incest with a child.

¶3 Prior to trial, the State filed a motion seeking to introduce evidence that Arendt had engaged in other acts of sexual assault against H.A. and three of her sisters.[1] The State argued that the evidence was admissible to prove motive, intent, scheme, and plan because in each incident, Arendt sought sexual gratification by placing the child on her stomach, removing her lower clothing, and touching his penis to her anus. The State asserted that the acts were substantially similar: "[A]ll the acts involve his natural-born children, all the acts happened when the children were very young, prepubescent, and all of them involve the same type of sexual act, penis to anus."

[1] During the pendency of this case, Arendt proceeded to jury trial in a separate Sheboygan county child sexual assault case. H.A. and her sister, S.A., were the alleged victims. Arendt was acquitted of all charges in the Sheboygan county case. In 1995, Arendt was acquitted of child sexual assault charges involving his daughter A.A., who provided other acts testimony at the present trial. Though the trial court ruled that other acts concerning a fourth daughter, J.A., were admissible, she did not testify at trial.

¶4 The trial court ruled that the alleged prior sexual assaults were admissible to prove motive or intent:

> So I think there is a proper purpose; you know, particularly when you have to apply this more liberal rule [to child sexual assault cases].… [T]here is greater latitude in this type of case that recognizes the credibility challenges and the difficulty that you're dealing with a child. The case law really sets that forth.
>
> And I think if you look at the trend in the law in this area, where the pattern in the cases is, the reasoning is that you're dealing with children. These are all sexual assaults involving a child. They're all his children. They're all in the residence. They are very, very similar. And I think the State has shown it's being offered for a permissible purpose.

¶5 At trial, the State presented other acts evidence through the testimony of H.A., S.A., and A.A. The jury found Arendt guilty on all counts, and the trial court imposed an aggregate bifurcated sentence totaling thirty years, with seventeen years of initial confinement and thirteen years of extended supervision. After a hearing, the trial court denied Arendt's motion for postconviction relief.

The Trial Court Did Not Err in Admitting the Other Acts Evidence Concerning A.A.

¶6 Arendt challenges the admission of evidence that he sexually assaulted A.A. twice, when she was three or four years old.[2] At the motion hearing in the trial court, the State's proffer was that on both occasions A.A. was

[2] Arendt concedes that even if the trial court's on-the-record explanation was insufficient, there are facts in the record which support its admission of the other acts evidence concerning H.A. and S.A. ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (we will uphold a trial court's discretionary determination if there are facts in the record to support the decision).

"lying down on her stomach and [Arendt] was lying on top of her." A.A.'s pants were off and Arendt "put his penis in her butt and when it came out he put it back in again." A.A. screamed and "when others came into the room [Arendt] told them to leave." Relying in part on the transcripts from the 1995 trial involving A.A.'s allegations, trial counsel pointed out the factual differences between the assaults of H.A. and A.A. Trial counsel highlighted that in 1995, A.A. testified that she was assaulted on the living room couch after her father called her into the room and told her to undress and lay on her stomach. Trial counsel argued that the other acts were irrelevant given the difference in the girls' ages, the remoteness of A.A.'s allegations, and because A.A. was not assaulted in her parents' bedroom while sleeping in their bed.

¶7 The trial court took the matter under advisement, acknowledging that the assaults were not factually identical:

> It's kind of like saying with an armed robber who normally does convenience stores but deviates and goes to a liquor store, does that really make it different. Just like the sexual conduct occurring in a living room versus the parents' bedroom.…
>
> I think what you look at is the similarity of the conduct more than, you know, really refined nuances that create[] slight differences in the presentation of the conduct.…
>
> The question is, is it a distinction without a difference because they're saying the conduct still is overall very similar.

After further consideration, the trial court ruled that the other acts were admissible, concluding that they were "[m]aybe not perfectly fitting in every respect, but there are a lot of similarities to the contact":

> And it's not just a similarity, but in the striking aspects of this that the children are—admittedly there's a spread of ages, but they're all young. That may just be indicative of

> opportunity and station in life of each of the children; but regardless, one's three, one's five, seven or eight, or whatever. It's that they are—that the opportunity is there, and maybe that younger child has now progressed to the point where the child is older, and another child has taken that child's place.

On appeal, Arendt maintains that the other acts were too dissimilar and remote from the charged offenses to be relevant and that their admission was unfairly prejudicial.

¶8 Though character evidence is generally not admissible to show that the person acted in conformity therewith, evidence of a person's other crimes, wrongs, or acts may be admitted for certain purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* WIS. STAT. § 904.04(2)(a) (2011-12).[3] In determining whether other acts are admissible, courts employ a three-part test: (1) the evidence must be offered for an acceptable purpose, (2) the evidence must be relevant, and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). In child sexual assault cases, greater latitude is afforded the admissibility of other acts evidence. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

¶9 The decision whether to admit or exclude other acts evidence is left to the trial court's sound discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold its evidentiary ruling if the court "examined

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Id.***

¶10 We conclude that the trial court properly exercised its discretion in admitting the other acts involving A.A. First, the evidence was offered for a proper purpose, to prove intent and motive. It was probative of the notion that the touching itself was intentional and that it was performed for the specific purpose of sexual gratification. *See* ***Davidson***, 236 Wis. 2d 537, ¶¶57-59 (where charges involve sexual contact, other acts are admissible to show the defendant's purpose and motive in touching the victim, which is a requisite element of sexual contact).

¶11 Second, the trial court properly determined that the other acts were relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Here, the trial court applied the proper standard and carefully compared the facts of the H.A. and A.A. assaults. *See* ***Hunt***, 263 Wis. 2d 1, ¶64 (in assessing relevance, the measure of probative value is the similarity between the charged offense and the other act, including the nearness of time, place, and circumstance). The trial court acknowledged that the circumstances were not identical, that the girls differed in age, and that the acts involving A.A. occurred years earlier. *See* ***Davidson***, 236 Wis. 2d 537, ¶72 (probative value does not require that the acts be identical; remoteness in time and difference in age are factors to be considered). The trial court balanced the acts' similarity against their temporal distance and determined that the intervening years did not sever the

probative value of A.A.'s allegations.[4] The trial court reasonably determined that other acts were probative of Arendt's motive and intent in the charged offenses in light of the greater latitude rule and given their significant similarities, including that both sets of allegations came from very young, prepubescent natural daughters, occurred in the family home, and involved contact between Arendt's penis and the girls' buttocks as they lay on their stomachs.

¶12 Finally, the trial court properly determined that the probative value of the other acts was not substantially outweighed by the danger of unfair prejudice. Nearly all evidence is prejudicial to the party against whom it is offered. ***State v. Murphy***, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994). Unfair prejudice results when the evidence tends to influence the outcome by improper means or causes the jury to base its decision on something other than the established propositions in the case. ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

¶13 In this case, the trial court was mindful of the need to "guard against the jury saying that, you know, this person has escaped punishment before or this persons did this before and therefore they've acted in conformity, the propensity type evidence" and deemed this prong the "most difficult" to determine. However, in light of the substantial similarities, and thus the other acts' strong probative value, the court concluded that the evidence was admissible:

> And I think that you have to look at when you look at this, the case law says you have to look at the nearness in time, place, and circumstances of the alleged offense or elements sought proven in this case as compared to the other acts

[4] *See* ***State v. Opalewski***, 2002 WI App 145, ¶20, 256 Wis. 2d 110, 647 N.W.2d 331 (remoteness in time impacts relevance when remoteness "negate[s] all rational or logical connections between the fact to be proven and other acts evidence").

> evidence. And here, once again, you come back and they have very, very similar behavior. They all involve penile-anal contact, one form or another. They involve his children, they involve young children.
>
> And I just think on balance when you look at that, the evidence, I'm going to allow that testimony to be received. I think that presents a strong case for other acts evidence, and I'll give a curative instruction on this.

¶14 Arendt argues that the other acts were unduly prejudicial because he was acquitted at trial of charges involving the same incidents. The trial court considered but rejected this argument, stating: "That's not a finding of falsity. That's a finding of not guilty." Arendt has not met his burden of showing that the trial court erroneously exercised its discretion, especially in light of its cautionary instruction. *See* ***Hunt***, 263 Wis. 2d 1, ¶75; ***State v. Fishnick***, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985) (a cautionary instruction goes far to cure any adverse effect attendant to the admission of other acts evidence).

¶15 Similarly, we reject Arendt's contention that the acts were unfairly prejudicial because at trial, the theory of defense was that no contact ever occurred, thereby diminishing the probative value of A.A.'s allegations. Because the State must prove each element of a crime beyond a reasonable doubt, the trial court properly determined that the other acts were admissible to prove motive and intent. ***Davidson***, 236 Wis. 2d 537, ¶65 (other acts are admissible to prove even undisputed elements). We affirm the trial court's exercise of discretion.

Trial Counsel Did Not Provide Ineffective Assistance of Counsel

¶16 Arendt argues that trial counsel provided ineffective assistance of counsel by failing to impeach both A.A. and P.A., the mother of H.A. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient

performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To satisfy the prejudice prong, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶17 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id.*** at 698. The trial court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶18 Arendt contends that A.A.'s trial testimony differed from her testimony at the 1995 trial and that trial counsel was ineffective for failing to impeach her with these inconsistencies.[5] At the ***Machner***[6] hearing, when asked how he attacked A.A.'s credibility, trial counsel explained his strategy:

> I believe—and again, I didn't review it. My recollection in general is that I believe I asked her some questions and I had located a detective, a retired detective up in Green Bay

[5] In particular, Arendt asserts that "[A.A.'s] story changed from her father calling her into the living room and ordering her to lie on the couch so he could sexually assault her, to stating that she fell asleep on the couch watching TV and she awoke to her father on top of her."

[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> who had taken a police report back in 1994 or whatever it was; and I had gotten those reports. And those reports indicated, I thought, an incredible, unbelievable version of things.
>
> And I believe when I asked her about that, I believe she didn't recall. I called the detective. I had him subpoenaed; he came in. He testified to what she had told him back in [1994], and I thought that was an impeachment of her. And that's how I proceeded to impeach her, to attack her credibility.

The trial court determined that counsel did not perform deficiently:

> The courts don't favor going back and lightly looking at performance because in the heat of trial, particularly one like this where you have multiple days, there are all kinds of instantaneous decisions that are made by a lawyer.
>
> Now when you look at this, you have a situation where [trial counsel] made a strategic decision to call the live witness, the detective from Green Bay. And I vaguely recall this man coming in and talking about what was told to him and set up the contradictions in [] testimony.
>
> ….
>
> And I mean to have success in tracking down a retired detective from that long ago and deciding that a live body that doesn't really have any interest in this versus [A.A.], … you can hardly call that deficient performance.

¶19 We conclude that Arendt has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Strickland***, 466 U.S. at 689 (citation omitted). In considering whether trial counsel performed deficiently, we will not by hindsight reconstruct the "ideal defense." ***State v. Harper***, 57 Wis. 2d 543, 556-57, 205 N.W.2d 1 (1973) (the test for effectiveness is much broader and a defendant is not entitled to the perfect or best defense, but only to one which under all the facts constitutes reasonably effective representation). Here, under all the circumstances and given our "highly deferential" review, trial counsel's decision to use a live body to

impeach A.A. was objectively reasonable, as was his action in not impeaching A.A. with the 1995 trial transcripts, a move that could have easily engendered sympathy for A.A. and provided an opportunity for her to explain any inconsistencies. *See* ***Strickland***, 466 U.S. at 689. Arendt has not met his burden to establish that trial counsel's performance was deficient.

¶20 Similarly, we conclude that trial counsel did not perform deficiently by failing to recall P.A. in an attempt to impeach her with the testimony of her daughters.[7] At the ***Machner*** hearing, trial counsel testified that he believed he elicited evidence of P.A.'s inconsistent stories "through the detective, through the daughters, and through [the mother]" and that his strategy was to emphasize the contradictions in closing argument. When asked why he did not recall the mother in order to ask about the inconsistencies, he testified:

> I would have thought it would have been highly questionable to do that. I would have considered that almost malpractice to call the State's witness to have them explain away what I built up to attack her on. That's—I wouldn't have seen any reason to call her to explain that. I would assume the State would have questioned her if they thought they could rehabilitate her … on that point.

The trial court concluded that trial counsel's performance was not deficient:

> I think that certainly that's a strategic decision that objectively—I would not have asked [P.A.] any question I did not know the answer to. You always have that old adage.

[7] P.A. and H.A. both testified that when H.A. disclosed the assault to her mother, she did not provide any detail. In contrast, a police officer testified that P.A. specifically reported that the assault involved anal intercourse. In closing, Arendt argued that the reason why P.A. knew the nature of the assault was because she had helped H.A. fabricate the allegations as part of a divorce dispute.

> But not only that, I remember [P.A.] and thinking that this is an extremely unpredictable witness…. I remember she had some health issues when she was in here. I don't know if she had a minor seizure. I don't remember if we had to have a nurse come up, or if she just kind of overheated or was stressed out. She almost went into kind of a seizure kind of thing.…
>
> And then—so she was a witness that, like a lot of witnesses in criminal cases, that you really had to handle gingerly. And I certainly would not have asked her any question I was uncertain about her answer. I would have been very reluctant from a trial strategy. And that's a reasonable strategy in my opinion.

¶21 Arendt concedes that trial counsel pointed out the inconsistences in closing argument, but asserts that "it was too little, too late." We disagree. Findings of fact include the circumstances of the case and counsel's conduct and strategy. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. This court will not exclude the trial court's articulated assessments of credibility and demeanor, unless they are clearly erroneous. ***Id.***, ¶23. Here, trial counsel's strategic decision not to recall P.A. is well supported by the trial court's findings of fact concerning her demeanor and is objectively reasonable.

By the Court.—Judgment and order affirmed.

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