

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0665-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY A. ALLEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Gregory Allen appeals a judgment convicting him of second-degree sexual assault, burglary and kidnapping. He also appeals an order denying his motion for a new trial in which he alleged ineffective assistance of trial counsel. He argues that: (1) trial counsel ineffectively cross-examined the victim and other witnesses and failed to call witnesses who could have highlighted

weaknesses in the State's case; (2) the trial court erroneously exercised its discretion when it allowed evidence of Allen's prowling and a previous exposure and sexual assault; and (3) the State presented insufficient evidence to support the verdicts. We reject these arguments and affirm the judgment and order.

The State alleged that Allen entered the victim's home through a window, put a towel over her head so that she could not identify him and dragged her to the back of her residence. He then took the towel from her head and put it over his head and forced the victim to perform oral sex on him. She believed the perpetrator ejaculated in her hair based on feeling something slimy.

A police detective found many fingerprints on windows and screens and on a stool that was placed outside one of the windows. Allen's fingerprints were found on the edge of a screen and between the window and where the screen would have been had it not been removed. The victim said the screens were attached before the assault. The detective also found footprints that could not be matched to Allen's shoes. Hair samples taken from the victim's bathrobe did not match Allen's hair. A neighbor found a towel on a backyard fence. Blood was found on the towel although the victim did not indicate that the assailant was bleeding during the attack. None of Allen's DNA was found on the towel.

A neighbor testified that a dark colored Buick Regal was parked on the street on the morning of the assault. Allen's live-in girlfriend owns a gray Buick Regal that Allen was not allowed to use. She told police, however, that the vehicle was not always parked where she left it the night before, and the car smelled like smoke and contained ashes even though she does not smoke and Allen does.

The State presented other acts evidence that Allen exposed himself and sexually assaulted another woman in the same neighborhood one year earlier. The victim identified Allen as her assailant. The State also presented evidence that Allen was under surveillance after the assault in this case. An officer observed him driving his car late at night in the neighborhood where the assault took place, slowing down at residences that had lights on and almost stopping in front of the victim's house. Upon being questioned by the police, Allen denied that he had ever been at the victim's house. When confronted with fingerprint evidence, he admitted that he had been there window peeking, but denied the assault.

To establish ineffective assistance of counsel, Allen must show that his counsel's performance was deficient and the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Whether counsel's performance was deficient is a question of law that this court decides without deference to the trial court. *See State v. Ludwig*, 124 Wis.2d 600, 607, 369 N.W.2d 722, 715 (1985).

Allen's complaints about his trial counsel focus on counsel's failure to dramatically present inconsistencies in the testimony and gaps in the State's case. He faults counsel for not cross-examining the victim about inconsistencies in her description of the perpetrator at trial, at the preliminary hearing, and in police incident reports. The victim never saw the assailant above the waist and estimated his age and size from the force he applied to her. Trial counsel did cross-examine the victim to show discrepancies between her original description of the assailant and Allen's actual appearance as well as her failure to identify him

from a photo array or at the preliminary hearing. We conclude that trial counsel adequately exposed the inconsistencies.

Allen complains that the victim was not questioned about the absence of sperm or semen despite her belief that the perpetrator ejaculated. The jury was aware that Allen's DNA was not found on the towel or anywhere in the victim's home. Asking the victim to explain how that would be possible amounts to an attack on the victim's description of the crime. Counsel's decision not to challenge the fact that the victim was assaulted constitutes a reasonable trial strategy. The potential discrepancy between the victim's description of the crime and the physical evidence was argued to the jury.

Allen also criticizes his counsel for asking only "brief questions" about the victim's ex-boyfriend who was considered a suspect. Counsel questioned the victim and a police detective about many other possible suspects. Evidence that another person may have committed the crime is not admissible unless there is a "legitimate tendency" that the third person could have committed the crime. *See State v. Denny*, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). The record discloses no basis for concluding that counsel was ineffective for his failure to attempt to implicate the ex-boyfriend.

Allen argues that his counsel should have cross-examined the police officer regarding the location of fingerprints and the measures that were taken to recover semen. Counsel extensively cross-examined the detective on the location of the fingerprints and utilized his testimony at the preliminary hearing in doing so. In his closing argument, he also attacked the detective's change in terminology regarding where the fingerprints were found. Counsel asked a detective about an exhibit that indicates that no semen was identified on swabs and

smears, the towel, or the victim's bathrobe. The parties stipulated that DNA testing on blood found on the towel found excluded Allen. Counsel also brought out that none of the hairs found on the towel and bathrobe matched Allen's. We conclude that counsel adequately cross-examined the police witnesses and was not constitutionally ineffective for the manner in which he presented this evidence.

Allen complains that his counsel did not effectively cross-examine the neighbor or the detective regarding the initial description of the car seen in the area on the night of the assault. A police report indicated that the neighbor had initially described the Buick as a brown LeSabre. Allen's girlfriend's car was gray. The neighbor testified that the car was "dark-colored" and "probably a Regal." On cross-examination, he admitted that he really could not identify much about the car other than that it was dark and that he needed to look at the name of a car in order to tell what kind it was. Further attack on his identification was not necessary. Allen's girlfriend described her car as "light gray." Counsel pointed out that her description of the car did not match the neighbor's.

Allen argues that his counsel should have called expert witnesses to comment on the discrepancies in the State's case. Counsel cannot be faulted for efficiently presenting the inconsistencies and allowing the jury to draw its own conclusions rather than presenting "expert testimony" to comment on the significance of the lack of sperm or semen, interior fingerprints, hair, fiber, blood, saliva or DNA evidence linking Allen to the crime.

The court properly exercised its discretion when it admitted evidence of Allen's prior assault of Amanda E. and his prowling in the area of the victim's home. Admission of other crimes evidence involves a three-step process: (1) the other acts evidence must be offered for an acceptable purpose under § 904.04(2),

STATS.; (2) it must be relevant, considering the two facets of relevance set forth in § 904.01, STATS., that the evidence relates to a fact or proposition of consequence to the determination of the action and that the evidence has probative value; and (3) its probative value must not be 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 under § 904.03, STATS.; *State v. Sullivan*, 216 Wis.2d 768, 772, 576 N.W.2d 30, 32 (1998).

The trial court admitted evidence that Allen assaulted Amanda E. for the purpose of proving identity, a plan and preparation, factors specifically enumerated in § 904.04(2), STATS. When introduced for the purpose of proving identity, there should be a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant. *See State v. Fishnick*, 127 Wis.2d 247, 263-64, 378 N.W.2d 272, 281 (1985). The threshold measure for similarity to establish identity is nearness of time, place and circumstances. *See State v. Kuntz*, 160 Wis.2d 722, 746-47, 467 N.W.2d 531, 540 (1991). Here, both sexual assaults took place in the early morning hours in the same neighborhood comprised of small, one story, single family homes constructed relatively close to the streets. The victims are mature females. The assaults took place in June, when windows are more likely to be open and shades pulled back to allow fresh air into homes. The two assaults are sufficiently similar to show the identity of the assailant. In addition, the assault of Amanda E. was admissible to show preparation and plan. The evidence showed a plan to prowl a residential neighborhood in the middle of the night, taking advantage of summer

weather and obtain sexual gratification by exposing himself to women and having sexual contact with them.

Allen argues that Amanda E.'s description of her attacker compared to her trial testimony demonstrates an inconsistency that makes it unclear whether Allen was her attacker and that other acts evidence should not be allowed unless it is clearly established that the defendant committed the prior acts. Amanda E. identified Allen as her assailant at trial. Some of the inconsistencies can be explained by the passage of almost two years between the assault and the trial. Whether her previous description was inconsistent goes to the weight of the evidence, not its admissibility. Her testimony sufficiently identifies Allen as the perpetrator of the crimes against her.

The court also properly admitted evidence that Allen was seen driving around the same neighborhood and nearly stopping in front of the victim's residence after the assault. The court gave a cautionary instruction that this evidence was admitted only on the issues of intent, plan and preparation. The cautionary instruction eliminates or minimizes the risk of unfair prejudice. *See State v. Landrum*, 191 Wis.2d 107, 122, 528 N.W.2d 36, 42 (Ct. App. 1995). In addition, an officer admitted on cross-examination that it is not unlawful to drive around in the middle of the night. Evidence that Allen engaged in prowling was supplied by his own statement to the police in which he admitted window peeping at the victim's house in an effort to explain his fingerprints. In addition, Allen's girlfriend's testimony suggested that Allen drove around at night. Therefore, the prejudicial effect of presenting direct testimony on his modus operandi did not substantially outweigh its probative value.

Finally, the State presented sufficient evidence to support the convictions. Allen does not challenge the sufficiency of the evidence that crimes were committed, but only that he was the perpetrator. The test for sufficiency of the evidence is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove guilt beyond a reasonable doubt. *State v. Von Loh*, 157 Wis.2d 91, 101, 458 N.W.2d 556, 560 (Ct. App. 1990). The jury heard evidence that it had the right to believe that Allen's fingerprints were found on a stool and on the windows in a place that showed he was there on the night of the assault. He first denied being in the area of the victim's house until he was confronted with the fingerprints. He then admitted to window peeking in the area on a different night. His attempts to fabricate are circumstantial evidence of guilt. *Paulson v. State*, 118 Wis. 89, 97, 94 N.W. 771, 773 (1903). Allen's opportunity to commit the crime was established by his practice of driving around in the middle of the night in summer months, focusing on houses with lights on, and driving a car similar to one seen on the night of the assault. The jury heard evidence that Allen committed a sexual assault the previous summer only two blocks away. This evidence is sufficient to allow the jury to convict Allen of these crimes.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

