COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2447-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRIN E. PARNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: JOHN G. BARTHOLOMEW, Judge. *Reversed.*

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

¶1 HOOVER, P.J. Darrin Parnell appeals his judgment of conviction following a jury trial. Parnell was convicted of (1) second-degree sexual assault, aiding and abetting sexual intercourse, contrary to WIS. STAT. § 940.225(2)(f);[1]

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

(2) third-degree sexual assault, contrary to WIS. STAT. § 940.225(3); (3) false imprisonment, contrary to WIS. STAT. § 940.30; and (4) intentionally causing a child under eighteen to view sexually explicit conduct, contrary to WIS. STAT. § 948.055(1).[2] Parnell claims the trial court erred by permitting the State to present evidence of his past violent acts, and to introduce a police report containing an unavailable witness's statements to a police officer.

¶2 We conclude that the trial court erred by admitting both the evidence of Parnell's violent acts and the witness's statement. The other acts evidence was not admitted for any permissible purpose. Moreover, the other acts were not relevant to the use or threat of force or violence because there was no showing that the complainant was aware of the other acts, and the acts were dissimilar. Admitting the police report that summarized the unavailable witness's statement violated Parnell's confrontation right because there was no hearsay exception authorizing its admission, and the statement lacked guarantees of trustworthiness. Because we cannot conclude that the error was not harmless, the judgment is reversed.

BACKGROUND

¶3 The four charges arose from activity that occurred at a party at Parnell's apartment. Parnell apparently often had parties at his apartment, attended by a number of regular participants who then considered themselves part

[2] Parnell was originally charged with (1) first-degree sexual assault, having sexual intercourse without consent by use or threat of force while being aided or abetted by one or more other persons, contrary to WIS. STAT. § 940.225(1)(c); (2) first-degree sexual assault, aided or abetted by another to have sexual intercourse without consent by use or threat of force or violence, contrary to WIS. STAT. § 940.225(1)(c); (3) false imprisonment; and (4) causing a minor to view sexually explicit conduct.

of a club, or "family." To become a member of the "family," one had to engage in sexual relations with others, and otherwise do whatever Parnell asked. Failure to abide by the "rules" meant you could not be a member of the family.

¶4 At trial, the complainant, Katrina A., a minor, testified that while at the party, Parnell forced her to perform oral sex with another minor, Nick R. She also testified that Parnell prevented her from leaving his apartment and forced her to have oral sex with him.[3] She claimed that she was crying throughout the evening after Parnell told her she had to have oral sex. Several witnesses supported Katrina's account.

¶5 Parnell's testimony contradicted Katrina's version of what happened. He indicated that Katrina willingly had sexual intercourse with him. He contended that earlier, however, Katrina was upset because Parnell initially would not have intercourse with her and instead suggested she have intercourse with Nick. The defense provided other witnesses who corroborated Parnell's version.

¶6 During the trial, the State introduced evidence consisting of several incidents of domestic violence by Parnell. The State also introduced a police report summarizing the statement of Dawn Hase, who had been at the party but did not appear as a witness at trial. The report corroborated parts of Katrina's account and referred to a nonconsensual sexual encounter between Parnell and Hase.

¶7 The State, at the close of its case, amended the charge of first-degree sexual intercourse by use or threat of force or violence while aided and abetted by

[3] Parnell does not deny sexual contact with Katrina, but contends that it was consensual.

another to a charge of second-degree sexual assault, sexual intercourse by use or threat of force or violence. The State also requested that the court instruct the jury on lesser-included offenses for the first- and second-degree sexual assault charges. The lesser-included offenses did not contain the element of use or threat of use of force.

¶8 The jury acquitted Parnell of the first- and second-degree sexual assault charges involving the use or threat of force or violence. It found Parnell guilty of the lesser-included offenses of second- and third-degree sexual assault, as well as false imprisonment and intentionally causing a minor to view sexually explicit conduct.

¶9 Parnell filed a motion for a new trial based on newly-discovered evidence that included an affidavit from Hase. The affidavit elaborated on Hase's earlier statement, indicating that to her knowledge Katrina was not held against her will or forced to have sex with anyone. Parnell also filed a request for a new trial based on ineffective assistance of counsel. The court denied these motions.

¶10 On appeal, Parnell claims that admission of the other acts evidence and Hase's statement constituted error.[4] We set forth additional facts relevant to Parnell's claims in the discussion of those claims.

ANALYSIS

¶11 The admission of evidence is within the trial court's discretion. We will affirm if the court examined the relevant facts, applied a proper standard of

[4] Parnell also pursues his claim of ineffective assistance of counsel on appeal. Because we determine that defense counsel adequately objected to the evidence that Parnell asserts should not have been admitted, we reject the ineffective assistance of counsel claim.

law, and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). In considering whether the trial court applied the proper legal standard, however, no deference is due. *See* ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997). We review de novo whether the evidence before the trial court was legally sufficient to support its rulings. *See* ***id.***

1. Other Acts Evidence

¶12 At trial, the State offered evidence that Parnell had in the past acted violently toward his girlfriend, Josie. Nick testified that he had seen Parnell treat Josie violently, and Kaley W. testified that she had seen Parnell hit Josie more than once. On cross-examination, Parnell denied hitting Josie. Parnell claims that the evidence was admitted merely to prove his character and not for any permissible purpose. He further contends that the evidence was "irrelevant and not similar to the charges" against him.

¶13 The State contends that Parnell waived any claimed error by failing to object to the introduction of the other acts evidence. Parnell's counsel, however, objected when the State first asked a witness if he had observed Parnell act violently. Counsel objected that the evidence sought "goes to character." The State contends that this objection was not adequately specific to notify the court that the basis of the objection was to the introduction of "other crimes" evidence.

¶14 An objection that a question calls for impermissible character evidence sufficiently alerts the court that the objection is to the admission of other acts evidence. *See* WIS. STAT. § 901.03. WISCONSIN STAT. § 904.04(2) provides:

> *Evidence 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*. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Emphasis added.)

An objection that evidence is offered to prove character necessarily implicates § 904.04 and calls for an examination of the purpose for which the evidence is introduced. Defense counsel's objection preserved Parnell's challenge to the introduction of the other acts evidence.

¶15 The State further asserts that Parnell initially introduced the issue of his peacefulness through his counsel's examination of witnesses. The record belies this contention. Although defense counsel inquired of Nick about the peacefulness of the group, the State objected, and the court sustained the objection.[5] The State shortly thereafter inquired of Nick whether he observed Parnell act violently toward anyone. Defense counsel objected on several grounds, including character. The prosecutor claimed that defense counsel raised the issue of the group's peacefulness, and the court overruled Parnell's objection. The other record citations the State directs us to occur well after the State succeeded in introducing the other acts evidence. Parnell had preserved his objection to the introduction of this evidence and was compelled to respond as best he could. *See* WIS. STAT. § 901.03.

[5] Defense counsel's question inquired of the peacefulness of the *group*, not Parnell specifically. This further supports our conclusion that defense counsel did not open the door to the admission of Parnell's violence. We agree that if defense counsel had first raised Parnell's peacefulness, the prosecution could respond. *See*, *e.g.*, ***State v. Keith***, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997) ("defendant's presentation at trial may open a door for the prosecution that would otherwise remain closed").

¶16 "The general rule is to exclude evidence of other bad acts to prove a person's character in order to show that the person acted according to his character in committing the present act." ***State v. Fishnick***, 127 Wis. 2d 247, 253, 378 N.W.2d 272 (1985). The fear is "that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783; *see also* WIS. STAT. § 904.04(2). However, other acts evidence may be admitted when relevant for some purpose other than demonstrating the accused's propensity to commit the act charged. *See* WIS. STAT. § 904.04(2).

¶17 In ***Sullivan***, our supreme court delineated a three-step analysis to determine the admissibility of other acts evidence under WIS. STAT. § 904.04(2). *See* ***id.*** at 772-73. First, other acts may be admissible for the purpose of establishing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" WIS. STAT. § 904.04(2); *see* ***Sullivan***, 216 Wis. 2d at 772. Second, the evidence must be relevant under WIS. STAT. §§ 904.01 and 904.02. *See* ***Sullivan***, 216 Wis. 2d at 772. Third, its probative value must substantially outweigh the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. *See* ***id.*** at 772-73.

¶18 The trial court did not indicate the grounds on which it permitted the evidence to be received. The State offers no purpose for admission other than to rebut Parnell's evidence regarding his peacefulness. Again, however, the State successfully objected to defense counsel's question regarding peacefulness and later raised the issue of Parnell's violence. The evidence was therefore not admitted for a permitted purpose under WIS. STAT. § 904.04.

¶19 Even if the evidence were admitted for a permissible purpose, it is not relevant. The State claims that evidence of Parnell's violence was relevant both to the issue of use or threat of force or violence and to show a climate of coercion. The State does not demonstrate why these allegations of domestic violence bear any similarity to the facts of or charges in this case. There was no attempt to show that these other acts of violence were used to coerce sex. Indeed, even with the other acts evidence, the jury rejected the contention that Parnell's sexual intercourse with Katrina resulted from the use or threat of force.

¶20 Nor was the evidence admissible on the issue of Katrina's nonconsent. Importantly, the State made no showing that Katrina was aware of these other incidents, so they could not have affected her decision whether to have intercourse. Moreover, other acts evidence is inadmissible on the issue of consent. As stated in ***State v. Alsteen***, 108 Wis. 2d 723, 730-31, 324 N.W.2d 426 (1982):

> Evidence of Alsteen's prior acts has no probative value on the issue of [the complainant's] consent. Consent is unique to the individual. "The fact that one woman was raped . . . has no tendency to prove that another woman did not consent." ***Lovely v. United States***, 169 F.2d 386, 390 (4th Cir. 1948). Thus the testimony of [two witnesses] was irrelevant and should have been excluded.

¶21 Finally, because the evidence was neither admitted for a permissible purpose nor relevant, we need not address its obvious prejudicial effect.

2. Police Report of Hase's Statement

¶22 Hase was Josie's friend and was at Parnell's apartment the night of the assault. Over a month later, an officer interviewed Hase in a squad car. The officer took notes of his conversation and later dictated a report. Hase did not prepare any part of, review or sign the report. Hase was unavailable to testify at

trial. Over Parnell's objection, the State introduced the police report summarizing the Hase interview.

¶23 Hase's statement to the investigator corroborated some of Katrina's story. The report further stated that Hase had been forced to perform oral sex on Parnell in Katrina's presence; she feared he would "hit or harm her in some way …." The police report purporting to recount Hase's statement therefore inculpated Parnell and tended to exculpate Hase.

¶24 Parnell sought to exclude the report on grounds that it was hearsay, was not reliable and violated his confrontation right. The State contended that the report should be admitted as a statement against Hase's penal interest because it could support a charge of exposing a minor to sexual activity.[6] The trial court admitted the report. The court did not state its reasons, but presumably it was for the reasons the State advanced. We conclude that it was error to admit the report.

¶25 In ***State v. Bauer***, 109 Wis. 2d 204, 215, 325 N.W.2d 857 (1982), our supreme court announced the standard to be applied in determining whether hearsay evidence is admissible in a criminal case:

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability.

[6] WISCONSIN STAT. § 948.055(1) provides:

> Whoever intentionally causes a child who has not attained 18 years of age to view or listen to sexually explicit conduct may be penalized as provided in sub. (2) if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.

> If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. … If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

WISCONSIN STAT. § 908.045 provides, in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (4) STATEMENT AGAINST INTEREST. A statement which was at the time of its making … so far tended to subject the declarant to civil or criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

¶26 We are not satisfied that the evidence fits within a recognized hearsay exception. We cannot conclude that Hase necessarily made an admission against interest. She claims that she was forced to perform oral sex with Parnell in Katrina's presence. Being coerced to perform a sexual act in front of a minor does not necessarily subject Hase to criminal liability, *see* WIS. STAT. § 939.46.[7] It is therefore doubtful that Hase's statement falls under WIS. STAT. § 908.045(4).

¶27 We need not, however, make that determination. Even assuming that Hase's statement could implicate her as Parnell's accomplice in intentionally causing Katrina to view sexually explicit conduct, and was therefore admissible under WIS. STAT. § 908.045, its admission violated the confrontation clause. The confrontation clause provides "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …." U.S. CONST.,

[7] Although WIS. STAT. § 939.46 states that the defense of coercion requires imminent danger of death or great bodily harm, the police report does not inform on the danger Hase perceived.

amend. VI.[8] Under certain circumstances, however, a hearsay statement may be admitted without violating the confrontation clause when the declarant is unavailable at trial for cross-examination. A plurality of the United States Supreme Court most recently reiterated the analytical framework for considering hearsay statements under the confrontation clause in ***Lilly v. Virginia***, 527 U.S. 116 (1999):

> [T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability.

Id. at 124-25 (quoting ***Ohio v. Roberts***, 448 U.S. 56, 66 (1980)).

¶28 The ***Lilly*** Court further explained that the practice of admitting accomplices' statements to inculpate a criminal defendant is "of quite recent vintage." ***Id.*** at 130. It noted that "this … category of hearsay encompasses statements that are inherently unreliable." ***Id.*** It went on to hold "that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." ***Id.*** at 133. Thus, under ***Lilly***, Hase's statement must contain particularized guarantees of trustworthiness to satisfy the confrontation clause.

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[8] Article I, § 7, of the Wisconsin Constitution similarly provides: "In all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face." Despite the difference in language, however, the Wisconsin Supreme Court has interpreted the confrontation clause of the Wisconsin Constitution consistent with the United States Supreme Court's interpretation of the Sixth Amendment confrontation clause. *See* ***State v. Burns***, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983).

¶29 In ***Idaho v. Wright***, 497 U.S. 805, 820-21 (1990), the Supreme Court explained that "guarantees of trustworthiness" must be drawn from the totality of the circumstances surrounding the preparation of the statement. The Court declined to endorse a mechanical test for determining guarantees of trustworthiness and stated that courts have "considerable leeway in their consideration of appropriate factors." ***Id.*** at 822. The Supreme Court, however, specifically held that corroborating evidence will not support a finding that a statement bears sufficient guarantees of trustworthiness. Rather, a statement must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." ***Id.*** In ***Lilly***, the Court again rejected the proposition that corroborating evidence may support a finding that a statement bears particularized guarantees of trustworthiness. *See* ***Lilly***, 527 U.S. at 137-38.

¶30 Wisconsin law is in accord. "The confession of an accomplice inculpating the accused is presumptively unreliable as to the parts detailing the accused's conduct or culpability …." ***State v. Myren***, 133 Wis. 2d 430, 434, 395 N.W.2d 818 (Ct. App. 1986). The State's proof concerning the circumstances under which the statement was made must allay any suspicion of coercion, ulterior motive, desire to curry favor with authorities, or any reason not to tell the truth. *See* ***United States v. Robbin***, 197 F.3d 829, 840 (7th Cir. 1999).

> It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice--that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Lilly, 527 U.S. at 137.

¶31 Neither the police report summarizing Hase's statement nor the setting in which she was questioned provides any basis for concluding that her comments regarding Parnell's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting. The record reveals the following about the statement: (1) It was made solely in the presence of a police officer in a squad car; (2) it was made over a month after the offense; (3) Hase did not review or sign it; (4) there is no evidence of how it was taken, i.e., whether it was her narrative or in response to leading questions; (5) Hase minimized or excused her involvement in the crime; (6) Hase implicated Parnell; and (7) it is silent as to whether Katrina's sexual contacts were consensual, but carried an inference that they were not. Under the circumstances, the police report of Hase's statement should not have been admitted.

3. Harmless Error

¶32 We now examine whether the erroneous admission of the evidence was harmless. The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). A reasonable possibility is one that is sufficient to undermine our confidence in the outcome of the proceeding. *See* ***id.*** The conviction must be reversed unless the court is certain the error did not influence the jury. ***Sullivan***, 216 Wis. 2d at 792. The burden of proving no prejudice is on the State. *See* ***id.***

¶33 We conclude that the errors were not harmless and that the cumulative effect of the other acts evidence and Hase's statement deprived Parnell of a fair trial. Admitting Hase's statement exposed the jury to an uncharged sexual assault by an accuser who Parnell could not challenge. Hase's statement supports

Katrina's claims of coerced nonconsent, and corroborated other portions of Katrina's testimony. The evidence of Parnell striking his girlfriend also gave credibility to Katrina's claims of coerced nonconsent.

¶34 We cannot say that the admission of the other acts evidence and Hase's statement did not affect the jury's credibility assessment and opinion of Parnell's character, leading to his conviction. Cumulatively, the evidence corroborated Katrina's account and invited the jury to focus on Parnell's bad character. In turn, the jury could conclude that he was not credible and deserved to be punished. Consequently, we cannot say that the State has proven that there is no reasonable possibility that the errors contributed to the conviction. A new trial is necessary. *See* ***State v. Albright***, 98 Wis. 2d 663, 677-78, 298 N.W.2d 196 (Ct. App. 1980). Accordingly the judgment is reversed.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

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¶35 CANE, C.J. *(dissenting).* I respectfully dissent. Although I agree with the majority that the other acts evidence and Dawn H.'s statement to the police officer should not have been admitted, I would conclude that these errors were harmless because of the overwhelming evidence supporting the convictions.

¶36 The other acts evidence consisted of but two brief passages in a lengthy trial. Similarly, Dawn H.'s statement was received to show that this group was not a peaceful, fun-loving group run by Parnell, but rather a group operated under an atmosphere of coercion. Additionally, it was merely cumulative of Katrina A.'s and other testimony. Even without evidence of the threatening conduct toward Josie, and Dawn H.'s statement, the State conclusively proved that:

> (1) Parnell had sex with Katrina A.;
>
> (2) Nick R. had sex with Katrina A.;
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> (3) Parnell suggested that Katrina A. have sex with Nick R.;
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> (4) Katrina A. was crying for most of the evening;
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> (5) Katrina A. was not allowed to see her brother when he came to the door;
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> (6) Katrina A. was forced into a back bedroom with Nick R. and Parnell's girlfriend Josie, whose job was to make sure that Katrina A. engaged in sex with Nick R.;
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> (7) Parnell allowed Mike Brown to stay, but ordered Katrina A.'s brother to leave;
>
> (8) Parnell organized this group for the purpose of smoking marijuana and having sex;
>
> (9) Parnell and Josie were perceived as leaders of this group where members were required to take loyalty oaths and were expected to do as they were told;

> (10) The recipient of the oral sex, Nick R., said that Katrina A. was crying the entire time she was performing the sexual act on him and that she did not consent to the act with him;
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> (11) Brown who went home with Katrina A. said that he recognized something was wrong, and she told him that she did not want to talk about it;
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> (12) Katrina A.'s brother testified that he saw his sister crying when he was allowed to look into the room for a brief moment before being ordered to leave;
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> (13) Every member of the group was contacted by Parnell or by his girlfriend Josie about their trial testimony; and
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> (14) Parnell and Josie not only pressured witnesses, but falsified documents, lied to the police, and destroyed witness statements in advance of trial.
>
> (15) Much of Dawn H.'s statement about the coercive sexual atmosphere at Parnell's apartment and her being forced to have sex with Parnell while Katrina A. was in the room was merely cumulative of Katrina A.'s and other testimony.

¶37 Thus, evidence of Parnell's threatening conduct toward Josie in the presence of two other group members and the substance of Dawn H.'s statement were merely cumulative because the coercive sexual atmosphere of how this group operated was strongly established by other evidence. Even excluding the other acts evidence and Dawn H.'s statement, there is overwhelming evidence of Parnell's threatening demeanor, the inherently coercive nature of the group or "family" created and fostered by him, and the coercive sexual atmosphere Katrina A. described at the apartment where she testified about Parnell's sexual assault. Therefore, I would conclude that even though the evidence should not have been admitted, it is harmless because there is no reasonable probability it contributed to the convictions. Accordingly, I would affirm the convictions.