COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3209-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES A. TANKSLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Tanksley appeals from an order[1] denying his motion for severance and separate trials for sexual assault charges involving two

[1] Leave to appeal the nonfinal order was granted January 11, 2000.

boys. Tanksley argues that because "other acts" evidence from one case is not admissible in the other, and vice versa, consolidation of the cases is not justified and thus, the trial court erroneously exercised its discretion by denying his severance motion. We reject Tanksley's argument and affirm the order.

BACKGROUND

¶2 On April 9, 1997, Tanksley was charged with first-degree sexual assault of a child, Ryan J. (d.o.b. 03/31/87). The complaint was amended two days later to include one additional count of sexual assault of a child and one count of false imprisonment. Ryan complained that sometime during the summer of 1996, Tanksley took him to his room at the McMillion Hotel in Antigo and touched his genitalia with his hands and his mouth. Ryan also alleged that on April 7, 1997, he went to an apartment looking for his brother, but instead found Tanksley. According to Ryan, Tanksley showed him a video game; however, when Ryan attempted to leave, Tanksley prevented him by standing in front of the door and ultimately locking it. Ryan claimed that Tanksley then touched his genitalia with his hands and his mouth.

¶3 On June 3, 1997, a second complaint was filed against Tanksley, alleging one count of child enticement and one count of first-degree sexual assault of a child, involving Josh F. (d.o.b. 10/15/88). Josh complained that in the summer of 1996, Tanksley sought permission from Josh's mother for Josh to help move some items from his room in the McMillion Hotel. Josh claimed that while in Tanksley's room, Tanksley fondled his genitalia with his hands.

¶4 The State subsequently moved to admit evidence of Ryan's sexual assault in the case involving Josh, and vice versa. The trial court, concluding that the evidence was relevant to motive, intent and plan, determined that it would be

admissible at the respective trials. Tanksley then consented to consolidation of the two cases and the parties went to trial. A jury convicted Tanksley of all but the child enticement charge. On appeal to this court, his convictions were reversed due to the erroneous admission of highly prejudicial evidence. On remand, Tanksley moved to sever the charges and exclude evidence of each alleged assault in the trial of the other. The trial court denied his motion. We subsequently granted Tanksley's motion for leave to appeal the order denying his motion.

ANALYSIS

¶5 Tanksley contends that the trial court erroneously exercised its discretion by denying his motion to sever the charges. A motion for severance is addressed to the trial court's discretion. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982). We will sustain the trial court's discretionary decision if the court examined the relevant facts, applied the proper legal standard and used a rational process to reach a conclusion that a reasonable judge could reach. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). The record must reflect, however, "that discretion was exercised, including evidence that the trial judge undertook a reasonable inquiry and examination of the facts as the basis for his [or her] decision." ***State v. Speer***, 176 Wis. 2d 1101, 1116, 501 N.W.2d 429 (1993). Nevertheless, when a trial court "fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the … court's exercise of discretion." ***State v. Gray***, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999).

¶6 On appeal, we will reverse the trial court's determination only where the defendant can establish that the joinder caused "substantial prejudice." ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). Generally, where

evidence on the charges would be admissible in separate trials, the risk of prejudice will not be significant. *See* ***State v. Hall***, 103 Wis. 2d 125, 141-42, 307 N.W.2d 289 (1981). Courts have thus recognized that the test for prejudicial joinder parallels the analysis of the admissibility of other acts evidence. *See* ***Locke***, 177 Wis. 2d at 597.

¶7 In general, "evidence of other acts is not admissible because of the 'fear 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.'" ***Gray***, 225 Wis. 2d at 49 (quoting ***Sullivan***, 216 Wis. 2d at 783). Consistent with this apprehension, the courts of this state have held that "[o]ther acts evidence may not be introduced to show that the defendant has a certain character trait and, in the present charge, acted in conformity with that trait." ***Id.*** at 49; *see also* ***Sullivan***, 216 Wis. 2d at 781-82.

¶8 WISCONSIN STAT. §§ 904.04(2)[2] and 904.03[3] govern the admissibility of other acts evidence. Exceptions to the general rule against admitting other acts evidence are found in § 904.04(2); however, "[e]ven if the

[2] Under WIS. STAT. § 904.04(2):

> [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. 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.

All statutory references are to the 1997-98 version.

[3] WISCONSIN STAT. § 904.03, states: "Although relevant, evidence may be excluded if its 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."

other acts evidence is being offered for one of these acceptable purposes, it must be relevant, and its probative value must outweigh its unfair prejudicial effect." ***Gray***, 225 Wis. 2d at 49 (citations omitted). The ***Sullivan*** court propounded a three-step analysis for determining the admissibility of other acts evidence:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence 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?

Sullivan, 216 Wis. 2d at 772-73 (footnote omitted).

¶9 In sexual assault cases, especially those involving crimes against children, "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 376 (1992)). "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Davidson***, 2000 WI at ¶51. In ***Davidson***, the defendant was charged with second-degree sexual assault of his

thirteen-year-old niece. Applying the greater latitude rule in conjunction with the entire ***Sullivan*** analysis, our supreme court concluded that the admission of evidence of the defendant's prior conviction for first-degree sexual assault of a six-year-old girl did not constitute an erroneous exercise of discretion. *See* ***Davidson***, 2000 WI at ¶5. Although ***Davidson*** involved admission of a prior conviction as other acts evidence, we conclude the greater latitude rule is no less applicable where, as here, the proffered other acts evidence is not based on a prior conviction. *See* ***State v. Friedrich***, 135 Wis. 2d 1, 19-20, 398 N.W.2d 763 (1987) (applying greater latitude rule in trial for sexual assault of a child, trial court properly admitted testimony that the defendant, four and seven years before the charged assault, committed two uncharged sexual assaults).

A. OFFERED FOR A PERMISSIBLE PURPOSE

¶10 Turning to the first step of the analysis, we must first determine whether the evidence was offered for a proper purpose under WIS. STAT. § 904.04(2). The trial court could reasonably have concluded that the evidence in each case was mutually admissible to establish motive and intent. In prosecutions involving sexual contact with a child, intent and motive overlap. *See* ***State v. Fishnick***, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985). When a defendant's motive for an alleged sexual assault is an element of the crime charged, other crimes evidence may be offered for the purpose of establishing motive. *See* ***Davidson***, 2000 WI at ¶57.

¶11 Here, Tanksley, in addition to the false imprisonment allegation, was charged with three counts of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1), which provides: "Whoever has sexual contact or sexual

intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." In turn, "sexual contact" is defined, in pertinent part, as:

> Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

WIS. STAT. § 948.01(5)(a). Thus, Tanksley's purpose or motive for allegedly touching Ryan and Josh was one element of the crimes charged, and evidence relevant to motive from either case is therefore admissible in the other.

¶12 The evidence was also admissible to establish a scheme. "Evidence of other crimes may be admitted for the purpose of establishing a plan or scheme when there is a concurrence of common elements between the two incidents." ***Davidson***, 2000 WI at ¶60. Although there are some differences between the allegations, there are likewise some striking similarities. The assault on Josh and one of the assaults on Ryan are alleged to have occurred during the summer of 1996 in Tanksley's room at the McMillion Hotel. The remaining count involving Ryan was alleged to have occurred in April of 1997, less than one year later. All three alleged offenses involved hand-to-penis contact, although the offenses involving Ryan additionally included mouth-to-penis contact. Finally, the victims were of similar ages, nine and seven. Because of these common elements, and in light of the greater latitude rule, we conclude that evidence from either case is mutually admissible to establish a scheme.

B. RELEVANCE UNDER WIS. STAT. § 904.04(2)

¶13 The standard for relevancy is whether the evidence has a tendency to make a consequential fact or proposition more or less probable than it would be without the evidence. *See* ***Sullivan***, 216 Wis. 2d at 772-73. As discussed above, Tanksley's motive for allegedly touching Josh and Ryan is an element of the sexual assault charges. Thus, evidence from one case relates to that consequential fact in the other, and vice versa. Having determined that the other crimes evidence relates to facts of consequence in the respective cases, we must next examine whether the other acts evidence has any tendency to make those facts more or less probable. *See* ***Davidson***, 2000 WI at ¶67. "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." ***Id.*** Again, there are striking similarities in both cases—the boys were of similar ages, two of the three alleged assaults occurred in Tanksley's room at the McMillion Hotel, all three involved similar contact and all three occurred within one year of each other. We therefore conclude that the other acts evidence from both cases is mutually relevant.

C. UNFAIR PREJUDICE AND PROBATIVE VALUE

¶14 Finally, we must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Id. at ¶73 (citation omitted). The probative value of other crimes evidence "depends partially upon its nearness in time, place, and circumstance to the alleged crime or element sought to be proved." ***Id.*** at ¶75 (quoting ***Plymesser***, 172 Wis. 2d at 595). The ***Davidson*** court recognized that "similarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." ***Id.*** Given the similarities between the cases, a trial court could reasonably conclude that the highly probative value of the other crimes evidence in each respective case substantially outweighs the danger of unfair prejudice.

¶15 Under ***Sullivan***'s three-step analytical framework, as viewed under the greater latitude rule, we conclude that evidence from the two cases is mutually admissible. Thus, the trial court reasonably exercised its discretion by denying Tanksley's motion to sever.[4]

By the Court.—Order affirmed.

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

[4] After briefing was completed in this appeal, Tanksley filed a motion to proceed pro se. It appears that he wishes to represent himself at trial. If so, he should make a motion in the trial court upon remittitur. Counsel's duties in this court have been completed. We will allow counsel to withdraw from the appeal at this time. If Tanksley wishes to file a petition for review, he must file the pro se petition within 30 days of this decision.