COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP921-CR **Cir. Ct. No. 2012CF004899**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY PHILLIP ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Tony Phillip Rogers appeals from a judgment of conviction of four counts of first-degree sexual assault of a child—sexual contact with a person under the age of thirteen and one count of incest with a child, contrary to WIS. STAT. §§ 948.02(1) and 948.06(1) (2013-14), entered after a jury

trial.[1] Rogers contends on appeal that: (1) his trial counsel was ineffective for failing to seek admission of the victim's mental health records; (2) the trial court erred when it denied his request to introduce other acts evidence at trial in an attempt to show prior fabrication by the victim; and (3) the trial court erred by denying his motion for a mistrial after his jail-issued wristband became visible to the jury.[2]

¶2 We affirm because we conclude: (1) Rogers has not shown that his trial counsel performed deficiently nor has he shown any prejudice from that representation; and (2) the trial court properly exercised its discretion in denying both Rogers's motion to admit other acts evidence of the victim and his motion for a mistrial. We discuss each issue in turn below.

BACKGROUND

¶3 On November 20, 2013, Rogers was convicted of repeatedly sexually assaulting the victim, a minor child who was related to him. The acts occurred between September 25, 2005, and September 24, 2010, when the victim was between the ages of eight and twelve. At trial, the victim testified to the facts of the sexual assault, which are not pertinent to the issues on appeal.

¶4 Among the evidence introduced at trial was a letter the victim wrote to her mother in 2012. In the letter, the victim stated that she had been molested,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The trial which led to this appeal started November 18, 2013, with the Honorable Timothy G. Dugan presiding. Previously, on April 29, 2013, a jury trial began in front of the Honorable David Borowski, and a mistrial was declared due to juror misconduct. Appellant raises no claim relating to the first trial in this appeal.

was in need of mental health assistance, was "on the verge of committing suicide," "hate[ed] having too much responsibility," and was "[a]lways hearing voices and thinking negative thoughts and feel no one loves me." The victim testified that by "hearing voices" she meant that "[i]t was basically like playing on my conscience."

¶5 Based on the victim's references to mental health, suicide attempts, and "hearing voices," at a pretrial hearing, trial defense counsel sought to introduce evidence that the victim had been hospitalized for a mental health issue around the same time as the letter was written. The State did not object to the defense cross-examining the victim about hearing voices or her behavior as mentioned in the letter, but did object to any reference to the hospitalization. The trial court found that reference to the hospitalization lacked foundation and explanation and denied trial defense counsel's request.

¶6 Also related to the letter, one of the defendant's theories was that the victim had fabricated the allegations because she sought attention and because she wanted less responsibility and more freedom. Trial defense counsel sought to introduce evidence of other acts committed by the victim that Rogers believed would show she had fabricated her allegations against him. Specifically, Rogers presented an affidavit in court, which he did not offer as evidence below and did not cite in the record on appeal, but which apparently was a statement by a person who alleged the victim had previously told two specific lies. The affiant allegedly claimed that the victim told authority figures that she had personally witnessed a friend being molested by another person, which the friend denied occurred, and that the victim had previously made allegations that her mother had physically abused her. The trial court denied Rogers's request to introduce this evidence, stating that it was inadmissible character evidence under WIS. STAT. § 906.08(2).

¶7 Additionally at trial, Rogers moved for a mistrial because the bailiffs had failed to remove his jail-issued wristband, which became visible during trial. While the jury was in the room, and as trial defense counsel began to request that the jury be removed, the defendant brought attention to the wristband:

> [TRIAL DEFENSE COUNSEL]: Can we have the jury—
>
> THE DEFENDANT: Can we cut this wristband off so—
>
> THE COURT: Sir, just be quiet, please. All right.

¶8 The jury was then excused from the courtroom, and the wristband was removed. The trial court found that it was unlikely that the jury saw the wristband, the court itself had not observed it, and that Rogers intentionally called the jury's attention to it. The court denied Rogers's motion for a mistrial, saying:

> THE COURT: All right. The issue that comes up is the defendant has a wristband on from the jail. It's not obvious; I didn't observe it. He's got a shirt, he's got a jacket on. [Trial defense counsel] was hoping to have it brought to the Court's attention without anything occurring.
>
> The bailiff went over, they spoke. Mr. Rogers decided to volunteer and shove his wrist up at the bailiff and say, cut this wristband off. And we're certainly removing that at this point. I don't believe that any particular attention was drawn to the jury, but if it was, it was because of Mr. Rogers' decision and intentional conduct. So we'll have it removed, and the jury will come back in.
>
> [TRIAL DEFENSE COUNSEL]: My client also wishes to move for a mistrial.
>
> THE COURT: Denied.

¶9 Later in the trial, Rogers displayed a second wristband, which the court noticed:

> THE COURT: All right. Apparently the defendant has an additional wristband that wasn't obvious to anyone when the first wristband was cut off and was up his sleeve

further. In the course of trying to address that, as I mentioned before, the defendant obviously intentionally tried to display that band in the hopes of getting a mistrial.

Apparently he now has the second one that wasn't visible, he's pulled it down so it's clearly visible where it wasn't before, and we had a quick sidebar about that, indicated that he's sitting throughout most of the trial with his hands down out of view, easily he could've pushed the band back up underneath and it wouldn't be visible in any manner. He has again intentionally pulled it down so it's obvious.

He's been putting his hands up on this table, he's been using a tissue that was given to him by one of the bailiffs, instead of using the hand without it, he's raised it up. I watched the jury. They're not watching him. They're watching the witness under those circumstances.

So I don't think—At this point the bailiffs are going to cut that one off. They're also going to search and see if there's anything else that he obviously hasn't disclosed and he was so anxious to get his first wristband cut off, it's interesting that he didn't say, well, I have the second one, would you please cut that off too?

So his conduct's been intentional, and there's no basis for a mistrial, both on the grounds that I don't think it's been obvious necessarily to the jury, that anyone has seen that he has something, it's not clear what it is, and it's being displayed by him intentionally under the circumstances. So the bailiffs will remove it while we're on a break for lunch.

¶10 Ultimately, the bailiffs discovered multiple additional wristbands:

THE COURT: … [D]uring the trial there was what the officers believed an accident that your wristband was left on, and you intentionally tried to bring that to the attention of the jury to cause a mistrial.

The bailiffs removed that wristband during a break, and then when you came back into the courtroom, you had another wristband on, and you, in fact, were hiding wristbands with the purpose to bringing it to the attention of the jury in an attempt to cause a mistrial. And upon subsequent search, there were multiple wristbands, jail wristbands that were found on you.

¶11 On January 29, 2014, Rogers was sentenced to forty years: twenty-five years of initial confinement and fifteen years of extended supervision. This appeal follows.

DISCUSSION

¶12 On appeal, Rogers raises three issues: (1) that he received ineffective assistance of counsel under ***Strickland v. Washington***, 466 U.S. 668 (1984), because his trial counsel failed to obtain the victim's mental health treatment records for use at trial; (2) that the trial court erred by not allowing him to introduce evidence of other acts committed by the victim to show that she had fabricated her allegations against him; and (3) that the trial court erred by denying his motion for mistrial made when his jail wristband became visible while the jury was present.

¶13 The State counters as to the first issue that trial defense counsel was not ineffective for failing to seek admission of the victim's mental health records because Rogers could not make the preliminary showing of materiality of the records that is required for an *in camera* review under ***State v. Shiffra***, 175 Wis. 2d 600, 608-09, 499 N.W.2d 719 (Ct. App. 1993), and ***State v. Green***, 2002 WI 68, ¶¶32-34, 253 Wis. 2d 356, 646 N.W.2d 298.

¶14 As to Rogers's second issue, the State responds that the trial court did not err in denying his motion to admit other acts evidence for three reasons. First, Rogers failed to preserve the evidence on which he relies for his other acts claim. Second, Rogers failed to show its relevance to a permissible purpose under the three-part analysis of ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). And third, the evidence was inadmissible extrinsic evidence of specific conduct used to attack a witness's credibility. *See* WIS. STAT. § 906.08(2);

see also ***State v. Barreau***, 2002 WI App 198, ¶33, 257 Wis. 2d 203, 651 N.W.2d 12.

¶15 The State's response to Rogers's third issue is that the trial court did not err in denying his motion for mistrial regarding the visible jail wristband because it took prompt and appropriate measures for dealing with the wristband and found that Rogers intentionally called the jury's attention to the wristband. As such, the trial court's decision to deny Rogers's motion for a mistrial was a proper exercise of discretion.

¶16 On all three issues, we agree with the State, as discussed further below. Accordingly, we affirm each of the trial court's rulings.

1. Rogers has not shown that his trial counsel was ineffective.

¶17 "[A]n ineffective assistance of counsel claim presents a mixed question of fact and law." ***State v. Champlain***, 2008 WI App 5, ¶19, 307 Wis. 2d 232, 744 N.W.2d 889. We review a trial court's findings of fact for clear error; whether trial counsel's performance is constitutionally infirm is a question of law, which we review *de novo*. *See* ***id.***

¶18 In evaluating an ineffective assistance of counsel claim, we apply the two-part ***Strickland*** test. *See* ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. To satisfy this test, Rogers must show that: (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him. *See* ***Strickland***, 466 U.S. at 687. His claim fails when he has not satisfied either prong of the two-part test. *See* ***id.*** Deficient performance requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** With

respect to the "prejudice" component, Rogers must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.*** at 694.

¶19 Rogers contends that although his trial counsel sought to admit evidence of the victim's hospitalization, counsel did not do enough. Rogers argues that trial counsel should have filed a motion requesting an *in camera* review of the victim's mental health records to determine whether the victim was diagnosed with any mental health issue that could undermine her credibility as a witness at trial. He further contends that evidence that the victim suffered from a mental illness would have provided the jury with additional information that would undermine her credibility. He acknowledges that his trial counsel attempted to enter evidence that the victim had been hospitalized for a mental health issue, but claims it was deficient of trial counsel to fail to follow up with a request for an *in camera* inspection of the victim's mental health records when the trial court denied the admission of the hospitalization evidence.

¶20 Rogers's argument fails for several reasons. First, trial counsel did file the motion to admit reference to the victim's hospitalization, which led to the hearing at which the court ruled that Rogers was permitted to cross examine the victim on hearing voices and any of the matters she reveals in the letter to her mother. Thus, the victim's mental state was before the jury.

¶21 Second, it is Rogers's burden on appeal to show that trial counsel's representation fell below the objective standard of reasonably competent legal representation. *See* ***State v. Thiel***, 2003 WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To do that here, Rogers must show that the trial court would have admitted the mental health records if trial counsel had sought their

admission. But for those records to have been admissible, trial counsel would have had to meet the requirements set forth in ***Shiffra*** and ***Green***. Rogers fails to demonstrate on appeal that trial counsel could have met that showing.

¶22 In ***Shiffra***, this court held that a defendant may obtain *in camera* inspection of a victim's privileged medical records by making a preliminary showing that the records are material to the defense. ***Id.***, 175 Wis. 2d at 608. In ***Green***, our supreme court clarified that the preliminary showing of materiality requires the defendant to "show a 'reasonable likelihood' that the records will be necessary to a determination of guilt or innocence." ***Id.***, 253 Wis. 2d 356, ¶32 (citation omitted). The court further explained that "a defendant must set forth a fact-specific evidentiary showing, describing as precisely as possible the information sought from the records and how it is relevant to and supports his or her particular defense." ***Id.***, ¶33. The showing must be based on more than "mere speculation or conjecture as to what information is in the records" or a "mere contention that the victim has been involved in counseling related to prior sexual assaults or the current sexual assault." *See* ***id.***

¶23 Rogers falls far short of the threshold requirements. At the outset, he fails to set forth "a specific factual basis" that demonstrates that the victim's mental health records will contain "relevant information necessary to a determination of guilt or innocence." *See* ***id.***, ¶34. Instead, he just speculates. He jumps from the fact that the victim was hospitalized to his speculation that she must have mental health records and that they will show that she suffered "from a mental illness" and that it would be the type of mental illness that would somehow make it "more likely that she had fabricated or misremembered the events" at issue, which would have had a great impact on the jury. However, he offers no "fact-specific evidentiary showing" of relevance. *See* ***id.***, 253 Wis. 2d 356, ¶33.

He fails to point to anything in the victim's medical records that would indicate a propensity to lie. He simply links a series of guesses.

¶24 Having failed to set out any facts from which his trial counsel could have successfully made a ***Shiffra*/*Green*** motion, Rogers has not shown that trial counsel was deficient or that he was prejudiced by the lack of a motion. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (stating that a defendant suffers no prejudice when counsel fails to pursue a meritless motion).

2. The trial court properly exercised its discretion in denying Rogers's motion to admit other acts evidence.

¶25 We review the trial court's decision whether to admit or exclude evidence for an erroneous exercise of discretion. ***State v. Warbelton***, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557. "In Wisconsin the admissibility of other acts evidence is governed by WIS. STAT. §§ (Rule) 904.04(2) and 904.03." ***Sullivan***, 216 Wis. 2d at 781. Other acts evidence "is not admissible to prove the character of a person in order to show that [she] acted in conformity" with that character. *See* WIS. STAT. § 904.04(2)(a). But other acts evidence may be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.***; *see also* ***Sullivan***, 216 Wis. 2d at 781.

¶26 To determine whether other acts evidence should be admitted, courts employ a three-step analysis. ***Sullivan***, 216 Wis. 2d at 783. Courts ask first whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2) and next whether the evidence is relevant under WIS. STAT. § 904.01. *See* ***Sullivan***, 216 Wis. 2d at 783-90. The party seeking to admit the other acts evidence has the burden to establish that these first two prongs of the ***Sullivan*** test

are met by a preponderance of the evidence. *See* ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Once the moving party has established the first two prongs, the burden shifts to the opposing party to establish that the probative value of the evidence is outweighed by prejudice or confusion. *See* ***id.***

¶27 At trial, before any testimony was taken, trial counsel asked the court to permit him to question the victim about two claims she allegedly made to a friend—first, that she had witnessed a friend being molested by another person and second, that she had been physically abused by her mother. He argued that this evidence was admissible to show motive and *modus operandi* on the part of the victim: that she wanted to use her status as a victim to gain less responsibility and more freedom.

¶28 Trial counsel admitted he did not have a witness to testify about these alleged statements of the victim but told the trial court that he had a *copy* of the affidavit from a witness alleging that the victim had told her these two things, having misplaced the original. The transcript reveals that he gave a copy to the State and the trial court, but it is not in the record on appeal. Trial counsel also orally advised the trial court that the affiant said she knew both statements to be untrue because she knew the person who the victim had claimed was sexually assaulted and that person denied it. Counsel also told the court that the affiant said she had seen the victim pinch and scratch herself.

¶29 The trial court stated that the proffered evidence was for the purpose of attacking the victim's credibility, not other bad acts, which is prohibited by WIS. STAT. § 906.08(2) and ultimately ruled that Rogers had not satisfied the three-part ***Sullivan*** analysis, though the court did allow Rogers to cross examine the victim on the allegations.

¶30 The first problem with Rogers's other acts argument is that he failed to preserve the affidavit in the record on appeal. The State notes this in its brief, and Rogers does not refute it. It is Rogers's duty to ensure a complete record. *See* ***State v. McAttee***, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. "[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). Accordingly, we assume that the affidavit fails to show facts relevant to Rogers's stated purpose argument—motive or *modus operandi*.

¶31 Even assuming that the affidavit was in the appellate record and the witness to the statement was available to testify at trial, this evidence would not have been admissible other acts evidence because Rogers failed to show both a permissible purpose and relevance under ***Sullivan.*** *See* ***id.***, 216 Wis. 2d at 781-93. Rogers's attempt to cast this credibility evidence as evidence of other acts fails because he does not satisfy the three-part ***Sullivan*** analysis. *See* ***Barreau***, 257 Wis. 2d 203, ¶¶33-41. Even if we were to accept his assertion that the evidence was presented for an acceptable purpose, like motive or *modus operandi*, thereby satisfying the first prong in the analysis, he has failed to meet the second prong. Namely, he has not adequately demonstrated that the evidence was relevant.

¶32 For evidence to be relevant, it must satisfy two queries: (1) "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action," and (2) "whether the evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.***, ¶35.

¶33 Here, the proffered evidence is simply too unrelated to be relevant. Even if the victim had lied about her mom physically abusing her or about seeing a girlfriend being sexually assaulted, those kinds of lies—whether for gaining attention or greater privileges—do not show that she is going to lie about a relative sexually assaulting her. "The probative value of other acts evidence is partially dependent on its nearness in time, place and circumstance to the alleged act sought to be proved." ***State v. Johnson***, 184 Wis. 2d 324, 339, 516 N.W.2d 463 (Ct. App. 1994). These other alleged instances do not "involve[] the relationship between the principal actors," follow "on the heels" of the victim's accusations against Rogers, nor "travel[] directly" to Rogers's theory as to why the victim would falsely accuse him. *See* ***id.*** The record is silent as to when these alleged lies occurred in relation to the sexual assault report or the victim's letter to her mother. They simply do not pertain to the case at hand. It is far too obvious that the proffered evidence is solely for the purpose of showing that the victim is a liar, and that is expressly prohibited by WIS. STAT. 906.08(2).

¶34 Further, the probative value of these alleged other acts would have been outweighed by potential prejudice and confusion. Here, producing witnesses to testify regarding these alleged other acts, and witnesses to rebut them, would have devolved the trial into mini trials, as the trial court noted. It was a proper exercise of the trial court's discretion to deem the evidence inadmissible.

¶35 Notably, the trial court did permit Rogers's trial counsel to ask the victim whether she had made the two claimed statements of sexual assault to a friend and physical abuse by her mother. But the court limited the inquiry to the victim's answers. The court specifically ruled that Rogers could not follow up a denial by the victim with extrinsic evidence of the statements, regardless of whether they were lies, because WIS. STAT. § 906.08(2) prohibits attacks on the

victim's credibility by use of extrinsic evidence of specific conduct. *See also* ***Barreau***, 257 Wis. 2d 203, ¶33.

¶36 For all of the above reasons, the trial court did not improperly exercise its discretion in denying extrinsic use of the alleged statements of the victim.

3. The trial court properly exercised its discretion in denying Rogers's motion for a mistrial.

¶37 Lastly, Rogers argues that the trial court improperly exercised its discretion in denying his motion for mistrial. "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court." ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***Id.*** at 506-07. Here, the trial court complied with the requirements set forth in ***Bunch***: it noted that the wristband was not obviously visible, took prompt action to remove it, and concluded that even if the jury had seen the wristband, it was because of Rogers's intentional actions.

¶38 Rogers argues that the visibility of his wristband was prejudicial and that the necessary remedy was to declare a mistrial. However, he also correctly notes that the trial court "cannot know whether any members of the jury saw the wristband at all." He then claims that "[t]he bailiffs erred when they failed to remove the wristband, and the Court had a duty to correct that error in an appropriate manner." This statement ignores the fact that the bailiffs *did* remove

the wristband.[3] When his trial counsel tried to ask to have the jury taken out of the room, Rogers interrupted his lawyer, saying that he wanted the wristband removed. When the jury was removed, the bailiffs did remove it.

¶39 The trial court noted that the court had not seen the wristband, it was unlikely that the jury had, and it was Rogers himself who intentionally called unnecessary attention to it. Notably, later in the trial, the trial court discovered Rogers had several other wristbands on him. All were removed at that point, and the court found that Rogers was intentionally trying to create a mistrial with the wristbands. Rogers does not claim on appeal that these facts are incorrect, nor does he argue that the trial court's finding that he was intentionally trying to create a mistrial with wristbands was incorrect. Therefore, his appellate argument of trial court error in denying the earlier mistrial request seems completely disingenuous.

¶40 Further, the trial court did correct the error in an appropriate manner. When Rogers alerted the court to the wristband, the jury was excused from the courtroom, and the wristband was removed. Even if the jury had seen the wristband, due to Rogers's own actions, a defendant is not automatically prejudiced when a jury inadvertently sees him in handcuffs or custodial attire. *See* ***United States v. Rutledge***, 40 F.3d 879, 884 (7th Cir. 1994), *rev'd on other grounds by* ***Rutledge v. United States***, 517 U.S. 292 (1996). Accordingly, the trial court properly exercised its discretion given the circumstances.

¶41 Because we find that Rogers did not show that his trial counsel performed ineffectively and that the trial court properly exercised its discretion in

[3] Additionally, if the trial court had issued a curative instruction, such an instruction likely would have drawn even more attention to a wristband that the jury may not have even seen.

denying other acts evidence and in declining to declare a mistrial, we affirm the trial court. *See* WIS. STAT. § 805.18(2).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.