COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1105-CR **Cir. Ct. No. 2014CF765**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL A. PEACE,

DEFENDANT-APPELLANT.

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

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Daniel A. Peace appeals the judgment convicting him of sexual assault of a child under the age of thirteen and of repeated sexual assault of a child. *See* WIS. STAT. §§ 948.02(1), 948.025(1)(a) (2003-04, 2005-06).[1] He also appeals the order denying his postconviction motion. Because the trial court properly exercised its discretion in admitting other acts evidence and because Peace has not established that defense counsel was ineffective, we affirm.

I. BACKGROUND

¶2 This is a delayed reporting sexual assault case. In 2014, the State charged Peace with sexually assaulting two sisters, C.C. and S.R., between 2003 and 2005. During that time period, Peace lived with the girls' family and was their mother's roommate and, later, boyfriend.

¶3 According to the complaint, in 2013, police interviewed C.C., then age fifteen, and S.R., then age eighteen. C.C. reported that Peace sexually assaulted her once when she was around age six. She said that one day when she was home from school, Peace came into her bedroom, pulled her pants down, and "'lick[ed]'" her vagina. Peace then pulled down his own pants and put his penis in her vagina. C.C. said she started kicking him, at which point Peace stopped and left the room.

¶4 S.R. reported that Peace assaulted her many times when she was between the ages of eight and ten. S.R. said that her mother regularly left her and C.C. alone with Peace when she was at work. Peace would often play "hide and

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

seek" with the girls and when C.C. would count, S.R. said he would take her into a bedroom and perform oral sex on her. He would pull S.R.'s pants up when C.C. stopped counting.

¶5 Both C.C. and S.R. reported that social workers interviewed them in 2005, after Peace was arrested for a different child sexual assault. At that time, both girls denied being assaulted. C.C. said that she denied the assault because she was scared. According to the complaint, S.R. denied the assaults because she "'did not want to deal with it'" and "'just wanted to get past it.'" S.R. further stated that she knew her mother had broken up with Peace in the wake of his arrest and that he would not be around anymore, so the assaults would stop.

¶6 The State charged Peace with sexual assault of a child under the age of thirteen for the alleged assault of C.C. and repeated sexual assault of a child for the alleged assaults of S.R.

¶7 Prior to trial, the State moved to admit other acts evidence related to Peace's alleged sexual assaults of K.H., a third girl unrelated to C.C. and S.R., between 2002 and 2005. K.H. was between ages seven and nine at the time and the assaults were described in the State's motion as "numerous acts of penis to mouth, mouth to vagina and penis to anus sexual intercourse." According to the State's motion, in the case involving K.H., Peace allegedly told her to come to the basement because he had a "surprise" for her. In that case, the State charged Peace with first-degree sexual assault of a child. Ultimately, he pled no contest to a reduced charge of causing mental harm to a child.

¶8 The State argued the other acts evidence was necessary to show Peace's intent and method of operation—"trickery" used to isolate young girls who were all between the ages of six and nine. The trial court granted the State's

motion over defense counsel's objection. However, the trial court subsequently ruled that it would not allow a statement made by Peace in the case involving K.H. to be used at trial because it would "tempt [the jury] to find him guilty of these two offenses simply based on his confession to this conduct regarding … the original victim [K.H.]" The trial court additionally made clear that it did not want K.H.'s testimony to leave the jury "with the impression that Mr. Peace was not held accountable for his conduct toward her"; consequently, the parties stipulated that the jury would be told Peace had "admitted to certain conduct which resulted in him being convicted of a child-abuse-related offense in connection with the incidents involving [K.H.]"

¶9 The jury found Peace guilty of both counts and the trial court sentenced him to serve two consecutive twenty-year sentences with each consisting of ten years of initial confinement and ten years of extended supervision.

¶10 After the trial but before sentencing, Peace argued in a *pro se* letter to the court that C.C. and S.R.'s mother knew the details of K.H.'s allegations against him. At the sentencing hearing, Peace further argued that he told defense counsel this information but that counsel did not question C.C. and S.R.'s mother during trial about her prior knowledge of the details relating to K.H. When questioned by the trial court during the hearing, C.C. and S.R.'s mother confirmed that she had visited Peace in jail on more than one occasion and discovered the charges against him while he was being held in connection with the 2005 case involving K.H. C.C. and S.R.'s mother further stated that she did not become aware of the details of that case until Peace sent her various documents in the mail at the time those charges were pending. She claimed that she disposed of all of the

documents that Peace sent her shortly thereafter and never discussed their contents with C.C. or S.R.

¶11 Peace filed a postconviction motion for a new trial on the grounds that the trial court erred in granting the State's motion to admit other acts evidence and that he was denied effective assistance of counsel based on counsel's failure to question C.C. and S.R.'s mother about her prior knowledge of specific details of the allegations made in the K.H. case. The trial court denied the motion without holding a hearing.

We include additional facts as needed below.

II. DISCUSSION

A. *Other Acts Evidence*

¶12 On appeal, Peace maintains that the trial court erred in admitting the other acts evidence concerning K.H. Specifically, it erred in admitting the testimony of K.H., K.H.'s mother, and the fact that Peace was convicted of a crime following K.H.'s allegations.

¶13 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 sexual assault cases, especially those involving assaults against children, greater latitude is afforded to the admissibility of other acts evidence. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. "[T]he greater latitude rule applies to the entire analysis of

whether evidence of a defendant's other crimes was properly admitted at trial." ***Id.***

¶14 The decision whether to admit or exclude other acts evidence is left to the trial court's sound discretion. *See* ***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 the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." *See* ***id.***

¶15 We conclude that the trial court properly exercised its discretion in admitting the other acts evidence involving K.H. First, the trial court was persuaded by the State's argument that evidence concerning K.H. was admissible because it showed Peace's modus operandi whereby he sexually assaulted similarly aged girls through "game playing" and other "age appropriate activities." This conclusion is especially true in light of the greater latitude rule. 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***, 236 Wis. 2d 537, ¶60. A distinctive method of operation may be deemed indicative of a common plan or scheme. *See* ***State v. Ziebart***, 2003 WI App 258, ¶¶21-24, 268 Wis. 2d 468, 673 N.W.2d 369.

¶16 Second, the trial court properly determined that the other acts involving K.H. 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. In assessing relevance, the measure of probative value is the similarity between the charged offenses and the other act,

including "the 'nearness of time, place, and circumstance[.]'" *See* ***Hunt***, 263 Wis. 2d 1, ¶64 (citation omitted). As the trial court noted, the allegations involving K.H. took place during the same time period as those involving C.C. and S.R. The trial court further noted that "the existence of those behaviors" by Peace against K.H. made it more probable that the charged conduct involving C.C. and S.R. occurred.

¶17 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. *See* ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). 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." ***Id.***

¶18 Peace's appellate argument hinges on this prong of the analysis. He first questions the trial court's logic in concluding that his inculpatory statement from the K.H. case was too prejudicial to admit but that the other evidence, namely the testimony of K.H. and K.H.'s mother along with the stipulation that he admitted to certain conduct, was not.

¶19 We are not convinced by Peace's argument that his inculpatory statement was in essence so similar to the other acts evidence admitted at his trial that the trial court could not reasonably admit one while excluding the other. In the signed statement, Peace relayed the following: he masturbated in front of K.H. and kissed her on the cheek afterward; he touched K.H.'s vagina because, he said, she put his hand there; and he could not remember if he had penis to vagina and penis to anus intercourse with K.H., but he believed he might have done so.

¶20 The trial court reasonably determined that Peace's detailed admissions were not especially probative given that K.H. and K.H.'s mother would be testifying at trial and that Peace's own statement was far more prejudicial than the stipulated admission to "certain conduct which resulted in him being convicted of a child-abuse-related offense in connection with the incidents involving [K.H.]" Peace does not offer any legal authority to support this argument that the trial court erred in this regard; instead, he rests on his own assessment that the trial court's "internal logic was inconsistent." We disagree.

¶21 Next, Peace takes issue with the trial court's remarks that the other acts evidence could be used by the defense to argue that C.C. and S.R. should not be believed given that neither one reported any misconduct when social workers interviewed them in 2005. According to the trial court: "[B]ecause [the other acts evidence] in fact cuts both ways and in the eyes of some may undermine the credibility of these victims, the [c]ourt is … finding that the evidence is probative and not unfairly prejudicial." Peace submits that the trial court erred when it based its decision, at least in part, on its own conclusion that the evidence could benefit the defense. Again, we disagree. Peace does not offer any legal support for the specific proposition that a trial court's discretionary decision to admit evidence may not account for any potential benefits the evidence may have for the defense.

¶22 Lastly, Peace argues that the testimony of K.H.'s mother was cumulative and, as such, irrelevant and unfairly prejudicial. In its motion to admit other acts evidence, the State noted that "[t]he evidence here—being similar method of operation—defendant targets pre-pubescent girls to whom he has access already as a family friend o[r] boyfriend of the mother." K.H.'s mother provided information about her family's history and involvement with Peace and provided

context for how K.H. came to report the abuse. Having reviewed the transcripts, we agree with the State's assessment that any overlap in the testimony was minimal and did not amount to improper "[p]iling on." *See* ***Whitty v. State***, 34 Wis. 2d 278, 297, 149 N.W.2d 557 (1967).

¶23 Ultimately, the record reflects an adequate weighing of proper factors and supports the trial court's determination that the evidence's probative value outweighed any prejudice.[2] The trial court, therefore, properly exercised its discretion when it admitted the other acts evidence.

B. *Ineffective Assistance of Counsel*

¶24 Next, Peace argues that he was denied effective assistance when defense counsel did not ask C.C. and S.R.'s mother any questions about whether, and if so how and to what extent, she had knowledge of K.H.'s prior allegations against Peace.

¶25 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result

[2] We note in passing that any risk of unfair prejudice associated with the admission of the other acts evidence would have been alleviated by the trial court's warning to the jury that the evidence was not to be used to conclude that Peace was a "bad person" who therefore likely committed the charged offenses. *See* ***State v. Hammer***, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629 (approving this cautionary warning).

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶26 Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***id.*** However, whether the defendant's proof is sufficient to establish either deficient performance or prejudice is a question of law that we review independently. *See* ***id.***

¶27 Peace claims he told defense counsel prior to trial that C.C. and S.R.'s mother had information about the allegations made in the K.H. case years prior to her daughters' allegations in this case. He stresses the importance of this information, which he believes would have provided the jury with a potential explanation as to how C.C. and S.R. would have had access to the specifics of the allegations K.H. made prior to making their own allegations. Given the lack of other supporting evidence and C.C. and S.R.'s prior denials that Peace had touched them inappropriately, he contends that if the jury had heard that C.C. and S.R.'s mother knew of the allegations in the K.H. case, there is a reasonable likelihood it would not have found C.C. and S.R. credible.

¶28 We resolve this issue by addressing only the prejudice prong of the analysis. *See* ***Strickland***, 466 U.S. at 697. To sum it up, Peace argues that there is a reasonable possibility that the outcome of his trial would have been different if defense counsel had questioned C.C. and S.R.'s mother about whether she had shared the details of K.H.'s allegations with her daughters.

¶29 At trial, the jury heard from S.R. that she did not know K.H. or K.H.'s mother and did not believe C.C. knew them either. S.R. testified only that she believed her mother had "heard of them before" and that C.C. heard her mom talking about them. When questioned at the sentencing hearing, C.C. and S.R.'s mother claimed that she disposed of all of the documents regarding the K.H. case that Peace sent her and that she never discussed their contents with C.C. or S.R.

¶30 Assuming that C.C. and S.R.'s mother would have testified consistently at trial, defense counsel could have, at best, speculated in closing that she and S.R. were lying and that C.C. and S.R.'s mother had actually shared the information with her daughters. Even if C.C. and S.R.'s mother had shared the details of K.H.'s allegations with her daughters, the jury would then have to conclude that the information prompted S.R. and C.C. to make their own false allegations against Peace based on interactions they had with him many years earlier.

¶31 Peace overemphasizes the impact this line of questioning would have had given the complete trial record. His speculative claim does not undermine this court's confidence in the outcome of the trial. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

By the Court.—Judgment and order affirmed.

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