COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1971-CR

Cir. Ct. Nos. 2012CF482
2012CF485

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY M. SHANNON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Larry Shannon appeals from judgments convicting him of twelve counts allocated among the following crimes against three victims:

first-degree sexual assault of a child, attempted first-degree intentional homicide, incest, false imprisonment, and strangulation and suffocation. On appeal, Shannon challenges the circuit court's admission of other acts evidence and its exclusion from evidence of two articles discussing DNA evidence. We conclude that if any error occurred in the admission of the other acts evidence, such error was harmless. We further conclude that the circuit court properly exercised its discretion when it excluded the DNA evidence articles. We affirm.

¶2 A jury found Shannon guilty of twelve counts arising from a multi-day rampage. The evidence at trial included the testimony and prior statements of the victims, testimony from law enforcement officers, a physician and a nurse who described the severity of the injuries Shannon inflicted, and a DNA analyst. The evidence also included testimony about other criminal acts Shannon committed in Kankakee, Illinois. On appeal, Shannon does not challenge the sufficiency of the evidence of his guilt.

Other Acts Evidence

¶3 Shannon challenges the circuit court's decision to admit as other acts evidence an incident that occurred in Kankakee, Illinois, fifteen years before trial (and twelve years before the offenses in this case). In the Kankakee incident, Shannon pled guilty to aggravated criminal sexual abuse and aggravated battery of an ex-girlfriend. Shannon choked and sexually assaulted the victim and blamed her for his conduct. Evidence of the Kankakee incident, which the court admitted for the purpose of demonstrating motive and intent, came in through the testimony of City of Whitewater Police Officer Winger who reviewed the Kankakee case documents and read a description of the incident to the jury. Winger stated the date, place, and facts relevant to the Kankakee crimes (penis-vagina intercourse by

use of force and causing bodily harm by grabbing the victim with hands around her neck). After Winger read this description, the circuit court gave the jury a limiting instruction that Shannon was not on trial for the Kankakee incident and the incident should only be considered for purposes of motive and intent in the case being tried. The court provided a similar limiting instruction during the final instructions to the jury.

¶4 Whether to admit other acts evidence is discretionary with the circuit court. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). To be admissible, other acts evidence must be offered for an acceptable purpose under WIS. STAT. § 904.04(2) (2015-16),[1] must be relevant under § 904.01, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice along with other considerations. ***Sullivan***, 216 Wis. 2d 772-73.

¶5 Shannon argues that the Kankakee other acts evidence was unduly prejudicial.[2] We agree with the State that given the testimony and the quantity of other evidence of Shannon's shockingly violent conduct toward the victims in the case before us, the sufficiency of which Shannon does not contest on appeal, it is not substantially likely that a description of similar conduct directed against an ex-girlfriend was unduly prejudicial.

¶6 Shannon also argues that the manner in which the other acts evidence came in violated his confrontation rights. As discussed, the Kankakee

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

[2] Shannon does not argue that the Kankakee evidence was not offered for an acceptable purpose or irrelevant. Therefore, we do not address those aspects of the ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), analysis.

incident came in through Winger's description of the crimes to which Shannon pled guilty along with a brief recitation of the underlying facts supporting the crimes.

¶7 We assume without deciding that a Confrontation Clause violation occurred. Nevertheless, a Confrontation Clause violation is subject to a harmless error analysis. ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362. An error is harmless if the party benefitting from the error shows "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.*** (citation omitted). Among the factors we consider in assessing harmless error are: "the importance of the erroneously admitted evidence; … the nature of the defense; the nature of the State's case; and the overall strength of the State's case." ***Id.*** (citation omitted).

¶8 Applying these factors here, we are persuaded that the jury would have arrived at the same verdict had the error not occurred, and therefore any error in presenting the Kankakee incident to the jury was harmless. As the State discusses, the evidence against Shannon was overwhelming. The victims' testimony and statements were supported by physical and medical evidence and by the testimony of a law enforcement officer and medical witnesses. The victims testified that over days, Shannon terrorized them, tried to or threatened to kill them, battered, sexually assaulted and choked them, tied them down, and slashed them with knives, causing deep neck wounds among other injuries. At trial, Shannon argued that the State could not prove intentional conduct or other elements of the crimes. The evidence was more than sufficient in all respects to convict Shannon of attempted first-degree intentional homicide, first-degree

sexual assault of a child, incest, false imprisonment, and strangulation and suffocation.[3]

¶9 Shannon's reply brief does not dissuade us from the applicability of the harmless error analysis. We reject Shannon's Confrontation Clause claim because the error, if any, was harmless beyond a reasonable doubt.

Excluded DNA Articles

¶10 Shannon argues that the circuit court erred when it excluded from evidence two articles discussing DNA evidence: one article discussed the transfer of DNA from one item of clothing to another when the clothing was washed together in the washing machine and the second article discussed whether a single sperm cell was evidence of a sexual assault. Shannon wanted to use these articles as part of his cross-examination of the DNA analyst and to suggest another reason for the presence of significant amounts of his DNA, sperm and semen (emission material) found on and in the external and internal genitalia of one of the victims: that victim admitted that she wore Shannon's shorts during the weekend he brutalized her and the other victims. Relying upon the articles, Shannon theorized that the emission material found on and in the victim's genital area was transferred there from his shorts and not as the result of a sexual assault.

¶11 Decisions to admit or exclude evidence are within the circuit court's discretion, and we will affirm if the circuit court properly exercised its discretion. ***State v. Hunt***, 2014 WI 102, ¶20, 360 Wis. 2d 576, 851 N.W.2d 434.

[3] As previously noted, Shannon does not challenge the sufficiency of the evidence to convict him.

¶12 We affirm the circuit court because the articles were not relevant, and Shannon's appellate arguments do not convince us otherwise.[4] Evidence must be relevant to be admissible. WIS. STAT. § 904.02. 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.

¶13 Shannon does not offer this court any analysis of the articles to establish that they are relevant to an issue in the case. The State convincingly argues that the articles were not relevant.

¶14 One article focused on the transfer of DNA among clothing in the washing machine, not the transfer of DNA from clothing to the victim's internal and external genitalia, which was Shannon's theory. The DNA analyst's testimony further illuminates this article's lack of relevancy. The DNA analyst testified that the swabs from the victim's internal and external genital area contained semen with sperm cells matching Shannon's DNA. On the issue of touch and transfer DNA, the DNA analyst stated that the amount of DNA transferred by touch and transfer is usually very slight, and the amount of semen detected on the victim's swabs was inconsistent with transfer DNA.[5] The analyst testified that DNA would not transfer from an item of clothing to another wearer's body as Shannon theorized. The analyst further opined that sperm would not

[4] The circuit court applied a WIS. STAT. § 907.02(1) or ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993), analysis to reach its decision to exclude the articles. We may affirm a correct decision of circuit court even though that court relied on other grounds. *See* ***State v. Rognrud***, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).

[5] The amount of emission material also exceeded a single sperm cell, the focus of the second DNA article. The second article was not relevant.

migrate from Shannon's shorts into the victim's vaginal canal. In addition to the DNA analyst's testimony, there was sufficient evidence of injuries to the victim's genital area that were consistent with a sexual assault.

¶15 Shannon has not shown this court via his appellate briefs that the DNA articles were relevant. We affirm the circuit court's discretionary decision to exclude the DNA articles.

By the Court.—Judgments affirmed.

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