COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2484-CR **Cir. Ct. No. 2007CM3230**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYLER J. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Reversed and cause remanded for further proceedings.*

¶1 LUNDSTEN, J.[1] Tyler Schmidt appeals a circuit court judgment convicting him of lewd and lascivious behavior in violation of WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§ 944.20(1)(b). He argues that the erroneous admission of other acts evidence at his jury trial entitles him to a new trial. I conclude that the admission of the other acts evidence was error and that the error was not harmless. I therefore reverse the judgment and remand for further proceedings.

Background

¶2 According to the criminal complaint, on February 18, 2007, at approximately 3:32 p.m., three women were in a vehicle pulling away from a store in the Langdon Street area in Madison when they observed a man expose his penis and appear to masturbate in their presence. The perpetrator was later identified as Schmidt. We will refer to this incident as the "charged incident."

¶3 Before trial, the State sought to admit "other acts" evidence showing that in June 2007, about four months after the charged incident, Schmidt exposed himself in a similar fashion while standing in a garage that was in close proximity both to the location of the charged incident and to Schmidt's apartment. The circuit court determined that the evidence was admissible to show identity, plan, and absence of mistake.

¶4 At trial, two of the witnesses to the charged incident identified Schmidt as the perpetrator, but Schmidt, his mother, his father, and his brother all testified that they were together for a family meal at the time of the charged incident. In addition, the State put on evidence of the other acts incident in the form of testimony by both the victim of that incident and an officer who investigated it. The jury found Schmidt guilty. We reference additional facts as needed below.

Discussion

¶5 Schmidt argues that the circuit court erred by admitting the other acts evidence and that the error was not harmless. I agree.

Admissibility Of Other Acts Evidence

¶6 ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), sets forth the familiar three-step framework for deciding the admissibility of other acts evidence. First, the evidence must be offered for a permissible purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. Second, the evidence must be relevant. ***Id.*** Third, the court must determine whether the probative value of the evidence 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. ***Id.*** at 772-73. Appellate courts review the circuit court's decision to admit other acts evidence based on the information known to the circuit court at the time of the decision. Subsequent actual events at trial may be considered, if necessary, to determine whether the erroneous admission of evidence was harmless error. *See* ***State v. Grant***, 139 Wis. 2d 45, 53, 406 N.W.2d 744 (1987).

¶7 I focus my attention on the admissibility of the other acts evidence to show *identity* because that is the only theory of admission the State argues on appeal. Before that, I pause to comment on the circuit court's statement that the evidence was also admissible to show plan and absence of mistake. I do so because appellate courts have often spoken loosely when addressing plan and absence of mistake and accordingly have caused confusion about why evidence is or is not admissible for these purposes.

¶8 Plan does not fit here because the other acts incident was in no sense part of the planning or part of a single plan encompassing the charged incident. "[S]imilarity of facts is not enough to admit other acts under [the plan exception]. There must be some evidence that the prior acts were a step in a plan leading to the charged offense, or some other result of which the charged offense was but one step." ***State v. Cofield***, 2000 WI App 196, ¶13, 238 Wis. 2d 467, 618 N.W.2d 214. I acknowledge that published cases, including cases decided after ***Cofield***, have held that other acts evidence was admissible to show plan, along with other purposes, without engaging in the clear analysis used in ***Cofield***. *See, e.g.*, ***State v. Hunt***, 2003 WI 81, ¶¶58-61, 65-67, 263 Wis. 2d 1, 666 N.W.2d 771; ***State v. Davidson***, 2000 WI 91, ¶¶56-62, 66-68, 72, 236 Wis. 2d 537, 613 N.W.2d 606. But such cases strip "plan" of any real meaning and, at best, render it superfluous in light of other purposes.

¶9 Absence of mistake does not work here because there is no suggestion that Schmidt accidentally exposed himself. The typical proper absence-of-mistake scenario is when a defendant asserts that an alleged sexual touching was accidental and the prosecutor offers other similar acts to rebut the defense of accident. *See, e.g.*, ***State v. Veach***, 2002 WI 110, ¶84, 255 Wis. 2d 390, 648 N.W.2d 447 (the evidence was "probative of whether any touching that occurred was accidental or done by mistake"); *see also* ***State v. Gray***, 225 Wis. 2d 39, 56, 590 N.W.2d 918 (1999) ("Other acts evidence is properly admitted to show absence of mistake if it tends to undermine a defendant's innocent explanation for his or her behavior.").

¶10 I return now to identity and the ***Sullivan*** analysis.

¶11 The first step is easy. The other acts evidence was offered to show identity, and identity is a proper purpose.

¶12 The second inquiry is whether the other acts evidence is *relevant* to show the identity of the perpetrator. Other acts evidence is relevant to show identity if it tends to show the imprint of the particular defendant. ***State v. Kuntz***, 160 Wis. 2d 722, 746, 467 N.W.2d 531 (1991). Courts consider factors such as nearness of time, place, and circumstance of the other act when compared with the charged crime. Whether there are sufficient common and unique features is generally left to the discretion of the circuit court. *See* ***id.*** at 746-47.

¶13 I agree with the circuit court's determination that the other acts evidence tends to corroborate the identification of Schmidt as the perpetrator of the charged incident. The State points to the following similarities between the two incidents:

- Both incidents took place in the Langdon Street neighborhood, within approximately one-tenth of a mile of each other.
- The incidents occurred in close proximity to Schmidt's apartment.
- The incidents occurred less than four months apart.
- The incidents took place at the same time of day, between 3:30 and 4:00 p.m.
- In both incidents, the perpetrator exposed his penis and masturbated in front of one or more victims, and in neither incident did the perpetrator say anything to the victim or victims.
- Both incidents involved female victims in their 20s, all of whom were strangers to Schmidt.

Schmidt's behavior hardly, as the State asserts, constitutes a signature crime. But the similarities, combined with proximity in time and place, do lend support to a finding that the victims in the charged incident did not identify the wrong person.

¶14 I take issue, however, with the circuit court's application of the third ***Sullivan*** step—balancing the probative value of the evidence against the risk of unfair prejudice. The evidence has low probative value. I agree with Schmidt that this appears to be a generic fact pattern for this type of crime. Further, although one would hope that this type of behavior is relatively rare, there was no expectation at the time the court ruled that the State would present evidence of the frequency of the crime in this particular neighborhood. Likely most Dane County residents and, therefore, most prospective jurors would be at least somewhat aware that the area in question is near campus and is densely populated. But it is not common knowledge how frequently or infrequently this exposure crime occurs there. Common sense alone would not be enough to give the jurors more than a very rough guess at how likely it is that, if Schmidt committed the other acts crime, he also committed the charged crime.

¶15 The risk that the jury would improperly use the other acts incident to conclude that Schmidt was the sort of person who would commit this crime was great. Exposing one's self to unsuspecting victims is not the worst sex crime, but it is disgusting. It is also the sort of crime that people may generally understand is caused by a compulsion that is difficult to control and, thus, a crime the perpetrator is likely to commit repeatedly. It would be difficult for any juror to put aside knowledge that Schmidt is the type of person who would commit this sort of crime when deciding whether he was the person who committed the charged incident. It follows that there was a substantial risk that some of the jurors would

rely, in part, on a belief that Schmidt had a propensity to expose himself to women.

¶16 Accordingly, I conclude that the circuit court erroneously exercised its discretion on the third ***Sullivan*** step and that the other acts evidence was erroneously admitted.

Harmless Error

¶17 The question remains whether the error was harmless. Schmidt argues that it was not harmless. The State in its brief agrees, with admirable candor, that if admission was error, it was not harmless. Nonetheless, I *sua sponte* reviewed the full trial transcript to satisfy myself that the error was not harmless.[2]

¶18 Our supreme court has discussed the harmless error test as follows:

> In determining whether a constitutional error is harmless, the inquiry is as follows: "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" This court also has formulated the test for harmless error in alternative wording. Under ***Chapman v. California***, the error is harmless if the beneficiary of the error proves "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"

State v. Mayo, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (citations omitted).

[2] A conference call with both parties was held, during which the State indicated a willingness to make a harmless error argument if asked to do so. Defense counsel indicated a preference that the parties stand on their briefs. For reasons explained during that conference call, I then declined the State's offer.

¶19 Harmless error is often a difficult call based on a cold record, and that is the situation here. The State's eyewitness identification evidence appears to have been very strong. Two of the victims of the charged incident identified Schmidt as the perpetrator under circumstances generally suggesting reliable identifications. Although they gave height information that was inconsistent with Schmidt, the identification procedures were non-suggestive and both victims were confident of their identifications. Moreover, Schmidt's counsel never seriously challenged their credibility.

¶20 It is difficult to assess Schmidt's alibi witnesses—his mother, father, and brother. If I am ever charged with a crime, I hope to have alibi witnesses that are not close family members. I think it is reasonable to assume that the jurors would have viewed Schmidt's alibi witnesses with skepticism. Also, the prosecutor seemed to effectively chip away at their credibility, especially Schmidt's mother's, with questions highlighting that recollections of the long-past day in question seemed implausibly detailed. At the same time, however, there was not just one family member, but three. And Schmidt's father's testimony that he drove Schmidt from Janesville to Madison following the family meal in Janesville that particular day was supported by a bank statement showing that Schmidt's father shopped that evening in a grocery store in Madison.

¶21 All in all, I cannot confidently say that the jurors would have rejected this alibi testimony and found, beyond a reasonable doubt, that Schmidt was guilty, if they had not heard other acts evidence strongly suggesting that the man the two victims identified was in fact the sort of person who would commit such a crime.

¶22 I am mindful, as the State has pointed out, that many cases state that limiting instructions to the jury go a long way in curing unfair prejudice. But this court has also said that, although "a cautioning instruction is normally sufficient to cure any adverse effect attendant with the admission of other acts evidence, … this is not always the case." ***State v. Anderson***, 230 Wis. 2d 121, 132-33, 600 N.W.2d 913 (Ct. App. 1999) (citation omitted). The pattern limiting instruction for identity used here, I believe, is particularly unlikely to cure error. In telling the jurors that they may consider other acts evidence on the issue of "identity," the instruction explains only that "identity" refers to whether the other act is "so similar" to the offense charged that it "tends to identify" the defendant as the perpetrator. This is not an effective explanation that the conduct or circumstances must be such that the crime bears the signature or imprint of the defendant.

¶23 In sum, for the reasons stated, Schmidt's conviction is reversed, and the matter is remanded for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.