COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1562-CR **Cir. Ct. No. 2006CF78**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES W. FUTCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Vernon County: MICHAEL T. KIRCHMAN, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. James Futch appeals from a judgment convicting him of first-degree sexual assault of a child as a repeat offender, and from an order denying his motion for a new trial. We affirm for the reasons discussed below.

BACKGROUND

¶2 The current charge stems from allegations that Futch touched the vagina of his five-year-old daughter. The State moved to introduce other acts evidence that Futch had committed numerous prior sexual assaults against other young girls. Assaults on four of those girls had resulted in criminal convictions in Vernon County in 1986. An additional charge involving a fifth girl in the 1986 complaint was dismissed and another incident from the 1980s that occurred in California was never charged. Futch was also acquitted in 2005 on a 2003 Crawford County case involving yet another girl.

¶3 Futch sought, if not to bar the other acts evidence completely, to at least limit the amount and type of other acts evidence that could be admitted. The court ruled that the State could introduce the 1986 convictions themselves and any related conduct that Futch had admitted, and it declined to limit in advance the manner by which the State could prove that conduct. However, the trial court agreed with Futch that any allegations from the 1980s that did not result in a conviction and were not admitted by Futch should be excluded. In addition, although the court initially ruled that the State could introduce evidence relating to the Crawford County case, the court subsequently accepted a stipulation from the parties that the State would be "prohibited from introducing evidence of any sexual assaults in 2003 in Crawford County by any means whatsoever."

¶4 At trial, the State produced testimony from two of the victims from the 1980s, over Futch's objection that the testimony was cumulative. A police officer who had investigated the 1986 incidents was allowed to read the complaint to the jury over Futch's objections on both hearsay and other acts grounds. In addition to relaying allegations from the two victims who testified, the complaint

contained allegations from three other girls who did not testify, including the girl whose charge was dismissed.

¶5 At another point during the trial, the State asked Futch whether he still had a problem with finding young girls sexually attractive. When he answered no, the State asked whether he recalled "ever testifying" that he had a problem still finding young girls sexually attractive. Futch objected and requested a mistrial on the grounds that the question contained a reference to the 2005 Crawford County trial, in violation of the court's pretrial order and the parties' stipulation. The court ruled that the question was proper for impeachment purposes, and denied the motion for a mistrial.

¶6 Futch also sought to cross-examine the victim's mother about a prior allegation of sexual assault involving another man that the mother had reported to police after observing her daughter rubbing her vaginal area. The trial court refused to allow any cross-examination on that topic.

¶7 After the jury found Futch guilty, Futch moved for a new trial on the grounds of newly discovered evidence. He alleged that he had learned the victim's mother had told Futch's ex-wife: "If he wants to cause me problems, I can have him put away." Futch argued that this evidence would have supported the defense theory that the mother had coached or encouraged her daughter to make a false accusation against Futch because he was seeking custody. The court denied the motion, and this appeal followed.

¶8 Futch raises four claims on appeal: (1) the trial court should not have allowed the State's witness to read the 1986 complaint and portions of the transcript of Futch's police interview; (2) the trial court should have granted Futch a mistrial based on the State's reference to testimony from Futch's 2003 trial;

(3) the trial court should have allowed the defense to question the victim's mother about a report that another man had assaulted the victim; and (4) the trial court should have granted Futch a new trial based upon newly discovered evidence that the victim's mother had told someone she would "put Futch away" if he challenged her for custody.

STANDARD OF REVIEW

¶9 "Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial." ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. We will only set aside such discretionary determinations if the trial court has failed to apply a relevant statute or consider legally relevant factors, or has acted based upon mistaken facts or an erroneous view of law. ***Id.***; ***Duffy v. Duffy***, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). We will, however, independently determine whether a trial court has properly interpreted the law. ***James***, 285 Wis. 2d 783, ¶8.

¶10 The decision whether to grant a mistrial is also discretionary. "The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

¶11 A motion for a new trial based on newly discovered evidence is likewise addressed to the sound discretion of the trial court, and we will ordinarily not reverse the trial court's decision unless it failed to rationally apply the proper legal standard to the facts of record. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). We may independently determine, however, whether the denial of a new trial based on newly discovered evidence deprives the

defendant due process. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

DISCUSSION

1986 Complaint and Police Interrogation

¶12 Futch acknowledges, given our standard of review for discretionary evidentiary determinations, that he would be unlikely to prevail on a challenge to the trial court's underlying ruling that the State could introduce other acts evidence relating to any sexual assaults on which Futch had actually been convicted or had admitted his conduct. Instead, Futch raises three challenges to the specific means by which the State was allowed to present evidence to establish those prior bad acts.

¶13 Futch first contends that the police officer should not have been allowed to read any of the probable cause portion of the 1986 complaint to the jury because it contained inadmissible hearsay. *See generally* WIS. STAT. §§ 908.01 and 908.02. The State argues, and the trial court ruled, that the allegations contained in the complaint were not hearsay because they were not being offered for the truth of the matter asserted, but merely to place Futch's subsequent statements to police in context. Futch counters that the complaint did more than give context to other testimony; it provided an independent source with substantive details for allegations that Futch had committed other prior bad acts, which necessarily tended to prove the truth of the matter asserted. *See* ***State v. Britt***, 203 Wis. 2d 25, 39-40, 553 N.W.2d 528 (Ct. App. 1996).

¶14 Futch next contends that those portions of the complaint and his police interview relating to Count 4 (on which he was not convicted and never

admitted the underlying conduct) constituted inadmissible prior bad act evidence and also violated a pretrial order. *See generally* WIS. STAT. § 904.04(2)(a). The State concedes that the trial court ruled prior to trial that any evidence relating to Count 4 was inadmissible prior bad act evidence, and the State offers no argument on appeal to support its admissibility. Instead, the State suggests that Futch forfeited the prior bad act issue by not explicitly citing the court's pretrial ruling when he renewed his objection to the Count 4 evidence at trial.

¶15 Futch further maintains that any probative value from reading certain portions of the transcript of his 1986 interrogation was substantially outweighed by the danger of unfair prejudice. *See generally* WIS. STAT. § 904.03. Futch specifically points to portions of the interrogation where Futch admitted that he was afraid he might molest his own children when he got older, that the reason he might be doing things to young girls might relate back to something that happened with his older sister, and that even his oldest victim did not usually wear a bra. The State points out that Futch did not object to the admission of the interrogation transcript itself when the State offered it into evidence (although he did reserve an objection as to what parts of the exhibit might go back to the jury).

¶16 As a threshold matter, we do not find any of the State's forfeiture arguments persuasive. It is clear from the pretrial motions Futch filed that he vigorously objected to any evidence relating to the 1986 complaint and associated conduct on the multiple grounds of hearsay, prior bad acts, and danger of unfair prejudice. He renewed those same objections at trial in a more limited manner. The whole purpose of filing pretrial motions is to streamline the progress of the trial itself. It is not necessary to relitigate already preserved objections with further argument at trial. Nor are we persuaded that Futch's failure to object to admission of the transcript as an exhibit should be construed to forfeit his already

preserved objections to the content of certain testimony read from the transcript. We will therefore address Futch's arguments on the merits.

¶17 Addressing Futch's third claim first, we are satisfied that it was within the circuit court's discretion to determine that the probative value of the interrogation transcript, including the portions Futch specifically challenges on appeal, outweighed the danger of unfair prejudice. We will not engage in reweighing the factors of that balancing test on appeal.

¶18 With regard to Futch's first and second claims, we will assume for the sake of argument that the 1986 complaint contained inadmissible hearsay relating to all five counts and that the portions of the complaint and interrogation transcript relating to Count 4 also constituted inadmissible prior bad act evidence which had been specifically excluded by pretrial order. We conclude, however, that any error in reading the 1986 complaint and challenged portion of the interrogation transcript to the jury was harmless given the substantial amount of similar prior bad act evidence that was properly admitted. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (an error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error" (citation omitted)).

¶19 Taking into account the testimony from two of the victims from the 1980s assaults, as well as unchallenged portions of the interrogation transcript, the jury was properly informed that Futch had been convicted of sexually assaulting four different girls in the 1980s, and had admitted much of his conduct. Properly presented evidence also established that the girls had ranged in age from about seven to thirteen; that Futch's multiple assaults on the first victim included coming into her bedroom at night to fondle her and rub his penis between her legs; that he

had assaulted the second victim twice in an unspecified manner; that he had assaulted the third victim once by crawling into her bed, getting on top of her, fondling her and making her fondle him; and that he had assaulted the fourth[1] victim numerous times in an unspecified manner.

¶20 In addition, Futch, himself, testified that he had been convicted in 1986 of sexually assaulting four little girls, and that he did not fight those charges because he was guilty and "needed help with that part of [his] life." He explained that each of the girls was a friend of the family that he or his wife was babysitting, and that the assaults were "usually at night time and the other people were sleeping." He further acknowledged that he still found little girls sexually attractive, "not as often … but I have;" that he would never be cured and could only hope to control and manage his attraction; and that he would have ongoing "red flag" situations to avoid throughout the course of his lifetime.

¶21 Based on our assumption that the complaint and portion of the interrogation transcript relating to Count 4 were inadmissible, the jury was improperly informed that Futch had assaulted a fifth victim sixteen to nineteen times by touching her front, back and bottom; that he was also alleged to have tried to lick the first victim; that his alleged assaults of the second victim included touching her vaginal area and getting into bed with her to fondle her; and that his alleged assaults on the fourth victim spanned a period of two or three years with a pattern of him crawling into her bed and fondling her, making her fondle him, and getting on top of her to simulate intercourse.

[1] Our reference to the fourth victim who was properly before the jury refers to the fifth count, while our reference to a fifth victim who the jury should not have been informed about refers to the fourth count.

¶22 Although the challenged evidence was damaging to the defense, we do not see how it would have affected a rational jury's decision in light of the properly admitted other acts evidence. Aside from the licking allegation, which the jury also heard that Futch denied, the specific acts, that we assume were improperly presented to the jury, were of a nearly identical nature to the acts already described by the two girls who testified, and the conduct Futch himself admitted on the stand. We do not see anything in the additional allegations that was more egregious than the information properly before the jury. Nor were the improperly admitted other acts any closer in modus operandi to the present case than the properly admitted other acts. The improperly admitted other acts also occurred in the same timeframe as the properly admitted other acts, which was twenty years before the present offense.

¶23 The bottom line is that the properly admitted evidence already established that Futch had a pattern in the 1980s of molesting young girls in a similar manner. Under WIS. STAT. § 904.04(2)(b), the jury could consider Futch's prior convictions for sexual assaults on children to be evidence of his character and conclude that he had acted in conformity therewith in the present case. Informing the jury that there had been five rather than four victims in the 1980s, and that the nature of the assaults on the victims who did not testify was substantially similar to those committed on the two victims who did testify would not have made a rational jury any more likely to draw that propensity conclusion, particularly in light of Futch's own testimony that he was still attracted to young girls.

Reference to 2005 Testimony

¶24 Futch contends that he is entitled to a mistrial because the State violated both the court's pretrial ruling and the parties' stipulation by referring to testimony from his 2005 trial that resulted in an acquittal.

¶25 With regard to whether the reference violated a court order, we note that a court is not bound by its own pretrial rulings, but rather is free to reconsider them upon hearing the actual testimony that comes in at trial. We are satisfied that the court acted within its discretion when it concluded that the testimony was permissible for impeachment purposes, even if it would have been excluded on other acts grounds. In other words, the reference did not violate the trial court's amended ruling.

¶26 With regard to violating the stipulation, the trial court had already ruled before the parties reached their stipulation that the probative value of evidence relating to the 2003 assault outweighed its prejudicial value. Therefore, the court was certainly within its discretion to conclude that an oblique reference to prior testimony, that did not even mention any additional trial or other victims, was not sufficiently prejudicial to warrant a mistrial, even if it did violate the parties' stipulation.

Prior Allegation of Sexual Assault by Victim's Mother

¶27 Futch sought to cross-examine the victim's mother about a prior allegation of sexual assault involving another man that the mother had reported to police after observing her daughter rubbing her vaginal area. Futch did not contend that the mother had been lying about what her daughter had told her. Rather, he argued that the prior incident was relevant to show that the mother was

extremely concerned about people having sexual contact with her daughter, so that when she saw "rubbing behavior" she "jumps to the assumption that there has been some sort of improper sexual contact." Futch further argued that repeated questioning by the mother as to whether someone had touched the daughter could implant a false memory in the child's mind.

¶28 The court ruled that the prior incident was not relevant. We are satisfied the court's ruling was well within its discretion. As the State points out, the mother's actual testimony was that, when she saw her daughter rubbing herself, she asked her why she was rubbing herself, not whether someone had touched her.

Newly Discovered Evidence

¶29 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See* ***Coogan***, 154 Wis. 2d at 394-95. If the new evidence serves only to impeach the credibility of a witness who testified at trial, it is insufficient to warrant a new trial as a matter of due process, because it does not create a reasonable probability of a different result. *See* ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

¶30 Here, the trial court determined that the mother's statement that she could have Futch "put away" if he wanted to cause her problems satisfied the first three elements of the test for newly discovered evidence. However, the trial court

viewed the statement as cumulative to the extent that the defense had already introduced evidence that a custody dispute during divorce may have given the mother a motive to encourage her daughter to make a false allegation. It further reasoned that the statement was not specific enough to make it reasonably probable that a different result would be reached on trial. We agree with the trial court's analysis. In addition, we note that the mother's statement could be properly viewed as merely going to the credibility of a witness. Therefore, we see no basis to set aside the trial court's order refusing to grant Futch a new trial.

By the Court.—Judgment and order affirmed.

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