

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP436-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF629

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SOLOMON T. ARMSTRONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for
Waukesha County: J. MAC DAVIS and KATHLEEN B. STILLING, Judges.

Affirmed.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Solomon Armstrong appeals a judgment of conviction and an order denying his postconviction motion.¹ Armstrong was convicted of one count of first-degree sexual assault of a child under the age of thirteen, pursuant to WIS. STAT. § 948.02(1)(e) (2009-10),² following a jury trial. He argues on appeal that the circuit court erroneously exercised its discretion when it allowed the State to introduce “other acts evidence” of a prior sexual assault committed by Armstrong, excluded evidence of a victim’s previous sexual assault, and admitted his confession to police. Armstrong also argues that the circuit court improperly concluded that his trial counsel did not render ineffective assistance. For the reasons set forth below, we affirm the judgment of conviction and the circuit court’s order denying Armstrong’s postconviction motion.

BACKGROUND

¶2 Armstrong was charged with sexually assaulting two girls under the age of thirteen. The conduct for which he was charged included touching one of the girl’s breast, buttocks, and vagina with his hands, and “humping” her with his private part.

¹ The Honorable J. Mac Davis presided over trial and entered the judgment of conviction. The Honorable Kathleen B. Stilling entered the order denying Armstrong’s postconviction motion.

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 Prior to trial, the State moved for the admission of other acts evidence in the form of testimony from a seventeen-year-old girl whom Armstrong had assaulted when she was thirteen years old by “grinding” on her buttocks. The prior conduct was never charged. The court allowed the other acts evidence to be admitted, and the State later introduced it at trial.

¶4 Armstrong filed a pretrial motion for the admission of interview statements from one of the victims regarding a prior sexual assault by her aunt’s boyfriend. The court denied Armstrong’s motion. Armstrong also filed a pretrial motion to suppress a statement taken by police on the day of his arrest, in which he confessed to having touched the girls on their private parts, arguing that the statement was involuntary. The circuit court concluded that the statement was not involuntary and allowed the State to introduce it at trial.

¶5 The jury returned a guilty verdict on one count of first-degree sexual assault of a child under the age of thirteen. The jury acquitted as to a second count, and the court declared a mistrial on the final two counts. The State later dismissed the charges that were mistried.

¶6 Armstrong filed a postconviction motion, arguing that the circuit court ruled improperly on the three pretrial motions. He further argued that his

trial counsel rendered ineffective assistance of counsel. After a *Machner*³ hearing, the court denied the postconviction motion. Armstrong now appeals both the judgment of conviction and the order denying his postconviction motion.

STANDARD OF REVIEW

¶7 The question of whether a circuit court erred when it admitted or excluded evidence is subject to an erroneous exercise of discretion standard. *State v. Nelis*, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619. We will sustain an evidentiary ruling if we find that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion of law that a reasonable judge could reach. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Whether the circuit court relied on applicable law in making an evidentiary ruling is a question of law. *State v. Rhodes*, 2011 WI 73, ¶¶22-26, 336 Wis. 2d 64, 799 N.W.2d 850.

¶8 In determining whether statements to police are admissible, the reviewing court gives deference to the circuit court's findings regarding the factual circumstances that surrounded the making of the statements; however, the application of the constitutional principles to those facts is subject to independent

³ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

appellate review. *State v. Hoppe*, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407.

¶9 Ineffective assistance of counsel claims present mixed questions of fact and law. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court’s factual findings must be upheld unless they are clearly erroneous, but whether counsel’s performance was deficient and whether it prejudiced the defendant are questions of law that we review de novo. *Id.* at 634; *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

DISCUSSION

Admission of Other Acts Evidence

¶10 Armstrong argues that the circuit court erroneously exercised its discretion when it admitted evidence of Armstrong’s prior act of sexual assault on a young girl. We disagree. Evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” WIS. STAT. § 904.04(2)(a). However, § 904.04(2) will not exclude other acts evidence when the evidence is “offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

¶11 When deciding whether to allow other acts evidence, Wisconsin courts apply the three-step analytical framework set forth in *Sullivan*, 216 Wis. 2d

at 772-73. Under *Sullivan*, courts must consider: (1) whether the evidence is offered for a proper purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. See *id.* In cases involving sexual assault, particularly those where the victim is a child, greater latitude is permitted in applying the *Sullivan* framework, and other acts evidence is admitted more liberally. See *State v. Davidson*, 2000 WI 91, ¶¶36-44, 236 Wis. 2d 537, 613 N.W.2d 606. See also *State v. Marinez*, 2011 WI 12, 331 Wis. 2d 568, ¶20, 797 N.W.2d 399.

¶12 The circuit court considered the *Sullivan* steps on the record when it decided to admit evidence of Armstrong's prior sexual contact with a child. See *Sullivan*, 216 Wis. 2d at 772-73. Applying the first step, the court concluded that the other acts evidence was offered for the proper purpose of showing Armstrong's motive or intent to seek sexual gratification. Applying the second step, the court determined that the evidence had probative value because it tended to show a purpose of sexual gratification, as opposed to accidental conduct. The court reasoned that the prior conduct was similar enough to the conduct charged, and recent enough to be relevant. Applying the third step of the *Sullivan* framework, the court concluded that the evidence was not unfairly prejudicial or likely to unduly confuse the jury, and ruled that the evidence was admissible. See *id.*

¶13 We are satisfied, in light of *Sullivan* and *Marinez*, that the circuit court examined the relevant facts, applied the proper legal standard, and reached a conclusion of law that a reasonable judge could reach. *See Sullivan*, 216 Wis. 2d at 780; *Marinez*, 331 Wis. 2d 568, ¶20. The court did so through a rational process demonstrated on the record. Accordingly, we conclude that the circuit court properly exercised its discretion in admitting the evidence of Armstrong's prior sexual contact with a young girl.

Exclusion of Evidence of Victim's Prior Sexual Assault

¶14 Armstrong asserts that the circuit court erroneously exercised its discretion when it denied his motion to admit evidence that one of the victims had previously been sexually assaulted. Wisconsin's rape shield law, WIS. STAT. § 972.11(2)(b), prohibits a defendant from offering evidence relating to a victim's prior sexual conduct. However, in some cases, a victim's prior sexual conduct may be so relevant and probative that to bar evidence of such conduct would deny the defendant his or her constitutional right to present a defense. *State v. Pulizzano*, 155 Wis. 2d 633, 647, 456 N.W.2d 325 (1990). Armstrong argues that his is such a case.

¶15 A defendant trying to establish a constitutional right to present otherwise excluded evidence of a child victim's prior sexual conduct must make an offer of proof showing: (1) that the prior act clearly occurred; (2) that the act

closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect. *Pulizzano*, 155 Wis. 2d at 656. Armstrong argues that his offer of proof demonstrated these factors, and that the circuit court erroneously exercised its discretion in excluding the evidence of the victim's prior conduct.

¶16 We note that the circuit court discussed the *Pulizzano* requirements on the record and concluded that, although the prior sexual assault did occur and therefore satisfied the first requirement, the other four requirements were not met. The court reasoned that the prior assault did not resemble the conduct in Armstrong's case closely enough to be relevant, and that Armstrong had not established that evidence of the prior assault was necessary to his defense. We are satisfied, upon review of the court's reasoned analysis of the *Pulizzano* requirements with respect to the facts of this case, that the court properly exercised its discretion in barring evidence of the victim's prior assault.

Voluntariness of the Appellant's Confession

¶17 Armstrong challenges his confession to police as being involuntary. He asserts that the detective who interviewed him placed undue psychological pressure on him when he made frequent mention of the fact that Armstrong was

not from Waukesha County and that, as an outsider, the consequences to him would be dire if he did not make a confession.

¶18 A defendant's statements are voluntary if they arise from a free and unconstrained will and reflect deliberateness of choice, as opposed to arising from an unequal confrontation in which the pressures on the defendant exceed the defendant's ability to resist. *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. *Id.* at 239. In considering whether a statement was involuntary, we view the totality of the circumstances, balancing the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers. *Hoppe*, 261 Wis. 2d 294, ¶38.

¶19 We note that the circuit court made a finding of fact that there was no police misconduct, and Armstrong has not demonstrated that the finding was clearly erroneous, such that we should reverse on appeal. *See Pitsch*, 124 Wis. 2d at 634. Neither has Armstrong convinced us that he was coerced or that he had any personal characteristics that made him susceptible to pressure. An officer telling a defendant that the prosecutor will look on his case differently if he does not cooperate is not coercive conduct, so long as no leniency is promised for a confession. *State v. Berggren*, 2009 WI App 82, ¶31, 320 Wis. 2d 209, 769 N.W.2d 110. The record reflects that there was no leniency promised to Armstrong if he confessed. Although the officer may have unduly emphasized

that Armstrong was not from Waukesha County, Armstrong possessed other characteristics to resist pressure from the officer. He was thirty-five years old at the time of the police interview. He had received some higher education and was working as a manager of a tax preparation office. He has not convinced us that he possessed characteristics that made him susceptible to pressure. In light of the totality of the circumstances, we conclude that Armstrong has failed to show that his confession was involuntary.

Ineffective Assistance of Counsel Claim

¶20 In order to prevail on a claim for ineffective assistance of counsel, the claimant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Pitsch*, 124 Wis. 2d at 633. Armstrong asserts that his trial counsel's performance was deficient because she did not object to testimony given by forensic interviewer Sarah Bertram, in which Bertram stated that her job was to find out the truth of what happened. Armstrong states that Bertram's testimony amounted to improper vouching of the type disallowed by *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), and that his counsel's failure to object to the testimony rendered her assistance ineffective.

¶21 The circuit court made factual findings that Bertram did not state that the victims were telling the truth, and that she merely stated that trying to

discover the truth is part of her job. We agree. Given that Bertram never testified about the victims' credibility, or even about the statements the victims made to her, we are satisfied that the circuit court properly concluded that Bertram's testimony did not rise to the level of a vouching statement under *Haseltine*, 120 Wis. 2d at 96.

¶22 Because Bertram's testimony was not improper, counsel was not deficient in failing to object to it. See *State v. Ewing*, 2005 WI App 206, ¶18, 287 Wis. 2d 327, 704 N.W.2d 405. We agree with the circuit court's conclusion that counsel's failure to object to Bertram's statements was not deficient performance and that, accordingly, Armstrong failed to establish that he received ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

