COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3312-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO Q. CRUZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Antonio Q. Cruz appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that he is entitled to a new trial in the interests of justice because the trial court admitted prejudicial testimony, and erroneously exercised its discretion when it allowed the State to introduce other

testimony. Because we conclude that he is not entitled to a new trial and the evidence was properly admitted, we affirm.

¶2 Cruz was convicted after a jury trial of two counts of first-degree sexual assault of a child. He was charged with sexually assaulting the then five-year-old daughter of his wife. During the trial, three conceded errors occurred. First, two witnesses referred to that fact that Cruz had been in jail and in prison at some time in the past. Secondly, Cruz's wife testified that Cruz had been in drug rehabilitation. Thirdly, the prosecutor improperly vouched for three witnesses during closing argument by calling them honest, sincere and good people. In each case, Cruz moved for a mistrial. The trial court denied each motion. The court gave the jury curative instructions in each case.

¶3 Cruz argues on appeal that he is entitled to a new trial in the interests of justice because of the cumulative prejudicial effect of these errors. The first issue presented is the proper standard of review for this court. Cruz argues that he is raising a constitutional claim that the errors committed deprived him of due process, and therefore, as to these claims, this court's review is de novo. *See* ***State v. Phillips***, 218 Wis. 2d 180, 190-91, 577 N.W.2d 794 (1998). The State argues that Cruz did not raise the constitutional claims in his motion for postconviction relief and therefore, the proper standard of review is erroneous exercise of discretion. *See* ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶46, 233 Wis. 2d 371, 607 N.W.2d 637. Cruz responds that he did raise the constitutional claim in his motion. We agree and therefore will review the matter de novo as to any constitutional implications in the case.

¶4 The essential issue in this case is whether the improper references so clouded the crucial issue of the sexual assault allegation that the real controversy

was not tried. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). While we conclude that the cumulative effect of these references renders this case a close call, we cannot ultimately conclude that the real controversy was not tried. The crucial issue in this case was whether Cruz sexually assaulted his wife's daughter. We cannot conclude that the brief and isolated references to his drug rehabilitation and prior incarceration precluded the jury from fairly judging that allegation. Cruz's prior experiences with incarceration and rehabilitation do not bear directly on whether the sexual assaults occurred.

¶5 We similarly conclude that the comments the prosecutor made during closing argument about the sincerity and honesty of her witnesses, although improper, did not keep the real controversy from being tried. We fully agree that the prosecutor should not have commented on the truthfulness and good character of her witnesses. *See* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). We cannot conclude, however, that the comments in this case would have been of much consequence to the jury in reaching its verdict.

¶6 This, however, does not excuse the prosecutor's conduct. The prosecutor clearly violated the rule against commenting on the truthfulness of another witness. The prosecutor should be aware that such comments are improper and should refrain from making them in the future. We note that this is the third time in three months that this particular prosecutor, Shelly Rusch, has been admonished by this court for improper conduct, and in one of the cases the admonishment was for asking a witness to comment on another witness's truthfulness. ***State v. Everts***, No. 01-0798-CRLV, unpublished slip op. at ¶21 (WI App Aug. 22, 2001); ***State v. Robinson***, No. 00-2048-CR, unpublished slip op. at ¶9 (WI App July 3, 2001). We once again admonish Rusch that she must follow

the rules of the court or risk reversal if improper conduct is found to have prejudiced the result.

¶7 Cruz also complains that the trial court improperly allowed the State to introduce the testimony of a jail inmate, Timothy Olson. Olson was in jail with Cruz at one time. He testified that Cruz had told him that Cruz had a sexual preference for little girls. Prior to trial, the State made a motion in limine to admit this testimony as other acts testimony. The State argued that the evidence was admissible as other acts evidence under the standards set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The court ruled that the evidence was admissible, but concluded that it was not other acts evidence. The court viewed the statement as an admission of the crime with which he was charged.

¶8 On appeal, the State once again argues that it was other acts evidence, but that it was nonetheless properly admitted. We agree with the State that this was other acts evidence and that the trial court should have performed a ***Sullivan*** analysis. Since the trial court did not perform the required analysis, we independently review the record to determine if it provides a basis for the trial court's decision. ***Id.*** at 781. Having done so, we agree that the evidence was properly admitted. Therefore, we affirm but for different reasons. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

¶9 The admission of other acts evidence requires a three-step analysis. The court must consider:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule)

> 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence 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? *See* Wis. Stat. § (Rule) 904.03.

Sullivan, 216 Wis. 2d at 772-73 (footnote omitted).

¶10 We conclude that the evidence was offered for a proper purpose. Wisconsin has long recognized a greater latitude rule in admitting other acts evidence in sexual assault cases involving a child. ***State v. Davidson***, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. The purpose or motive for allegedly touching the child is one element of the crime, and evidence relevant to motive, therefore, is admissible. ***Id.*** at ¶59. Such evidence is also admissible to establish a plan. "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." ***Id.*** at ¶60. While the descriptions of the sexual acts testified to by Olson do not exactly match the facts of this case, as in ***Davidson***, there are striking similarities. ***Id.*** at ¶61. The victim in this case testified that Cruz had her climb on top of his erect penis so that his penis was touching her vagina, and at that at a different time, he placed her hand on his penis. Olson testified that Cruz told him that he liked to rub his penis on little girls' vaginas, and that he liked to have them perform fellatio on him. The similarities in this case between the acts charged and the acts described by Olson are greater than the similarities between the incidents

described in ***Davidson***. We conclude that this other acts evidence was offered for a proper purpose because it established motive, intent, preparation and plan.

¶11 The next step in the analysis is whether the evidence is relevant. The evidence admitted showed Cruz's preference for little girls—exactly the issue in this case. *See* ***id.*** at ¶65. It was relevant. The next issue is whether it was probative. We again conclude that it was. Again as in ***Davidson***, the evidence here showed that the defendant was sexually attracted to young children and acted on the sexual attraction. ***Id.*** at ¶68. The evidence was probative.

¶12 The final issue is whether the probative value is outweighed by the danger of unfair prejudice. Cruz argues that the testimony showed only his propensity to have sex with little girls and not that he committed this particular crime. We have already concluded, however, that this testimony was relevant and probative. All evidence which helps establish a defendant's guilt is prejudicial. Only unfairly prejudicial evidence is precluded. We conclude that this evidence was not unfairly prejudicial.[1] For the reasons stated, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

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

[1] Since we conclude that the evidence was properly admitted, we do not need to address the harmless error argument.