COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2946-CR **Cir. Ct. No. 2002CF336**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT PRICE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Robert Price appeals a judgment convicting him of first-degree sexual assault of a child, as a habitual criminal, and an order denying his motions for postconviction relief. The issues are: (1) whether the circuit court erroneously exercised its discretion in admitting other acts evidence; (2) whether

the circuit court properly denied Price's postconviction motion for an in camera review of human services records relating to previous allegations of sexual assault against the victim, Rachael G.; (3) whether Price received ineffective assistance of counsel; and (4) whether the circuit court properly exercised its sentencing discretion. We affirm.

¶2 Price first argues that the circuit court erroneously exercised its discretion by admitting evidence that he had previously committed a sexual assault against an eight-year-old girl in 1991. In deciding whether to omit other acts evidence, the circuit court should determine: (1) whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2) (2005-06)[1]; (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 issues or misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 783-89, 576 N.W.2d 30 (1998). "In cases involving allegations of sexual assault, particularly child sexual assault, courts are to permit a 'greater latitude of proof as to other like occurrences.'" ***State v. Veach***, 2002 WI 110, ¶51, 255 Wis. 2d 390, 648 N.W.2d 447. We review a circuit court decision admitting other acts evidence for a misuse of discretion. ***Id.***, ¶45.

¶3 The evidence was properly admitted to show intent, motive, plan, and absence of mistake or accident. This prosecution was based on an allegation that Price fondled eight-year-old Rachael while an invited guest at the home of her

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

father. The prior assault also involved Price fondling an eight-year-old girl while staying at someone's home as an invited guest. Because the two incidents were so similar, the evidence of the prior assault was relevant to show that Price acted intentionally when he touched and assaulted Rachael and that he planned to do so for purposes of sexual gratification.

¶4 Turning to the second and third ***Sullivan*** elements, the circuit court properly applied ***Sullivan*** to reach a decision that was well-reasoned and reasonable. The court explained:

> With regard to the second prong, the measure of probative value in assessing relevance is the similarity between the charged offense and the other act. Similarity is demonstrated by showing the nearness of time, place, and circumstance between the other act and the alleged crime. Remoteness in time may be outweighed by the similarity of the incidents. Admittedly, these two incidents are separated by approximately 12 years …. However, it appears that Defendant was incarcerated for a significant portion of this time. And, Wisconsin courts have allowed other acts evidence of similar or even greater age. Furthermore, … the remoteness in time of the proffered act is outweighed by the striking similarity of the alleged incidents. In both cases, the alleged victim was an eight-year-old girl. In both cases, the alleged assault was a fondling of the victim's genitalia. And, in both cases, Defendant allegedly gained access to each girl when staying overnight as an invited guest of her parent or parents.
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> Finally, with respect to the third prong, the Court finds no reason to believe that this evidence would be unfairly prejudicial toward the Defendant. The [prior] incident is not any more inflammatory or aggravated than the allegations underlying the current charge. Nor does the Court believe that it would pose a significant risk of confusing the jury, since the incidents are clearly distinct as to persons and time.

(Citations and quotation marks omitted).

¶5 Price argues that the evidence was too remote in time because the prior assault occurred twelve years ago. Considering everything, including the fact that Price had no opportunity to commit assaults against children during a substantial period of that twelve years because he was incarcerated, the circuit court decided that the evidence was not too remote in time. The circuit court acted within the bounds of its discretionary authority in making this determination. We conclude that the circuit court properly admitted the other acts evidence.

¶6 Price next argues that the circuit court improperly denied his post-trial motion for an in camera review of any records of the Waukesha County Human Services Department relating to prior reports of sexual abuse of Rachael. Price contends that such records exist based on one sentence included in a report on a physical examination of Rachael when she was twenty-two months old by Dr. Judy Guinn, which indicated that "reportedly, approximately one month ago, Mom had accused Dad of sexual abuse to Rachael."

¶7 The Wisconsin Supreme Court has explained that:

> "the preliminary showing for an in camera review requires a defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence [that] is not merely cumulative to other evidence available to the defendant."

State v. Green, 2002 WI 68, ¶33-34, 253 Wis. 2d 356, 646 N.W.2d 298 (abrogating in part but otherwise affirming the threshold requirement from ***State v. Shiffra***, 175 Wis. 2d 600, 608-09, 499 N.W.2d 719 (Ct. App. 1993). The defendant must "reasonably investigate information related to the victim before setting forth an offer of proof and to clearly articulate how the information sought corresponds to his or her theory of defense." ***Green***, 253 Wis. 2d 356, ¶35.

¶8 Price first argues that the circuit court applied the wrong legal standard—the higher burden of proof required by the "consequential evidence" test—in deciding whether to conduct an in camera review. *See* ***State v. Robertson***, 2003 WI App 84, ¶22, 263 Wis. 2d 349, 661 N.W.2d 105 (the ***Shiffra-Green*** preliminary materiality test applies when a defendant seeks a postconviction in camera review but, if the motion for in camera review is granted, the court applies the consequential evidence test to determine whether to release the records to the defendant). However, our review of the circuit court's oral decision satisfies us that the circuit court applied the lower ***Shiffra-Green*** preliminary materiality standard. Under that standard, Price was not entitled to an in camera review of the records, if they exist, because he did not set forth a specific factual basis demonstrating a reasonable likelihood that the records contained information relevant to the facts at issue in this case. Rachael told her father about the assault immediately after Price assaulted her. Rachael's mother's allegation against her father made when Rachael was not yet two-years-old is not relevant to whether eight-year-old Rachael correctly remembered and reported what happened with Price.

¶9 Price next argues that he received ineffective assistance of trial counsel. To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that he or she was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶10 Price contends his attorney should have called a legal expert to testify about "parental anxiety, suggestibility influences, and interviewer bias, to assist the jury in understanding recognized factors, present in this case, that can lead a young child to report an event that never happened." Price contended that his attorney should have argued the following defense theory: that Rachael had a traumatic encounter with Price when he "exploded in a fit of rage" after locking his keys inside his van, and that her fear of Price and desire that he leave her home transformed into an allegation of inappropriate sexual touching through the anxious parental interviewing that followed the incident. The problem with Price's alternative theory of defense, which he contends his attorney should have supported by calling an expert witness, is that it rests on the premise that Rachael's father engaged in anxiety-driven questioning of her that led to a false accusation. However, the record shows that Rachael's father did not become upset until *after Rachael reported the assault to him*, so her father's anxiety could not have *caused* her to report this crime. Counsel did not perform deficiently in failing to call an expert witness to address parental anxiety and interviewer bias because that theory does not fit the facts of this case. We reject the claim of ineffective assistance of counsel.[2]

¶11 Finally, Price argues that the circuit court erroneously exercised its sentencing discretion because it did not adequately explain the reasons for the

[2] To the extent that Price's contention is that the allegation from when Rachael was twenty-two months old, coupled with another allegation made by Rachael's father against her mother's boyfriend at around the same time, caused her father to engage in anxious questioning of Rachael six years later leading to a false accusation, this contention, too, does not fit the facts of this case. It ignores the fact that Rachael was hysterical and crying when she called her father to her room and told him that Price had touched her indecently. It was not Rachael's father's questioning which led to Rachael's accusations.

sentence it gave, it did not sufficiently consider Price's rehabilitative needs and it incorrectly considered the crime to be aggravated and vicious. "Circuit courts are required to specify the objectives of the sentence on the record." ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. "These objectives include, but are not limited to, the protection of the community, punishment of the defendant, and deterrence to others." ***Id.*** Courts should also explain "in light of the facts of the case, why the particular component parts of the sentence imposed advance the specified objectives." ***Id.***, ¶42.

¶12 The circuit court adequately explained the reasons for its sentence based on the facts of this case and the appropriate legal standards. Contrary to Price's assertion, the court considered his rehabilitative needs, but concluded that he was not a good candidate for rehabilitation, which was certainly reasonable considering that Price had been released from prison for committing a sexual assault against another eight-year-old girl in the past. We recognize that the forty-year sentence is lengthy, especially considering that Price was nearly sixty-years old when he was convicted. However, the question is not whether we would have imposed this sentence, but whether the circuit court acted outside the ambit of its discretion in imposing the sentence. Here, the facts support the court's decision to impose the sentence it did. This was Price's second conviction for sexually assaulting a young child. In addition, the presentence investigator informed the court that Price's twenty-year-old daughter reported being assaulted by her father several times when she was young. The court reasonably concluded that Price was a substantial threat to children and that he was not willing to accept responsibility for his repeated assaults on children based, among other things, on his comments at sentencing. Under these circumstances, we cannot say that the forty-year

sentence was so excessive or unduly harsh as to shock public sentiment. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).