COURT OF APPEALS
DECISION
DATED AND RELEASED

May 16, 1996

NOTICE

No. 95-0154-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGER H. LEISKAU,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

GARTZKE, P.J. Roger Leiskau appeals from a judgment convicting him on two counts of first-degree sexual assault of a child, § 948.02(1), STATS., and from an order denying his postconviction motion.[1] We

[1] Section 948.02(1), STATS., provides, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." Section 948.01(5), STATS., provides:

reject his contentions that the trial court erred by admitting photographs he took of children and allowing testimony regarding a photograph he took of a nude woman. We decline to exercise our power under § 752.35, STATS., to grant a new trial in the interests of justice. We therefore affirm the judgment and order.

The charges involve an incident in which Leiskau allegedly placed Tanya A., age 10, and Sara S., age 12, on his lap, and briefly rubbed their vaginal areas on the top of their clothing. The jury heard evidence that during the spring and summer of 1992 Leiskau had befriended a number of children who lived in the same trailer park as he, and the children, including Tanya A. and Sara S., frequently came to his trailer after school and during the summer vacation to play in his wheelchair and eat the candy that he kept on hand. During one of those visits at his trailer, according to Tanya and Sara, he put them on his lap while he sat on a reclining lawn chair outside his trailer and briefly rubbed their vaginal areas.

The morning of the trial the court heard Leiskau's motion to exclude "other acts" evidence the State intended to offer. The evidence consists of photographs Leiskau had taken of children in his trailer home. The photographs fall into two categories: a photograph of a nude woman standing in front of a mirror, showing the front of the woman and the reflection of her back. The State desired admission of that photograph in connection with three other photographs of Sara. Two photographs show Sara standing fully clothed in front of the same mirror. The photographs show her front and the reflection of her back. The third photograph of Sara shows her and three much younger children all fully clothed, in a group picture in the trailer. The second category consists of sixteen photographs Leiskau took of fully clothed children (none of whom is Sara or Tanya) eating candy in his trailer.

(..continued)

"Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant.

Section 904.04(2), STATS., provides in substance that evidence of other acts is not admissible to prove the character of a person in order to show that the person acted in conformity with that character, but the evidence is admissible if offered for other purposes. When evaluating the admissibility of other acts evidence, the trial court must first determine whether the evidence is offered for a purpose other than to prove the character of the person in order to show he or she acted in conformity with that character. If the evidence satisfies that test, then the court must decide whether its probative value is substantially outweighed by the danger of unfair prejudice. Section 904.03, STATS. ***State v. Friedrich***, 135 Wis.2d 1, 19, 398 N.W.2d 763, 771 (1987). Implicit in the analysis is the requirement that the other acts evidence be relevant to an issue in the case. ***Id***. We review the admission of such evidence for proper exercise of the court's discretion. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982).

To justify admission of the photograph of the nude woman, the prosecutor said, "I think anybody in their right mind looking at the [photograph] and the two photographs of Sara [___] can see what's going on in the defendant's mind ...." The prosecutor argued that the similar poses of the nude woman and Sara before the mirror were relevant to the State's claim that when Leiskau touched Sara's vaginal area, he did so for purposes of sexual gratification or arousal and not accidentally or unintentionally. Leiskau contended that the photograph of the nude woman and the two photographs of Sara before the mirror and the group picture were irrelevant to any of the issues in this case.

The trial court admitted in evidence the photograph of the nude woman and the two photographs showing Sara standing before the mirror as relevant to Leiskau's intent. It ruled that the photograph of the nude woman could not go to the jury but the State could offer testimony by the woman that the photograph had been taken. The court ruled that "there is a tie into the poses in the two pictures of [Sara] ... there is a similarity here. There is a similarity in placement. There is enough there ...." that the State should be able to argue the inferences it wanted the jury to draw from the photographs.

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Section 904.01, STATS. The

trial court has broad discretion in determining the relevance. ***State v. Oberlander***, 149 Wis.2d 132, 140, 438 N.W.2d 580, 583 (1989). We will not overturn the court's discretionary ruling if a reasonable basis exists for it. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). If the ruling is made on the basis of facts of record and the correct law, we must uphold it even though we would not necessarily have agreed with the ruling. ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

We affirm the ruling with regard to the photograph of the nude woman and the two photographs of Sara. The three photographs bear on the elements of intentional touching and the purpose of sexual gratification which the State must establish to prove its case under § 948.02(1), STATS., and an absence of mistake on Leiskau's part when touching the children. The evidence was not offered for a prohibited purpose under § 904.04(2), STATS., and the court took into account the danger of unfair prejudice. Indeed the court specifically noted the risk of unfair prejudice should the photograph of the nude woman go to the jury, and ruled that it could only be described to the jury.

The second category of photographs, sixteen in all, involve some duplication. One image appears in triplicate and another in duplicate. Each shows a gangly girl perhaps in her early teens, wearing a jumpsuit which exposes her legs. All but three images center on her crotch area. She sits on a chair with her legs widely apart, and although her crotch is obscured in some images by a jar of candy she holds between her legs and in other images by a child standing in front of her, several of the photographs center on her crotch. The court said it "certainly" is arguable that her poses are provocative. While the court did not spell out what it meant by "provocative," we infer the court intended that the pictures could be interpreted as showing the photographer's interest in the crotch area. So interpreted, the photographs are relevant to Leiskau's intent and were not offered for a purpose prohibited under § 904.04(2), STATS.

Leiskau asserts that the probative value of the photographs is minimal because intent was not an issue in this case, since he conceded at trial that if he had rubbed the girls' vaginal areas, his act could not have been accidental and would have been for sexual arousal or gratification. He instead denied that the rubbing happened. He admitted that he may have touched the

girls accidentally, as in bumping, hugging or tickling them, but he adamantly denied rubbing their vaginal areas.

We agree with the State that the photographs are admissible. They are relevant to the elements of intentional touching and of touching for gratification or arousal. The State must prove every element beyond a reasonable doubt, even if the defendant does not dispute one or more elements. ***State v. Plymesser***, 172 Wis.2d 583, 594, 493 N.W.2d 367, 372 (1992).

While the court did not expressly rule on the unfairly prejudicial issue, we believe its negative decision is implicit under the court's ruling, particularly in view of the court's concern over the risk of unfair prejudice when it discussed the photograph of the nude woman. The probative value of the photographs is enough to overcome the risk of unfair prejudice.

Citing ***State v. Friedrich***, 135 Wis.2d 1, 398 N.W.2d 763 (1987), Leiskau also argues that in a child sexual assault case the jury should never hear evidence about the defendant's sexual interests and practices with adults. The ***Friedrich*** court held the trial court erred when it admitted evidence allowing an adult to testify she had been propositioned by the defendant.

> The nature of this evidence is such that it does not fit within the outline of the scheme or plan established with respect to Defendant's seeking sexual gratification from young girls ... [n]or does the testimony ... fit within the "motive" exception to sec. 904.04(2), Stats.... The [adult's] testimony showed that Defendant sought a consensual sexual relationship with an adult [and not Defendant's desire to obtain sexual gratification from young girls].

Friedrich, 135 Wis.2d at 26, 398 N.W.2d at 774. The defendant was charged with second-degree sexual assault of his fourteen-year-old niece. An adult testified that before the trial, she was employed for a few months in the defendant's tavern. She stated the defendant, on several occasions, made sexually provocative statements and sexual advances.

Here, the State introduced the photograph of the nude woman standing in front of the mirror to prove Leiskau's intent, not a plan or scheme. The testimony does not show merely that Leiskau sought a consensual sexual relationship with an adult, but rather that he thought in sexual terms of Sara.

Having found no evidentiary error, we turn to whether a new trial should be awarded in the interest of justice.

Notwithstanding his reference to the postconviction order in his notice of appeal, Leiskau does not contend that the trial court improperly exercised its discretion when it refused to order a new trial under § 805.15(1), STATS. Rather, Leiskau requests that we grant a new trial under § 752.35, STATS.

Our authority to order a new trial in the interest of justice exists by virtue of the statutory grant in § 752.35, STATS., which provides in material part:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from ... and ... remit the case to the trial court for entry of the proper judgment or for a new trial ....

Section 752.35, STATS., is identical in all pertinent respects to the statutory grant to the supreme court in § 751.06, STATS. The supreme court may grant a new trial in the interest of justice, "even where the circuit court has exercised its power to order or deny a new trial in the interest of justice." ***Stivarius v. DiVall***, 121 Wis.2d 145, 153, 358 N.W.2d 530, 534 (1984). Possessing the same statutory power as the supreme court, the court of appeals may exercise its discretion under § 752.35 without deciding whether the trial court erroneously exercised its discretion under § 805.15(1), STATS.

To exercise our authority on the basis of the first ground specified in § 752.35, STATS., that justice has miscarried, we must conclude that there is a substantial likelihood of a different result at the second trial. ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990). We are not that restricted when

we consider whether the real controversy has been fully tried. We may grant a new trial under § 752.35 if we are satisfied that the real controversy has not been fully tried, regardless whether it is likely that a second trial will produce a different result. ***Vollmer***, 156 Wis.2d at 16, 456 N.W.2d at 804.

Given the conflicting testimony at the trial and the fact that a verdict of guilty or not guilty in this case is ultimately the jury's decision regarding the credibility of the witnesses, we are not satisfied that a substantial likelihood exists of a different result in a second trial.

The real controversy at the trial was what Leiskau describes as "the central issue in this case: whether [he] could have committed the offenses in the manner alleged by the complainants, or whether, as he contended, he was physically unable to have done so." Leiskau asserts that Dr. Sperling's testimony is critical to that issue.

If Dr. Sperling's testimony is critical, it is surprising that Leiskau failed to call him as a witness. Dr. Sperling was not only Leiskau's treating physician but he is also a professor of rehabilitation medicine in the University of Wisconsin Medical School, and director of the rehabilitation center at the University Hospital. He specializes in spinal cord injury care. However, his attorney asserted at the evidentiary hearing on the postconviction motion that Leiskau is not sophisticated in law and it did not occur to him to tell his trial counsel about Dr. Sperling. The State does not dispute Leiskau's excuse.

While Leiskau is largely responsible for failing to have Dr. Sperling testify at his trial, that does not prevent us from granting a new trial under § 752.35, STATS. *Compare* ***State v. Harp***, 161 Wis.2d 773, 783, 469 N.W.2d 210, 214 (Ct. App. 1991) (contribution of defendant to court's error in jury instructions does not bar defendant from seeking new trial under § 805.15(1), STATS.). The State does not claim that Leiskau attempted to reserve Dr. Sperling as a surprise witness should Leiskau be found guilty.

Following the hearing on Leiskau's postconviction motion at which Dr. Sperling testified, the trial court denied the motion. Although we review the record de novo for purposes of deciding whether to grant a new trial under § 752.35, STATS., we nevertheless look to the trial court's decision for assistance. The court concluded that Dr. Sperling's testimony, properly

considered, is merely that of an additional witness, and as such its absence at the trial did not affect Leiskau's substantial rights and prevent the real controversy from being tried.

Before reviewing the testimony of Dr. Sperling, we put it in the trial context. Following an automobile accident in 1970 in which his spinal cord was injured, Leiskau has been paralyzed from just under the nipple line down. He underwent several subsequent surgeries over a number of years, including removal of his entire left leg below the hip and a surgical insertion of a colostomy.

At the trial Sara testified that Leiskau lifted her out of his wheelchair where she had been sitting and set her upon his lap while he was on the lawn chair. Tanya and Sara claim that Leiskau sat up from a reclining position and leaned forward without pulling them up against him while he rubbed between their legs. Sara said she tried to get up but Leiskau pulled her back into his lap. Both girls claim that they sat directly on top of Leiskau's leg or knee while it was extended straight out in front of him. Sara could not remember if the lawn chair had a pad on it.

Leiskau testified regarding the location of the colostomy and urine bags and his leg spasms and leg pain in support of his claim that the girls did not sit on his lap or leg. One witness testified that in the years she had known Leiskau she had never seen him put a child on his lap or seen a child sit on his lap. A nursing assistant and active member of the Colitis Foundation Support Groups and Madison Ostomy Association, who himself has a colostomy, corroborated Leiskau's testimony about the concern persons with ostomies have regarding their appliances.

Dr. Sperling testified that Leiskau almost certainly could not maintain his balance to lift a child out of a wheelchair and set her on his lap. He could not sit upright without using his arms, could not lean forward without bracing himself and could not maintain that position without difficulty. When in an upright sitting position without a back support, Leiskau would have difficulty maintaining his balance and jostling would throw him off balance.

Dr. Sperling testified that the weight of a child on Leiskau's leg would almost certainly cause severe spasms strong enough to knock Leiskau

out of his wheelchair and that Leiskau would have learned to avoid such situations. Leiskau had lost forty degrees of motion in his leg and cannot straighten the leg fully in front of him.

Dr. Sperling also testified that Leiskau's colostomy bag could be ruptured by putting a child on his lap, and Leiskau has advanced osteoporosis which would subject him to the risk of serious injury by putting a child on the leg. Because of serious bed sores that had resulted in Leiskau's amputations and colostomy, he must have a cushion on his chair at all times.

If the record showed only the conflicts between the testimony of Tanya and Sara at the trial and Dr. Sperling's testimony in response to Leiskau's motion, we could well conclude that because Dr. Sperling did not testify at the trial the real controversy had not been tried. But there is more to this record.

Officer Walling testified that during his interview with Leiskau regarding the claimed incident, he asked Leiskau whether he knew he had touched either of the girls inappropriately. Leiskau responded that he did not recall touching Tanya between her legs but if he did it may have been when he released her from a bear hug and the touching was unintentional. If he had inappropriately touched Tanya, he regretted it and he said it was an accident. Officer Jill Brown interviewed Leiskau at his request. Leiskau denied to Officer Brown that he had inappropriately touched Tanya, but if he had it was accidental when she was sitting on his lap. And he denied having massaged Tanya's vaginal area. During their conversation, the question never came up regarding the impact of someone sitting on his lap on his colostomy bag.

Dr. Sperling's testimony did not render implausible the testimony of Sara and Tanya. Dr. Sperling testified that Leiskau could lean forward and it was not impossible for him to set a child on his lap. If Leiskau himself had said that he let children sit on his lap, Dr. Sperling would believe him. Dr. Sperling did not know how frequently Leiskau's leg spasms occurred. Although Leiskau had testified that if a child sat on top of his leg that would interfere with colostomy tubing that ran along the top of his leg, his colostomy can be moved about. If Leiskau had testified that children had sat on his lap in 1992, it could have happened and nothing makes it physically impossible for that to happen.

If the central issue was, as Leiskau describes it, whether he could have committed the offenses in the manner alleged by the complainants or whether he was physically unable to have done so, Dr. Sperling did not resolve it in Leiskau's favor. For that reason, we conclude that the central issue described by Leiskau was sufficiently tried, and we ought not order a new trial under § 752.35, STATS., on grounds that the real controversy was not fully tried.

We therefore affirm the judgment of conviction before us. We find no evidentiary error. Although Leiskau's notice of appeal includes review of the trial court's order on his postconviction motion, he appears to have abandoned that request, and we decline to order a new trial under § 752.35, STATS.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 95-0154-CR(D)

SUNDBY, J. (*dissenting*). This appeal dramatically illustrates how the prohibition against introducing other-acts evidence to prove the elements of a crime has been eroded. Section 904.04(2), STATS., provides that evidence of other acts is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith." In this case, the trial court admitted evidence of totally innocent photographs of children to prove that the defendant had a morbid sexual interest in young girls. I have reproduced in the appendix the photographs of the young girls taken by defendant. The girls are fully clothed, are not posed, and merely demonstrate the ungainliness and unladylike postures of adolescent girls. It is not the photographs which may have impermissibly influenced the jury but the prosecutor's comments with respect to the photographs.

In his closing argument, among the facts recited by the prosecutor which he asked the jury to consider in determining what "we know about the defendant," the prosecutor recited the following:

> Defendant is a paraplegic, confined to a wheelchair; he's divorced; he has no children; he likes and encourages children to be present at his trailer; he has physical contact with the children by bear hugging them and tickling them; he allows them to play outside his trailer in his wheelchair; he allows them to play inside the trailer with his alligator chair while he's taking photographs of them there; and allows them into his bedroom for the purpose of taking before and after photographs of a person's hairstyle because she's going to have her hair cut.

When I view the photographs, I see gangling teen-agers that my mother would have admonished to "Sit up like a lady." A great deal is in the eye of the beholder. It is fortunate for the world that Goya (1746-1828) painted in the 16th and 17th centuries and not the last half of the 20th century. *See* (by all means), *La Maja Desnuda*.

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

COURT OF APPEALS
OF WISCONSIN
ROOM 231, STATE CAPITOL EAST
POST OFFICE BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE: (608) 266-1880
FAX: (608) 267-0640

Marilyn L. Graves, Clerk
Court of Appeals