COURT OF APPEALS
DECISION
DATED AND RELEASED

June 10, 1997

NOTICE

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

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

No. 96-1258-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY B. WILKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Timothy Wilks appeals from a judgment convicting him of four counts of first-degree sexual assault, four counts of second-degree sexual assault, two counts of armed burglary, and two counts of battery during a burglary. *See* §§ 940.225(1)(b), 940.225(2)(a), 943.10(1)(a) & (2)(a) & (2)(d), STATS. He also appeals from an order denying his postconviction motion.

Wilks claims that the trial court erred when it admitted facts surrounding his four prior convictions. He also claims that the trial court erred in admitting DNA evidence. We affirm.

Wilks was arrested and charged with four counts of first-degree sexual assault, four counts of second-degree sexual assault, two counts of armed burglary, and two counts of battery during a burglary. All the crimes occurred in 1986 and involved four separate incidents with four different elderly women. At trial, over defense objection, the prosecution presented evidence of "other crimes" committed by Wilks, two in 1977 that led to convictions for armed burglary and armed robbery, and two in 1981 that led to convictions for attempted robbery and attempted burglary. These crimes also involved elderly women. The trial court instructed the jury at the close of evidence to consider the "other crimes" evidence with regard to Wilks's preparation or plan in committing the present charges. *See* RULE 904.04(2), STATS.[1] Prior to trial, the prosecution notified the trial court of its intention to introduce DNA evidence. At the hearing on the admissibility of the evidence, the prosecution presented expert testimony on the DNA testing process as well as testimony on the statistical probability calculations that identified the frequency of a match between DNA samples. Although Wilks did not object to the DNA test and procedure used, he did object to the use of statistical calculations, arguing that the statistical calculations were unreliable. The trial

[1] RULE 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. 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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

court rejected Wilks's complaints, finding that both the DNA testing process and the statistical calculations were reliable and that any further debate went only to the weight of the evidence, and was thus a matter for the jury.

Wilks was convicted on all counts. Subsequently, he filed a postconviction motion arguing again that the statistical calculations were unreliable and that his conviction should be vacated. The trial court denied his motion.

Wilks claims that the trial court committed prejudicial error by allowing the prosecution to introduce evidence of "other crimes." Evidence of "other crimes" is admissible under RULE 904.04(2), STATS., if used for a purpose other than to show propensity. ***Id.; State v. Bedker***, 149 Wis.2d 257, 264–265, 440 N.W.2d 802, 804 (Ct. App. 1989) (listing of grounds for admission under RULE 904.04(2) not exclusive).

Application of RULE 904.04(2), STATS., requires a two-step test: (1) whether the evidence is admissible under RULE 904.04(2); and, if so, (2) whether the prejudice inherent in this evidence substantially outweighs its probative value. RULE 904.03, STATS.; ***State v. Johnson***, 121 Wis.2d 237, 252–254, 358 N.W.2d 824, 831–832 (Ct. App. 1984). Implicit in this analysis is the requirement that the evidence is relevant to an issue in the case. ***State v. C.V.C.***, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989). Our review of this issue is governed by the erroneous-exercise-of-discretion standard. ***State v. Jones***, 151 Wis.2d 488, 492–493, 444 N.W.2d 760, 792 (Ct. App. 1989).

The trial court determined that the "other crimes" evidence was relevant to show plan or preparation in committing the charged offenses. We

disagree. Nevertheless, we conclude that the evidence was relevant and admissible as to identity.[2]

Where "other crimes" evidence is offered to show identity, the test of relevancy is that the offenses must be so similar that evidence of one crime tends to prove the defendant is guilty of the crime charged. *See* ***State v. Kuntz***, 160 Wis.2d 722, 746–747, 467 N.W.2d 531, 540 (1991) (acts are so similar that they "constitute the imprint of the defendant") (quoted source omitted). In determining relevancy, we consider the relation in time, place and circumstance between the charged offense and the other crimes. ***Id.***

The "other crimes" occurred close in time to the charged offenses. Regarding the 1981 crimes, Wilks entered prison in December of 1982, and was released on May 20, 1986, just two months before the first of the four charged crimes and five months before the last of the four charged crimes. The gap between the 1981 charged crimes was, therefore, two to five months. *See* ***State v. Speer,*** 176 Wis.2d 1101, 1117, 501 N.W.2d 429, 434 (1993) (Periods of confinement are not considered in determining the nearness in time between the prior offenses and the crimes charged.). Regarding the 1977 crimes, they were not so remote as to lose their probity with respect to the charged crimes.[3] *See, e.g.,* ***State v. Plymesser***, 172 Wis.2d 583, 596, 493 N.W.2d 367, 373 (1992) (thirteen-year gap); ***State v. Mink***, 146 Wis.2d 1, 16, 429 N.W.2d 99, 105–106 (Ct. App. 1988) (thirteen-year gap and twenty-two-year gap).

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[2] Although the trial court did not rely on this ground in admitting the evidence, we are free to examine a ground other than that relied on by the trial court if the alternative ground results in an affirmance. ***State v. Busamante***, 201 Wis.2d 562, 577 n.9, 549 N.W.2d 746, 752 n.9 (Ct. App. 1996).

[3] The record does not indicate what sentences Wilks received on his 1977 convictions.

Regarding the place of the crimes, the four "other crimes" occurred on Milwaukee's north side. The charged offenses occurred in the same geographic location as the "other crimes," approximately one mile away.[4]

Further, the "other crimes" had substantial similarities in their circumstance to the charged offenses. The "other crimes" involved burglaries or attempted burglaries of single family residences inhabited by elderly women who either lived alone or who were home alone at the time of the crimes. The alleged offenses also involved residential break-ins, confrontational crimes and violence directed at elderly women. Given the similarities between the "other crimes" and the charged offenses, evidence of the "other crimes" was admissible to establish Wilks's identity as the perpetrator of the charged offenses. *See* ***Whitty v. State***, 34 Wis.2d 278, 292–294, 149 N.W.2d 557, 563–564 (1967) (recognizing similar rule prior to adoption of the rules of evidence).

We also conclude that the probative value of the other acts evidence to prove Wilks's identity was not substantially outweighed by any prejudicial effect. *See* RULE 904.03, STATS. Exclusion of relevant evidence is only warranted when it is likely that admitting the evidence would be unfairly prejudicial in its effect by influencing the jury by improper means, appealing to its sympathy, arousing its sense of horror, promoting its desire to punish or otherwise causing the jury to base its decision on extraneous considerations. ***Bedker***, 149 Wis.2d at 266–267, 440 N.W.2d at 805. As noted, the "other crimes" evidence was highly probative of Wilks's identity as the perpetrator of the alleged crimes, given their similar pattern. Any risk of unfair prejudice against Wilks was

[4] We take judicial notice of the location of the various crime scenes. *See* RULE 902.01, STATS.

minimized by the trial court's cautionary instruction on the permissible use of the "other crimes." The trial court explained to the jury that they could not consider the "other crimes" evidence as proof that Wilks was of bad character or that he had acted in conformity therewith to commit the charged crime. *See* ***id***.

Wilks next contends that the trial court erred in permitting the jury to hear expert testimony regarding the statistical significance of DNA matches as calculated by the "product rule" method on the grounds that product calculations are unreliable and misleading.

The decision of whether to admit expert testimony regarding scientific techniques is committed to the sound discretion of the trial court. ***State v. Peters***, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct. App. 1995).[5] "We will uphold the trial court's discretionary decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** "[T]he rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability. Rather, scientific evidence is admissible if: (1) it is relevant, [RULE] 904.01, STATS.; (2) the witness is qualified as an expert, [RULE] 907.02, STATS.; and (3) the evidence will assist the trier of fact in determining an issue of fact, [RULE] 907.02." ***Id.***, 192 Wis.2d at 687–688, 534 N.W.2d at 871.

[5] Section 972.11(5), STATS., dealing with the admissibility of DNA evidence in criminal trials does not apply here. It was created by 1993 Wis. Act 16, § 3846, effective August 12, 1993, and "applies to actions or proceedings commenced" on the date. *See* 1993 Wis. Act 16, § 9336(5). The alleged crimes occurred in 1986. The criminal complaint was filed on July 8, 1991.

First, there is no dispute that the prosecution witness on DNA statistical evidence, Lisa Forman, was a qualified expert.[6] Second, the evidence was relevant to an issue of fact at trial—the likelihood that Wilks was the source of the semen found at the four crime scenes. *See* RULE 904.01, STATS. (Evidence is relevant if it makes a fact that is of consequence to the determination of the action more or less probable.). Finally, the statistical evidence was offered to help the jury evaluate the significance of the finding that a sample of DNA obtained from the crime scenes matched the DNA profile of Wilks. The statistical estimate is interpreted as the probability that a person selected at random from a comparison population would have a DNA profile that matches that of the crime scene sample. *See* ***Peters***, 192 Wis.2d at 691–692, 534 N.W.2d at 874. Stated another way, it informs the jury of the probability that a defendant's DNA sample matches that from the crime scene purely by chance. Statistical evidence based on the "product rule" is admissible, subject to attacks that go to the weight of that evidence. *See* ***State v. Walstad***, 119 Wis.2d 483, 518–519, 351 N.W.2d 469, 487 (1984).

By the Court.—Judgment and order affirmed.

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

[6] Forman has a Ph.D. in human variation, anthropology and population genetics. She has worked for Cellmark Diagnostics, a DNA identification company, since 1989. Forman has testified as an expert in population genetics in approximately ninety criminal cases and has authored several papers in the area of population genetics.