COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1142-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROY MALVITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MC KAY, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Roy Malvitz appeals his conviction of child enticement and an order denying his motion for postconviction relief. Malvitz contends that the court erroneously admitted evidence of several exposure incidents from 1977, that he received ineffective assistance of counsel, and that there is insufficient evidence to support his conviction. While we conclude that trial counsel was not

ineffective and that there was sufficient evidence to support his conviction, we hold that admitting evidence of the 1977 acts was erroneous. The judgment of conviction is therefore reversed and the matter is remanded to the trial court.

At around 11 a.m. on December 23, 1994, Roy Malvitz was driving in Green Bay when he came upon a thirteen-year-old girl. Malvitz testified that the girl looked cold and either troubled or scared, and he intended to ask her if she needed help. Employed as an over-the-road truck driver, Malvitz asserted that his background and the "unwritten law" of truck drivers instilled in him a helpful nature, and in stopping to talk to the girl he was only making sure that she was all right. After stopping, Malvitz claims he knocked his coffee cup over, and by the time he looked up the girl was gone.

Malvitz asserts that he then continued on his way home, stopping once at an intersection to refill his coffee cup. He again saw the girl, and again stopped to find out if she was all right. When she replied that she was fine, he asked her if he could give her a ride somewhere. She refused, and he proceeded to drive home.[1]

The girl and a nearby postal carrier offered testimony that conflicted somewhat with Malvitz's version of events. The girl testified that she was neither troubled nor scared while walking home. Further, although she was not wearing a coat, she says that she was not cold because it was an unusually warm December day.[2] The postal carrier also testified that the girl did not appear scared, troubled,

[1] Malvitz did not live in Green Bay; he claims that he had been in town to visit a brother and shop before he encountered the girl.

[2] The record indicates that the temperature was 36 degrees Fahrenheit at 9 a.m. and 39 degrees Fahrenheit at 12 noon that day.

or cold while walking, and that Malvitz's behavior made him feel so uncomfortable that he decided to follow him.

The girl further testified that Malvitz never asked if she was cold or in trouble, but only asked her several times if she wanted a ride. She testified that Malvitz never said anything of a sexual nature to her, never offered her money, never threatened her, and never pretended to be a friend or relative of hers. Nevertheless, after Malvitz left she became scared, and the postal carrier helped her to call her parents. The police were then called, and Malvitz was ultimately charged with child enticement. *See* § 948.07, STATS.

At the preliminary hearing, Malvitz's attorney elected to put Malvitz on the stand. Malvitz testified to his version of events, but the court concluded that there were facts and reasonable inferences therefrom that could support a conclusion that Malvitz probably committed a felony. While on the stand, Malvitz was impeached with evidence of a prior incident of indecent exposure. The incident occurred in 1977, and involved Malvitz purchasing cigarettes from a forty-seven-year-old female gas station attendant with his penis exposed.

Malvitz's trial attorney brought a motion in limine to exclude evidence of the 1977 exposure incidents[3] which the trial court denied. At trial, the State offered testimony of both the girl and the postal carrier about the day in question, and of the gas station attendant concerning the 1977 exposure incidents. Malvitz was found guilty, and afterwards brought a motion for postconviction

[3] Although Malvitz was alleged to have been involved in three exposure instances altogether, he was only once given an ordinance violation and fined. At the preliminary hearing, the State only offered into evidence the one incident that resulted in a fine.

relief based on ineffective assistance of counsel. The motion was denied, and Malvitz appeals.

Malvitz first claims that the trial court erred by admitting evidence of the prior exposure incidents. Malvitz contends that the trial court erroneously exercised its discretion because the events occurred seventeen years prior to the enticement charge and were not sufficiently similar. We agree.

The trial court's decision to admit evidence of other acts is a discretionary one. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501-02 (1983). "We will uphold the trial court's decision to admit evidence if we can determine a reasonable basis for it." ***State v. Rushing***, 197 Wis.2d 631, 645, 541 N.W.2d 155, 161 (Ct. App. 1995). Greater latitude should be given to a trial court's admission of other acts evidence in sexual assault cases, particularly those involving children. ***State v. Friedrich***, 135 Wis.2d 1, 19, 398 N.W.2d 763, 770 (1987).

No matter how relaxed this standard is, however, there still is a standard that must be applied. Before admitting evidence of other crimes, wrongs, or acts, the trial court must apply a two-prong test: first, it must determine whether the evidence is admissible under § 904.04(2), STATS.;[4] and second, it must determine whether the probative value of the evidence is substantially outweighed by the prejudicial value of the evidence. ***State v. Kuntz***, 160 Wis.2d 722, 746-47, 467 N.W.2d 531, 540 (1991). As with all evidence, the evidence of

[4] Section 904.04(2), STATS., states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he 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."

prior bad acts must be relevant. ***Id***. In addition, when the prior acts are more remote in time, a greater degree of similarity is necessary to establish a link between the prior acts and the conduct charged. *See* ***State v. Mink***, 146 Wis.2d 1, 17, 429 N.W.2d 99, 104 (Ct. App. 1988); ***State v. Tabor***, 191 Wis.2d 482, 496, 529 N.W.2d 915, 920 (Ct. App. 1995).

We begin our analysis by noting that seventeen years had elapsed between the incidents of exposure and the enticement charge. A greater showing of similarities is therefore required. The earlier incidents, however, appear to be completely unrelated to the conduct at issue in this case. In the earlier incidents, Malvitz exposed his penis to a forty-seven-year-old woman while walking towards her at her workplace. In this case, Malvitz was charged with enticing a minor into his car for sexual gratification purposes. It is true, as the trial court noted, that both incidents occurred in the same area of Green Bay. But there is no suggestion that this demonstrates a common plan, or shows anything more than a coincidence. Further, it is also true, as the trial court noted, that a vehicle was involved in both incidents. But unlike the current charge, in the prior bad act the presence of the vehicle was only incidental—Malvitz had used it to get to the gas station, and then exposed himself while outside of the vehicle.

The trial court also noted that a sexual component was involved in both incidents. To accept this as a similarity is dangerous, however, for there is very little evidence that there was a sexual component to Malvitz's charged conduct. The trial court appears to have made a circular argument by using the prior act of exposure to suggest a similar sexual motive in Malvitz's current actions, and then, because of this similarity, admitting the prior act. We are

unwilling to follow this logic, and do not agree that in this case the existence of a sexual component constitutes a sufficient similarity.[5]

In examining the many cases dealing with the admission of prior bad acts, we are further persuaded that the similarities between the acts in question in this case are insufficient to show a logical connection. For example, in ***Rushing***, this court concluded that evidence of a prior consensual homosexual encounter was not sufficiently probative in a case involving an assault with a sleeping boy. In ***State v. Jeske***, 197 Wis.2d 905, 541 N.W.2d 225 (Ct. App. 1995), the defendant's suggestive remarks made to the sister of a sexual assault victim one year before the assault was rejected as insufficiently probative. In ***State v. Grant***, 139 Wis.2d 45, 406 N.W.2d 744 (1987), the State conceded that evidence of prowling introduced in a case involving a charge of burglary and sexual assault was inadmissible. In ***State v. Fishnick***, 127 Wis.2d 247, 378 N.W.2d 272 (1985), an instance of exposure to a young girl that occurred one week prior to an enticement charge was deemed inadmissible. Finally, in ***State v. Sonnenberg***, 117 Wis.2d 159, 344 N.W.2d 95 (1984), the court determined that conduct involving the propositioning of an adult woman was insufficiently similar to a charge of sexual contact with a minor. These cases reveal that, even under the relaxed standard, there still must be a sufficient similarity between the prior bad acts and the conduct charged before the prior acts are admissible.

Lacking such a similarity, the admission of the prior acts in this case appears to be a classic case of using character evidence to prove that Malvitz

[5] This is not to say that in other cases, such as where there is additional proof that a defendant intended sexual gratification purposes, similarities in the sexual components of incidents cannot be used to support the introduction of the prior acts.

committed the crime. The apparent rationale behind admitting this evidence was to demonstrate that Malvitz is a pervert. Because he is a pervert, therefore, we should conclude that his intent in attempting to entice this child into his car must have been for purposes of sexual gratification. Such arguments, however, are specifically excluded under our evidence code, § 904.04(1), STATS., which states that "evidence of a person's character … is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." We conclude that a new trial is therefore required.

Malvitz next argues that his trial counsel was ineffective for failing to challenge the decision to put Malvitz on the stand at the preliminary hearing.[6] Malvitz complains that it was his trial counsel's job to have challenged this decision, which he failed to do. *See* ***State v. Wolverton***, 193 Wis.2d 234, 254, 533 N.W.2d 167, 174 (1995) ("The law in Wisconsin is clear: '[a] defendant who claims error occurred at the preliminary hearing may only obtain relief *prior to trial*.'") (quoting ***State v. Webb***, 160 Wis.2d 622, 636, 467 N.W.2d 108, 114 (1991)) (emphasis in ***Wolverton***). Malvitz claims prejudice from these claimed errors because they "opened the door" for the jury to hear about the 1977 exposure incidents, and because the transcript was used for impeachment purposes at trial.

A claim of ineffective assistance of counsel is reviewed under the criteria established in ***Strickland v. Washington***, 466 U.S. 668 (1984). This involves a two-step process, and Malvitz must prove both steps. First, Malvitz must show that his counsel's actions fell below the objectively minimum standard

[6] Even though we have already concluded that Malvitz is entitled to a new trial, we address this issue because we believe it is reasonably likely that Malvitz will try to attack the preliminary hearing at the new trial.

required of attorneys, and involved errors so serious that Malvitz was deprived of his Sixth Amendment right to counsel. ***Id***. at 687-88. Strategic trial decisions that are rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. ***Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996). If counsel's performance was deficient, the second step requires the defendant to show that his defense was prejudiced by the deficiency. ***Strickland***, 466 U.S. at 687.

The decision to call a defendant to the stand is a strategic one. Strategic decisions are afforded great deference, and will only support a determination of ineffective assistance if they are not rationally based on the facts and the law. ***State v. Elm***, 201 Wis.2d at 464-65, 549 N.W.2d at 476. Given this high burden, we cannot conclude that it was erroneous to put Malvitz on the stand at the preliminary hearing. While it may now appear that this decision was not the best one, we must make every effort to avoid using the benefit of hindsight in reviewing counsel's conduct. ***State v. Foy***, 206 Wis.2d 628, 639, 557 N.W.2d 494, 498 (Ct. App. 1996). The evidence in support of the charge against Malvitz was not overwhelming, and counsel could reasonably conclude that there was a chance to avoid a trial by introducing an innocent explanation of Malvitz's conduct. Because this decision does not rise to the level of deficient representation, trial counsel's failure to challenge it was also not deficient. Malvitz has therefore failed to meet his burden in establishing the ineffective assistance of counsel, and we need not further address the existence of prejudice.

Finally, Malvitz contends that there was insufficient evidence to support the conviction of child enticement. Although we have already concluded that Malvitz is entitled to a new trial, double jeopardy considerations require this

court to address the claim that the conviction was not supported by sufficient evidence. ***Rushing***, 197 Wis.2d at 641, 541 N.W.2d at 159.

Section 948.07, STATS. (child enticement), requires that the accused have the intent to, *inter alia*, have sexual contact, expose a sex organ, or cause bodily harm to the child. Malvitz claims that there was no evidence to support any such intent on his part. We conclude, however, that even in the absence of the prior acts evidence, there was sufficient evidence to support Malvitz's conviction.

When this court reviews a challenge to the sufficiency of the evidence, the test is whether there is evidence that, if believed and rationally considered by the factfinder, would be sufficient to prove the defendant's guilt beyond a reasonable doubt. ***State v. Bembenek***, 111 Wis.2d 617, 639, 331 N.W.2d 616, 627 (Ct. App. 1983). The standard of review for sufficiency of the evidence requires us to search the record for evidence and reasonable inferences that can be drawn to support the factfinder's determination. ***Peissig v. Wisconsin Gas Co.***, 155 Wis.2d 686, 702-03, 456 N.W.2d 348, 355 (1990). Circumstantial evidence is sufficient to support a conviction. ***State v. Poellinger***, 153 Wis.2d 493, 505-07, 451 N.W.2d 752, 757-58 (1990). The credibility of witnesses and the weight to be attached to their evidence is a matter within the exclusive province of the trier of fact. ***Lellman v. Mott***, 204 Wis.2d 166, 170-71, 554 N.W.2d 525, 527 (Ct. App. 1996).

Malvitz contends that he approached the young girl while in his vehicle because he was concerned that she was in trouble, scared, or cold. He testified that he reached these conclusions because she looked upset and was inappropriately dressed for the weather. There is other evidence, however,

indicating that the girl was not inappropriately dressed, was walking casually to her home, and did not appear to be in distress.

Direct evidence of a defendant's intent is frequently a matter to be determined from circumstantial evidence. In this case, Malvitz concedes that he approached the young girl in question twice, that he paused at an intersection for several minutes, and that he asked her if she wished to take a ride in his car. Although he claimed that his intent was innocent and that he paused at the intersection only to refill his coffee cup, the jury was not required to accept his explanation. Malvitz's behavior, which so concerned the postal carrier that he decided to follow him, and the fact that Malvitz's testimony about the girl's apparent distress was inconsistent with other testimony, are sufficient to permit a finding that his actions were intended for some type of sexual gratification. Therefore, we reject Malvitz's argument that the evidence was insufficient to support the conviction.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.