COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2455-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN J. A.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

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

PER CURIAM. Warren J. A. appeals from a judgment convicting him of three counts of first-degree sexual assault of a child, § 948.02(1), STATS., and one count of incest with a child, § 948.06(1), STATS., and from an order denying his postconviction motion for a new trial. We affirm.

Warren was accused of having sexual contact with his daughter and her friend, R.L. Both girls were ten years old at the time of the contact. The girls alleged that during a sleepover at Warren's house, he entered his daughter's room and sexually touched both girls. The jury convicted Warren. Warren sought a new trial on the grounds that evidence that he had sexually assaulted his daughter for several years prior to the charged incidents was impermissible other acts evidence and trial counsel was ineffective for failing to object to this evidence or seek a mistrial. The trial court rejected both claims.

We recite the facts relevant to this appeal. At trial, a Racine county sheriff's detective testified that the daughter told her that Warren entered her bedroom and sexually touched her and R.L., that R.L. yelled at Warren, his daughter tried to kick him and Warren left the room. A second sheriff's interview occurred after the mother reported that the daughter stated that Warren had been having sexual contact with her from the time she was three years old until she was seven or eight years old. During the second interview, the daughter told the detective that "this had happened a lot of times." The daughter stated that Warren would enter her room, strip her and "touch her private parts."

Warren's appellate challenge to the evidence and trial counsel's handling of it turn on the admissibility of the evidence. Because trial counsel did not object to the evidence at trial, we must look to the postconviction motion hearing for a record of the basis for an objection, why the objection was not made, and how the trial court would have ruled had such an objection been made.

At the postconviction motion hearing, trial counsel testified that he did not object to the detective's testimony because his theory of defense was that the contact did not occur and that the daughter was coached, manipulated or

pressured by law enforcement and others to fabricate the allegations against Warren. Counsel noted that at trial, the daughter recanted testimony she had given at the preliminary examination which corroborated R.L.'s version of events.[1] Counsel testified that he was aware of the accusations of past sexual contact and that he intended to use those accusations to bolster his theory that the daughter was pressured to make the accusations and "the system went amuck" in Warren's case, resulting in an incomplete investigation of other possible perpetrators. Counsel also declined to seek a limiting instruction so as not to emphasize the evidence for the jury.

The trial court found that trial counsel's decision not to object to evidence of prior sexual contact was a matter of reasonable trial strategy, and even if counsel had objected, the evidence would have been admissible to show "a course of conduct" and for "a whole host of reasons." Because the evidence was admissible, the court concluded that Warren was not prejudiced by trial counsel's failure to object to it.

While § 904.04(2), STATS., "precludes the admission of character or propensity evidence, it permits the admission of other acts evidence if its relevance does not hinge on an accused's propensity to commit the act charged." ***State v. Sullivan,*** 216 Wis.2d 768, 783, 576 N.W.2d 30, 37 (1998). Among the evidential propositions which do not violate the propensity inference are plan, motive and intent. *See* ***id.***

[1] At the preliminary examination, the daughter testified that Warren was in the room when R.L. was pinching her to get her attention and that he fled thereafter. At trial, the daughter denied that anything happened on the night in question but recalled that R.L. pinched her to wake her up.

Our supreme court has stated "that a greater latitude of proof is to be allowed in the admission of other acts evidence in sex crime cases, particularly those involving a minor child." ***State v. Mink,*** 146 Wis.2d 1, 13, 429 N.W.2d 99, 104 (Ct. App. 1988). What is required is to place "the other acts evidence within one of the well-established exceptions of sec. 904.04(2), Stats." ***Mink***, 146 Wis.2d at 14, 429 N.W.2d at 104. We conclude that evidence that Warren had previous sexual contact with his daughter was offered for and relevant to these permissible purposes. *See* ***Sullivan,*** 216 Wis.2d at 785, 576 N.W.2d at 38. The prior instances of sexual contact were relevant to Warren's plan, motive[2] and intent[3] to enter his daughter's room at night and have sexual contact with her. As the State persuasively argues on appeal, the daughter's reference to Warren having done "this" to her "a lot of times" supports an inference that she was referring to the same type of conduct which formed the basis for the charged crimes.

Additionally, the purpose of greater latitude in other acts evidence in this area of the criminal law is borne out by the daughter's recantation at trial and the attempt to portray her as having been pressured to make the allegations. One purpose of the greater latitude rule is "to corroborate the victim's testimony against a credibility challenge by the defense. Such a challenge may involve the possibility of fantasy, unreliability or vindictiveness on the part of the child-

---

[2] Although motive is not an element of any crime, *see* ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988), "[m]atters going to motive ... are inextricably caught up with and bear upon considerations of intent ...." ***State v. Johnson***, 121 Wis.2d 237, 253, 358 N.W.2d 824, 832 (Ct. App. 1984). Intent is an element of the crimes with which Warren was charged. *See* §§ 948.02(1), 948.01(5)(a), STATS.

[3] Warren argues that evidence of prior sexual contact was not relevant to intent because he denied having been in the girls' bedroom. Because the State had the burden of proof on all elements of the offenses, including intent, the State was entitled to use this evidence to satisfy that burden. *See* ***State v. Plymesser,*** 172 Wis.2d 583, 594-95, 493 N.W.2d 367, 372 (1992).

victim." ***Mink***, 146 Wis.2d at 14, 429 N.W.2d at 104. Here, although the other acts evidence came in through a detective's testimony, Warren's defense to the girls' accusations—that the events did not occur and that the daughter fabricated the allegations—is akin to that offered in ***Mink*** as justification for the greater latitude rule.

Having determined that the evidence fell within permissible exceptions to § 904.04(2), STATS., we turn to the probative value of the other acts evidence. Its value depends on the other incident's nearness in time, place and circumstances to the alleged crime. *See* ***Sullivan,*** 216 Wis.2d at 786, 576 N.W.2d at 38. Here, the prior abuse continued for several years and inferentially occurred in the same manner as the charged crimes. "Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the probative value lies in the similarity between the other act and the charged offense." ***Id.***

Finally, we consider whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *See* ***Sullivan***, 216 Wis.2d at 789, 576 N.W.2d at 39-40. A trial court implicitly determines that probative value outweighs prejudice when it denies defense motions challenging the evidence after conviction. *See* ***State v. Shillcutt,*** 116 Wis.2d 227, 237, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Given the greater latitude test in cases such as these, we conclude that the evidence's probative value outweighed its prejudicial effect.

Because evidence of prior sexual contact was properly admitted, trial counsel was not ineffective for not objecting to it. *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed).

We reject Warren's contention that the evidence was misused in closing. Warren contends that the prosecutor essentially argued that because Warren assaulted his daughter for many years prior to the charged crimes, he must be guilty of the charged crimes. We disagree with Warren's characterization of the prosecutor's closing argument. She did not expressly argue to the jury that it should convict Warren of the charged offenses because he committed similar acts in the past. Rather, the references to the past abuse were intended to address the jury's possible reluctance to believe that a man would have sexual contact with a ten-year-old girl and that one of the victims was his daughter.

Warren complains that the State did not give formal pretrial notice of its intent to introduce other acts evidence. However, at the postconviction motion hearing, defense counsel testified that he was aware of this evidence and prepared a strategy to meet it. Even if the State had a pretrial obligation to disclose its intent to use this evidence, which we need not decide, we fail to see any prejudice to Warren arising from the lack of formal pretrial notice in this case.

Finally, Warren argues that the trial court erroneously excluded evidence that other children had spent the night at his house without incident. At the postconviction motion hearing, trial counsel testified that he moved the court to admit evidence that other children who stayed overnight or regularly gathered at Warren's house were not sexually assaulted. The trial court ruled that the evidence was prohibited under ***State v. Tabor,*** 191 Wis.2d 482, 529 N.W.2d 915 (Ct. App. 1995). We agree. ***Tabor*** prohibits the introduction of this evidence because it is not relevant to the question of whether Warren assaulted his daughter and R.L. *See* ***id.*** at 496-97, 529 N.W.2d at 921. "[E]vidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." ***Id.*** at 497, 529 N.W.2d at 921 (quoted source omitted).

By the Court.—Judgment and order affirmed.

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