COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3284-CR **Cir. Ct. No. 01-CF-7**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

EDWARD L. SNIDER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State of Wisconsin appeals an order denying its motion to admit "other acts" evidence in a sexual assault prosecution against Edward Snider. The State argues that the trial court erroneously exercised its

discretion when it applied an incorrect legal standard under WIS. STAT. § 904.04.[1] We agree. Therefore, we reverse the order and remand for further proceedings.

BACKGROUND

¶2 Snider was charged with one count of third-degree sexual assault and one count of fourth-degree sexual assault. The complaint alleged that in December 1998, Snider placed his hand under the sixteen-year-old victim's shirt and touched her breast for purposes of sexual gratification. The complaint also alleged that in November 2000, when the same victim was eighteen, she had passed out due to intoxication and awoke to find Snider's finger inserted into her vagina.

¶3 Following a preliminary hearing, Snider was bound over for trial.[2] The State filed a motion to admit "other acts" evidence under WIS. STAT. § 904.04. The "other act" consisted of a September 2000 incident in Minnesota, when the same victim passed out due to intoxication and awoke to find Snider had inserted his fingers in her vagina. The State argued that the evidence would establish opportunity, preparation and plan.

¶4 Snider argued against the admission of the Minnesota incident, suggesting that the general rule for "other acts" evidence is one of presumed

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The State discusses that it did not object to Snider's motion to sever the charges, but the record does not contain an order indicating the charges were severed. The parties, nonetheless, assume for purposes of this appeal that the charges will be severed at trial.

inadmissibility. He also argued that the law prohibited application of the "greater latitude" rule because the complainant was not a young child.

¶5 The trial court pointed out that the greater latitude rule applied in child sexual assault cases and where the alleged victim was developmentally disabled or suffered some sort of diminished capacity. The court accepted that there is a general prohibition against the admissibility against "other acts" evidence and agreed with Snider that the "greater latitude" rule was not applicable in this case. The court stated that its concern was that "opportunity converts to the word propensity."

¶6 The court also noted introducing evidence of the Minnesota incident might unfairly force Snider to defend a mini-trial on the Minnesota charge arising out of the incident. On these bases, the court concluded that the probative value of the Minnesota incident was "substantially outweighed by the danger of unfair prejudice" and that the evidence might so confuse a jury that it might not make a decision based on evidence of a crime in Wisconsin. The court denied the State's motion.[3]

[3] We note that Snider's statement of the case, statement of facts and argument contain just one record citation. This single citation is inadequate and violates the rules of appellate procedure. *See* WIS. STAT. RULE 809.19(1)(d) and (e). Although Snider's brief also includes two parentheticals each with a number, this is insufficient to indicate the source.

The rules of appellate procedure are designed to facilitate review, and inadequate compliance hampers our ability to address the issues and consumes judicial resources. Compliance with these rules is required because a high-volume intermediate appellate court is an error-correcting court that is without the judicial resources to sift the record for facts that might support an appellant's contentions. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

(continued)

STANDARD OF REVIEW

¶7 "We review a circuit court's decision to admit evidence under a discretionary standard." ***State v. Veach***, 2002 WI 110, ¶55, __ Wis. 2d __, 648 N.W.2d 447. The question is not whether this court would have made the same ruling as the trial court, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. ***State v. Rushing***, 197 Wis. 2d 631, 645, 541 N.W.2d 155 (Ct. App. 1995). Generally, this court will uphold the trial court's ruling on the admissibility of evidence if there is a reasonable basis for the trial court's decision. ***Id.*** If a court exercises discretion based on an erroneous legal standard, its conduct exceeds the limits of discretion. ***State v. Wyss***, 124 Wis. 2d 681, 734, 370 N.W.2d 745 (1985).

DISCUSSION

¶8 The State argues that the trial court erroneously exercised its discretion because it based its decision on an error of law. We agree. "[T]he law concerning the admissibility of other crimes evidence creates neither a presumption of exclusion nor a presumption of admissibility." ***State v. Speer***, 176 Wis. 2d 1101, 1116, 501 N.W.2d 429 (1993).

¶9 The admissibility of other acts evidence is governed by WIS. STAT. §§ 904.04(2) and 904.03. Section 904.04(2) bars proof that an accused committed

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As we have observed, this court cannot continue to function at its current capacity without requiring compliance with the rules of appellate procedure, the purpose of which is to facilitate review. *See* ***Cascade Mtn., Inc. v. Capitol Indemn. Corp.***, 212 Wis. 2d 265, 270 n.3, 569 N.W.2d 45 (Ct. App. 1997). We remind counsel that failure to comply with the rules of appellate procedure is subject to sanction under WIS. STAT. RULE 809.83(2), including summary reversal, striking of the paper and imposition of penalties. We do not apply those sanctions here, but address the merits of Snider's arguments.

some other act for the purpose of showing he or she had a corresponding character trait and acted in conformity with that trait:

> **(2)** 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.

¶10 When considering the admissibility of other acts evidence, the court begins with a three-part analysis set out in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? …
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

Id. at 772.

¶11 At each step of the ***Sullivan*** test, the court may apply the "greater latitude" rule. ***Veach***, 2002 WI 110 at ¶53. "Like many other U.S. jurisdictions, Wisconsin courts permit 'a more liberal admission of other crimes evidence' in sexual assault cases than in other cases." ***State v. Davidson***, 2000 WI 91, ¶44, 236 Wis. 2d 537, 613 N.W.2d 606 (footnote omitted). This rule does not, however, relieve a court of the duty to ensure that the other acts evidence is

offered for a proper purpose under WIS. STAT. § 904.04(2) and is admissible under the other rules of evidence. ***Id.*** at ¶52.

¶12 Here, the court agreed with the State that it had met the first two prongs of the ***Sullivan*** test. However, when addressing the third prong, it concluded that admitting the evidence for the purpose of showing "opportunity" under WIS. STAT. § 904.04(2) was the equivalent of "propensity" and therefore led to unfair prejudice. We conclude that the court's reasoning rests on a misstatement of the law. Opportunity is a permissible basis for admission and is distinct from propensity. *See* ***Sullivan***, 216 Wis. 2d at 783 ("The second sentence in § (Rule) 904.04(2) sets forth a series of evidential propositions which do not violate the propensity inference: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").[4]

¶13 We also conclude that the trial court misstated the "greater latitude" rule. The court stated that the "greater latitude" rule would not apply because the victim was not a child or suffering from some sort of diminished capacity. However, our supreme court has stated: "[I]n sexual assault cases, especially those involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial." ***Davidson***, 2000 WI 91 at ¶51. Also, our supreme court

> has stated that a "greater latitude of proof as to other like occurrences" is evident in Wisconsin cases dealing with sex crimes, expecially those dealing with incest and indecent liberties with a child. *Hendrickson v. State*, 61 Wis. 2d

[4] We recognize the trial court's legitimate struggle in not reaching a distinction between the concepts of opportunity and propensity in this case. We are, however, bound by our supreme court's statement of law. ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979).

> 275, 279, 212 N.W.2d 481 (1973). This "greater latitude of proof" standard as applicable to other-acts evidence in sex crimes cases was recently reaffirmed by this court in *State v. Fishnick*, 127 Wis. 2d 247, 378 N.W.2d 272 (1985). The *Fishnick* court stated: "We reaffirm, however, our commitment to the principle that a greater latitude of proof is to be allowed in the admission of other-acts evidence in sex crimes cases, particularly in those involving incest and indecent liberties with a minor child." *Id.* at 257. (Footnote omitted.)

State v. Friedrich, 135 Wis. 2d 1, 19-20, 398 N.W.2d 763 (1987). We accordingly read these statements to hold that the "greater latitude" rule for admission of "other acts" evidence is applicable to all sex crimes cases, *not exclusively* those involving children. *See* ***Davidson***, 2000 WI 91 at ¶44.

¶14 Because the trial court misstated the law when it concluded that there was a general prohibition against the admissibility of other acts evidence, that opportunity was equivalent to propensity and that the greater latitude rule was inapplicable, it erroneously exercised its discretion when it addressed the third prong of the ***Sullivan*** test. Accordingly, we reverse the order and remand to the trial court to exercise its discretion under the appropriate legal standard.

By the Court.—Order reversed and cause remanded with directions.

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