COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2637-CR **Cir. Ct. No. 00-CF-435**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MARK D. PETT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Reversed and cause remanded with directions*.

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

¶1 HOOVER, P.J. The State appeals an order suppressing evidence in its case against Mark Pett. The trial court ruled that the State's failure to timely file a ***Whitty*** motion required the suppression of certain evidence the State wanted to introduce. *See* ***Whitty v. State***, 34 Wis. 2d 278, 292-97, 149 N.W.2d 557

(1967). Because no statute or case law requires the State to file such a motion before trial, we reverse the order and remand with directions.

Background

¶2 In 2000, the State charged Pett with violating WIS. STAT. § 948.02(1),[1] first-degree sexual assault of a child, for an event that allegedly occurred in 1995. The court heard several motions in limine. One motion Pett filed on June 14, 2001, sought an order:

> Prohibiting the prosecution from introducing any evidence concerning alleged acts of criminal or other misconduct by the Defendant either prior to or following the date of the alleged offense charged in the Complaint on the ground that the probative value of such other misconduct evidence, if any, is outweighed by its prejudicial effect, and by the likelihood that the jury would infer that the Defendant is predisposed to commit crimes, was predisposed to commit the crime charged in the Complaint, and therefrom conclude the ultimate questions in this case upon an improper basis.

¶3 At the July 12, 2001, hearing on this motion, the State indicated it believed Pett was referring to another sexual assault for which he had been convicted, as well as the fact that he was registered as a sex offender. The State commented that it had reviewed the prior conviction and concluded it was not sufficiently similar to the assault in this case to be admissible under WIS. STAT. § 904.04(2). Thus, the State declined to seek introduction of Pett's prior assault conviction. Consequently, Pett stated that his motions had been sufficiently

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

addressed. The court order permitted the State to ask only if Pett had been convicted of crimes and, if Pett answered "yes" on the stand, how many.

¶4 In August 2002, Pett filed another motion in limine, this time seeking an order "Clarifying the Court's Order …. Specifically, prohibiting … reference to prior statements made by the Defendant concerning underage females [and l]imiting the testimony of the State's witnesses … by prohibiting each of said state witnesses from testifying to hearsay …."

¶5 At the hearing on the motion, Pett explained that through discovery he learned there were allegations that he had made a statement to another individual "regarding some young females, that, ooh, look at this young female. She looks good enough to, whatever." Pett argued that this constituted an "other act," subject to exclusion under WIS. STAT. § 904.04(2) because the State did not file a ***Whitty*** motion. *See* ***id.*** at 292-97. The State argued that the comments were not other acts evidence and were relevant to Pett's mindset. Pett also explained that one of the State's witnesses would testify that the complainant was laying on top of him and that the complainant was "touchy feely" with him. These, Pett claimed, were also inadmissible other acts.[2]

¶6 The court determined the evidence constituted other acts and ruled that because the State "failed to file a Whitty or 'other acts motion' in a timely manner and the trial is scheduled less than 24 hours from the time of said motion hearing, [this] 'other acts evidence' is prohibited from coming into evidence …."

[2] These three pieces of evidence—defendant's prior statements, the claim the victim was laying on top of him, and the claim the victim was "touchy feely"—will be referred to collectively as "the evidence."

The State appeals under WIS. STAT. § 974.05(1)(d)2, which allows it to bring an interlocutory appeal from a non-final order suppressing evidence.

Discussion

¶7 Whether to admit other acts evidence is, like any evidentiary rule, committed to the trial court's discretion. *See* ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 528, 261 N.W.2d 434 (1978). We will review a trial court's discretionary decision to determine whether the court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

¶8 If a trial court does not delineate the facts influencing its decision, it has erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). An error of law also constitutes an erroneous exercise of discretion. ***State v. Hutnik***, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968). If this court determines that the trial court erroneously exercised its discretion, we reverse and remand to provide the trial court with the opportunity to properly exercise its discretion. *See* ***King v. King***, 224 Wis. 2d 235, 254, 590 N.W.2d 480 (1999).

¶9 We conclude that the trial court erroneously exercised its discretion in two ways. First, it erred when it excluded the evidence because of the State's "failure" to file a pretrial motion; no statute or case law requires the State to do so under the circumstances before us. The trial court also erred because it failed to articulate any other reasoning from which we could determine a rational basis for its ruling that the evidence offered was other acts evidence. *See* ***Bunch***, 191 Wis. 2d at 506-07.

Admission of Other Acts Evidence

¶10 In determining whether to admit other acts evidence under WIS. STAT. § 904.04(2), a court must engage in the three-step analysis set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The framework is as follows:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2) …?
>
> (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? *See* Wis. Stat. § (Rule) 904.03.

Id. at 772-73 (footnote omitted). "[T]he admissibility of other acts evidence is not controlled by predispositions or presumptions …." ***State v. Speer***, 176 Wis. 2d 1101, 1111, 501 N.W.2d 429 (1993). Thus, there is no inherent pretrial burden on the State to seek admission of other acts evidence, nor can there be a burden on the defendant to seek the evidence's exclusion.

¶11 This is not to say, however, that we will never hold one side to have erred for failure to bring a pretrial motion for the introduction of evidence. In ***State v. Fink***, 195 Wis. 2d 330, 536 N.W.2d 401 (Ct. App. 1995), we reversed a trial court decision denying Fink a continuance when the State filed a ***Whitty*** motion one week before trial. ***Id.*** at 334. We concluded that the motion was untimely because it unfairly prejudiced Fink's ability to fashion a defense. ***Id.*** at 343. In other cases, failure to disclose other acts evidence a party seeks to admit

may well be a discovery violation, sanctionable by suppression.[3] Finally, a trial court has the authority to order that certain matters be considered before trial.[4]

¶12 Sometimes, however, a pretrial motion is legitimately unanticipated, as happened here. The State contended that it did not believe the evidence it sought to admit was other acts evidence.[5] Thus, the evidence was not discussed at the first motion hearing. For this reason, as well as those already articulated, we cannot hold that all attempts to introduce or exclude other acts evidence must be addressed before trial, even though such timing is usually advisable.

¶13 Indeed, if the evidence the State tries to introduce is not other acts evidence, the circuit court would err as a matter of law by requiring a ***Whitty*** motion. Presently, however, we need not consider whether the evidence in this case is other acts evidence under WIS. STAT. § 904.04(2); we must give the trial court an opportunity to exercise its discretion in that matter. *See* ***King***, 224 Wis. 2d at 254.

¶14 The trial court concluded without discussion that the State's evidence was other acts evidence and excluded it solely on the basis of the State's failure to file a ***Whitty*** motion. As indicated, however, the court cannot

[3] We note here that Pett did seek, as part of discovery, notice of all other acts evidence the State intended to use against him. Pett, however, alleges no discovery violation or unfair prejudice or surprise and, in any event, the State maintains it did not believe the evidence to be other acts evidence.

[4] Jefferson County, for instance, has a local rule requiring the court to hear motions to admit or exclude other acts evidence no later than ten days before trial. Jefferson County, Wis., Cir. Ct. R. of Crim. P. IIc.

[5] On appeal, the State devotes considerable effort to demonstrate that the assistant district attorney's belief was correct.

automatically exclude other acts evidence because the State fails to seek its admission before trial. The State is not required to do so.

¶15 Pett attempts to raise several tangential arguments, none of which has merit. He claims first that the trial court engaged in an analysis weighing the probative value of the State's evidence against its prejudicial value. We can locate no such analysis in the record and Pett provides us with no citations. Second, Pett argues that the State should have known he would seek to have this evidence excluded, based on the first motion in limine. However, the State informed him that it thought he was referring to his previous conviction and sex registration and made appropriate concessions. Following those concessions, Pett indicated he was satisfied with the State's actions. Thus, while the first motion in limine was broadly worded, Pett applied it narrowly and the State had no reason to believe this evidence would be questioned later. Finally, Pett claims that much of the planned witness testimony is unsubstantiated. This is not an appellate court's concern; the credibility of witnesses and the weight to be given to their testimony are the province of the fact-finder. *See* WIS. STAT. § 805.17(2) (when trial is to the court); ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (when trial is to the jury).

¶16 On remand, the court must first articulate its evaluation as to whether the evidence the State wishes to admit is indeed other acts evidence under WIS. STAT. § 904.04(2). If the court determines the evidence is other acts evidence, it must conduct a ***Sullivan*** analysis to evaluate the evidence's admissibility. If the court determines some or all of the evidence is not other acts evidence and is not subject to another exclusionary rule, the court must still weigh the potential prejudice against the probative value of the evidence under` WIS. STAT. § 904.03 and articulate its reasoning.

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

Not recommended for publication in the official reports.