COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2275-CR **Cir. Ct. No. 2011CF97**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD D. GUITE, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Richard Guite, Sr., appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1)(b). Guite also appeals the order denying his postconviction motion for a new trial. Guite argues the trial court erroneously

exercised its discretion by admitting other acts evidence and by denying Guite's postconviction motion for a new trial based on newlydiscovered evidence. Alternatively, Guite urges this court to exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35[1] because justice has miscarried and the real controversy has not been fully tried. We reject Guite's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Guite with first-degree sexual assault of a child under age thirteen. The State filed four pre-trial motions to admit other acts evidence. The trial court granted three of the motions and provided a cautionary instruction to the jury about the other acts evidence. At trial, K. K. testified that in October 2006, when she was ten-years old, she attended a wedding vow renewal ceremony and reception for her mother and step-father. K. K. indicated that she returned home with her grandmother, three sisters and two half-brothers. The children's bedroom had two sets of bunk beds and, according to K. K., her older sister, N. K., slept on the bottom of one of the bunk beds with her two younger half-brothers, while K. K. slept on the top bunk. K. K. explained that the top bed of this metal bunk bed was narrower than the bottom and the bunk bed's ladder was broken.

¶3 K. K. testified that after going to bed she heard "a lot of noise coming from downstairs." Because the door to the bedroom was open, K. K. saw her grandmother helping Guite, who is her step-uncle, up the stairs. K. K. testified

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

that it appeared Guite "had been drinking." According to K. K., Guite later entered the children's bedroom; climbed up on her bed; held her down; removed her pants and underwear; and had penis-to-vagina intercourse with her. K. K. testified she then slapped Guite and pushed him off the bed. Guite consequently hit and bent the bed railing before falling to the floor and stumbling out of the room. K. K. further testified she was not aware of any of her siblings waking up. K. K. stated she did not report the assault because she was scared of Guite and embarrassed by the incident. K. K. wrote about the assault after she began keeping a journal in 2010. Her step-brother read the journal in December of that year and reported it to K. K.'s step-mother, who then contacted law enforcement.

¶4 K. K.'s grandmother testified she escorted the children home from the reception. According to the grandmother, however, N. K. was not with them, but arrived later with Guite and helped him up the stairs. None of the siblings purportedly in the bedroom at the time of the assault testified at trial. A jury found Guite guilty of the crime charged and the court imposed a forty-year sentence consisting of thirty years' initial confinement and ten years' extended supervision. Guite filed a postconviction motion for a new trial based on newlydiscovered evidence. The motion was denied after a hearing and this appeal follows.

DISCUSSION

¶5 Guite contends the trial court erroneously exercised its discretion by admitting other acts evidence. The admissibility of evidence lies within the trial court's sound discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). The court must engage in a three-step analysis to determine the admissibility of other acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is

offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.*** at 772-73. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant[2] and, finally, whether its probative value outweighs the danger of unfair prejudice. ***Id.*** Further, Wisconsin recognizes that in child sexual assault cases, courts permit "greater latitude of proof as to other like occurrences." ***State v. Davidson***, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606.

¶6 Here, the State sought to admit the testimony of three individuals who claimed they had been sexually assaulted by Guite when they were thirteen to fourteen years old. Two of the individuals, B. G. and D. G., were related to Guite, although the State was prohibited from specifying how they were related. The State was also prohibited from informing the jury that Guite had been convicted of the second-degree sexual assault of B. G. The third individual, J. M., was the sister of Guite's ex-girlfriend.

¶7 D. G. claimed that in 1985, when she was thirteen years old, she accompanied Guite, who was an over-the-road trucker, on a trip. D. G. indicated that while in the sleeping quarters of the truck, Guite woke her up and had penis-to-vagina intercourse with her. D. G. added that Guite attempted sexual intercourse with her one month later, when D. G. was at Guite's home. Next,

[2] In assessing relevance, we must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

J. M. claimed that in 1991, when she was thirteen years old, Guite drove her from Wisconsin to California to visit her mother for the summer. According to J. M., Guite had sexual intercourse with her in the sleeping quarters of the truck every night of the four-night trip. J. M. further claimed that during the return trip to Wisconsin at the end of the summer, Guite again had sexual intercourse with J. M., who was then fourteen years old. Finally, B. G. claimed that in 1993, when she was thirteen or fourteen years old, she awoke to Guite, a relative she lived with at the time, touching her vaginal area. Guite then rubbed his penis on her vaginal area.

¶8 The trial court granted the motions to admit this evidence, concluding it was properly offered to show motive; it was relevant; and the probative value outweighed the danger of unfair prejudice or confusion. The court, however, cautioned the jury that the other acts evidence was received only "on the issue of motive, that is, whether the defendant has a reason to desire the result of the offense charged." The jury was also specifically told not to consider the other acts evidence as proof "that the defendant is a bad person [and] for that reason is guilty of the offense charged."

¶9 Guite argues the trial court erred by determining that the other acts evidence established motive because the prior assaults were too remote in time to K. K.'s assault. Specifically, Guite contends that "[t]he persistence of a motive for sexual contact with minors in spite of being sanctioned by the criminal justice system in the interim was not established by the State." Guite also asserts the other acts evidence was not relevant under ***Sullivan***, both because of the thirteen-year gap between the last other acts offense and K. K.'s assault, and because of the age difference between ten-year-old K. K. and the thirteen- and fourteen-year old D. G., B. G. and J. M. Finally, claiming the other acts evidence "merely bolstered

a weak case," Guite contends the probative value of its admission did not outweigh the danger of unfair prejudice.

¶10 It is within the trial court's discretion to determine whether other acts evidence is too remote. ***State v. Hammer***, 2000 WI 92, ¶33, 236 Wis. 2d 686, 613 N.W.2d 629. "Even when evidence may be considered too remote, the evidence is not necessarily rendered irrelevant if the remoteness is balanced by the similarity in the two incidents." ***Id.*** Here, the trial court reasonably exercised its discretion by determining it was appropriate to admit other acts evidence establishing Guite's motive to sexually assault sleeping young girls with a close relationship to him. The court properly determined the other acts evidence was relevant to motive, given the similarities between the prior acts and the sexual assault of K. K., despite the passage of time and the three-to-four-year age difference between K. K. and the other girls.

¶11 Further, the trial court properly concluded the probative value of the other acts evidence was not outweighed by the risk of unfair prejudice. First, the court limited the evidence to keep the jury from knowing Guite had been convicted for one of the other acts. The State was also prohibited from revealing the specific nature of Guite's familial relationships to two of the victims. Moreover, the court carefully instructed the jury on how it should consider the other acts evidence, and we presume the jury followed the court's instructions. *See* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). We therefore conclude the trial court reasonably exercised its discretion by admitting the other acts evidence, and we reject Guite's claim that he is entitled to a new trial based on the admission of that evidence.

¶12 Guite also argues the trial court erroneously exercised its discretion by denying his motion for a new trial based on newly discovered evidence. A trial court may grant a new trial based on newly discovered evidence if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Terrance J.W.***, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). "If the newly discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial." ***State v. Avery***, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997).

¶13 Here, the newly discovered evidence consisted of a statement from K. K.'s step-cousin, E. D., as well as statements from three of K. K.'s siblings who Guite's investigator was prevented from interviewing before trial. At the postconviction hearing, E. D.—who was seven years old when the assault occurred—claimed she was sleeping in the bedroom with K. K. and the other children on the night of the assault. E. D. asserted that contrary to K. K.'s testimony, K. K. was on the bottom bunk and K. K.'s older sister was on the top bunk. E. D. claimed that metal bunk beds are generally very "squeaky" and would have made enough noise to wake someone had anyone attempted intercourse on the bed. E. D. also related that she did not recall Guite coming into the children's bedroom. Although E. D. allegedly told the investigator that she saw Guite at the residence the next morning, still wearing his tuxedo, she testified at the hearing that she did not recall seeing him in the morning.

¶14 K. K.'s older sister, N. K., testified that she returned from the reception with her grandmother and sisters. Although N. K. recalled that E. D.

was supposed to sleep at the house, N. K. testified that E. D. did not travel back to the house with them and N. K. did not remember seeing E. D. there that night. When Guite later arrived intoxicated, N. K. escorted him upstairs. N. K. testified she then slept on the floor downstairs and her grandmother slept on the couch. K. K.'s younger sisters—aged seven and eight on the night of the assault—testified they did not recall seeing E. D. at the residence the night of the reception. Neither recalled seeing an adult male in the upstairs bedroom where they slept, and neither recalled waking to any noise during the night, though one of the younger sisters recalled that the top bed of the metal bunk was "squeaky."

¶15 The trial court determined that the proffered evidence was discovered after the conviction; Guite was not negligent in seeking the evidence; the evidence was material; and the evidence was not merely cumulative. Guite challenges the trial court's ultimate determination that there was no reasonable probability the jury would have had a reasonable doubt about Guite's guilt had it heard the new evidence. Guite argues that if the jury heard the new testimony—specifically, the contradictions to K. K.'s trial testimony, and the fact that nobody awoke from the sounds of a squeaky metal bunk bed or Guite's fall to the floor—it is reasonably probable a jury would have reached a different verdict. We are not persuaded.

¶16 First, the trial court found E. D.'s testimony to be incredible, intimating it was implausible for a fourteen-year-old girl to remember exactly where several children and her grandmother slept seven years earlier when there was no event distinguishing that night from any other. The trial court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS.

STAT. § 805.17(2). The court's credibility determination is supported by the record. None of the other witnesses, including the grandmother, recalled E. D. being present at the house on the night of the reception. E. D.'s testimony, much of which conflicts with that of other witnesses, was therefore questionable under the circumstances.

¶17 Even assuming E. D. was in the house that night, there is no reason to believe her testimony or that of K. K.'s sisters would have undermined the jury's verdict. K. K. testified at trial that her siblings were in the room during the assault and there was no evidence that any of them heard the assault or awoke to Guite falling on the ground. Thus even had E. D. and K. K.'s sisters testified that they were in the room and unaware of Guite's presence, it would have added nothing more to K. K.'s story. The jury was aware there were several children in the bedroom who did not awake to the assault or its immediate aftermath. To the extent Guite alternatively emphasizes that different children had different memories of the night of the assault, there is nothing unusual, incredible or nefarious about these divergent recollections. It is to be expected that anyone, especially children, would have slightly different memories of things like sleeping arrangements on a particular night so long ago. Because it is not reasonably probable that a different result would be reached at a new trial based on the proffered evidence, we conclude the trial court properly exercised its discretion by denying Guite's motion for a new trial.

¶18 Alternatively, Guite seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Guite must convince us "that the jury was precluded from considering 'important

testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Guite "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶19 Guite emphasizes he went to trial deprived of not only E. D.'s testimony, but the testimony of K. K.'s sisters "who were in a position to have noticed if Guite was in the bedroom having intercourse with K. K." As the State argues, however, it cannot be said that the absence of the new testimony precluded the jury from hearing evidence on an important issue. The testimony of E. D. and K. K.'s sisters does not obscure K. K.'s trial testimony that Guite entered the bedroom with several other people present, that he sexually assaulted her, and that no one awoke during or after the assault. It is unreasonable to assume the jury did not consider the plausibility of this scenario and the evidence before it. The real controversy—whether Guite assaulted K. K.—was fully tried even without the new testimony. Guite also reiterates that the other acts evidence "bootstrapped Guite's unfortunate past onto a weak case and resulted in a conviction." Because we have already rejected Guite's challenge to the admission of other acts evidence, we will not grant a new trial based on that properly admitted evidence. Upon our review of the record, we conclude Guite has failed to show that the real controversy has not been fully tried or that justice has for any reason miscarried.

Therefore, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Guite a new trial.

By the Court.—Judgment and order affirmed.

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