

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP1748-CR
2015AP1749-CR**

**Cir. Ct. Nos. 2010CF168
2010CF578**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDDIE D. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Eddie D. Walker appeals from a judgment of conviction entered after a jury found him guilty of two counts of first-degree sexual assault and from an order denying postconviction relief. Walker's

convictions arise from two separate incidents involving different females, C.H. and J.N. Walker challenges the circuit court's admission of evidence that he sexually assaulted a third female, B.V., on a different occasion. We conclude that the circuit court properly exercised its discretion in admitting the other acts evidence. We affirm.

¶2 In February 2010, Walker and a codefendant, Keith Bailey, were charged with sexually assaulting a seventeen-year-old female, C.H. Bailey and C.H. were friends and Bailey arranged to pick her up at a gas station. Bailey arrived with Walker, whom he introduced as his brother, "Memphis." Bailey told C.H. they were going to a party and drove to his aunt's house. Bailey directed C.H. down to the basement and he and Walker followed behind. Bailey and Walker began making sexually suggestive comments and eventually, Bailey pushed C.H. down on the couch and said, "You're gonna give me and my brother something." Bailey grabbed C.H.'s hair, forced her head into his lap, and made her perform fellatio. Walker then grabbed C.H. by the hair and forced her to perform oral sex on his penis. After Bailey made C.H. perform a second act of oral sex, Walker had forcible vaginal intercourse with C.H. Bailey said it was his turn and continued sexually assaulting C.H. while Walker watched.

¶3 The State then filed a complaint charging Walker and Bailey with the February 2009 sexual assault of J.N., who was Bailey's ex-girlfriend. J.N. was entering her apartment when Bailey and Walker, who was introduced as "Memphis," pushed their way in and sexually assaulted her. While Bailey bent her over a couch and performed forcible vaginal and anal intercourse, Walker put his penis next to her face and told her to "suck it." When Bailey finished, he told Walker it was his turn, and Walker attempted forcible vaginal intercourse.

¶4 The State filed an other acts motion seeking to introduce evidence that in March 2008, Walker sexually assaulted a seventeen-year-old female, B.V.¹ The motion asserted that B.V.’s sister, N.K., invited Bailey over to her home. Bailey arrived with Walker, whom he identified as “Memphis,” and a third man, J.J. Walker pushed B.V. toward the bedroom and closed the door. When N.K. went to check on them, she saw Walker holding B.V. by the hair and forcing her to perform oral sex on his penis. N.K. told Walker to stop but Bailey and J.J. entered the room. With Bailey in the room, Walker pinned B.V. down and assaulted her vaginally while J.J. forced her to perform oral sex. Though Walker was originally charged with offenses including second-degree sexual assault, he entered into a deferred prosecution agreement after pleading no contest to a misdemeanor charge of exposing genitals.

¶5 Over Walker’s objection, the circuit court ruled that the B.V. incident constituted admissible other acts evidence. C.H., J.N., and B.V. all testified at trial. The circuit court instructed the jury that if it found that the incident with B.V. did occur, it could consider the other acts testimony for limited enumerated purposes and could not consider the evidence to conclude that the defendant had a certain character or character trait and that he “acted in conformity with that trait or character with respect to the offense charged.”² The jury found Walker guilty of both counts of first-degree sexual assault.

¹ The State’s other acts motion was filed prior to the criminal complaint involving the assault of J.N., and originally sought to introduce other acts evidence of both the J.N. and the B.V. assaults. J.N. had initially refused to cooperate out of fear of retaliation, but changed her mind after Walker and Bailey were charged with assaulting C.H. On the State’s motion, the C.H. and J.N. charges were joined for trial and the State maintained its request to admit the other acts evidence concerning B.V.

² The circuit court further instructed the jury:

(continued)

¶6 Postconviction, Walker filed a motion for a new trial on grounds that the circuit court erred in admitting B.V.’s other acts testimony. Walker pointed out that B.V.’s trial testimony differed from what she and her sister reported to the police. The postconviction court declined to revisit its ruling, determining it had conducted a proper analysis prior to trial and that “[i]t was even more evident as the trial played out how the modus operandi [with B.V.] was similar.”

¶7 On appeal, Walker maintains that the circuit court erred in admitting the other acts evidence concerning B.V. Though character evidence is generally not admissible to show that the person acted in conformity therewith, evidence of a person’s other crimes, wrongs or acts may be admitted for certain purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* WIS. STAT. § 904.04(2)(a).³ In determining whether other acts are admissible, courts employ a three-part test: (1) the evidence must be offered for an acceptable purpose; (2) the evidence must be relevant; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). “[I]n sexual assault cases, especially those involving assaults against children, greater latitude is afforded the admissibility of other acts evidence. *State v. Davidson*, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606. “[T]he greater

You may consider the evidence only for the purposes that I’ve described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial.” *Id.*

¶8 The decision whether to admit or exclude other acts evidence is left to the circuit court's sound discretion. *State v. Hunt*, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold its evidentiary ruling if the court “examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.” *Id.*

¶9 We conclude that the circuit court properly exercised its discretion in admitting the other acts involving B.V. First, the circuit court acted within its discretion in admitting the evidence for purposes of establishing Walker's modus operandi and plan or scheme, especially in light of the greater latitude rule. Evidence of other crimes may be admitted for the purpose of establishing a plan or scheme “when there is a concurrence of common elements between the two incidents.” *Davidson*, 236 Wis. 2d 537, ¶60. A distinctive method of operation may be deemed indicative of a common plan or scheme. *See State v. Ziebart*, 2003 WI App 258, ¶¶21-23, 268 Wis. 2d 468, 673 N.W.2d 369. *See also State v. Hurley*, 2015 WI 35, ¶65, 361 Wis. 2d 529, 861 N.W.2d 174 (Where there was “[a] great similarity” between the other acts and the charged assaults, the circuit court acted within its discretion in admitting the other acts evidence “for the purpose of proving method of operation to prove the plan of [the defendant].”). As the circuit court noted, the circumstances of the B.V. incident bore striking similarities to the charged assaults. As in both charged assaults, Walker gained access to B.V. through Bailey, who introduced him as “Memphis.” Bailey was present during all three assaults and each involved Walker acting in concert with another male perpetrator.

¶10 Second, the circuit court properly determined that the other acts involving B.V. were relevant. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01. In assessing relevance, the measure of probative value is the similarity between the charged offenses and the other act, including the nearness of time, place, and circumstance. See *Hunt*, 263 Wis. 2d 1, ¶64. Here, the B.V. incident occurred one year before the J.N. assault and two years before the C.H. assault. As with J.N. and C.H., Walker gained access to B.V., a stranger, through Bailey, who introduced him as “Memphis.” All occurred in a private residence. Like with J.N. and C.H., Walker sexually assaulted B.V. with Bailey in the room. As in the charged assaults, Walker assaulted B.V. with the assistance of and in concert with another male perpetrator. C.H. and B.V. were both seventeen-years old; Walker grabbed both girls by the hair and forced each to perform oral sex. He attempted to force J.N. to perform oral sex by placing his penis on her face and telling her to “suck it,” as Bailey engaged in forcible vaginal intercourse. With B.V., Walker engaged in forcible vaginal intercourse while J.J. made her perform oral sex. Walker told B.V. to “suck my dick” and to “just take it. You’re just a trick.” During the course of the two charged assaults, J.N. and C.H. were similarly subjected to humiliating and demeaning language.

¶11 Walker contends that the B.V. incident was too dissimilar to warrant admission, arguing that whereas the C.H. and J.N. assaults were “properly joined to prove *modus operandi*,” the incident with B.V. did not include a simultaneous assault by Bailey and occurred while other people were around. We disagree. Probative value does not require that the other acts evidence to be identical to the charged offense. See *Davidson*, 236 Wis. 2d 537, ¶72. In all three incidents,

Bailey brought Walker to victims known by Bailey, thereby creating the opportunity and circumstances whereby the plan could play out. In all, the codefendants watched and emboldened each other while sexually humiliating the victim through words, the pulling of hair and simultaneous sexual acts. The circuit court properly exercised its discretion in determining that these “qualifying identifiers” were probative on the issue of modus operandi and plan.⁴

¶12 Finally, the trial court properly determined that the probative value of the other acts was not substantially outweighed by the danger of unfair prejudice. Nearly all evidence is prejudicial to the party against whom it is offered. *State v. Murphy*, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994). Unfair prejudice results when the evidence tends to influence the outcome by improper means or causes the jury to base its decision on something other than the established propositions in the case. *State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

¶13 Walker argues that the unfair prejudice of the B.V. evidence vastly outweighed its probative value. In particular, Walker points to the proof problems in that case which led to a substantial charge reduction and deferred prosecution agreement, and to the inconsistencies in B.V.’s testimony at the trial on the current

⁴ We similarly reject Walker’s argument that in order to be admissible for purposes of “plan” under WIS. STAT. § 904.04(2)(a), the State needed to show that the B.V. assault was “one step in his multi-year plan to eventually assault C.H and J.N.” As the circuit court explained, the other acts were relevant to show that “inside of that crime ... there [was] a similar set of plans as they proceed with the commission of the crime.” This comports with *State v. Hurley*, 2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 174, and *State v. Davidson*, 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606. See also *State v. Friedrich*, 135 Wis. 2d 1, 24-25, 398 N.W.2d 763 (1987) (defendant’s prior sexual assaults of young girls with whom he had quasi-familial relationships were admissible to show his plan to sexually assault a young niece); *Day v. State*, 92 Wis. 2d 392, 404-05, 284 N.W.2d 666 (1979) (defendant’s earlier sexual assaults of teenage girls were admissible to show his plan of sexually assaulting minors).

charges. We are not persuaded. Even assuming the State dismissed the more serious felonies as to B.V. because it was concerned it could not prove the charges beyond a reasonable doubt, other acts are relevant if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act. *State v. Landrum*, 191 Wis. 2d 107, 119-20, 528 N.W.2d 36 (Ct. App. 1995). Even conduct for which a defendant was previously acquitted may be admissible as other acts evidence due to the lesser burden of proof. *Id.* at 120. As to Walker's complaint that B.V.'s trial testimony was inconsistent both internally and with her prior statements, trial counsel was able to use these discrepancies for impeachment purposes. Additionally, the circuit court instructed the jury they could consider B.V.'s testimony for the enumerated other acts purposes only if they found the conduct actually occurred. Walker has not met his burden of showing that the probative value of the other acts evidence was substantially outweighed by any alleged prejudicial effect, especially in light of the cautionary instruction provided to the jury. *See Hunt*, 263 Wis. 2d 1, ¶75; *State v. Fishnick*, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985) (a cautionary instruction goes far to cure any adverse effect attendant to the admission of other acts evidence).

By the Court.—Judgment and order affirmed.

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

