COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP882-CR **Cir. Ct. No. 2011CF4561**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVELLE JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Lavelle Jackson appeals a judgment of conviction entered after a jury found him guilty of repeated sexual assault of the same child.

He claims the circuit court erred by denying his pretrial motion to admit other acts evidence concerning the victim's prior allegation of unwanted touching by another man. He further claims the circuit court erred by denying him an evidentiary hearing on the pretrial motion. We affirm.

Background

¶2 The State charged Jackson with repeated sexual assault of the same child, his biological daughter K.K.J.[1] Jackson denied the charge and demanded a trial.

¶3 In pretrial proceedings, Jackson moved to admit evidence that K.K.J. had previously reported unwanted touching by her mother's former boyfriend, L.P. Over the course of several status dates and non-evidentiary hearings, Jackson described the substance of the proposed evidence: approximately a year before K.K.J. disclosed Jackson's assaults, she told her mother and then the police that L.P. on several occasions had rubbed her thigh over her clothing and told her he loved her. Jackson also provided police reports generated in response to K.K.J.'s disclosure concerning L.P. Those police reports revealed the investigating officer's conclusion that the actions K.K.J. described were not crimes and showed that the investigation into her disclosure quickly came to a halt when K.K.J.'s mother decided against allowing further interviews of K.K.J. to avoid upsetting the child. Jackson argued that the evidence concerning L.P. should be admitted to show that K.K.J. exhibited a pattern of making false claims against her mother's sexual partners and to show that the mother encouraged K.K.J. to make such

[1] The State originally charged Jackson with an additional count of incest with a child but did not pursue that charge.

allegedly false claims. He also requested a pretrial evidentiary hearing to explore the matter. The circuit court denied Jackson's motion without an evidentiary hearing, concluding that the proposed evidence was not relevant, that it lacked probative value, and that it would violate the rape shield law, WIS. STAT. § 972.11(2) (2015-16).[2]

¶4 The matter proceeded to trial. K.K.J., who was then ten years old, testified against Jackson. She said that when she was seven and eight years old, Jackson sexually assaulted her on multiple occasions. According to K.K.J., Jackson: (1) rubbed his hand over her clothed vagina; (2) licked her nipples; (3) licked her exposed vagina; (4) rubbed his penis against her exposed vagina; and (5) penetrated her anally with his penis. Jackson testified on his own behalf. He told the jury that K.K.J. was lying and that she made the false allegations to please her mother, who hated him. The jury found Jackson guilty. He appeals.

Discussion

¶5 Jackson claims the circuit court wrongly excluded his proposed trial evidence that, before the allegations against him arose, K.K.J. reported that her mother's former boyfriend rubbed K.K.J's clothed thigh and told her he loved her. Evidence of a complainant's prior sexual conduct is generally prohibited pursuant to the Wisconsin rape shield law, WIS. STAT. § 972.11, subject to three statutory exceptions. *See* ***State v. Ringer***, 2010 WI 69, ¶25, 326 Wis. 2d 351, 785 N.W.2d 448. Our supreme court has recognized that when the rape shield law bars

[2] Although the circuit court proceedings in this matter ended in 2013, the evidentiary statutes we discuss in this opinion have not subsequently been amended in any way relevant to our analysis. Consequently, all references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

evidence, a defendant may attempt to show that the complainant's prior sexual conduct must nonetheless be admitted to protect a defendant's constitutional rights to confrontation and compulsory process. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 647-48, 456 N.W.2d 325 (1990). ***Pulizzano*** goes on to prescribe a five-part showing that a defendant must make to establish a constitutional right to present the statutorily excluded evidence of the complainant's sexual activity. *See* ***id.*** at 656. Jackson argues that the evidence he offered concerning L.P. satisfied the ***Pulizzano*** test and therefore was admissible.

¶6 Jackson and the State agree, however, that the evidence at issue is not evidence of prior sexual activity by the complainant and therefore admission of the evidence is not controlled by the rape shield law. Our review of WIS. STAT. § 972.11(2) in light of the record and the briefs persuades us that the parties are correct in maintaining that the rape shield law does not control here. Accordingly, we decline Jackson's invitation to apply ***Pulizzano*** in assessing whether the circuit court properly excluded his proffered evidence. Instead, we conclude that the evidence at issue is properly viewed as evidence of "other acts," and its admissibility is therefore governed by WIS. STAT. § 904.04(2)(a).

¶7 WISCONSIN STAT. § 904.04(2)(a) provides, in part, that "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." The statute, however, "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." ***Id.*** Admissibility of evidence under § 904.04(2)(a) is governed by a familiar three-step inquiry under which the circuit court determines whether: (1) the evidence is offered for a permissible purpose, as required by § 904.04(2)(a); (2) the evidence is relevant within the meaning of

WIS. STAT. § 904.01; and (3) the probative value of the evidence is substantially outweighed by the concerns regarding unfair prejudice, confusion, and delay enumerated in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶8 We review a circuit court's decision excluding other acts evidence deferentially for an erroneous exercise of discretion. *See* ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. Moreover, when the circuit court does not conduct a complete analysis under WIS. STAT. § 904.04(2), we conduct an independent review of the record and uphold the circuit court's decision if the record provides a basis for doing so. *See* ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832.

¶9 The first step in the ***Sullivan*** analysis requires the proponent of the evidence to identify one or more permissible purposes for admitting it. *See* ***id.***, 216 Wis. 2d at 772. This step is not demanding. *See* ***Payano***, 320 Wis. 2d 348, ¶63. Here, Jackson argued (albeit somewhat inartfully) that the purpose of the proposed evidence was to show that K.K.J.'s mother had a motive, plan, and intent to hurt her former romantic partners by "grooming" K.K.J. to make false allegations about the behavior of those men. We assume without deciding that Jackson satisfied the first step in the ***Sullivan*** analysis.

¶10 Jackson failed, however, to satisfy the second step of ***Sullivan*** because he did not demonstrate that the evidence he sought to admit was relevant within the meaning of WIS. STAT. § 904.01. "The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." ***Sullivan***, 216 Wis. 2d at 772. The second consideration is whether the evidence has probative value because the

evidence "has a tendency to make a consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.***

¶11 Evidence that K.K.J. previously reported unwelcome touching by L.P. does not support a claim that anyone had a motive, plan, or intent to make false allegations because the evidence does not suggest that the previous reporting was false. The supreme court reached just such a conclusion under analogous circumstances in ***Ringer***. There, a defendant sought to admit a complainant's prior accusation of sexual contact against a third party, arguing that the prior sexual assault accusation was untrue and therefore supported a conclusion that the complainant's sexual assault accusations against the defendant were also untrue. *See* ***id.***, 326 Wis. 2d 351, ¶5. The supreme court explained that, before admitting evidence of prior accusations to demonstrate that subsequent accusations were untrue, the circuit court "must first conclude from the proffered evidence that a jury could reasonably find that the complainant made prior untruthful allegations." *See* ***id.***, ¶31. In other words, a prior accusation does not support a theory that a later accusation is false unless something demonstrates that the prior accusation was false.

¶12 Here, Jackson failed to present anything showing that K.K.J's prior accusation of unwanted touching was false. He showed only that law enforcement terminated the investigation of that accusation without recommending criminal charges. As ***Ringer*** explains, failure to prosecute "in and of itself, does not support a finding that the allegations were untruthful." ***Id.***, ¶40. Here, the reasons for law enforcement's decision not to prosecute L.P. were twofold: (1) K.K.J.'s allegation about L.P.'s actions did not describe a crime; and (2) K.K.J.'s mother did not want to risk traumatizing the child with forensic interviews. Neither of these reasons demonstrates that K.K.J. was untruthful when she made her prior

allegation. As did the circuit court, we conclude that the mere fact of K.K.J.'s making a prior allegation does not, under the circumstances here, suggest that the prior allegation was false. *See* ***id***.

¶13 According to Jackson, the prior allegation concerning L.P. is nonetheless relevant because K.K.J.'s mother was "involved in that allegation being reported," and thus the prior allegation demonstrates that K.K.J.'s mother coached the child. Nothing in the offer of proof supports such a conclusion. While it is true that K.K.J.'s mother accompanied K.K.J. to the police station when she made her report about L.P., K.K.J. was eight years old at the time. The presence of a chaperone is therefore wholly unremarkable and certainly does not indicate any inappropriate influence on the child.

¶14 Moreover, an assessment of probative value takes into account the similarity between the other acts sought to be admitted and the "fact or proposition sought to be proved.... The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *See* ***Sullivan***, 216 Wis. 2d at 786-87. Here, the prior allegation that K.K.J. made about L.P. involved nonsexual touching over clothing. Jackson simply fails to show that K.K.J.'s report of such nonsexual contact by L.P. is similar to K.K.J.'s allegations that Jackson subjected her to mouth-to-breast contact, mouth-to-vagina contact, penis-to-anus contact, and penis-to-vagina contact.

¶15 In light of the foregoing, we agree with the circuit court's determination that the proffered evidence about L.P. was "not probative.... [J]ust because that [other] person is not prosecuted, does [not] mean it was a prior false allegation.... There's no indication that it was a prior false statement.... It's not relevant to anything."

¶16 Because the proposed other acts evidence was irrelevant and lacked probative value, we need not engage in further analysis under ***Sullivan***. *See* ***id.***, 216 Wis. 2d at 789. The circuit court did not erroneously exercise discretion under WIS. STAT. § 904.04(2) by excluding irrelevant evidence.

¶17 Jackson next argues that exclusion of the proffered evidence deprived him of his constitutional right to present a defense. Whether a circuit court's evidentiary ruling abridged a defendant's right to present a defense is a question of constitutional fact for our *de novo* review. *See* ***State v. Stutesman***, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998). Upon conducting that review, we conclude that we must reject Jackson's claim.

¶18 As we have seen, the evidence that Jackson wished to present was irrelevant. "When evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense." ***State v. Muckerheide***, 2007 WI 5, ¶40, 298 Wis. 2d 553, 725 N.W.2d 930. The circuit court's decision barring Jackson from presenting irrelevant evidence thus did not abridge his constitutional rights. *See* ***id.***

¶19 Jackson complains, however, that because the circuit court declined to hold an evidentiary hearing on his motion to admit other acts evidence, he was unable to demonstrate the relevance of the proposed evidence. He argues he was entitled to an evidentiary hearing at which he could try to demonstrate the admissibility of his proffered evidence. We disagree.

¶20 The standard for determining whether a defendant is entitled to a pretrial evidentiary hearing is set forth in ***State v. Velez***, 224 Wis. 2d 1, 589 N.W.2d 9 (1999). *See* ***State v. Allen***, 2004 WI 106, ¶11 n.5, 274 Wis. 2d 568, 682 N.W.2d 433 (stating that ***Velez*** "contains a comprehensive discussion and

application of the pretrial motion sufficiency standard"). As ***Velez*** explains, a circuit court considering whether to grant a pretrial evidentiary hearing begins by applying the rules for assessing a defendant's right to a postconviction evidentiary hearing. *See* ***id.*** at 10-14. Those rules require that the circuit court hold an evidentiary hearing if the defendant's motion contains allegations of fact that, if true, would entitle the defendant to relief. *See* ***id.*** at 17. The circuit court has discretion, however, to deny a postconviction motion without a hearing if: "1) the defendant failed to allege sufficient facts in his or her motion to raise a question of fact; 2) the defendant presented only conclusory allegations; or 3) the record conclusively demonstrates that the defendant is not entitled to relief." ***Id.***

¶21 A circuit court considering whether to hold a pretrial evidentiary hearing must apply an additional safeguard:

> a [circuit] court must provide the defendant the opportunity to develop the factual record where the motion, alleged facts, inferences fairly drawn from the alleged facts, offers of proof, and defense counsel's legal theory satisfy the court of a reasonable possibility that an evidentiary hearing will establish the factual basis on which the defendant's motion may prevail.

Id. at 13 (citation omitted).

¶22 Here, Jackson supported his request for a pretrial evidentiary hearing with the police reports we have already described. Those reports did not reveal any reason to believe that an evidentiary hearing could establish a "factual basis on which [Jackson's] motion may prevail," *see* ***id.***, and even on appeal Jackson fails to explain how a hearing could have led to admissible evidence. Rather, he says he should have been granted a hearing "to determine whether or not additional information existed which would have supported the defense motion." Thus, Jackson offered only a hope that relevant information might emerge if a

hearing were held. That is precisely the circumstance under which a circuit court may, in its discretion, deny a pretrial motion without an evidentiary hearing. *See* ***id.*** at 18.

¶23 For the reasons set forth above, we conclude that the circuit court properly excluded Jackson's proposed evidence without conducting an evidentiary hearing.[3] Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

[3] We observe that Jackson's brief-in-chief includes a variety of complaints that do not appear tethered to arguments in support of a claim for relief. For example, Jackson states that the circuit court denied his motion *in limine* to admit evidence suggesting K.K.J. had been exposed to pornography. Similarly, he describes various rulings adjourning the trial. We understand his recitation of these rulings as merely descriptions of what he views as the relevant context for the arguments concerning other acts evidence that we have addressed in the body of this opinion. To the extent, if any, that Jackson intended his descriptions of other pretrial rulings to serve as a basis for appellate relief, we conclude that his arguments are undeveloped, and we therefore do not address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App.1992).