

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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 No. 2010AP2710-CR

Cir. Ct. No. 2007CF1293

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERARDO M. COLON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Gerardo Colon appeals a judgment convicting him, as a repeat offender, of exposing a child to harmful descriptions and repeated sexual assault of the same child. The sole issue on appeal is whether an evidentiary ruling barring the introduction of evidence about a prior sexual assault

of the victim denied Colon his constitutional right to present a defense. We conclude that the circuit court properly excluded the evidence and affirm the conviction.

BACKGROUND

¶2 The victim in this case testified that her mother's boyfriend, Colon, had inappropriately touched her private parts and made her touch his private parts through their clothing, and had also made sexual comments to her on several occasions when she was nine years old. Some of the comments included references to oral sex.

¶3 Colon was barred from presenting testimony from the victim's mother that, when the victim was four years old, she returned from a visit to her father and told her siblings that her father had made her suck his penis and had licked her crotch. The mother believed the father had been charged with a misdemeanor, but was uncertain of the outcome of the case. The victim herself had no memory of the prior incident.

STANDARD OF REVIEW

¶4 Whether an evidentiary decision deprives a defendant of the right to present a defense is a constitutional question which we will review de novo. *See State v. Heft*, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

DISCUSSION

¶5 Wisconsin's rape shield law generally prohibits a defendant from introducing evidence concerning a victim's prior sexual experiences. WIS. STAT. § 972.11(2) (2009-10);¹ *State v. Carter*, 2010 WI 40, ¶39, 324 Wis. 2d 640, 782 N.W.2d 695. However, a defendant's constitutional right to present a defense may require the admission of otherwise excludable evidence of a child's prior sexual experience in order to provide an alternative source for the child's sexual knowledge. *State v. Pulizzanno*, 155 Wis. 2d 633, 648, 656, 456 N.W.2d 325 (1990). Under *Pulizzanno*, the defendant must make an offer of proof showing that: (1) the prior acts clearly occurred; (2) the prior acts closely resembled those in the present case; (3) the prior acts are clearly relevant to a material issue; (4) the evidence is necessary to the defendant's case; and (5) the probative value of the evidence outweighs its prejudicial effect. *Id.* at 656.

¶6 We conclude that Colon's offer of proof was insufficient on several of the *Pulizzanno* factors. We are not persuaded that there was a close resemblance between the prior acts, which involved direct physical contact, and the present acts, which involved contact through clothing and verbal statements. Although the prior acts involved oral sex, there was no showing that experiencing those acts would have provided the victim with knowledge of the crude language about oral sex that Colon was charged with saying to the victim. Moreover, the fact that the victim could not even remember the prior assault severely undermined the relevancy of the proposed testimony. If the victim could not remember

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

previously being subjected to oral sex, it is difficult to see how that experience could have provided her with an alternate source of information. By the same token, since the victim's prior sexual experience involved dissimilar acts and did not explain how the child would have known the specific words alleged to have been used by Colon, we cannot conclude that it was necessary to Colon's defense.

By the Court.—Judgment affirmed.

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

