

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 27, 1996

NOTICE

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

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

No. 96-1028-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID D. BREITENFELD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ashland County:
NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. David Breitenfeld appeals his conviction for repeated sexual assault of the same child in violation of § 948.025(1), STATS., after a trial by jury. At trial, the victim recanted her charges and denied that Breitenfeld had committed any sexual acts. Over Breitenfeld's objection, the trial court admitted Breitenfeld's 1989 written statement admitting sexual activities with children six-years before the charged offense. On appeal, Breitenfeld argues that the 1989 written statement constituted inadmissible other bad acts evidence and that the jury used this inadmissible character

evidence to find Breitenfeld committed the offense. We reject this argument and affirm Breitenfeld's conviction.

We first conclude that Breitenfeld's 1989 written statement was admissible on the issues of intent and motive. The trial court made a discretionary decision. *State v. Plymesser*, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). Unless Breitenfeld affirmatively conceded intent, the State had to prove it as an element of the crime. Breitenfeld did not concede intent, and the State therefore had the right to introduce the written statement for this purpose under *Plymesser*. See *id.* at 593-95, 493 N.W.2d at 372-73. In addition, we have no power to overrule the Wisconsin Supreme Court's decision in *Plymesser*, and we therefore decline to address Breitenfeld's claim that *Plymesser* misapplies the rules of evidence.

Having established the relevance of the statement, we must review the court's determination that the statement's probativeness substantially outweighs any unfair prejudice. See *State v. Peters*, 192 Wis.2d 674, 695, 534 N.W.2d 867, 875 (Ct. App. 1995). This determination is within the trial court's discretion and will be affirmed as long as the record discloses a reasonable basis for the court's decision. *Id.* Here, the court weighed the relative probativeness against the potential prejudice of Breitenfeld's 1989 statement and determined the statement's probativeness substantially outweighed any prejudice. The record discloses the court had a reasonable basis for admitting this statement. Therefore, we conclude that the trial court was within its discretion in admitting the statement.

Because there is sufficient evidence in the record to support the court's finding that the 1989 statement was relevant and we must deferentially review the trial court's weighing of the probative value of the evidence against its prejudicial nature, we conclude the court did not err in admitting Breitenfeld's statement.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.