COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-0411-CR
97-0412-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HARLAN L. HORSWILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Harlan L. Horswill appeals a judgment of conviction of five counts of sexual assault of a child in violation of § 948.02(1), STATS., and one count of sexual contact with a person under the age of sixteen in violation of § 948.02(2). He contends that the trial court erroneously exercised its

discretion in admitting evidence that he sexually assaulted three girls in Washington ten years earlier. We conclude that the trial court properly exercised its discretion and therefore affirm.

The charges against Horswill involved sexual contact with two girls, ages seven and nine, and sexual contact and sexual intercourse with an eleven-year-old girl. The incidents of contact involved the touching and fondling of the girls' buttocks, genitals and breasts during recreational activities such as swimming and watching fireflies. Horswill maintained that any contact during the activities was incidental and not for sexual gratification. He denied the incident of sexual intercourse.

The State filed a motion to introduce evidence of prior incidents to prove that the touching was intentional, committed for the motive of sexual gratification and not incidental or accidental. The motion asserted that in 1986, Horswill was charged with six counts of indecent liberties with three young girls in the State of Washington. Those charges involved touching girls between the ages of seven and ten on the buttocks and genitals during recreational activities such as swimming and tractor rides. He was eventually convicted on two counts after entering an ***Alford*** plea. The document supporting the motion indicated that Horswill did not deny engaging in the recreational activities but denied knowledge of any sexual contact.

After briefing and argument, the court granted the State's motion to introduce evidence of the Washington incidents. The court stated that the facts of the Washington incidents were very similar to those alleged in this case. The court observed that Horswill's defense in this case was that the touchings may have happened but were not intended to be sexual. The court concluded that

evidence of the Washington incidents was admissible to prove intent, plan, lack of mistake or accident, and that the probative value was not substantially outweighed by prejudice.

On appeal, Horswill claims that admission of the prior convictions violated § 904.04(2), STATS., and that the incidents were too remote in time and location to be of sufficient probative value to overcome the prejudicial effect under § 904.03, STATS.

We review the trial court's ruling to determine whether the court exercised its discretion based on the facts of record and according to accepted legal standards. ***State v. Fishnick***, 127 Wis.2d 247, 257, 378 N.W.2d 272, 278 (1985). We do not reverse the trial court's discretionary ruling where there is a reasonable basis for the trial court's decision. ***Id.***

Section 904.04(2), STATS., provides:

> (2) OTHER CRIMES, WRONGS, OR ACTS. 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. This subsection 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.

This statute allows other acts evidence if it is relevant to something other than character. *See* ***State v. Johnson***, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence. Section 904.01, STATS. Horswill's defense centered on his assertion that any contact that may have occurred was not of a sexual nature. Evidence that he was previously

convicted of sexually touching young girls while engaged in recreational activities with them has a tendency to make it more probable that the touching alleged in this case was not accidental but was intentional and for the purpose of sexual gratification.

Even if evidence is relevant and not barred by § 904.04(2), STATS., the trial court may still exclude it if its probative value is outweighed by "the danger of unfair prejudice." Section 904.03, STATS. *See* ***Johnson***, 184 Wis.2d at 337, 516 N.W.2d at 466. Horswill claims that "substantial differences in time, place, and circumstance" of the Washington incidents substantiates that their probative value is outweighed by their prejudicial impact.

The probative value depends in part on the nearness in time, place and circumstances to the crime sought to be proved. ***State v. Plymesser***, 172 Wis.2d 583, 595, 493 N.W.2d 367, 373 (1992). A sufficient similarity in circumstance may offset a remoteness in time that is as great as thirteen years, ***id.*** at 596, 493 N.W.2d 373, or twenty-two years, ***State v. Mink***, 146 Wis.2d 1, 16, 429 N.W.2d 99, 105 (Ct. App. 1988). The trial court's conclusion that the facts of the Washington incidents and those alleged here are "very similar" is supported by the record. The trial court could reasonably consider the evidence of the Washington incident to be highly probative of Horswill's intent and purpose in this case.

Section § 940.03, STATS., is concerned with *unfair* prejudice, ***State v. Parr***, 182 Wis.2d 349, 361, 513 N.W.2d 647, 650 (Ct. App. 1994)—that is, the potential harm that a jury might conclude that because a defendant committed one bad act, he or she necessarily committed the crime charged. ***State v. Roberson***, 157 Wis.2d 447, 456, 459 N.W.2d 611, 614 (Ct. App. 1990). A limiting

instruction directing the jury to consider the other acts evidence only for the permissible purposes is generally considered to eliminate or minimize the risk of unfair prejudice. *See* ***Parr***, 182 Wis.2d at 361, 513 N.W.2d at 650. In this case the jury was instructed to consider the prior incidents only for the "issue of intent and absence of mistake or accident … that is, whether [Horswill] acted with the state of mind that is required for this offense." The trial court's conclusion that the probative value of the evidence was not substantially outweighed by its prejudice is a reasonable one, reached after application of the correct law to the facts of record.

We conclude that the trial court applied the correct law to the facts of record, and that its decision to admit evidence of the prior Washington incidents was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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