

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

Nos. 98-2160, 98-2161-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STEVEN M. ZOROMSKI,

DEFENDANT-RESPONDENT.

APPEALS from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. The State appeals an order denying its motion to introduce other acts evidence at Steven Zoromski's trial. The other acts evidence in this sex crimes case was offered both to prove intent, motive, absence of mistake or accident and to support the minor victims' credibility. The State contends that the trial court erred by excluding this evidence because it incorrectly

concluded that the admission of other acts evidence in a sex crimes case to support a minor victim's credibility was an impermissible purpose. We do not decide whether other acts evidence is admissible for purposes of corroboration or credibility in sex crimes cases involving minors. We conclude that the trial court's discretionary decision denying the admission of the other acts evidence because its probative value was outweighed by its prejudicial effect was based on accepted legal standards in compliance with § 904.04(2) and 904.03, STATS., and the facts of the case. Accordingly, the trial court's order is affirmed.

Two informations charged Steven Zoromski with a total of three counts of sexual contact with children under the age of sixteen and one count of sexual contact with a child under the age of thirteen. The State sought to introduce details of four alleged uncharged instances demonstrating that Zoromski touched and fondled sexual parts of young victims, committed acts of oral sex, and on occasion threatened them if the incidents were disclosed to others. Three of the alleged instances involve evidence of other acts committed against victims of the underlying charges. The fourth alleged instance involves a separate victim.

The trial court rejected the State's attempt to offer the other acts evidence based on the State's contention that the evidence went to prove intent, motive and absence of mistake. The trial court concluded that Zoromski's offer to stipulate to these issues, if the jury found that the acts charged occurred at all, substantially reduced the probative value of the other acts evidence. The State also contended the evidence was relevant to bolster the credibility of the alleged victims. The trial court concluded that attacking Zoromski's credibility or bolstering the credibility of a minor victim of a sex crime was not one of the permissible uses of other acts evidence as set forth in § 904.04(2), STATS., and was contrary to *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998).

Finally, the trial court concluded that the probative value of the other acts evidence was minimal and that the prejudicial effect was great. It therefore excluded the State's attempt to introduce the other acts evidence as part of the State's case-in-chief.

The applicable standard for reviewing a trial court's evidentiary rulings is whether the court exercised appropriate discretion. *Id.* at 780, 576 N.W.2d at 36. We sustain an evidentiary ruling if we find the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Id.*

Generally, evidence of other criminal acts is inadmissible to prove the character of a person to show he acted in conformity therewith. Section 904.04(2), STATS. When, however, the other acts evidence is offered for other purposes material and relevant to a disputed issue of fact, such evidence may be introduced subject to a three-prong analysis. *Id.* at 771-72, 576 N.W.2d at 32. The first step is to determine whether the other acts evidence is offered for a permissible purpose under § 904.04(2), STATS., such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* at 783, 576 N.W.2d at 37. This list is not exhaustive or exclusive. *Id.* (citing *State v. Kaster*, 148 Wis.2d 789, 797, 436 N.W.2d 891, 894 (Ct. App. 1989)). The second step of the analysis is to determine whether the evidence is relevant, considering whether the evidence is material and whether it has probative value. *Id.* at ___, 576 N.W.2d at 33. The third step is to determine whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *Id.*

Here, the other acts evidence was offered to show the acts were committed for the purpose of sexual gratification and absence of mistake. Because Zoromski offered to stipulate to intent and was not offering mistake as a defense, the trial court properly concluded the evidence had little probative value.

The State, however, also sought to introduce the other acts evidence for the purpose of corroborating the minor victims' allegations and rebutting credibility challenges the defense raised. The trial court was unwilling to adopt credibility or corroboration as permitted purposes for the admission of other acts evidence in light of the Wisconsin Supreme Court's recent holding in *Sullivan*, reaffirming *Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557 (1967), and because it is not among the permitted purposes articulated in § 904.04(2), STATS. The State, on appeal, contends that the trial court erred in its analysis of the vitality of the "greater latitude" test found in a line of cases including *State v. Fishnick*, 127 Wis.2d 247, 257 n.4, 378 N.W.2d 272, 278 n.4 (1985); *State v. Friedrich*, 135 Wis.2d 1, 19-20, 398 N.W.2d 763, 771 (1987); *State v. Mink*, 146 Wis.2d 1, 13-14, 429 N.W.2d 99, 104 (Ct. App. 1988); *State v. Plymesser*, 172 Wis.2d 583, 597-98, 493 N.W.2d 367, 374 (1992); and *State v. Parr*, 182 Wis.2d 349, 361, 513 N.W.2d 647, 650 (Ct. App. 1994). The State maintains that *Sullivan* only reaffirms *Whitty* but does not overrule or weaken the "greater latitude" test which applies to the admission of other crimes evidence in sex crimes cases against children.

We need not decide whether other acts evidence sought to be introduced can be used to support a minor victim's credibility. Even if it is a permitted purpose under *Sullivan*, we conclude that in this instance, the probative value of such evidence is slight and the trial court correctly determined that the prejudicial effect of the other acts evidence outweighed its probative value.

The use of accusations of other victims is far more directly probative of propensity, an impermissible use of other acts evidence, than it is probative of a particular victim's credibility. Proof of another victim's allegations of sexual contact does not make the allegation charged more probable and therefore more credible than it would be without the evidence. Direct independent evidence of other acts between this defendant and the victims would have more probative value. We conclude that because the other acts evidence here involved only assertions by victims that other acts had occurred, it is of little probative value of the same victims' credibility.

The trial court addressed the third step of the *Sullivan* analysis concluding that the probative value of the other acts evidence was outweighed by the danger of unfair prejudice. Unfair prejudice results when other acts evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathy, arouses a sense of horror, provokes the jury's instinct to punish or otherwise causes the jury to base its decision on something other than the established propositions in the case. *Sullivan*, 216 Wis.2d at 789, 576 N.W.2d at 40. Here, the trial court determined that the potential unfair prejudice to Zoromski by proving a series of other allegations of sexual conduct with children would be substantial. We agree. Allegations that the defendant engaged in other acts of sexual contact with minors is strong evidence of bad character which may well improperly influence a jury in its desire to convict a defendant on the basis of bad character rather than on the evidence introduced in the crimes charged. In addition, the evidence involves multiple victims on different occasions but over the same general period of time. As a result, the potential for the jury confusing the issues and improperly relying on the other bad acts evidence even with a cautionary instruction by the court is substantial. We believe the trial court

properly balanced the probative value versus the unfair prejudice to the defendant and properly concluded in the exercise of its discretion that the unfair prejudice outweighed the probative value.

We conclude the trial court's discretionary decision denying admission of the other acts evidence was based on accepted legal standards in compliance with §§ 904.04(2) and 904.03, STATS., and the facts of the case. Because the court properly exercised its discretion, we affirm its order to exclude the other bad acts evidence.

By the Court.—Order affirmed.

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

