

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2423-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER A. JEROME,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
THOMAS J. SAZAMA, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roger Jerome appeals a judgment convicting him of three counts of sexually assaulting the same child, his live-in girlfriend's fifteen-year-old daughter. He argues that the court erroneously allowed the victim to testify about an earlier encounter in which Jerome told the child that she could

take her shirt off while they were cutting brush. She refused, and he rubbed her back through her shirt. Because we conclude that this evidence was admissible under WIS. STAT. § 904.04(2),¹ we affirm the judgment.

¶2 The trial court did not indicate the grounds on which it admitted this evidence. Therefore, this court independently reviews the record to determine whether there is a basis for admitting the evidence. *See State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). Other acts evidence is admissible if it satisfies a three-step process. *Id.* at 772-73. The court must first decide whether the evidence was offered for an acceptable purpose; second, whether the act is relevant under WIS. STAT. § 904.04(1); and third, whether its probative value is substantially outweighed by the danger of unfair prejudice. We apply a greater latitude rule to all three questions when reviewing the admissibility of other acts evidence in child sexual assault cases. *See State v. Davidson*, 2000 WI 91, ¶51, 236 Wis. 2d 537, 563, 613 N.W.2d 606.

¶3 Even without applying the greater latitude rule, evidence that Jerome asked the victim to remove her shirt on an earlier occasion satisfies the tests set out in *Sullivan*. The evidence was not admitted to establish a propensity. Rather, it showed Jerome's motive and intent, plan, preparation and the context of the crime.

¶4 The evidence was relevant because it showed that the victim was the object of Jerome's sexual desires. That incident can reasonably be viewed as the first attempt at sexual contact that was consummated less than two months later. The victim's failure to inform her mother about Jerome's inappropriate suggestion

¹ All statutory references are to the 1999-2000 version unless otherwise noted.

created the context in which he made increasingly bold sexual advances toward the child, apparently without fear that she would inform others. Whether described as plan, preparation or context, the incident can reasonably be viewed as Jerome's "testing the waters" before risking more blatant sexual behavior with the child.

¶5 The danger of unfair prejudice does not substantially outweigh the probative value of this evidence. Because a jury might be reluctant to believe that a man would sexually assault his girlfriend's daughter in their home without having previously tested the waters and without "grooming" the victim, it was important for the jury to hear this background evidence.

¶6 There was very little potential for this act to create unfair prejudice against Jerome. The unfair prejudice that arises from other acts evidence includes the tendency to believe a defendant guilty merely because he is a person likely to do such acts, the tendency to condemn him because he has escaped punishment for another offense, the injustice of attacking one who is not prepared to defend himself and confusion of the issues. See *State v. Whitty*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). None of these factors is implicated in this case. The other act was not a crime and was less serious than the crimes charged. The only witness was the same victim who accused him in the present case. Jerome's argument that the victim fabricated each of the incidents did not have to be modified in any way to cover the additional incident. Finally, each incident was presented in chronological order and there is no basis for believing the jury was confused.

By the Court.—Judgment affirmed.

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

