

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2005

Cornelia G. Clark
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. 2005AP1186-CR

Cir. Ct. No. 2003CF127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD MAX LEWIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County:
JAMES P. JANSEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edward Lewis appeals a judgment convicting him of repeated sexual assault of his stepdaughter from mid-2001 to October 28, 2003. He argues that the court erroneously exercised its discretion when it allowed other acts evidence that he repeatedly molested his brother, Orin, five to twelve years

ago when Orin was five to twelve years old. He also argues that the State presented insufficient evidence that Lewis assaulted his stepdaughter at least three times between mid-2001 and October 2003. We reject these arguments and affirm the judgment.

¶2 Lewis's abuse of the child came to light when he told his wife that he had molested the child when she was three years old and also molested his stepson. She believed Lewis wanted her to participate in sex acts with him and the children. His wife called the police. An officer testified that Lewis admitted having sexual contact with his stepdaughter beginning when she was four years old. He said he had sexual contact with her twelve or more times. Two days after the interview, Lewis recanted his confession. However, while in jail, he told a social worker of "a series of incidents, more than one incident" of sexual contact and sexual penetration of his stepdaughter.

¶3 Lewis's stepdaughter testified that Lewis "put his private in my butt" ten times and also "put his private in my private," which hurt her. He also made her "drink hot milk" from his private. The child told an examining nurse that "daddy had touched her" with "his privates" one hundred times.

¶4 Lewis's younger brother, Orin, also testified that he had witnessed the child performing oral sex on Lewis in June 2003. Lewis told him not to tell anybody. Orin testified that Lewis touched and molested him "more times than I can count," and engaged in oral and anal sex with Orin on multiple occasions.

¶5 Lewis testified on his own behalf. He denied assaulting the child and said Orin had committed the assaults. He said he wanted to die and, by taking the blame, his father-in-law would kill him, and he would protect Orin from prison.

¶6 The trial court properly admitted evidence of Lewis's sexual assaults of his younger brother. Admissibility of other acts evidence is governed by a three-step test: The evidence must be admitted for an acceptable purpose under WIS. STAT. § 904.04(2);¹ it must be relevant; and its probative value must not be outweighed by the danger of unfair prejudice. *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). Greater latitude applies to all three questions when reviewing other acts evidence in sexual assault cases involving children. *State v. Davidson*, 2000 WI 91, ¶51, 236 Wis. 2d 537, 613 N.W.2d 606.

¶7 Orin's testimony was admitted for a permissible purpose under WIS. STAT. § 904.04(2), to establish Lewis's motive, intent and plan. *See Davidson*, 236 Wis. 2d 537, ¶59. Orin's testimony was relevant because both crimes involved exploiting young children and family members, when Lewis was viewed as an authority figure by the victims. They involved oral and anal sex. The remoteness in time, five to twelve years before trial and as few as two years before Lewis began molesting his stepdaughter, is counterbalanced by the similarity of the assaults. *See State v. Mink*, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988). The testimony was more probative than prejudicial. The danger of unfair prejudice was curtailed by only brief testimony about the acts, a single sentence in the State's closing argument, and a cautionary instruction. *See State v. Hammer*, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629. Therefore, the trial court properly exercised its discretion when it admitted Orin's testimony.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶8 The State presented sufficient evidence that at least three sexual assaults occurred between mid-2001 and October 2003. The jury is not required to unanimously agree on which underlying acts occurred, as long as they unanimously agree that Lewis committed at least three sexual assaults during that time. *See State v. Johnson*, 2001 WI 52, ¶15, 243 Wis. 2d 365, 627 N.W.2d 455. The victim's testimony, her statements to the examining nurse and a social worker, Lewis's inculpatory statements and other witnesses' observations of inappropriate behavior are sufficient to support the verdict.

By the Court.—Judgment affirmed.

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

