

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 2013

Diane M. Fremgen
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. 2012AP1442-CR

Cir. Ct. No. 2009CF5344

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIXAVIER PACHECO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN and DAVID L. BOROWSKI Judges. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Elixavier Pacheco appeals a judgment of conviction for second-degree sexual assault of a child. Pacheco contends that the circuit court erroneously exercised its discretion by admitting evidence that

Pacheco had previously sexually assaulted the victim. We conclude that the court properly exercised its discretion. Accordingly, we affirm.

BACKGROUND

¶2 In November 2009, the State charged Pacheco with second-degree sexual assault of a child less than sixteen years of age. According to the criminal complaint, on October 7, 2009, Pacheco went to the home of M.H., who was then fourteen years old, and forced her to engage in sex acts.

¶3 Prior to trial, the State moved to introduce other acts evidence showing that Pacheco had sexually assaulted M.H. in the past. The State argued that the other acts evidence was necessary to provide the background of this case, to provide context for online chat messages between M.H. and her friend that were sent immediately before and after the assault, and to explain M.H.'s behavior and help the jury assess M.H.'s credibility. Pacheco objected, arguing that the evidence was not offered for a proper purpose and that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

¶4 The circuit court allowed the State to introduce evidence that Pacheco had previously sexually assaulted M.H. The court reasoned that the other acts evidence was offered for the permissible purposes of providing context and bolstering M.H.'s credibility. Pacheco moved for reconsideration, and the court denied the motion.¹

¹ The Honorable Jeffrey Conen presided over the court that ruled on the State's motion to introduce other acts evidence. The Honorable Jean DiMotto presided over the court that ruled on Pacheco's motion for reconsideration.

¶5 At trial, M.H. testified as to the events on October 7, 2009. She testified that Pacheco arrived at her home and stated he was going to get something to eat, and that M.H. then went to the living room and began chatting with her friend over the internet. She testified that the sexual assault occurred during a break in the online chat, and that M.H. did not do anything during the assaults, consistent with her behavior when Pacheco had sexually assaulted her in the past.

¶6 The State introduced a transcript of the online chat between M.H. and her friend on the evening of October 7, 2009. M.H. testified that she had typed “I’m like IDK” (meaning I don’t know) and then “scared” because she felt scared; and that she felt scared because Pacheco had sexually assaulted her before. She then described the sexual assault that occurred during the seventeen-minute break in the chat.

¶7 M.H. testified that she then resumed the chat, and typed that she hated Pacheco; she testified she typed that because of the sexual assault that had just occurred. M.H. testified she typed “I had to”; “I don’t know how to say no to him”; “he did it”; “he, umm”; and “touched me?”, all referring to the sexual assault that had taken place.

¶8 M.H. testified that she typed “I thought he changed,” meaning M.H. thought that if she and Pacheco were alone again, he would not sexually assault her. She explained that when she typed “I’ve been doing this since I was like six,” she meant she had been putting up with Pacheco sexually assaulting her. She also explained that she typed “You don’t get it. I don’t have a choice”; “I don’t know how to stop him”; and “he knows that,” meaning that she did not know how to

stop Pacheco from sexually assaulting her and in her mind she could not say no, and that she believed Pacheco knew that.

¶9 Pacheco testified in his own defense that he went to M.H.'s home to get food on October 7, 2009, but that he did not sexually assault M.H. while he was at the house. He admitted that he had sexually assaulted M.H. in the past, but stated that he did not sexually assault her on October 7, 2009, as she claimed.

¶10 The court instructed the jury not to consider evidence as to Pacheco's prior assaults of M.H. as evidence of guilt in this case, but only as context for M.H.'s statements in the online chat. The jury returned a guilty verdict, and the court entered a judgment of conviction and sentence. Pacheco appeals.

STANDARD OF REVIEW

¶11 A circuit court's admission of other acts evidence is subject to review for an erroneous exercise of discretion. *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399. A circuit court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law, and uses a rational process to reach a reasonable result. *Id.* Moreover, when a circuit court does not adequately explain its exercise of discretion, we will review the record to determine whether it provides adequate support for the circuit court's decision. *Id.*

DISCUSSION

¶12 Under WIS. STAT. § 904.04(2) (2011-12),² other acts evidence is inadmissible as character evidence to show the likelihood the defendant acted in conformity with that character in the charged offense. However, other acts evidence may be admitted “when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* The supreme court has explained that other acts evidence is admissible if: (1) it is offered for a proper purpose under § 904.04(2); (2) it is relevant; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Because this case involves the sexual assault of a child, the greater latitude rule applies, providing for more liberal admission of other acts evidence. *See Marinez*, 331 Wis. 2d 568, ¶20. The greater latitude rule applies to each prong of the *Sullivan* analysis. *Id.*

¶13 Pacheco contends that there was no permissible purpose for admitting evidence of the prior sexual assaults. Pacheco argues that the circuit court erroneously exercised its discretion by admitting the parts of the online chat that referred to the prior sexual assaults, and then admitting M.H.’s other acts testimony to provide context for that erroneously admitted other acts evidence. Pacheco concedes that the majority of the online chat was admissible, but contends that the circuit court should have excluded the lines of the online chat that referred to the prior assaults rather than admit more other acts evidence to

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

provide context for the inadmissible lines in the chat. Pacheco asserts that M.H.'s testimony as to the prior sexual assaults was not necessary to provide context for the admissible statements in the online chat, which could have been explained within the context of the currently charged sexual assault.³

¶14 The State responds that the other acts evidence showing that Pacheco had previously sexually assaulted M.H. was necessary to provide background and context for the current charges. It asserts that evidence of the prior assaults was necessary to provide context to overcome the jury's likely disbelief as to the facts of the sexual assault in this case, and to explain why M.H. complied with Pacheco's demands for sexual contact with her.

¶15 We conclude that the circuit court properly exercised its discretion by admitting the other acts evidence as to the prior sexual assaults by Pacheco against M.H. We find instructive the supreme court's relatively recent *Marinez* decision, in which the supreme court addressed the admissibility of other acts evidence to provide context for other, admissible statements by a child sexual assault victim.

¶16 In *Marinez*, the circuit court allowed the State to introduce other acts evidence that the defendant had previously burned the child sexual assault victim's hands. *Id.*, ¶¶1-2. The evidence was admitted in the form of statements the child

³ We note that it is not entirely clear whether Pacheco objected to admission of those parts of the chat that referred to the prior assaults, or only objected to admission of M.H.'s testimony as to the prior sexual assaults. Neither party addresses whether the issue of admissibility of the chat itself, as opposed to M.H.'s testimony about the chat, was properly preserved below. Because we determine that the entire chat was properly admitted, we need not address whether an argument to exclude parts of the chat was properly preserved. Accordingly, we assume for purposes of this opinion that Pacheco properly preserved this issue below.

victim made in a videotaped forensic interview. *Id.* The court allowed the State to introduce the entire videotaped interview, including the child's statements as to the current sexual assault and the prior hand-burning incident. *Id.*

¶17 The supreme court held that the other acts evidence of the hand-burning incident was properly admitted. *Id.*, ¶3. As to the first prong, whether the hand-burning evidence was admitted for a proper purpose, the court explained that this initial step in the analysis “is not demanding.” *Id.*, ¶25. The court stated that “[i]dentifying proper purposes for the admission of other-acts evidence is largely meant to develop the framework for the relevancy determination,” and that “[t]he purposes for which other-acts evidence may be admitted are ‘almost infinite[,]’ with the prohibition against drawing the propensity inference being the main limiting factor.” *Id.* (citation omitted). Thus, the court explained, “[t]he proponent need only identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct.” *Id.* (quoted source omitted).

¶18 The court concluded that the hand-burning evidence was admissible for the proper purpose of establishing context for the child victim's statements as to the sexual assault. *Id.*, ¶26. The court explained that the hand-burning evidence provided a more complete story of the sexual assault, including indication of when and where the assault occurred, and helped the jury assess the victim's credibility. *Id.* The court explained that “context, credibility, and providing a more complete background” were all permissible purposes for admitting other acts evidence in certain circumstances. *Id.*, ¶¶27-28. The court then concluded that admission of the other acts evidence was appropriate based on the “unique nature” of the case. *Id.*, ¶28. Specifically, the court noted that the victim was a very young child who, in a videotaped interview, “wove this hand-

burning incident into her account of the sexual abuse she suffered.” *Id.* The court also noted that the State’s case rested entirely on the victim’s videotaped allegations. *Id.*

¶19 Here, as in *Marinez*, the State sought to introduce other acts evidence that was interwoven with the child victim’s statements as to the current sexual assault. M.H.’s online statements that Pacheco had previously sexually assaulted her provided context and lent credibility to her statements that a sexual assault had just occurred. M.H.’s online statements and her testimony at trial as to the prior sexual assaults provided a more complete story of the current sexual assault, including providing an explanation for M.H.’s apparent acquiescence to Pacheco’s demands for sexual contact with her. Additionally, as in *Marinez*, the unique nature of this case—that Pacheco had allegedly repeatedly sexually assaulted M.H. over a period of eight years, and that M.H. had an online discussion with her friend regarding the repeated assaults immediately before and after the assault alleged in this case took place—supports admission of the other acts evidence. Accordingly, we conclude that the evidence of the prior sexual assaults was admissible for the proper purpose of providing context, including providing a more complete background of the case and establishing M.H.’s credibility.

¶20 The second prong of our analysis, whether the other acts evidence was relevant, is a question of whether the evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.*, ¶¶30-33 (quoted source omitted). We conclude that M.H.’s statements that Pacheco had previously sexually assaulted her were relevant to help the jury assess M.H.’s credibility, which was central to this case. *See id.*, ¶34. Here, as in *Marinez* and

“so many child sexual assault cases, this case boiled down to whom the jury believed; the child alleging she was sexually assaulted or the defendant who denies it occurred.” *Id.*, ¶34.

¶21 Having determined that the other acts evidence was both offered for a proper purpose and relevant, we turn to whether the danger of unfair prejudice substantially outweighed the probative value of the evidence. We conclude that it did not.

¶22 Pacheco contends that the unfair prejudice of the evidence vastly outweighed its probative value, because it was the sort of evidence that would arouse a jury’s sense of horror and provoke an instinct to punish Pacheco for his past acts. *See Sullivan*, 216 Wis. 2d at 789-90. He contends that, conversely, the probative value of the evidence was low, because the State did not need to prove the prior acts occurred to prove the sexual assault occurred in this case.

¶23 The State argues that the high probative value of the evidence of the prior sexual assaults far outweighed any danger of unfair prejudice, because it was the only evidence that explained what otherwise appeared to be M.H.’s strange behavior. It also asserts that any danger of unfair prejudice was eliminated by the court’s instruction to the jury not to consider the evidence of the prior assaults as evidence of guilt in this case, but only as context for M.H.’s statements in the online chat.

¶24 While we agree with Pacheco that there was a danger that the jury would be provoked to punish Pacheco for his past acts of sexually assaulting M.H. and that evidence of those past acts would arouse the jury’s sense of horror, we also agree with the State that the probative value of the evidence was not substantially outweighed by that danger. We conclude that the probative value of

the other acts evidence was extremely high, in that it explained M.H.'s otherwise inexplicable passive submission to Pacheco's demands for sexual contact with her, and provided a full context for the online chat M.H. had with her friend immediately before and after the sexual assault. Additionally, the prejudice of the other acts evidence was mitigated by the court's limiting instruction to the jury. Accordingly, we conclude that the circuit court properly exercised its discretion by admitting the other acts evidence in this case.

By the Court.—Judgment affirmed.

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

