

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 3, 2014

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. 2013AP647-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF774

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS C. MARTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Dennis C. Marth appeals from a judgment convicting him of three counts of child enticement contrary to WIS. STAT.

§ 948.07(1) (2011-12).¹ He contends that the circuit court erroneously exercised its discretion by admitting other acts evidence against him. He further contends that he should receive a new trial in the interest of justice. We reject Marth's claims and affirm the judgment.

¶2 Marth was convicted following a jury trial of three counts of child enticement. The charges stemmed from allegations that Marth had approached three young boys at a public park and asked them to show him where the railroad tracks were located. The park had railroad tracks running along the south end, past a wood line.

¶3 Prior to trial, the State moved for the admission of various other acts evidence against Marth to show his motive, intent, and plan in interacting with the boys. Ultimately, the circuit court allowed testimony concerning three incidents: (1) an incident from November 1983 in which Marth had sexual contact with a five-year-old boy in the bathroom of a McDonald's restaurant, (2) an incident from October 1985 in which Marth had sexual contact with a four-year-old boy while at a Halloween party, and (3) an incident from 1991 in which Marth repeatedly followed several young males into a restroom at a park in Florida.²

¶4 The case proceeded to trial, and a jury found Marth guilty of the charged offenses. The circuit court subsequently sentenced him to seventy-five years' imprisonment. This appeal follows.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

² The State had sought to introduce several other incidents of sexual misconduct as other acts evidence. The circuit court denied three of the State's requests, and the State voluntarily withdrew two others.

¶5 On appeal, Marth first contends that the circuit court erroneously exercised its discretion by admitting the other acts evidence against him.³ Primarily, he complains about the factual differences and length in time between the other acts evidence and charged offenses.

¶6 The admissibility of other acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2); (2) whether it is relevant under WIS. STAT. § 904.01; and (3) whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay under WIS. STAT. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998). Section 904.04(2) favors admissibility of other acts evidence except when offered to prove the propensity of the defendant to commit similar acts. *See State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). In a sex crime case, especially one involving a child victim, the admissibility of other acts evidence must be viewed in light of the “greater latitude” rule, which “helps other acts evidence to come in under the exceptions stated in WIS. STAT. § (Rule) 904.04(2).” *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, ¶23, 613 N.W.2d 629.

¶7 A circuit court’s decision to admit other acts evidence involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. *See id.*, ¶21. We will uphold the circuit court’s decision if discretion

³ Marth focuses his argument on the McDonald’s incident and the Florida park incident. Although he does not claim that the Halloween party incident was admitted in error, we include it in our discussion for the sake of completeness.

was exercised in accordance with accepted legal standards and the facts of record, and if there was a reasonable basis for the court's determination. *Id.*

¶8 Here, the circuit court conducted a thorough analysis under *Sullivan* of the incidents in question before admitting them as other acts evidence. First, the court determined that the incidents were offered for a proper purpose of establishing Marth's intent, which is an element of the charged offenses. *See* WIS. STAT. § 948.07(1). Next, the court found the incidents to be relevant because they would make the proposition that Marth's intent was to engage in sexual contact with the boys more or less probable. Finally, the court concluded that the probative value of the incidents outweighed the danger of unfair prejudice.⁴

¶9 Reviewing the circuit court's decision, we are satisfied that it properly exercised its discretion in admitting the incidents as other acts evidence. Although there are factual differences between the incidents and charged offenses, their common features (i.e., all of the events involved young male children in places where one would expect to find children) established that they were probative of Marth's motive and intent. This is particularly true in view of the greater latitude rule. Furthermore, the incidents' remoteness in time was mitigated by the fact that Marth was confined or on supervision for much of the time between them and the charged offenses.⁵ Accordingly, we conclude that there was a reasonable basis for the circuit court's determination.

⁴ The circuit court reduced the danger of unfair prejudice at trial with a limiting/cautionary instruction to the jury.

⁵ The circuit court noted that Marth was subject to confinement and supervision for the vast majority of the time from 1991 through July 2011, the date of the charged offenses.

¶10 Marth next contends that he should receive a new trial in the interest of justice. He asks for this relief pursuant to WIS. STAT. § 752.35.

¶11 We exercise our discretionary power to grant a new trial infrequently and judiciously. *See State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have determined that no error occurred as to the admission of the other acts evidence. We therefore conclude that no basis exists to order a new trial under WIS. STAT. § 752.35.

By the Court.—Judgment affirmed.

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

