COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1647-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

REUBEN G. MAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: RAYMOND THUMS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Reuben May appeals a judgment convicting him of three counts of second-degree sexual assault as a repeater and an order denying postconviction relief. May argues that the trial court erroneously admitted "other acts" evidence and permitted the prosecutor to improperly cross-examine him. He

further argues that defense counsel failed to effectively object to the "other acts" evidence and to the improper jury instructions. In addition, he contends that a new trial is required in the interest of justice. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 May was charged in a three-count information with second-degree sexual assault as a repeat offender against Tammy W., Margaret M. and Naomi S. The sexual contact was alleged to have taken place in his home in 1997 when each girl was under the age of sixteen years. Before trial, pursuant to WIS. STAT. § 904.04(2)[1], the State offered evidence of two other assaults against teenage girls to prove May's intent to sexually gratify himself, to show that the incidents of touching were not accidental, and to bolster the victims' testimony.[2] The first other act consisted of a 1995 fourth-degree sexual assault against Angel J. to which May pled guilty. The second involved a 1997 uncharged groping of Margaret M. in May's kitchen.

¶3 The court noted that the two incidents of "other acts" evidence were strikingly similar to the acts charged and admitted them on the issues of intent,

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 904.04(2) reads:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

absence of mistake and credibility. Accordingly, Angel J. testified at trial that in January 1995, when she was a fourteen-year-old runaway from shelter care, a girlfriend arranged for her to sleep at May's house. After going to bed on a fold-out couch, May touched Angel's buttocks over her clothes. When she moved away, he touched her buttocks over her clothing a second time. The next morning, as she was walking from the living room into the kitchen, May touched her buttocks a third time over her clothes. When she exited the kitchen, he touched her buttocks over her clothing again. Angel testified that she left May's house and told officers that same day what had occurred.

¶4 Margaret M. testified to the second "other act." In the fall of 1997, when she was fifteen years old, she agreed to baby-sit for May's four-year-old son. She described an uncharged incident in which May had groped her all over, slid his hand over her clothed vaginal area and grabbed her clothed buttocks while she was in his kitchen. May then attempted to kiss her and she backed away.

¶5 In support of two of the three charged counts of second-degree sexual assault, Tammy W. testified that in the fall of 1997, she was fourteen years old and a friend of Margaret M. During the school lunch hour, they would walk to May's house to smoke cigarettes and listen to music. In October, she and Margaret baby-sat for May's son and stayed overnight. May returned home at approximately 10:30 p.m. He drank beer and gave some to the girls. At about 12:45 a.m., the girls went to sleep on a fold-out couch. Tammy woke up to find May touching her breast and vagina under her clothing. He inserted his finger in her vagina and, when she kicked at him, he moved away. Tammy testified that Margaret was sleeping next to her and that May went over to her. She saw him place his finger in Margaret's vagina and then place his mouth on her vaginal area.

¶6 Margaret testified that May bought her cigarettes regularly and also bought her clothing, including bras. He furnished her with beer on three or four occasions. She had a key to his house and would go there during school lunch hour with friends. She did not recollect the assault witnessed by Tammy, explaining that at the time she was a heavy sleeper.

¶7 Naomi S. testified with respect to the third charged count. In the fall of 1997, when she was fourteen years old, she went to May's house to baby-sit. While she was sitting on his porch, she leaned forward and May touched her buttocks with his hand over her clothes. She got up and moved away. Before he left for work, he touched her buttocks a second time. Later that evening he asked her if she wanted someone to spoil her and if she wanted to be his girlfriend.

¶8 May testified on his own behalf that while much of what the girls testified to was true, he did not improperly touch the girls as they claimed. He stated that he occasionally would give Margaret a hug, "when she looked depressed or crying. I would ask her first." If she said yes, "I'd give her a shoulder hug."

¶9 On cross-examination, the prosecutor inquired: "You were convicted of sexually assaulting a girl under the age of 16. … is that right?" May answered, "Yes." In answer to a later question, May replied, "And for the case in 1995, I do recollect that the District Attorney's office offered me a plea bargain of time served on that case …." When the prosecutor began asking about the details of the 1995 conviction, defense counsel objected and the court held a discussion outside the presence of the jury. The court permitted the prosecutor to continue questioning, as follows:

> Q. … In January of 1995 at a place you were living, did you, in the middle of the night, go to a piece of furniture that a juvenile runaway, under the age of 16, was sleeping on and wake her up by touching her on her body?
>
> A. I do not remember because I was sleeping on the floor that night, and I'm not denying that I may have touched her. I've already answered the question that I was convicted of it, yes.
>
> Q. It might have happened, it might not have?
>
> A. I don't know. I could have been sleepwalking. People do have a tendency to sleepwalk. Like I said, I was sleeping on the floor, and it may have happened; it may not have happened.

Toward the end of this line of questioning, May replied, "That's been over three years ago. I don't remember the case."

¶10 The jury found May guilty as charged. May filed a postconviction motion challenging his conviction, which was denied after an evidentiary hearing. This appeal follows.

I. THE ADMISSIBILITY OF "OTHER ACTS" EVIDENCE

¶11 May argues that the trial court erroneously admitted evidence of the two prior sexual assaults committed against Angel J. and Margaret M. We conclude that the evidence was admitted for a proper purpose and that the record supports the court's exercise of discretion. Accordingly, May's argument fails.

A. Standard of Review

¶12 "On appeal, the question is not whether this court would have admitted the other crimes evidence, 'but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Davidson***, 2000 WI 91 ¶53, 236 Wis. 2d 537, 613

N.W.2d 606 (citation omitted). The trial court's exercise of discretion will be sustained if the trial court reviewed the relevant facts, applied a proper standard of law and, using a rational process, reached a reasonable conclusion. ***Id.*** "If the trial court failed to articulate its reasoning, an appellate court will review the record independently to determine whether there is any reasonable basis for the trial court's discretionary decision." ***Id.***

B. Analysis

¶13 A three-part framework is employed for analyzing the admissibility of other acts evidence:

> 1. Is the other act evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2)?
>
> 2. Is the other act evidence relevant under Wis. Stat. § (Rule) 904.01?
>
> 3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stat. § (Rule) 904.03?

Id. at ¶35.

¶14 "[A]longside this general framework, there also exists in Wisconsin law the longstanding principle that in sexual assault cases, particularly cases that involve sexual assault of a child, courts permit a 'greater latitude of proof as to other like occurrences.'" ***Id.*** at ¶36. Our supreme court "has consistently held that in sexual assault cases, especially those involving crimes against children, the greater latitude rule applies" together with the three-part framework. ***Id.*** at ¶44. "Like many other U.S. jurisdictions, Wisconsin courts permit 'a more liberal admission of other crimes evidence' in sexual assault cases than in other cases." ***Id.*** (footnote and citation omitted). In sexual assault cases, especially those

involving assaults against children, the greater latitude rule applies to the entire analysis of whether evidence of a defendant's other crimes was properly admitted at trial. ***Id.*** at ¶51. "The effect of the rule is to permit the more liberal admission of other crimes evidence in sex crime cases in which the victim is a child." ***Id.*** With these principles in mind, we turn to the application of the three-part analytical framework to the specific facts of the case before us.

1. Purpose

¶15 First, we examine "whether the other acts evidence [was] offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2)[.]" ***Id.*** at ¶35. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2). Nonetheless, "[t]his subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.*** "Evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused's charged criminal conduct." ***State v. Sullivan***, 216 Wis. 2d 768, 784, 576 N.W.2d 30 (1998).

¶16 The record demonstrates that the other acts evidence was offered and admitted to prove May's intent to become sexually aroused or gratified and the lack of mistake or accident. Thus, it was not offered to prove propensity but for acceptable purposes under WIS. STAT. § 904.04(2). The first portion of the three-part test is satisfied.

2. Relevancy

¶17 Next, we must determine whether the other acts evidence is relevant under WIS. STAT. § 904.01. *See* ***Davidson***. Under § 904.01, relevancy has two facets. "The first consideration in assessing relevance is whether the evidence relates to a fact or proposition that is of consequence to the determination of the action." ***Sullivan***, 216 Wis. 2d at 772. "The substantive law determines the elements of the crime charged and the ultimate facts and links in the chain of inferences that are of consequence to the case." ***Id.*** at 785-86. Intent to become sexually aroused or gratified is an element of the definition of sexual contact under WIS. STAT. § 948.01(5); *see also* WIS. STAT. § 948.02(2) (1995-96). Because intent or absence of accident is of consequence to the case, the other acts evidence satisfies the initial relevancy consideration under § 904.01. *See* ***Sullivan***, 216 Wis. 2d at 785.

¶18 "The second consideration in assessing relevance is probative value, that is, whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." ***Id.*** at 786. "The probative value of the other acts evidence in this case depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." ***Id.***

> Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the probative value lies in the similarity between the other act and the charged offense. The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence. In other words, "[I]f a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable."

Id. at 786-87 (footnote and citation omitted). "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." ***Id.*** at 787.

¶19 The other acts evidence bears great similarity to the charged offenses in time, place and circumstance. All the assaults occurred between 1995 and 1997 at May's residence to girls ages fourteen or fifteen who were invited to either baby-sit or sleep overnight at his home. All involved similar acts of fondling or touching of the girls' buttocks or vaginal areas, with the exception of Margaret M., which also involved oral-genital contact. Because of the nearness in time, place and circumstances of the other acts to the alleged crimes, the record discloses a rational basis for concluding that the other acts evidence has a tendency to show intent or lack of mistake or accident. *See* ***id.*** at 785-86. Consequently, the record supports the determination that the other acts evidence meets both facets of the relevancy test under WIS. STAT. § 904.01. *See* ***id.*** at 786.

3. Prejudice

¶20 Having concluded that evidence of the two other assaults was offered for proper purposes under WIS. STAT. § (Rule) 904.04(2) and was relevant under WIS. STAT. § (Rule) 904.01, we next must determine whether, under WIS. STAT. § 904.03, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *See* ***Davidson***, 2000 WI at ¶73. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis. 2d at 789-90.

¶21 The record discloses a reasonable basis to conclude that the probative value of the other crimes evidence was not substantially outweighed by the danger of unfair prejudice. As our previous discussion demonstrates, the probative value of other acts evidence, depending partially upon its nearness in time, place, and circumstance to the alleged crime or element sought to be proved, is high. "[S]imilarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." ***Davidson***, 2000 WI at ¶75. Consistent with ***Davidson*** and ***Sullivan***, the trial court could reasonably have determined that the similarities made the other crimes evidence highly probative of the defendant's intent and the lack of absence or mistake.

¶22 Additionally, the Angel J. offense was a charged, convicted crime, to which May had pled guilty. The high degree of reliability of the evidence of the Angel J. assault increased its probative value. *See* ***Davidson***, 2000 WI at ¶77 (suggesting that when prior acts resulted in an arrest, charge, or conviction, its reliability may be accorded added weight). Also, the trial court limited the danger of unfair prejudice posed by the evidence by reading cautionary instructions to the jury after closing arguments.[3] Cautionary instructions help to limit the danger of

[3] The court read the following cautionary instruction to the jury after the closing arguments:

> Evidence has been received regarding other incidents involving the defendant for which the defendant is not on trial.
>
> Specifically, evidence has been received that the defendant touched the buttocks of Angel [J.] and touched the breast and/or vagina of Margaret [M.]. If you find that this conduct did occur, you should consider it only on the issue of intent, absence of mistake, or accident.
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and

(continued)

unfair prejudice that might result from other acts evidence. *See* ***id.*** at ¶78. In view of ***Davidson***, we conclude that the trial court could have reasonably determined that the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice under WIS. STAT. § 904.03.

¶23 In conclusion, we hold that under the three-step analytical framework set forth in ***Davidson*** and consistent with the greater latitude rule, the trial court's decision to admit evidence of the two other sexual assaults against Angel J. and Margaret M. did not constitute an erroneous exercise of discretion.

¶24 May contends, nonetheless, that the court erred because intent or absence of mistake was never an issue in the case. He argues that he denied that the acts occurred at all and, therefore, there was no contested issue regarding the intent behind the touching. We disagree. May's general denial that the touching occurred and his assertion that the victims were lying put the elements of the offense in dispute. "If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the

---

> that the defendant acted in conformity with that trait or character with respect to the offense charged in this case. The evidence was received on the issues of:
>
> Intent, that is, whether the defendant acted with the state of mind that is required for this offense.
>
> Absence of mistake or accident, that is, whether the defendant acted with the state of mind required for this offense.
>
> You may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

element." ***State v. Hammer***, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629; *see* ***Davidson***, 2000 WI at ¶65.

¶25 May further claims that the trial court misapplied the law when it relied on the similarity between the acts charged and the other acts evidence. He argues that to consider the similarities between the other acts and the charged offenses transforms the other acts into propensity evidence. Under ***Davidson***, however, similarities between the two categories is an appropriate consideration of relevancy. "The probative value of the other acts evidence in this case depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." ***Sullivan***, 216 Wis. 2d at 786. The record discloses no error.

¶26 May also contends that using other acts to bolster credibility was error. This notion was laid to rest in ***Davidson***, which states: "[T]his court specifically reaffirmed its commitment to the rule and explained that one of the reasons behind the [greater latitude] rule is the need to corroborate the victim's testimony against credibility challenges." ***Id.*** at ¶40. We are bound by the decisions of the Wisconsin Supreme Court. *See* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984).

II. IMPROPER CROSS-EXAMINATION

¶27 Next, May argues that the trial court erroneously permitted the prosecutor to cross-examine him regarding the nature and circumstance of his prior conviction involving Angel J. He contends that when asked, he answered truthfully the number of his prior convictions and, therefore, under ***Nicholas v. State***, 49 Wis. 2d 683, 688-89, 183 N.W.2d 11 (1971), further examination was foreclosed.

¶28 The record discloses that on direct examination, May was asked whether he had ever been convicted of a crime and he answered "Yes." When asked how many times, he answered "Six." Later, on cross-examination, May was asked about details of his conviction for the Angel J. assault. Upon objection of defense counsel, the prosecutor explained that he was not seeking facts about the offense for impeachment purposes but, rather, for purposes of showing intent and lack of mistake or accident under WIS. STAT. § 904.04(2). The trial court permitted the line of inquiry.

¶29 The court's ruling was consistent with its pretrial ruling allowing the State to introduce evidence of the sexual assault against Angel J. on the issue of intent and absence of accident or mistake. Although May admitted the conviction, his reference to a favorable plea bargain and his "sleepwalking" explanation essentially denied any intent to be sexually aroused or gratified. By so doing, May put in issue the facts of the offense.

¶30 The ***Nicholas*** case does not control. ***Nicholas*** dealt with the concept that for purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible. *See* ***id.*** at 688-89; *see also* WIS. STAT. § 906.09. Mays offers no authority for the proposition that a defendant's admission of a conviction for impeachment purposes under a ***Nichols*** analysis, precludes ***Whitty*** evidence from being introduced. *See* ***Whitty v. State***, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). Because ***Nichols*** does not consider a WIS. STAT. § 904.04(2) issue, May's argument fails.

¶31 In any event, the cross-examination was cumulative to the details of the offense introduced earlier through Angel J.'s testimony. Accordingly, May's argument fails to demonstrate prejudice. *See* WIS. STAT. § 901.03(1).

III. ASSISTANCE OF COUNSEL

¶32 May contends that in order to avoid the introduction of the other acts evidence, his trial counsel should have conceded that the purpose of the charged offenses was sexual gratification and that the victims were under sixteen. May acknowledges that his trial attorney objected to the other acts evidence. Nonetheless, May faults his attorney for failing to enter into a stipulation advanced in ***State v. Wallerman,*** 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), which provides that a defendant can concede elements of a crime in order to avoid the introduction of other acts evidence. *See also* ***State v. DeKeyser***, 221 Wis. 2d 435, 443, 585 N.W.2d 668 (Ct. App. 1998).

¶33 The Angel J. offense and the uncharged contact with Margaret M. were admitted to prove that the touching, if it occurred in the instant case, was for the purpose of sexual gratification, or the absence of mistake or accident. A ***Wallerman*** stipulation, however, could have conceded this element and theoretically eliminated the admission of the other acts evidence. *See* ***DeKeyser***, 221 Wis. 2d at 443. By offering a ***Wallerman*** stipulation, May claims he could have avoided the introduction of the other acts evidence and thus the likelihood that the jury would use it improperly.

¶34 We are unpersuaded. To establish ineffective assistance of trial counsel, May must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and May must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and that it might be considered sound trial strategy. *See* ***id.*** at 689.

¶35 Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *See* ***id.*** at 690. A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. *See* ***State v. Felton***, 110 Wis. 2d 485, 501-02, 329 N.W.2d 161 (1983).

¶36 To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines confidence in the outcome. *See* ***Strickland***, 466 U.S. at 694.

¶37 At the postconviction hearing, defense counsel stated that the issues of age, intent to gratify and absence of mistake or accident were not the primary issues in the case. He agreed with postconviction counsel that the issues were whether May improperly touched the victims and whether they were lying. Defense counsel acknowledged that he did not discuss with May the possibility of a ***Wallerman*** stipulation.

¶38 Counsel testified, however, that he had read ***Wallerman*** but did not believe that it was directly on point. Counsel also testified that he did not believe a ***Wallerman*** stipulation would be a means to keep out the Angel J. and Margaret M. other acts evidence. He explained that a defense strategy based on ***Wallerman*** would not have applied as to at least one of the three charged counts:

> I guess I would further add, especially as to Naomi [S.], that gratification may well have been an issue at various points during our preparation for the case. As I recall the allegations with regard to [Naomi S.], she alleged that Rueben touched her on her buttocks while they were sitting or standing on the porch, and that at the very least is a situation where, depending upon how the evidence came

> out at trial, there may well have been an issue as to gratification.

¶39 In ***DeKeyser***, we concluded that an attorney was deficient for failing to know about the option of a ***Wallerman*** stipulation. *See* ***DeKeyser***, 221 Wis. 2d at 443. However, we did not "suggest that counsel's failure to offer a ***Wallerman*** stipulation to exclude other acts evidence from being introduced will always require a reversal of a sexual assault conviction." ***Id.*** at 453.

> Counsel may decline to utilize such a stipulation for a variety of strategic reasons. Such a decision is not deficient performance. Further, the receipt of other acts evidence will not always be prejudicial to the defendant. The evidence of guilt may be adequate even without the other acts evidence or the other acts evidence may be of such a nature that it has little impact on the jury. In such cases the receipt of the other acts evidence, even if it could have been excluded by a stipulation, would not undermine our confidence in the verdict.

DeKeyser, 221 Wis. 2d at 453-54.

¶40 Here, defense counsel was aware of the ***Wallerman*** case, but did not believe that a stipulation would have avoided the introduction of other acts evidence in view of the potential issue of intent to gratify with respect to the Naomi S. count. An appellate court will not second-guess a trial attorney's "considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." ***Felton***, 110 Wis. 2d at 502. The record fails to support any claim that defense counsel did not know or understand the ***Wallerman*** decision.[4]

[4] ***State v. Dekeyser***, 221 Wis. 2d 435, 585 N.W.2d 668 (1998), had not yet been issued at the time of May's trial.

¶41 We cannot conclude that counsel's professional decisions were deficient. Counsel noted that May's intent to obtain sexual gratification may well have become an issue at trial. The record supports this determination.[5] Because the record reflects a strategic trial decision rationally based on the facts and the law, it fails to establish ineffective assistance of counsel. *See* ***Felton***, 110 Wis. 2d at 501-02.

¶42 In any event, to establish prejudice May must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 687. A reasonable probability is one that undermines confidence in the outcome. *See* ***id.*** at 694. Here, the other acts evidence was less dramatic than the evidence introduced to support the three charged counts. We are satisfied that the receipt of the other acts evidence, even if it could have been excluded by a stipulation, does not undermine our confidence in the verdict.

¶43 Next, May argues that trial counsel was ineffective for failing to object to non-standard jury instructions which were stated in the alternative. We disagree. The record discloses that the court read each count separately and specifically admonished the jury after each count, "To this charge, the defendant has also entered a plea of not guilty which means the State must prove every element of the offense charged beyond a reasonable doubt." The court then instructed the jury on the elements of second-degree sexual assault:

> Second degree sexual assault of a child, as defined in Section 948.02(2) of the Criminal Code of Wisconsin, is

[5] At the probable cause hearing, the trial court did not make specific findings of fact. Nonetheless, we conclude that the court's order implies this finding. *See* ***State v. Echols***, 175 Wis. 2d 653, 672, 499 N.W.2d 631, 636 (1993).

committed by one who has sexual contact with a person who has not attained the age of 16 years for the purpose of becoming sexually aroused or gratified.

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

First, that the defendant had sexual contact with Naomi [S.], and/or Tammy [W.], and/or Margaret [M.].

Second, that the defendant had sexual contact with Naomi [S.], and/or Tammy [W.], and/or Margaret [M.] for the purpose of becoming sexually aroused or gratified.

Third, that Naomi [S.], and/or Tammy [W.], and/or Margaret [M.], had not yet attained the age of 16 years at the time of the sexual contact.

The first element requires that the defendant had sexual contact with Naomi [S.], and/or Tammy [W.] and/or Margaret [M.].

Sexual contact is any intentional touching by the defendant of the buttocks of Naomi [S.]. Sexual contact is any intentional touching by the defendant of the breast and/or vagina of Tammy [W.]. Sexual contact is any intentional touching by the defendant of the vagina of Margaret [M.]. The touching may be of the buttocks, breast, or vagina directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

The second element requires that the defendant had sexual contact with Nomi [S.], and/or Tammy [W.], and/or Margaret [M.], for the purpose of becoming sexually aroused or gratified.

….

[Y]ou must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant had sexual contact with Naomi [S.], and/or Tammy [W.], and/or Margaret [M.], for the purpose of becoming sexually aroused or gratified.

The third element requires that Naomi [S.], and/or Tammy [W.], and/or Margaret [M.], had not attained the age of 16 years at the time of the sexual contact. Knowledge of Naomi [S.]'s , and/or Tammy [W.]'s, and/or Margaret [M.]'s age by the defendant is not required and mistake regarding Naomi [S.]'s, and/or Tammy [W.'s], and/or Margaret [M.]'s age is not a defense.

¶44 The court also instructed on the presumption of innocence and the State's burden of proof beyond a reasonable doubt. At the close of instructions, the court read six separate verdict forms, two for each of the three victims. The court then instructed:

> It is for you to determine whether the defendant is guilty or not guilty of each of the offenses charged. You must make a finding as to each count in the Information. Each count charges a separate crime, and you must consider each one separately. Your verdict for the crime charged on one count must not affect you verdict on any other count.
>
> This is a criminal, not civil case; therefore, before the jury may return a verdict which may legally be received, such verdict must be reached unanimously. In a criminal case. All twelve jurors must agree in order to arrive at a verdict.
>
> I've always added that means yes or no, guilty or not guilty, all twelve must agree.

¶45 May argues that according to WIS JI—CRIMINAL 2101A, separate instructions must be given for each victim. He argues that the "and/or" language as given would permit the jury to find guilt as to one of the elements and one of the victims, and find another element as to another victim, creating an ambiguous verdict and depriving him of jury unanimity. We are unpersuaded.

¶46 May's argument might carry more weight if separate verdicts had not been given. Because of the separate charges, separate verdict forms, and the court's instruction that the jury was to find guilt or innocence with respect to each victim separately, there was nothing misleading about the instructions. If the instructions adequately convey the applicable law, this court will not find an erroneous exercise of discretion. *See* ***State v. Amos***, 153 Wis. 2d 257, 278, 450 N.W.2d 503 (Ct. App. 1989). Because the instructions were not erroneous, trial counsel could not be faulted for failing to object.

IV. INTEREST OF JUSTICE

¶47 Finally, May contends that the erroneous admission of other acts testimony and the erroneous jury instructions entitle him to a discretionary reversal in the interest of justice. *See* WIS. STAT. § 752.35. We disagree. For reasons discussed above, we conclude that the real controversy was fully and fairly tried. We reject the argument that this is one of the rare cases that merits a new trial in the interests of justice.

By the Court.—Judgment and order affirmed.

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