

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2006AP713-CR

Cir. Ct. No. 2004CF116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD L. LARSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Gerald L. Larson appeals from a judgment of conviction of first-degree sexual assault of a child and from an order denying his postconviction motion. He claims other acts evidence, including 512 photos stored on his computer, was improperly admitted. We conclude that the admission

of the other acts evidence was proper and that the trial court's failure to exercise its discretion with respect to the admission of all 512 photos was harmless error. We affirm the judgment and order.

¶2 Larson was charged with touching the breasts and vagina of ten-year-old Mariah K. as she sat next to him in his car. The amended information alleged that the assault occurred between June 1 and August 20, 2003.

¶3 Krystal C., Mariah's older sister, testified about four instances of vaginal intercourse with Larson that occurred in the summers of 2002 and 2003 when she was twelve and thirteen years old. Two instances took place in the back of Larson's pickup truck and on one occasion he took pictures. As a slide show presentation, the jury viewed 512 images taken from Larson's computer.

¶4 Michele C. testified that when she was between eleven and thirteen years old, on many occasions Larson let her drive his vehicle while she sat on his lap and that he would "finger" her vagina. She also indicated that at his home Larson had intercourse with her more than five times and he touched her breasts. Michele was age twenty-five at trial meaning the incidents she testified about occurred between 1990 and 1992.

¶5 The admissibility of other acts evidence is governed by WIS. STAT. § 904.04(2) (2003-04).¹ The three-step framework for deciding the admissibility of other-acts evidence is: (1) Whether the evidence is offered for an acceptable purpose under § 904.04(2); (2) whether the evidence is relevant; and (3) whether

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

the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury or needless delay. *State v. Hunt*, 2003 WI 81, ¶32, 263 Wis. 2d 1, 666 N.W.2d 771. We consider whether the trial court exercised appropriate discretion in admitting such evidence. *Id.*, ¶34. An erroneous exercise of discretion does not exist if there is a reasonable basis for the trial court's ruling. *Id.*, ¶42. In sexual assault cases, particularly those involving a child, courts permit a "greater latitude of proof as to other like occurrences." *State v. Davidson*, 2000 WI 91, ¶36, 236 Wis. 2d 537, 613 N.W.2d 606. Thus, the trial court must permit greater latitude in each step of the three-step analysis. *State v. Veach*, 2002 WI 110, ¶53, 255 Wis. 2d 390, 648 N.W.2d 447.

¶6 The trial court found that the other acts evidence was offered for and was relevant to the acceptable purposes of motive, intent, and plan. The evidence was admissible for the purpose of intent even though Larson's theory of defense did not dispute intent.² See *Veach*, 255 Wis. 2d 390, ¶77 ("Evidence relevant to any element is admissible even if the element is undisputed.").

¶7 Relevancy also involves determining whether the other acts evidence has probative value. *Id.*, ¶79. Probative value of other acts evidence depends on the similarity between the charged offense and the other acts. *Id.*, ¶81. The evidence was probative. Mariah testified that the sexual contact took place while she was alone in Larson's car. Both Krystal and Michele indicated that sexual contact took place when they were alone with Larson in his car. Although the contact with Krystal and Michele involved sexual intercourse and the charged

² Larson's theory of defense was that the child's testimony was not credible because she claimed the acts took place in a vehicle which Larson's witnesses indicated was not operational at the time of the offense.

offense involved only touching, that difference is not significant in light of Michele's testimony that her contact with Larson started as touching. The past offenses need not be identical to the charged offense in order to be probative and relevant. *Davidson*, 236 Wis. 2d 537, ¶72. We conclude the evidence was probative on the issues of plan and intent to gain sexual gratification by contact with young girls.

¶8 The trial court specifically addressed and determined that the probative value was not outweighed by the danger of unfair prejudice. To minimize potential prejudice from evidence of the assaults of Michele, the trial court ruled that Michele could not testify that Larson held her arms down when he sexually assaulted her. The trial court recognized that the cautionary jury instruction went a long way in minimizing the potential for unfair prejudice. *See State v. Hammer*, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629 (cautionary instructions eliminate or minimize the potential for unfair prejudice).

¶9 We conclude the trial court properly exercised its discretion in weighing the probative value against the danger of unfair prejudice with one exception. The court allowed all 512 photos of Larson's sexual encounter with Krystal to be displayed to the jury. It did so without reviewing each of the pictures.³

¶10 Under WIS. STAT. § 904.03 the trial court is entrusted to act as the gatekeeper to unduly prejudicial evidence. *State v. Davis*, 2002 WI 75, ¶21, 254

³ On the first day of trial, the trial court remarked that it did not know there was going to be a showing of photographs. On the second day of the trial, Larson renewed his objection to the admission of the photographs. He pointed out that the admissibility of the other acts evidence had been determined without access to the photographs.

Wis. 2d 1, 645 N.W.2d 913. To fulfill this role the trial court must weigh the probative value with the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The trial court abrogates this role when it does not review the proffered photographs in camera before allowing them to be shown to the jury. *See United States v. Long*, 328 F.3d 655, 664-65 (D.C. Cir. 2003) (the gatekeeping role contemplates thoughtful consideration of the proffered evidence; admission of 250 photographs out of 301 was a proper exercise of discretion where the court reviewed in camera every photograph the government sought to admit). Thus, we are without any basis in the record to conclude that the trial court properly exercised its discretion in applying the § 904.03 balancing test to the 512 photographs.

¶11 We conclude the trial court's admission of all 512 photographs without considering admissibility individually is harmless error. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury." *State v. Sullivan*, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998) (citations omitted).

¶12 The first several photographs displayed to the jury were highly probative in corroborating Krystal's testimony that Larson had sexual intercourse with her in the back of his truck. A unique birthmark depicted in the photographs identified Krystal. Also, the outside environment depicted in the photographs identified the location where Krystal testified the assault occurred. Although there is no question that the photographs were graphic and depicted the act of sexual

intercourse as well as genitals,⁴ the display of the remaining photographs was continuous and was described as taking less than five minutes. The only pause in the presentation was at the outset for the identifying photographs. Once the identifying photographs confirmed Krystal's testimony, the impact of the remaining photographs was minimal. The jury was not allowed to handle the photographs and they did not go to the jury room. Additionally, the victim's testimony was unequivocal. The other acts evidence provided by Michele, an adult witness, was solid and probative of Larson's intent with the young victim. We are convinced that the showing of all 512 photographs did not contribute to Larson's conviction.

By the Court.—Judgment and order affirmed.

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

⁴ Krystal was not further victimized by the display of the photos. She was not asked to identify each photograph. The display of the photos occurred on the second day of trial and at the conclusion of the police detective's testimony. The trial court closed the courtroom to protect Krystal's privacy.

