

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2773-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM F.S.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

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

PER CURIAM. William F.S. appeals a judgment convicting him of two counts of incest and two counts of having sexual contact with his twelve-year-old granddaughter. He argues that the State's motion to admit other acts evidence was untimely and failed to give adequate notice of the acts the State sought to admit. He also argues that the trial court improperly exercised its discretion when

it admitted the other acts evidence. We reject these arguments and affirm the judgment.

The victim testified that her grandfather came up behind her while she was doing the dishes, turned her around, and rubbed her through her clothing between her legs and on her breasts with his hands. She testified that on another occasion her grandfather led her to his bedroom, placed her on the bed, lay on top of her and rubbed her between her legs and touched her breasts with his hands through her clothing. Her nine-year-old brother testified that on a separate occasion that summer, he saw his grandfather lying on top of the victim on a couch touching her chest and her “privates” with his hand through her clothing. William admitted contact with his granddaughter on the two occasions for which charges were brought but denied any intent to have sexual contact or seek sexual gratification. He described the contact as “horseplay” or a simple hug.

William challenges the State’s motion to present other acts evidence on the grounds that the motion transposed two of the digits in the other crimes statute; it was not filed within ten days of the arraignment as required by § 971.31(5)(a), STATS.; and it failed to provide adequate notice of the time, place and circumstances of the uncharged incident. The motion erroneously cited § 940.04 rather than § 904.04, STATS. The trial court recognized the State’s citation error at the hearing. The prosecutor responded that defense counsel had pointed out the error to the prosecutor one week before the hearing. William has not established any prejudice from the erroneous citation. *See* § 971.26, STATS.

William waived any issue regarding the motion’s timeliness by his failure to object at the motion hearing. He has also failed to establish any prejudice from the untimely motion. Section 971.31(5)(a) allows the trial court to

entertain untimely motions. In the absence of any objection or claim of prejudice, the trial court properly allowed the motion.

While the motion did not specifically identify the other act the State sought to admit, it asked for a hearing at which the State provided the additional information. The prosecutor clarified that the other act occurred during the same summer as the underlying charges. As the trial court noted, the law does not require more specificity from children. *See State v. Fawcett*, 145 Wis.2d 244, 254, 426 N.W.2d 91, 96 (Ct. App. 1988). The prosecutor identified the location as a couch in William's home. The circumstances closely matched the allegation concerning sexual contact on William's bed. While this additional information could have been given at an earlier date, William did not object to the timing or request that the trial be postponed to allow additional time to respond to the information provided at the hearing.

The trial court properly exercised its discretion when it admitted the victim's brother's testimony regarding the uncharged incident. The admissibility of other acts evidence involves a three-step analysis: the court must determine (1) whether the evidence is offered for a permissible purpose under § 904.04(2), STATS.; (2) whether it is relevant in that it relates to a proposition or fact that is of consequence to the determination of the action, and whether it has a tendency to make the consequential fact more or less probable than it would be without the evidence; and (3) whether its probative value is substantially outweighed by its prejudicial effect. *See State v. Sullivan*, 216 Wis.2d 768, 771-73, 576 N.W.2d 30, 32 (1998).

The incident described by the victim's brother established William's intent, motive and absence of accident or mistake, issues that were raised by his

claims of “horseplay and an innocent hug.” This incident did not involve tickling, wrestling, hugging or other innocent explanations, and therefore tends to support the allegation of intentional sexual touching for the purpose of sexual gratification. *See State v. Roberson*, 157 Wis.2d 447, 455, 459 N.W.2d 611, 613 (Ct. App. 1990). It is also relevant in that it corroborates the victim’s testimony against William’s accusation that she fabricated the charge because she did not want to live with him. *State v. Fishnick*, 127 Wis.2d 247, 257 n.4, 378 N.W.2d 272, 278 (1985).

The danger of unfair prejudice does not substantially outweigh this evidence’s probative value. Probative value turns on the nearness in time, place and circumstance to the crime sought to be proved. *Roberson* at 456, 459 N.W.2d at 613. Here, the other act occurred during the same summer, in the same house, and under very similar circumstances. The acts described in the brother’s testimony were not more inflammatory than the underlying charges. It is highly unlikely that the jury would convict William of these offenses despite having a reasonable doubt based solely on its conclusion that he committed the other offense.

By the Court.—Judgment affirmed.

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

